CCAT'S 34TH ANNUAL SYMPOSIUM

THE CHALLENGE OF DIVERSITY

Keynote Address

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June 5, 2018

Distingués collègues, members of all bars, distinguished guests, chers amis.

I would first like to thank the organizing committee of this event for inviting me to deliver the keynote address this morning. It is my great pleasure to be here with you to talk about the challenge of diversity.

To insure diversity is represented and respected in the administration of justice, we must first seek to understand why resistance to it endures.

How to eliminate in judges the unconscious biases that encumber their minds, how to eliminate such biases in the public service, in our institutions, in our leaders, in our civil servants, in the population as a whole, that is the challenge we must overcome if we want to foster cultural and religious diversity in the administration of justice.

One of the issues arising from the *Charter* is that of the tension between liberty and equality, that is, individual interests and rights, and collective goals. Often the right claimed by a given individual is seen through the prism of the social norms favoured or disfavoured by the group to which she or he belongs. That prism can distort the objective perception of that individual's situation. The same can be said of subjective perceptions of the relevant circumstances, especially amongst members of the mainstream group.

In the last decades, immigration has radically changed Western democracies. In the United Kingdom, the proportion of foreign-born residents almost doubled in ten years, growing from 8.9 % in 2004 to 14 % in 2016.[1] The percentage is close to that of the United States, where foreign-born residents make up 13.5 % of the population.[2] Canada is more welcoming. According to Statistics Canada, 21.9% of our population is foreign born.[3]

This phenomenon is bound to stir up emotional responses amongst individuals already living here. Outcries against multiculturalism are frequent. Immigrants are accused of resisting integration and politicians are blamed for not imposing tough enough requirements for immigrants to be admitted, like that of speaking the local language.

Let us go back to basics.

The thirst for justice is universal. We all need to know that we live in a just society. When the criminal system punishes, it is not in a spirit of vengeance but rather to restore society's moral equilibrium. That is why a just society does not punish the individual who had no intention to harm or was not grossly unconcerned with the effects of his or her actions. Such is what distinguishes an accident from a crime.

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[1] https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/ukpopulationbycountryofbirthandnationality/2016.

[2] https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states.

[3] https://www150statcan.gc.ca/n1/daily-quotidien/171025/dq171025b-eng.htm.

Under private law, parties first and foremost seek validation of their rights according to the law. Although it can be adapted to the needs of a given situation, the law remains substantially the same for all citizens. In criminal law, legislators and the judicial system work to insure that the accused is given a fair trial, regardless of his or her personal characteristics or background. That is one facet of what we call the rule of law. All are subject to the same law and the law is fairly applied, that is, applied in the same manner to all.

The fundamental value that is the rule of law is the reason why 80% of citizens who have had to experience the criminal system have declared themselves satisfied with its workings despite the fact that 80% of them cannot have all been successful before it and despite that the public perception conveyed, we must admit, is often to the contrary!

When faced with manifestations of systemic discrimination – because this is what the backlash against immigration often amounts to – we often think that if there is no intention to harm, there can be no discrimination. But phenomena of systemic discrimination occur in response to conflicts of values so deeply interiorised that all subjective motivations are hidden, even to oneself. In other terms, discrimination, even amongst the most educated and well-meaning people, within institutions that stand as the ultimate product of democratic development, oftentimes is the unwanted result caused by the interplay of perceptions

culturally shared by the dominant group. That group, after all, is the one that votes the laws, albeit without any intention to harm more vulnerable groups. In fact, the simple suggestion that the dominant group could be guilty of something that it did not desire at all can easily upset its members.

Discrimination is thus mainly the result of an ethnocentrism generally inherent to every individual. This ethnocentrism does not relate only to ethnicity but also to the social group with which an individual identifies. It is distinct from racism, sexism and homophobia in that it does not imply a hateful conduct. It is more akin to a reflex, which would be to perceive reality according to references specific to one's social group.

