Responsibility and Democracy

1:30-3:15, Friday May 20, New Chancellor Day Hall, Maxwell Cohen Moot Court
Chair: Professor Jean-François Gaudreault-Desbiens, Faculty of Law, University of Montreal, Montreal

Summary
The chair introduced the session by discussing Justice Gonthier's deep interest in using principles to create consensus in Canada's complex society. Mr. Rempel opened the session with a discussion concerning the role of logic and common sense in Justice Gonthier's work. Professor Panaccio drew parallels between Justice Gonthier's writings and the classical tradition of natural law. Professor Harrington used Parliament's non-use of the notwithstanding clause to argue against dialogue theory, and Professor Latour examined the role of laicité as a vector of social cohesion and equality. Mr. Dordelly-Rosales proposed a new theory of constitutional interpretation in Venezuela based on Canada's principle-based constitutional adjudication.

The Role of Logic and Common Sense in Adjudication
Mr. Ryan Rempel, Research Branch, Agriculture and Agri-Food Canada, Winnipeg
Mr. Rempel opened with a brief discussion of Justice Gonthier's perceived ideology. Though Justice Gonthier was often seen as conservative in comparison to the more liberal majority on the court, Mr. Rempel's examination of eight cases in which Justice Gonthier dissented demonstrates the difficulty of classifying Justice Gonthier ideologically. Four themes emerged from this examination: 1) Justice Gonthier had a wide conception of harm and was not anxious about incorporating morality into his judgments; 2) Justice Gonthier was more comfortable drawing on the significance of meaning or social practices than some of his colleagues; 3) Justice Gonthier had a greater willingness to credit the legislature for having made a sophisticated judgment rather than a careless error than some of his colleagues; and 4) Justice Gonthier was sceptical of his colleagues' idealized conceptions of human nature.

Due to general judicial anxiety concerning the use of morality in adjudication, courts seek to find instead a tangible harm that can be linked to constitutional values. Mr. Rempel put forth that though Justice Gonthier used the language of the harm principle, he was much more willing to recognize intangible harms than his colleagues. In *Butler*, the majority's focus on anti-social behavior stands in sharp contrast to Justice Gonthier's suggestion, based on community standards, that certain representations of sexuality may be harmful. According to Mr. Rempel, where moral claims involved concrete problems and a strong society-wide consensus existed on the issue, Justice Gonthier was likely to validate the moral claim.

Justice Gonthier was also more comfortable than some of his colleagues interpreting reasoning from the significance or meaning of practices rather than their tangible effects. In *Tremblay*, Gonthier

found that the behavior of the women was less an erotic portrayal and more of an sexual encounter, despite the fact that no tangible touching went on. Rather than limiting himself to the most basic definitions of public and private—the number of people witnessing the activity in question—Justice Gonthier drew reasoning from the public significance placed on the activities.

Mr. Rempel pointed to *Chamberlain* as an example of Justice Gonthier's willingness to credit legislatures with sophisticated judgments. The case focused on a school district's refusal to approve certain books depicting same-sex families for kindergarten and first grade classes. Though allowing that the school district may have been unduly influenced by the views of religious parents, Gonthier's construction of the situation was sympathetic, offering alternative and wiser reasons that may have motivated the school district's decision.

Mr. Rempel directed the audience to read his paper for a detailed discussion of Justice Gonthier's less optimistic view of human nature. In conclusion, Mr. Rempel reiterated the difficulty of classifying Justice Gonthier's ideology. Despite his seeming conservatism and traditionalism, Justice Gonthier's lack of anxiety about moral judgments and attentive deference ensured that rather than mounting crusades on behalf of traditional values, his judgments served as careful and balanced analyses of legal structures.

Le juge Charles D. Gonthier et la tradition classique du droit naturel : correspondances

Professor Charles-Maxime Panaccio, Faculty of Law (Civil Law section), University of Ottawa, Ottawa

Professor Panaccio used several of Justice Gonthier's judgments and the writings of natural law theorists, notably John Finnis, to argue in favour of similarities between Justice Gonthier's philosophy and that of classical natural law. He began by defining positive law as the law that is imposed by public institutions, and natural law as a superior law that defines human norms. In contrast to modern natural law theory, that focuses more on human rights, classical natural law theory is a moral philosophy intended to guide individuals through their decision-making process. Classical natural law theory, formulated by philosophers such as Thomas Aquinas and Aristotle, proposes that, using reason, we can determine objectively good values, such as fraternity, mercy, and common sense.

