Les Cahiers de droit

Introduction

Gisèle Côté-Harper

Les droits des minorités
Volume 27, Number 1, 1986

URI: https://id.erudit.org/iderudit/042729ar
DOI: https://doi.org/10.7202/042729ar

See table of contents

Publisher(s)

Faculté de droit de l'Université Laval

ISSN

0007-974X (print)
1918-8218 (digital)

Explore this journal

Cite this article

Côté-Harper, G. (1986). Introduction. *Les Cahiers de droit*, *27* (1), 135–143. https://doi.org/10.7202/042729ar

Introduction

Gisèle CÔTÉ-HARPER *

L'égalité est un concept moral et politique traduit en termes juridiques.

Il n'existe pas de notion universellement acceptée du concept d'égalité. Il n'existe pas non plus une définition unique de ce qu'est la discrimination, l'interdiction de la discrimination étant la formule négative du principe de l'égalité.

De plus, lorsque nous parlons de minorités, nous pensons en termes de minorités linguistiques, ethniques ou religieuses, respectant en cela la classification de l'article 27 du *Pacte international relatif aux droits civils et politiques* [1]. Cet article prévoit spécifiquement le droit des personnes appartenant à ces minorités de ne pouvoir être privées d'avoir, en commun avec les autres membres de leur groupe, leur propre vie culturelle, de professer ou de pratiquer leur propre religion ou d'employer leur propre langue.

Cependant, le Pacte ne confère pas aux minorités de droits en tant que collectivités, mais précise que les personnes appartenant à des minorités doivent jouir des droits qu'il confère.

* Professeure, Faculté de droit, Université Laval.

1. Entré en vigueur pour le Canada le 19 août 1976.

Les Cahiers de Droit, vol. 27, nº 1, mars 1986, p. 135-143
(1986) 27 *Les Cahiers de Droit* 135

Outre le droit des minorités, le Pacte reconnaît aussi spécifiquement le principe du droit à l'égalité sans discrimination, notamment de race, de couleur, de sexe, de langue, de religion, d'opinion politique ou d'origine nationale [2].

Ce n'est pas en vertu de l'article 26 qui interdit la discrimination que le Comité des droits de l'homme de l'ONU s'est prononcé dans le cas *Lovelace*, mais en vertu du droit des minorités :

> Dans le cas de Sandra Lovelace, il faut prendre en considération le fait que son mariage avec un non-Indien a été rompu. Il est naturel que, dans une telle situation, elle désire retourner vivre dans le milieu dont elle est issue, d'autant plus que depuis la dissolution de son mariage elle se trouve de nouveau culturellement liée surtout à la bande des Indiens Maliseet. Quels que puissent être les mérites de la *Loi sur les Indiens* à d'autres égards, il ne semble pas au Comité qu'il soit raisonnable, ni même nécessaire, pour préserver l'identité de la tribu, de dénier à Sandra Lovelace le droit de résider dans la réserve. Le Comité conclut par conséquent que refuser de reconnaître son appartenance à la bande constitue un déni injustifiable des droits que lui garantit l'article 27 du Pacte, considéré dans le contexte des autres dispositions précédemment mentionnées.[3]

Quant à une définition de l'expression discrimination, elle n'est pas uniforme.

Dans la *Convention internationale sur l'élimination de toutes les formes de discrimination raciale* [4], l'expression « discrimination » vise :

> ... toute distinction, exclusion, restriction ou préférence fondée sur la race [...] qui a pour but ou pour effet de détruire ou de compromettre la reconnaissance, la jouissance ou l'exercice, dans des conditions d'égalité, des droits de l'homme et des libertés fondamentales dans les domaines politique, économique, social et culturel ou dans tout autre domaine de la vie publique.[5]

Ce double volet se retrouve dans la *Charte* québécoise *des droits et libertés de la personne* [6]. Pour sa part, la *Charte canadienne des droits et libertés* [7] ne définit pas la discrimination et n'interdit pas spécifiquement l'effet discriminatoire [8].

2. Article 26.
3. Communication R.6/24.
4. Entrée en vigueur pour le Canada le 13 novembre 1970.
5. Article 1(1).
6. L.Q. 1975, c. 6 ; L.R.Q., c. C-12, a. 10.
7. *Loi de 1982 sur le Canada*, annexe B, 1982 (R.-U.), c. 11.
8. Article 15.

