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CHARTER AND CONTEXT: THE FACTS FOR WHICH WE NEED EVIDENCE, AND THE MYSTERIOUS OTHER ONES

Danielle Pinard^{*}

I. INTRODUCTION

The constitutional (and other) cases the Supreme Court of Canada handed down during the recent year confirm it: the contextual approach is the right approach.¹ One should no longer be seen to be abstract and formalistic.

The so-called contextual approach is the proper one for the analysis of equality rights,² the concept of cruel and unusual punishment³, the principles of fundamental justice,⁴ the issue of reasonable limits imposed on rights,⁵ as well

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¹ It is now "wrong" not to be contextual. See, for example, the argument made in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69, that the harm-based method using a community standard in obscenity cases was "insufficiently contextual" to respect equality rights of the gay community (at para. 53).

² See for example, *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, and *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703.

³ See for example, *R. v. Latimer*, [2001] 1 S.C.R. 3, 2001 SCC 1, at para. 74, and *R. v. Morrisey*, [2000] 2 S.C.R. 90, 2000 SCC 39, at para. 27.

⁴ See, for example, in *United States of America v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, the opinion of the Court, at para. 64, quoting Mr. Justice La Forest in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, who had "referred to a s. 7 'balancing process' in which the global context must be kept squarely in mind." The Court adds, at para. 65: "It is inherent in the *Kindler* and *Ng* [*Reference re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858] balancing process that the outcome may well vary from case to case depending on the mix of contextual factors put into the balance."

⁵ See, for example, *Little Sisters*, *supra*, note 1, minority at para. 217 and following, and L'Heureux-Dubé, Gonthier and Bastarache JJ.'s concurring opinion in *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 131 and following.

as for the interpretation of provincial human rights codes⁶ and for the application of the common law confessions rule.⁷

Apart from the obvious rhetorical aspect of this “contextualist” trend, the precise nature and content of a contextual approach remains somewhat uncertain. Indeed, I am not at all sure that the recent cases have clarified the confusion which surrounds this question.⁸

As a legitimate first impression, one might expect that a contextual approach in judicial reasoning would lead to a serious consideration of empirical facts and data relevant to constitutional issues. Such an approach would force judges to go beyond the interpretation of legal concepts and rules and to venture into the dangerousness of the real world. Dealing with facts of life would necessarily require evidence, and particularly social science evidence.

Some judges have ventured down this difficult path in a few cases. One recognizes Madam Justice L’Heureux-Dubé as the leader of this limited group.⁹

But most of the time, the so-called “contextual approach” seems to be no more than a rhetorical device which labels a judicial approach as pseudo-modern when in reality it has much in common with the former, more traditional one. The context referred to is often a context of legal norms of some sort,¹⁰ of values and of ideas. If the new judicial approach deals more explicitly with facts, those are often facts over which judges keep control: judges make judgmental facts the relevant and central ones; they “reason” the facts; they invent reasonable hypotheticals; they are satisfied with mere reasonable basis when things are uncertain. As such, there appears to be a mysterious category of facts for which evidence is not needed.

⁶ See, for example, *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*; *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665.

⁷ See, for example, *R. v. Oickle*, [2000] 2 S.C.R. 3.

⁸ Pinard, “La méthode contextuelle,” to be published in the January 2002 issue of the *Canadian Bar Review*.

⁹ For example, writing for the majority in *Winnipeg Child and Family Services v. W. (K.L.)*, [2000] 2 S.C.R. 519, 2000 SCC 48, Madam Justice L’Heureux-Dubé referred to the relevant social context, including “the frequent occurrence of child protection proceedings involving already disadvantaged members of society such as single-parent families, aboriginal families and disabled parents” (at para. 72), and the fact that children are often in danger in their families (at para. 74). See also L’Heureux-Dubé, Gonthier and Bastarache JJ.’s concurring opinion in *R. v. Sharpe*, *supra*, note 5.

¹⁰ See, for example, *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*; *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, *supra*, note 6, proposing a contextual approach in statutory interpretation but where context is defined in a very traditional way, as including “the other provisions of the law, related statutes, the objective of both the law and the specific provision, as well as the circumstances which led to the drafting of the text” (at para. 32).

I will try to explain this point of view with an overview of how some of last year's cases treated the facts. I will not presume to discover emerging jurisprudential trends or approaches, nor will I proceed with a thorough and detailed analysis of the cases. I will endeavour to establish links and I will ask questions. I am mainly concerned by what I perceive to be the tone or gist of a decision as regards process rather than with the actual result in the case.

II. ANALYSIS

This paper will briefly address four issues raised in the recent case law: the continued emphasis on human dignity in equality rights cases, the perceived need to use caution in relying on expert evidence, the construction of reasonable hypotheticals and the use of the rational basis standard.