Professor Panaccio argued that Gonthier's reasoning style and focus on morality echo classical natural law principles. In Butler as well as in other decisions, Justice Gonthier affirms the distinction between social morality—what people as a whole think—and objective morality—natural law. Using the idea of fraternity to tie Gonthier's propositions to those of John Finnis, Professor Panaccio put forth that cooperation among people is key in creating a community and working towards the communal good.

Professor Panaccio moved on to discuss Justice Gonthier's desire to correct the societal imbalance away from duties and towards rights. In *Sauvé*, Gonthier reiterated this idea, arguing in favour of

punishment for crimes based on a need to re-establish the equilibrium between individuals and the community. Individuals have a duty to their community to work towards the communal good, and when they fail in that duty, punishment is a way to re-establish the equilibrium.

Professor Panaccio briefly pointed to Justice Gonthier's reasoning in *M v. H* and *Chamberlain* to solidify his point. The classical natural law view of marriage as a fundamentally heterosexual institution is echoed by Gonthier, who sought to protect community standards. Professor Panaccio closed his presentation with a brief anecdote praising the year he spent working with Justice Gonthier and the time they spent debating moral philosophy.

A Humble Jurist : Justice Gonthier and the 'Dialogue'
Professor Matthew P. Harrington, Faculty of Law, University of Montreal, Montreal
Professor Harrington opened his presentation with the qualifier that despite his initial desire to discuss the theory of deference and Justice Gonthier's decisions, his research convinced him of the impracticability and institutional illegitimacy of deference by the Canadian Supreme Court. The theory of dialogue rests on the concept of deference, meaning that it assumes that at some point, the legislative and judicial branches would be willing to defer to each other. This theory allows judicial review to exist in Canada without threatening parliamentary sovereignty.

According to Professor Harrington, this theory is both impracticable and illegitimate. In terms of impracticability,, cases such as *Queen v. Hall* and *Sauvé* illustrate the Supreme Court's growing confidence in its power of judicial review and demands of deference from Parliament itself. Given the Supreme Court's nearly 30 years of experience in handing Charter cases, it is understandable that it would put forth more vigorous understandings of fundamental rights and expect more deference from other branches to its experience and expertise. The theory's illegitimacy stems from the judiciary's duty to say what the law is—that is, to decide cases and defend their judgments. Professor Harrington argued that any general doctrine of deference would prevent judges from deciding cases on strictly legal principles, potentially leading to incorrect legal outcomes on controversial or politically sensitive issues.

Professor Harrington pointed to the near impossibility of a Congressional reversal of an American Supreme Court decision as one of the key factors allowing the American Supreme Court to be the final arbiter on legal questions. Lacking a notwithstanding clause in the American constitution, the only way to overturn a Supreme Court decision is through a difficult amendment process under *Article 5* of the American constitution. This has resulted in a lack of dialogue between the legislature and the judiciary, which Professor Harrington is in favour of. Without any obligations to engage in dialogue, each branch is free to undertake its function and only that function. Though this can lead to increased conflict between the branches, it increases accountability and clarity of roles.

Building on this, Professor Harrington proposed a total abandonment of dialogue theory in Canada, instead suggesting a characterization of the relationship between the branches as one of agency, where each branch acts within a distinct function as an agent of the sovereign people, as in the

United States. Not only is the possibility of parliamentary overruling through the notwithstanding clause as unlikely as an amendment to the American constitution, but also section 52 of the Constitution Act 1982 and section 24 of the Canadian Charter support this conception of the branches. Professor Harrington argued that sections 52 and 24 replaced parliamentary supremacy with constitutional supremacy. In this scheme, the Canadian people made the justices of the Supreme Court trustees of the Constitution and charged them with keeping the other branches within their constitutionally-established limits. Professor Harrington closed by calling on the Supreme Court to embrace its mature role and ensure that the Constitution remains forever the supreme law of Canada.

The Importance of Principles in Constitutional Interpretation – The Case of Freedom of Expression

Mr. Nelson Dordelly-Rosales, Faculty of Law, University of Ottawa, Ottawa

Mr. Dordelly-Rosales began by relating an anecdote of his experience clerking at the Supreme Court in Venezuela. He discussed the importance, especially in a democracy, of having a reasonably clear understanding of what the law is, and the difficulties posed when the constitution is open to many interpretations.

Mr. Dordelly-Rosales argued that as the fundamental freedoms enshrined in a constitution reflect the core values of the nation, interpreting the constitution must involve identifying the constitutional principles representing these values. He praised Canada's strong commitment to the rule of law, the supremacy of the constitution, and humanitarianism as factors explaining why Canadian constitutional jurisprudence has become a global reference on constitutional principles.