Systemic discrimination, involuntary and unperceived, lies in attitudes, stereotypes, preconceived ideas and unconscious biases, often interiorised since infancy. Those influences affect our outlooks and behaviour without ever being identified and, most importantly, without ever being spoken of or expressly acknowledged.

Researchers in social psychology at Harvard developed a test called the Implicit Association Test. The test requires that you make instantaneous associations of ideas, using your keyboard, between concepts (e.g., black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy). The score is based on the length of a person's average pairing time. In other

words, and this is an oversimplification, what first comes to mind: a shorter reaction time to pair, for example, straight people with good or gay people with bad will point to implicit bias against gays.[4]

Thus, a feminist journalist in Québec who took the test and whose mother was a scientist was troubled to find out that her results revealed she had a strong implicit tendency to associate science with males![5]

This illustrates why systemic discrimination can only be assessed in terms of disadvantegeous effects or outcomes. Still today, it is difficult to find a better way to express this notion than to refer to the famous *Andrews* decision, in which the Supreme Court confirmed, if such confirmation was needed, that in matters relating to discrimination, social context in its entirety ought to guide the judges' evaluation of the circumstances at hand.

The reason why discrimination has to be judged by examining its impact regardless of any intent to discriminate is that Charter rights, as any other rights, must be interpreted according to the traditional "remedy construction" method. Charters exist to produce a result. It is therefore essential that we ask ourselves what solution is most susceptible of achieving the goal set by the charters, which is, like for any other legislation, to repress abuse

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[4] https://implicit.harvard.edu/implicit/faqs.html#faq2

[5] http://plus.lapresse.ca/screens/129000da-19a4-4979-9b1f-2537737d10ba__7C__jgfoI9V-Us~7.html

or remedy an unjust situation. Equality provisions in the charters are oriented towards an objective to meet, that of insuring equality before the law. In discrimination cases, it is often pointless to try to find the intention behind the discriminatory act or speech:

> **"It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory."[6]**

It would be naive to think that the changes necessary to attain this objective are self-evident and will gradually occur all on their own. That is even more true of the egalitarian aspirations of some in situations where inequality, systemic by definition, cannot be detected without a will to question learned behaviours or attitudes that appear *a priori* undisputable, but that are not necessarily shared by all members of society.

It is easy to fall into the trap of thinking that one is exempt from any bias against a subgroup because one knows the institutions by which that subgroup is governed and believes that one is aware of the characteristics of the subgroup. In reality, to conquer those

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[6] ***CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, p. 1139.**

biases means the re-examination by the dominant group, the one that votes the laws, of the perceptions of social reality held by all members of society that are affected by those laws.

I do not mean to imply that every decision maker who expresses a point of view regarding a group or a subgroup has fallen into the trap of preconceived ideas. In matters of fundamental rights, divergence of views is not only inevitable, but also legitimate. I simply wish all of us to be mindful of the fact that subjective culture encompasses beliefs, attitudes and values largely shared within a social group. If those beliefs, attitudes and values, and the laws that stand as their by-product, have an unfavourable impact on an identifiable subgroup, it is sensible to caution ourselves against the possibility of failing to recognise a pattern of systemic discrimination.

Let me illustrate this with a concrete example.

Our legislators codified the legitimacy of such a warning against prejudices at subsections 718.2 d) and e) *Cr.C.*

"718.2 A court that imposes a sentence shall also take into consideration the following principles:

[...]

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."

Here is a provision that reflects the reality that the number of Indigenous individuals who are incarcerated is a lot greater than one would expect given their numbers amongst the general population. It is then logical to think that in the case of Indigenous offenders, factors other than the penological principles stated in the *Criminal Code* come into play. Hence the necessity of this specific caution or *mise en garde* apparently directed at the courts but in fact aimed at all actors of the judicial system – defence lawyers and prosecutors alike.

