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Article abstract

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L'auteur ne veut pas exagérer l'importance de cette limite des réformes et tente de souligner qu'il y a beaucoup d'exemples des réformes importantes et fondamentales que la tradition juridique n'a pas empêchées.

LEGAL TRADITION AS A LIMITATION OF LAW REFORM

*par Julius Grey**

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It is perhaps a truism to state that in every developed system, the juridical or legal tradition acts as a brake on law reform, but it is one which is often forgotten both by jurists and by reformers.

Law reform can take place in two ways, firstly through parliamentary or, in the case of regulations, executive action and secondly through the courts. In a civilian system, the former way should theoretically predominate, but Quebec law is such a hybrid of civil and common law traditions that both ways are extremely important.

In recent years, the laws in force in the Province of Quebec have been undergoing a radical alteration, both in Ottawa and in Quebec City. The systematic reform, first of the Code of Civil Procedure more than ten years ago and now of the Civil Code are undoubtedly the most significant of the changes, but the combined effect of various laws establishing state control in fields hitherto unregulated (e.g. price & wage determination, language) is scarcely less revolutionary. Can it be said that the legal tradition tempers these reforms and limits their scope?

An obvious way in which the legal tradition does this is through the canons of statutory interpretation. Quebec's public law comes from English common law and the principles of statutory interpretation which evolved in England over the century are fully applicable here. It would be pointless to make a category of these principles which can easily be found in *Maxwell,* and *Craies.*[1] Suffice it to say, that the subjection of all new statutes to the presumptions against retroactive effect, against expropriation and against the infringement of existing rights and liberties clearly sets out limits to reform which democratic legislatures can only remove by highly unpopular explicit abrogations of rights. The operation of these principles in Quebec is very clearly described in Pigeon (now Mr. Justice Pigeon of the Supreme Court) *Rédaction et Interprétation des lois.*[2] The Courts will refuse, as long as it is possible to do so, to interpret law in such a way as to take away freedoms or property. The case of *Blais* v. *L'Association des Architectes,*[3] can perhaps serve as an example, politically relatively indifferent, of the application of this rule. Of course, Courts also try to carry out as

1. *Interpretation of Statutes*, Maxwell, London, 1969. *Interpretation of Statutes*, Craies, London, 1971.

2. *Rédaction et interprétation des lois*, Québec, 1965.

3. *Blais* v. *L'Association des Architectes*, (1964) C.S. 387.

much as possible the will of the elected representatives of the people and they must and do try to balance the two values in a fair and reasonable way.

It is an error to suppose that the rules of statutory interpretation are always used to protect rights and liberties. The narrow reading of the federal Bill of Rights given by the Supreme Court of Canada has had quite the opposite effect. A statement far closer to the truth would be that the canons of interpretation have a certain built-in opposition to major change, and that unless a change is expressed in very clear language, there is likelihood that it will be given very narrow scope.

Opposition to change exists in our judicial system quite apart from the sophisticated rules of statutory interpretation. The treatment which Quebec's provision for a declaratory judgment on motion, introduced in 1966 as art. 453 of the Code of Procedure, received at the hands of the Courts provides an excellent example of this. Unlike pure common law jurisdiction, Quebec had no provision for declarations prior to 1966 and there were numerous judgments refusing to recognize such relief. When the legislature introduced the new procedure, the courts set about attenuating its force by artificial restriction, until, by 1974, the declaratory motion was useful only in a very few areas of law (e.g. in construing wills). One of the most incisive cases explaining the judicial position was *Malarctic Hygrade Gold Mines (Quebec) Limited* v. *Quebec Securities Commission.*[4] The honourable Mr. Justice Melvin Rothman enumerated the various judicially-imposed restriction on declaration motions and made it clear that such motions would not easily be granted. His judgment was a perfect illustration of the judicial system as a restriction on law reform.

The subsequent history of the declaratory motion shows that the judicial system's restrictions on reform should not be blown out of proportion. In *Duquette* v. *The City of Ste-Agathe-des-Monts,*[5] the Supreme Court of Canada reversed the established line of jurisprudence and explicitly repudiated many of the Courts' glosses on art. 453.

A final restraint which the juridical tradition places on law reform is the most subtle of all. Law Reform Commissions and legislatures which set out to reform the law are usually limited in

4. *Malarctic Hygrade Gold Mines (Quebec) Limited* v. *Quebec Securities Commission,* (1974) D.C. 398.

5. *Duquette* v. *The City of Ste-Agathe-des-Monts,* (1976) 13 N.R. 160.

their thinking and their analysis by the legal system as they find it. No man can or ought wipe out from his mind the system in which he was trained and which he understands best, unless the system is totally outdated or immoral. Since such is not the case with our civil law, it follows that the present form and content of the law will invariably stamp its mutants in the future.

This point was admirably made by Prof. P.-A. Crépeau when he wrote in 1974:[6]

> "But the point that I should like to emphasize here is that the adaptation of our Civil Law to the needs of our society cannot be regarded as a break with the great civilian tradition of past centuries...
>
> As Professor René David told us in Montreal in 1966, on the occasion of the centennial celebrations of our Codification, the Civil law is essentially *"un style"*: it is a certain way of conceiving, of expressing and of applying a rule of law whatever be the policies it wishes to recognize at a certain time in the history of a country."

This completes the part of this report dealing with legislative limitations.

The limitations which the juridical tradition places on judicial reform of law are more easily perceived.