1. The Concept of Equality

Although seemingly a paradox, in order to treat some persons equally, we must treat them differently. The recognition of different means requires that we may have to treat some persons differently in order to enhance equality. Treating all in the same way may perpetuate inequality since disadvantaged groups cannot take advantage of equal treatment. The disadvantaged groups or persons aspiring to equal treatment could need equality of opportunity in our society.

> Somewhere between the theoretical extremes of the state as a neutral arbitrator of a fairplay game and as the realizer of absolutely equal shares there is an understanding of equality which recognizes the achievement of an overall balance of burdens and benefits [that] requires a recognition of different needs within a broad framework of equal rights.[9]

Viewed from this angle, difference should be acknowledged. The trend is to the effect that we should explicitly take differences into account in order to respond appropriately to them. "Neutral equality", meaning one which ignores differences for all purposes, would increase the gap between such groups and the majority. Recent studies have revealed that we should take note of the differences in order to achieve greater equality. If, for instance, we think in terms of physical disability, we should not ignore it when providing education. In the report of the Commission on Equality in Employment, we read that "sometimes equality means treating people the same, despite their differences, and sometimes it means treating them as equal by accommodating their differences" [10].

It is important at this point to mention that affirmative action programs are not precluded as infringing on equality rights. The Charter authorizes such programs implying that different needs are recognized.

Section 15(2) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups. Since affirmative action is a tool for remedying the disadvantages and the Charter clearly recognizes that such programs can exist and do not violate equality rights, we can assume that what the government had in mind is equality of opportunity.

If affirmative action programs are challenged under 15(1), the defense lies under subsection 2. This provision does not create a right to affirmative action nor does it provide for an authority to create such programs. As a

---

9. J. MCCALLA VICKERS, "Majority Equality Issues of the Eighties", (1983) *Can. Human Rights Y.B.* 47, p. 57.
10. Made public in Canada in December 1984 (The Abella Report).

remedy under section 24, such programs could be imposed by a court. Could we, however, argue that the government has obligations to take necessary steps to ensure that such programs exist?

2. Constructive Discrimination or the Adverse Effect Theory

In order to enhance the conception of equality of opportunity, it would require for our courts to rule that section 15 prohibits constructive discrimination or the adverse effect of legislation. Section 15 makes no reference to intent, purpose or effect.

We find reference to the adverse effect of a distinction in the *International Convention on the Elimination of All Forms of Discrimination* [11] and in the Quebec *Charter of Rights and Freedoms* according to which:

> Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.[12]

Historically in Canada, proof of intent to discriminate was required under human rights legislation proscribing discriminatory acts occurring "because of" a prohibited ground of discrimination. Later, boards of inquiry began to examine only discriminatory results. The respondent's motivation or intention was irrelevant, except in mitigation of penalty.

It was the first judicial consideration that found the discriminatory result to be prohibited and not that discriminatory intent. The question centered upon an Alberta equal pay case and the issue was considered by Mr. Justice McDonald [13].

In 1981, in *O'Malley v. Simpsons-Sears* [14], discrimination was alledged on the basis of religion since the applicant refused to work on Saturdays on account of his religion. The Board of Inquiry held that discriminatory result was sufficient. It was reversed by a majority of the Divisional Court and once again unanimously by the Ontario Court of Appeal.

In *Bhinder* [15], the Federal Court of Appeal decided that sections 7 and 10 of the *Canadian Human Rights Act* [16] are not sufficiently comprehensive to include indirect discrimination insofar that it "adversely affects" a protected

---

11. Article 1.
12. *Supra*, note 6, a. 10.
13. Re *Attorney-General for Alberta and Gares*, (1976), 67 D.L.R. (3d) 635, p. 695 (Alta S.C.).
14. (1981) 2 C.H.R.R. D/267. The Supreme Court of Canada heard this case on January 29, 1985.
15. *C.N.R. Co. v. C.H.R.C. and K.S. Bhinder*, (1983) 4 C.H.R.R. D/1404, Mr. Justice LeDain, dissenting. Heard by the Supreme Court on January 29, 1985.
16. S.C. 1976-77, c. 33, and amendments.

class. Only when there is an intention to discriminate or to treat differently is discrimination prohibited. Furthermore, there is no duty to accommodate religious belief since there is no specific wording to that effect.