1. Equality Cases and the Emphasis on Dignity

The increased emphasis placed on the human dignity aspect in equality rights analysis gives the impression that the relevant context becomes more and more a context of values, of opinions promoted and symbolic messages sent, rather than one of empirical facts about disadvantaged people. What counts is one's self-esteem, how one feels, how one is made to feel when one is denied a social benefit, and not the actual empirical facts, *i.e.*, the loss or non-access to a "targeted ameliorative program," for example.

Following the path established in *Law*,¹¹ the new cases dealing with equality rights also insist on human dignity as the central feature of an equality rights analysis. In *Lovelace*¹² as in *Granovsky*,¹³ the Court found that the complainants' dignity had not been demeaned, that no doubt had been cast on their worthiness as human beings and therefore that there had been no violation of equality rights. However, the complainants were refused state-administered advantages, and I am not sure that the concrete, empirical conditions in which they lived, and the empirical consequences of that exclusion, played an important role in the judicial reasoning process. The key question was apparently not so much the actual effect of the exclusion in people's real life (though the Court acknowledged that "the appellant aboriginal communities have experienced layer upon layer of exclusion and discrimination"¹⁴ and that his exclusion from the Canada Pension Plan had a grave financial impact on Mr.

¹¹ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

¹² *Supra*, note 2.

¹³ *Supra*, note 2.

¹⁴ *Lovelace*, *supra*, note 2, at para. 90.

Granovsky)¹⁵ as the symbolic message sent by the state as a result of their exclusion.

The Court alluded to the fact that a contextual analysis required a thorough consideration of “the social realities relating to their [the non-band communities’] exclusion from, or non-participation in, the *Indian Act* regime,”¹⁶ and admitted that Mr. Granovsky was “entitled to have taken into consideration the actual impact on him of the denial of that financial benefit.”¹⁷ However, one is left with the impression that by focusing on the message sent as a result of the exclusion and its impact on human dignity, the factual conditions in which the complainants lived were actually rendered irrelevant.

If the approach is still a contextual one, it has more to do with a context of values, feelings, ideas and impressions than with an empirical one concerned with how the world works, with how people live, with “conditions matérielles d’existence.” The assessment as to whether a person’s dignity has been demeaned requires the very orthodox tools judges have always used to make value judgments. It is far from a wild judicial incursion into empirical facts. It preserves the judicial power to decide and limits the role that parties can play by bringing social science evidence to the courts.

2. Closed Doors to Expert Evidence?

One would think that a contextual approach is a wisely sceptical one when judges question the reliability of their common sense assumptions and are curious and open-minded about the development of new knowledge. Apparently, some people even understood the contextual approach as an invitation to introduce expert evidence. However, recent cases contradict this possible first impression that the contextual trend necessarily encouraged a judicial open-door policy towards expert evidence. Indeed, in some recent cases, the Court rather insisted on the limits and costs of expert evidence.

The Court held in *R. v. D. (D.)*,¹⁸ that expert evidence explaining the significance of the length of delay before disclosure in sexual assault cases against children was not admissible because it was not necessary. Mr. Justice Major, writing for the majority, discussed the dangers of expert testimony, including the usurpation of the role of the trier of fact, and its costs in terms of time and money. He wrote:

¹⁵ *Granovsky, supra*, note 2, at para. 69.

¹⁶ *Lovelace, supra*, note 2, at para. 4.

¹⁷ *Granovsky, supra*, note 2, at para. 69.

¹⁸ [2000] 2 S.C.R. 275, 2000 SCC 43.

Finally, expert evidence is time-consuming and expensive. Modern litigation has introduced a proliferation of expert opinions of questionable value. The significance of the costs to the parties and the resulting strain upon judicial resources cannot be overstated.¹⁹

He considered that the affirmation at issue, being that “[i]n diagnosing cases of child sexual abuse, the timing of the disclosure, standing alone, signifies nothing,”²⁰ was a “simple fact,” “a simple and irrefutable proposition” that the trier of fact was capable of understanding and which did not necessitate expert evidence. Interestingly, three dissenting judges would have admitted the expert evidence, considering that a proper understanding of this issue could be outside the “knowledge of the ordinary juror.”²¹ For these judges, the expert testimony could demonstrate that the consensus in the scientific community was contrary to the common-sense argument according to which the length of delay “casts doubt on whether the alleged assaults occurred.”²²

In much the same vein, in *R. v. J. (J.-L.)*,²³ the Court confirmed the trial judge’s decision to refuse expert evidence presenting a new scientific theory in a criminal law trial. The Court warned against what it diagnosed as a “dramatic growth” in the presentation of expert evidence:

Expert witnesses have an essential role to play in the criminal courts. However, the dramatic growth in the frequency with which they have been called upon in recent years has led to ongoing debate about suitable controls on their participation, precautions to exclude “junk science”, and the need to preserve and protect the role of the trier of fact — the judge or the jury.²⁴

The Court referred with approval to the set of stringent factors used by the Supreme Court of the United States to establish the “reliable foundation” criterion for the admissibility of scientific evidence.²⁵ The limits and difficulties inherent in relying on expert evidence were repeatedly stressed.