There is no doubt that many basic changes in Quebec law were brought about by judges. One need not belabour the well-known decision of *Roncarelli* v. *Duplessis*[7] to see that it amounted to a radical and wholly admirable extension of art. 1053 C.c. And the Privy Council's attempt - not altogether successful - to remove religious impediments to marriage in *Despatie* v. *Tremblay*[8] was nothing if not heroic in scope.

However, a number of powerful restraints impede wholesale judicial reform.

Firstly, most judges view themselves as adjudicators not creators of law. We can sense this for instance in the words of the Hon. Mr. Justice Hugessen in *Hudon* v. *Marcoux*:[9]

> "En ce qui concerne la prétendue injustice de la Loi, il est clair que le requérant ne peut pas réussir. Le devoir des Tribunaux est d'appli-

6. Paul-A. CREPEAU, "Civil Law Revision in Quebec", 34 *Louisiana C.R.* 921.

7. *Roncarelli* v. *Duplessis*, (1959) S.C.R. 12.

8. *Despatie* v. *Tremblay*, (1921) 27 R.L. 209.

9. *Hudon* v. *Marcoux*, (1976) C.S. 1504, 1505.

quer la loi telle quelle et si la loi crée des injustices c'est au Parlement qu'il faut s'adresser pour obtenir le remède approprié."

It is evident that if His Lordship did not feel bound by the strict provision of the law he might have decided otherwise.

A second major restraint is the Common Law doctrine of stare decisis, that is, the obligation of the judges to follow established precedents. This doctrine appears to obtain in Quebec, subject to some small attenuation as compared to pure common law provinces. The classical work on this subject comes from the pen of the late Prof. W. Friedmann.[10] His conclusions are worth reproducing here:

"In conclusion, the position of stare decisis in the civil law of Quebec may be summarized as follows:

(1) Stare decisis is accepted in all its rigour in so far as the decisions of the Supreme Court of Canada on the Quebec civil law are concerned.

(2) As regards the Quebec Court of Queen's Bench (Appeal Side) and the lower Quebec courts, they overrule themselves or depart from the judgments of a higher court in the hierarchy on very exceptional occasions. The acceptance of the French doctrine that the text of the code, as distinct from any judicial or non-judicial commentary, is supreme authority enables them to do so. The record shows that such departures are rare.

(3) On the other hand, the theoretical liberty to depart from precedent is countered by the strong traditionalism of the Quebec courts, which makes them look to the established doctrine and precedent of the civil law with an orthodoxy far stricter than that practised by French courts.

(4) The Quebec technique of individual judgments, which is that of the common-law courts, brings in its train the complexities of the common-law doctrine of stare decisis, and the oblique methods of disregarding precedent which have been analyzed in regard to the common law.

(5) In its total practical effect, the Quebec doctrine and practice of precedent is remarkably close to that of the common law. The latter is not nearly as absolute in its obedience to precedent as is commonly supposed, while the Quebec courts are generally most reluctant to depart from precedent."

The technique of distinguishing cases can always be used to prevent a flagrant violation of stare decisis while effecting a radical

10. W. FRIEDMANN, "Stare Decisis at Common Law and under the Civil Code of Quebec", (1953) 31 *C.B.R.* 723.

reform of an aspect of law. However, one cannot doubt the power of precedent as a restriction on judicial reform.

Generally, Quebec's courts have not produced activist judges like Lord Denning, who would attempt to do justice as they saw it, notwithstanding apparently iron-clad statutes and powerful precedent. However, judges have sometimes spoken frankly when refusing to follow established rules. The best-known case is perhaps the decision of Chief Justice Jules Deschênes in *Commission de Transport de la C.U.M.* v. *Syndicat du Transport de Montréal.*[11] This case was a refusal to find strikers who violated an injunction in contempt of court. In the Hon. Chief Justice's reasons for judgment we find the following passage at p. 232:

> "Ce n'est pas par de semblables recours massifs à l'outrage au tribunal que l'on rapprochera les parties et que l'on ramènera dans les esprits un sentiment de soumission à la loi et de respect pour les décisions judiciaires.
>
> D'ici à ce que l'autorité politique trouve des remèdes appropriés à la solution de ces conflits sociaux, je suis d'opinion que la Cour supérieure ne doit pas prêter son autorité à l'écrasement d'une masse de citoyens par l'amende et la prison. Dans les circonstances qui prévalent actuellement la Cour, qui doit toujours user de son pouvoir répressif avec circonspection, ne doit pas collaborer à un geste voué d'avance à l'échec et impropre à résoudre un conflit qui relève maintenant, depuis un certain temps, de l'autorité politique."

This case was subsequently reversed by the Court of Appeal.[12] However, it remains significant as an illustration of judges shaking off the constraints of precedent and purporting to adapt the law to changing condition. It is important to remember that this is done and is often done successfully.

CONCLUSION

The central idea of this report has been the explanation of a certain built-in conservatism in our (and presumably any) legal system.

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11. *Commission de Transport de la C.U.M.* v. *Syndicat du Transport de Montréal* (C.S.N.), (1974) C.A. 227.

12. *Commission de Transport de la C.U.M.* v. *Syndicat du Transport de Montréal*, C.A. Montréal, no 09-00904-748, May 2, 1977.

The existence of this phenomenon as well as of forces of reform opposing it cannot be doubted. Both sets of forces should probably be viewed as significant and positive. No system of law would be healthy if it calcified into an immutable and inflexible collection of rules. However, a system without a certain way of thinking, an understanding of its past and no check on wild experimentation would be equally unnatural and undesirable.

Finally, the conservatism of our system should not be exaggerated. Despite all the restraints which seem to operate, Quebec law has in the past years been changed beyong recognition. The professional law reformers, the legislature and the courts all deserve a share of the credit for this modernization and renewal.