The Court ruled that the definition including the notion of "adverse effect" focusing more on the consequences of actions rather than on the actor's state of mind, requires an "anchor", i.e. a legislative basis. Such an "anchor", says the Court, in not found in the *Canadian Human Rights Act.*

However there is an "anchor" in international instruments ratified by Canada and the provinces in the *Convention on the Elimination of All Forms of Discrimination Against Women* [17] and the *Convention on the Elimination of All Forms of Racial Discrimination* [18].

Furthermore, article 26 of the *International Covenant on Civil and Political Rights* relating to equality rights does not explicitely refer to effect. It was interpreted as not requiring evidence of direct discrimination. This was so in a case where several Mauritian women challenged an immigration law requiring alien husbands but not alien wives of Mauritian nationals to obtain residence permits. If the permits were refused, there was no appeal. Furthermore, a law on deportation subjected the alien husband to an eventual expulsion. A mauritian woman who married an alien would be discriminated against on the basis of sex since the laws had the effect of preventing that woman from exercising one of her rights, namely that of protecting the family [19].

It is appropriate to quote Mr. Justice Tarnopolsky in *R. v. Videoflicks.*

> Regardless of whether the courts have, with respect to the determination of the distribution of powers and the characterization of laws in relation thereto, looked to "intent" or "effect" or to both,
>
> [...]
>
> in my view the interpretation of the Charter necessarily requires an assessment of the "effect" of impugned legislation. Intent and purpose will undoubtedly still have relevance. For the most part, however, in determining the appropriate balance between government action on the one hand and individual rights as set out in the Charter on the other, it will be the determination of the "effect" or "effects" of impugned legislation that is most important. While a law may have a legitimate purpose, its actual operation may result in the infringement of rights and freedoms guaranteed by the Charter. In the absence of legislative resort to s. 33 of the Charter, it will be rare indeed that legislation will have the direct and open purpose of taking away Charter rights or limiting Charter freedoms. An adverse impact, however, can occur as a result of the operation and enforcement of legislation or even because of its intended scope. To ignore

17. Article 4; entry into force in Canada on January 10, 1982.
18. Article 1; entry into force in Canada on November 13, 1970.
19. Communication R.9/35.

> the "effect" of the Act in issue before this Court would be to ignore reality and to concede the rights of the individual or a minority to the interests of the majority, even if these interests appear legitimate as far as the majority are concerned.[20]

Equality rights are not absolute. They can be limited by a general limitation clause and derogated by an overriding clause.

3. Section 1 of the Charter

The limitation clause under section 1 of the Charter provides that rights guaranteed under the Charter are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

Section 1 provides that the limit must satisfy those four conditions.

The test of "reasonableness" is constitutionalized; its meaning and scope is left to the courts. Judges are invested with the power to examine the reasonableness of the law, its rationality.

Mr. Justice Deschênes[21] distinguished between the end and the means in considering the burden of proof which rests on the shoulders of the party claiming the benefit of an exception. The party which claims the benefit of an exception must demonstrate its applicability.

Since the justification is the end, the burden of justification rests upon he who claims the benefit of the exception. In this particular case, Quebec had to prove the legitimacy of Bill 101's aims with respect to education.

> In deciding whether such a rational connection exists the courts should attach due weight to Parliament's determination, if Parliament has addressed the question. Where empirical data might validate an inference that would not appear to be warranted by common experience, I would be prepared to examine any information made available to Parliament [...] which might tend to establish a rational connection...[22]

However, in the absence of legislative resorting to the notwithstanding clause of section 33, under no circumstances can a limitation constitute an exception to the rights and freedoms or amount to amendments of the Charter. Without deciding whether section 1 applies or not to section 23 on language rights, the Supreme Court ruled in the *A.-G. Québec v. Association of Protestant School Boards*[23] that section 1 cannot be the equivalent of a

20. *R. v. Videoflicks*, (1984) 9 C.R.R. 193, 212 (Ont. C.A.).
21. *Québec Association of Protestant School Boards et al. v. Attorney General of Quebec (nº 2)* (1983), 140 D.L.R. 33, 57-58 (Qué. S.C.).
22. *R. v. Oakes* (1983), 2 C.C.C. (3d) 339, p. 363 (Ont. C.A.).
23. *A.-G. Québec v. Québec Association of Protestant School Boards*, [1984] 2 S.C.R. 66.

derogation authorized by section 33. Some limitations cannot be legitimatized by section 1.