Of course, all stereotypes are not inevitably unfavourable. Feminists recurrently criticize the privileges that white males enjoy. The notions of the *old boys club* and of *racial profiling* – the latter in the sense that white people are not affected by the practice of racial profiling – are patent examples. We must find a way to eradicate the undesired, yet very real consequences of a worldview that does not foster the emergence, in full equality, of women and religious or racial minorities, even in democratic Western societies.

How do we solve this quandary? When it comes to judges, the solution has been, for at least two decades, continuing legal and social context education. Judges, provided they agree to it – in compliance with the principle of judicial independence – receive training that emphasizes the application of legal rules to the specific social context under study.

I would not, however, attempt to suggest that professional training will on its own succeed in resolving all issues of ingrained biases and prejudices.

In Massachusetts, a task force studying unconscious biases amongst judges identified various behaviours to avoid: making jokes or demeaning comments about minorities while presiding, giving a member of a minority a harsher sentence where a white accused has been let off the hook, enforcing child support or alimony awards for whites more vigorously than for ethnic minorities.

How do we recognize demeaning remarks? I once read in a publication of the American Bar that to say, for example – "Wow, your English is so good! – might be meant as a compliment but is in reality a subtle insult, a microagression. Such slights can devalue individuals and negatively impact on their capacity to function…"[7] and, I might add, "to impress the court positively."

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[7] Evan R. Seamone, "Understanding the Person Beneath the Robe: Practical Methods for Neutralizing Harmful Judicial Biases" (2006) 42 Willamette L. Rev. 1, p. 19.

Some will think that such comments sink into the political correctness divide and are therefore excessive. Yet the goal is not to impose the use of a politically correct language, but to spark reflection. It is not unwise to ask ourselves whether the recipient of such a "compliment" will perceive it as such or as a "subtle put down."

Despite the reality of subtle manifestations of ingrained biases, the answer is not necessarily to provide judges with a generally accepted list of preconceived notions and favourable stereotypes in the hope of preventing the expression or their own preconceived ideas and unfavourable stereotypes. You will remember the stir caused by a sentence rendered some years ago in Quebec in which the judge declared that the child, although she had been sodomized, had at least preserved her virginity, a prized attribute in her community. The ensuing uproar was deafening. In a 2017 decision from the Ontario Superior Court of Justice, an accused was acquitted of a count of sexual assault for want of the required *mens rea*, although it found that he "probably had sex with his wife on many occasions without her specific consent, as both he and she believed that he had the right to do so."[8] We may question the accuracy in law of such astonishing reasoning.

On se souviendra que le débat sur les « accommodements raisonnables » a soulevé au Québec, il y a quelques années, un

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[8] ***R. v. H.E.*, 2017 ONSC 4277, para. 16-17.**

courant, sinon de méfiance, tout de moins de questionnement par rapport à nos minorités culturelles. Il faut bien reconnaître, du reste, que le multiculturalisme n'est pas seulement la cible de critiques au Québec et au Canada, mais également aux États-Unis et en Europe.

En 2006, David Brooks du *New York Times* proclamait haut et fort "the death of multiculturalism". Trevor Philips, who formerly presided the British *Commission for Racial Equality* levelled criticism at multiculturalism for emphasising cultural differences at the expense of social cohesion.

The events of 9/11 and acts of terrorism have become cause to call diversity into question in Western countries and even to suspend individual rights, notwithstanding the rule of law.