Mr. Dordelly-Rosales discussed Butler from a different perspective than previous panelists, examining the restriction of freedom of expression in the interest of protecting individuals from harmful materials. He continued, citing recent Canadian jurisprudence creating a new defence of responsible communication in the public interest and reiterating the importance of freedom of expression. He contrasted Canadian experiences of freedom of expression with Venezuelan ones, cautioning the audience of recent restrictions on freedom of expression in Venezuela.

Inspired by the Canadian experience, Mr. Dordelly-Rosales proposed a new approach to constitutional interpretation in Venezuela. First, courts should focus on the principles of the constitution rather than on policies when making decisions. The supreme values of the country are rooted in the constitution and illustrated by constitutional principles. Secondly, judges should use the principles to bridge the gap between the written words of the constitution and practical situations. Thirdly, courts need to recognize which constitutional principles are embedded in the Venezuelan constitution. He closed his presentation by pointing to Justice Gonthier's rulings as an ideal starting-point for Venezuelan judges seeking to develop their constitutional jurisprudence and protect fundamental Venezuelan societal values.

Responsabilité citoyenne et démocratie : la laïcité comme socle du pluralisme et source de cohésion sociale

Me Julie Latour, avocate, Montreal

Me Latour opened her presentation by thanking the organizers of the conference for working to make such a great initiative a reality. She sees *laïcité* as both a fundamental conflict in every society revealing an underlying tension between secularism and confessionalism, and as an essential condition for freedom of conscience, that is, the freedom to believe or not believe. Lacking an exact equivalent in English, *laïcité* can be defined as the structure of social institutions so as to ensure the separation of church and state. Me Latour sees *laïcité* as intimately linked to both freedom of conscience as well as to democracy. As part of the social contract, *laïcité* emanates from the people and forces institutions to change accordingly. It reflects a common spirit supporting equality and the respect of a public place where everyone is free to express their opinions.

After discussing the etymological history of the term '*laïcité*, Me Latour took the audience through a brief history of *laïcité* in Quebec, starting with Louis-Joseph Papineau's speeches to the legislative assembly in 1831. By the 1960s, schools, hospitals, and other institutions were no longer under the control of religious bodies. These reforms have allowed Quebec to entrench values of dignity and equality independently of religious precepts, allowing Quebec civil law to abandon such precepts, such as the inferiority of women. Me Latour maintained that '*laïcité officielle*' requires the state to be completely neutral in both appearance and actuality. In practice, this means that state employees, from bureaucrats to judges to teachers must not manifest their religious convictions.

She moved on to argue against '*laïcité ouverte*.' Basing itself in the promotion of diversity, this concept supports the presence of religions in the public sphere. In response, Me Latour contrasted the seven prayers that open the Ontario legislative assembly to the moment of silence that opens the Quebec legislative assembly, pointing out the burden that state recognition of multiple religions will entail in the long run. Contrary to statements made by supporters of '*laïcité ouverte*,' Me Latour argued that a religious presence in the public space threatens freedom of expression, gender equality, and freedom from discrimination based on sexual orientation, among others. To refute the suggestion that *'laïcité ouverte*' encourages integration, she pointed to the cultural conflicts emerging in Great Britain and Germany as a result of '*laïcité ouverte*.'

Me Latour briefly addressed the evolution of freedom of religion jurisprudence in *Amselem*, *Bruker*, and *Multani*, stating that the Supreme Court of Canada's focus on individual beliefs is based on a broad vision of Canadian multiculturalism. She closed by reiterating the original manner in which Quebec has entrenched universal values such as gender equality and protection of sexual orientation. The now-solidified *laïcité* of Quebec society and government has allowed this entrenchment to happen and guarantees societal pluralism for future generations.

Conclusions

From morality to judicial deference to freedom of expression and conscience, each of the presenters addressed a different aspect in which the principle of responsibility is tied to democracy. Mr. Rempel

and Professor Panaccio examined Justice Gonthier's reasoning and beliefs from different perspectives, but came to similar conclusions regarding the importance Justice Gonthier placed on maintaining community standards and the common good. Professor Harrington argued in favour of replacing dialogue theory with an agency-based conception of the legislative and judicial branches for the sake of preserving Canadian democracy. Lastly, Mr. Dordelly-Rosales and Me Latour examined the role of specific fundamental freedoms in maintaining democracy.

Responsibility, Fraternity, and Sustainability in Law

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