4. Derogation clause : Section 33

The derogation clause allows both Parliament and provincial legislatures to retain a limited power to pass laws that may conflict with parts of the Charter governing fundamental freedoms, legal rights and equality rights [24]. It is possible to derogate to the right to freedom of conscience and religion [25] as well as to freedom of thought [26], to the legal right to life, liberty and security of the person [27] and most importantly to the right to equality [28]. However, the derogation clause does not affect the provision guaranteing rights equally between men and women, the section relating to the minority language educational rights and the aboriginal rights.

The derogation clause has been the object of concern expressed by members of the Human Rights Committee when Canada presented its supplementary Report in October 1984.

One member even said that the derogation under article 33 did not comply with article 4 of the Covenant which refers to the State of emergency, since "it allowed for derogation from rights that were non derogable under the covenant" [29].

Under article 4 of the *International Covenant on Civil and Political Rights*, we read that :

> When a public emergency which threatens the life of a nation arises and it is officially proclaimed, a state party may derogate from a number of rights to the extent strictly required by the situation. The state party, however, may not derogate from certain specific rights and may not take discriminatory measures on a number of grounds, namely on the ground of race, colour, sex, language, religion or social origin...[30]

In times of emergency, the protection of human rights becomes all the more important, particularly these rights from which no derogations can be made, including the fact that "[e]very human being has the inherent right to life. This right shall be protected by law, no one shall be arbitrarily deprived of his life" [31].

---

24. Referring to sections 2 and 7 to 15.
25. Section 2(a).
26. Section 2(b).
27. Section 7.
28. Section 15.
29. Section 28.
30. *Supra*, note 1, a. 4.
31. *Id.*, a. 6.

Furthermore, no derogation is allowed under the Covenant with regard to the right to freedom of thought, conscience and religion [32].

The Government of Canada explained the existence of section 33 in the following terms :

> In the course of the constitutional debate leading to the adoption of the Charter, concern had been expressed that legitimate policy interests of Parliament or the legislatures might be overridden by the judiciary. As a result, section 33 had been incorporated in the Charter, but only for issues relating to fundamental freedoms, legal rights and equality rights.
>
> With one exception, no Government had availed itself of section 33 of the Charter. The National Assembly of Quebec had incorporated a notwithstanding clause in every provincial statute, whether adopted before or after the entry into force of the new Constitution. By that decision, the Government of Quebec indicated its disagreement with the process leading to the new Constitution, and with its contents. It was in no way opposed to the protection and promotion of human rights. Indeed, the Government of Quebec had amended the *Charte des droits et libertés de la personne du Québec* to ensure that, in areas falling under its jurisdiction, all persons in Quebec would enjoy protection similar to that afforded by the Constitution.
>
> The Quebec Charter solemnly affirmed fundamental rights and freedoms recognized in international instruments, recognized fundamental freedoms such as the right to life, assistance, freedom of conscience, religion, opinion, expression and association, the right to privacy, dignity, honour and reputation, as well as the right to the sanctity of the home and its contents. It also guaranteed the right to equality by prohibiting any discrimination based on race, colour, sex, pregnancy, sexual orientation, civil status, age, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap. It also recognized political, judicial, economic and social rights.[33]

However, to what extent can we feel that citizens are equally protected under a provincial Charter or Code when it can be amended by the legislature in order to include its own notwithstanding clause?

One of the alternatives that could be contemplated by the Quebec Government in response to a judgment made by a Superior Court Judge, who found language-law provisions forbidding bilingual signs contrary to the Quebec Charter [34], is not to amend the law in question, but to amend the Charter with a notwithstanding clause in connection with language rights.

This only illustrates that fundamental freedoms, the right to life, liberty and security and equality rights should not be subject to an overriding clause under the Canadian Charter.

---

32. *Id.*, a. 18.
33. CCPR/C/SR. 558.
34. *Ford* c. *P.G. Québec*, [1985] C.S. 147.

Conclusion

Section 15 is not only the responsibility of lawyers, politicians or the judiciary.

Individuals and groups can and should promote equality through their relationship towards one another. The reasonable limits to equality rights will depend upon the norms of society and the priorities set by Canadians. Laws and programmes alone cannot achieve true equality.

The issues of equality in Canada should be addressed in view of creating a society which will reach a better understanding of different groups and enhance its awareness of the need to recognize differences in a climate of mutual respect.