Social psychologists postulate that feeling threatened by the presence of what they call outgroups aggravates prejudices and discriminatory behaviours in different ways:

« Le sentiment d'être menacé par la présence des exogroupes est aussi susceptible d'aggraver les préjugés et les comportements discriminants. La théorie intégrée de la menace postule que l'existence de conflits intergroupes préalables, les différences de statut entre groupes, la force de l'identification à l'endogroupe, la méconnaissance de l'exogroupe, ainsi que la nature des contacts intergroupes déterminent les sentiments de menaces à l'égard des exogroupes (Stephan et al., 2002). Plus les exogroupes sont

perçus comme menaçants, plus ils sont susceptibles d'être la cible de préjugés et de discriminations. Le sentiment de menace est à l'origine d'attitudes différentes selon que la menace perçue est réelle (compétition pour emplois rares) ou symbolique (choc des cultures et valeurs). Ainsi Pereira, Vala et Costa-Lopes (2009) ont démontré que la relation entre préjugés et opposition à l'immigration est médiatisée par le seul sentiment d'une réelle menace, tandis que le lien entre préjugés et opposition à la naturalisation ou citoyenneté est médiatisé par un sentiment de menace symbolique. »[9]

Everywhere, in short, multiculturalism has come under attack as "that which allows immigrants <u>not</u> to integrate into Canadian Society."

Il existe aussi une nostalgie bien réelle de ce qui existait autrefois, the *good old days*. La sensibilité « pure laine » n'est pas exclusive au Québec, par exemple :

"It is undeniable that something has been lost", said Charles Moore in *The Telegraph*. That something is Englishness. Certainly it will be possible, though hard, to forge a United Kingdom made up of many ethnicities. It may end up being a dynamic and wonderful country. But whatever it is, and however well it turns

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[9] Anne-Lorraine Wagner-Guillermou *et al.*, « Propension à discriminer et acculturation », *Revue internationale de psychologie sociale* 2013/1 (Tome 26), p. 11-12 : https://www.cairn.info/revue-internationale-de-psychologie-sociale-2013-1-page-5.htm.

out, it cannot be England. What will I tell my grandchildren when they ask what England was? I think I shall tell them that it seemed like a good idea while it lasted, and that it lasted for about 1,000 years."[10]

Voltaire, lui, disait que « s'il n'y avait en Angleterre qu'une religion, le despotisme serait à craindre; s'il y en avait deux, elles se couperaient la gorge; mais il y en a trente, et elles vivent en paix et heureuses. » I read in those words a prescient plea for diversity by Voltaire, who lived in the Age of Enlightenment.

Still, in the face of today's public reactions, it would not be unexpected to see judges become more hesitant to protect collective minority rights. Admittedly, it is sometimes difficult to strike the right balance between opposite interests in the delicate context of a cultural clash. Joseph Magnet once wrote in the *McGill Law Journal*:

"Collective rights litigation has often occurred during times of local hysteria. The generality of constitutional texts has proven insufficient to prevent judges from being swept along by temporary social pathology. The courts are placed in a difficult position. Constitutional texts are inadequate to divert the judiciary's attention from an all too understandable desire to keep peace in

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[10] ***The Week*, 29 avril 2011, p. 18.**

the Canadian family, usually by sacrificing minority rights to preservation of the status quo."[11]

What is one to conclude from all of this? That in the case of conflicts between values, such as, for example, the right of women to equality and the inferior legal position given to them in some cultures, a judge's duty is to make an enlightened, an intelligent decision, one that solves the conflict as best as possible, based on the law that applies in this country. The word "intelligence" comes from the latin *intellegentia*, itself derived from the words *inter* and *legere*, *inter* meaning between and *legere* meaning to choose. An intelligent person learns to choose results that are desirable over those that are less so.

A society guided by intelligence knows to choose good over evil, trust over fear, love over hate, generosity over cruelty, tolerance over intolerance, compassion over arrogance and facts over ignorance or superstition.

John Stuart Mill observed that: "One, on the side of right, is an ethical majority." We rarely regret the decisions we make in accordance with our conscience.

Lastly, I would like to quote Philo of Alexandria. He said: be kind to everyone you meet, for they are all engaged in a fierce struggle.

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[11] J. Magnet, « Collective Rights, Cultural Autonomy and the Canadian State », (1986) 32 McGill L. J. 170 aux pages 172-3.

Thank you for your attention.