Finally, in *Parrott*,²⁶ the Court insisted that the evaluation of the ability of a witness (in this case a mentally challenged woman) to testify was within the domain of the judge’s competence, being “the very meat and potatoes of a trial

¹⁹ *Id.*, at para. 56.

²⁰ *Id.*, at para. 59.

²¹ *Id.*, at para. 24.

²² *Id.*, at para. 38.

²³ [2000] 2 S.C.R. 600, 2000 SCC 51.

²⁴ *Id.*, at para. 25.

²⁵ *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993).

²⁶ *R. v. Parrott*, [2001] 1 S.C.R. 178, 2001 SCC 3.

court's existence,"²⁷ and that the testimony of an expert on that issue was not necessary.

These cases rightly point out the dangers associated with expert evidence. They aim to curb what is said to be "a proliferation of expert opinions of questionable value."²⁸

The approval of the *Daubert* test of reliability and the use of an exacting criterion of necessity may be wise, but they certainly do not promote a contextual approach where new knowledge is called upon to inform judicial decisions.

And the very slim majority in two of the three cases²⁹ illustrates how mysterious indeed is the distinction between facts we know and facts for which we need expert evidence.

3. Reasonable Hypotheticals

The quest for factual foundations in constitutional cases will sometimes take the form of an explicit elaboration of reasonable hypothetical facts having nothing to do with the case at bar, or even with social facts empirically observed.³⁰

It is a feature one encounters for example in the case law concerning section 12 of the *Canadian Charter of Rights and Freedoms*:³¹ the protection against cruel and unusual punishment. In *Morrisey*,³² the Court discussed the particular aspect of a section 12 analysis which requires a consideration of "reasonable hypotheticals." If, by definition, hypotheticals are not facts that have been proven to the trier of fact according to the rules of evidence, they do not even have to be facts which exist in the real world and which can be empirically observed. They are, by definition, the product of the imagination. Mr. Justice Gonthier, writing for the majority, even admitted that there was an "air of unreality" about employing creative energy in crafting reasonable hypotheticals.³³ It is therefore not surprising that the Court could split as to the relevant criteria for establishing what constitutes "reasonable hypotheticals" within the meaning of section 12 of the Charter.

²⁷ *Id.*, at para. 57.

²⁸ *R. v. D. (D.)*, *supra*, note 18, at para. 56.

²⁹ In *R. v. D. (D.)*, as well as in *Parrott*, they were 4/7 majorities.

³⁰ It was done, for example, in *R. v. Mills*, [1999] 3 S.C.R. 668, where the Court considered that the determination of the constitutionality of the statute could be made in the light of its general effects, "under reasonable hypothetical circumstances" (at para. 41).

³¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

³² *Supra*, note 3.

³³ *Id.*, at para. 32.

Even in cases where the concept of reasonable hypotheticals is not mentioned as such, one wonders whether it cannot actually explain the decision rendered. In *Little Sisters*,³⁴ for example, the majority affirms that the statutory scheme “was capable of being administered with minimal impairment of the s. 2(b) rights ...”³⁵ and that “[i]f the Customs legislation operated as intended ... the deleterious effects would be outweighed by its salutary benefit.”³⁶ With this type of reasoning, one is closer to the elaboration of reasonable hypotheticals than to an empirical approach. It is hard to disagree with the dissenters in that case, who wrote that “the very nature of a contextual approach demands attention to how the Customs legislation is actually applied,”³⁷ and that “[t]he government’s burden under s. 1 is to justify the *actual* infringement on rights occasioned by the impugned legislation, not simply that occasioned by some hypothetical ideal of the legislation”³⁸ (emphasis in original).

Finally, it is also quite easy to conceptualize *Sharpe*³⁹ as a case based on “reasonable hypotheticals.” Indeed, the outcome whereby two applications of the challenged provisions were “read down” because they were held not to be justified under section 1, had nothing to do with the facts of the accusation against Mr. Sharpe. Chief Justice McLachlin’s discussion of the possible remedies confirms that the constitutional problems identified in the case had to do with hypothetical scenarios, and not with empirical discoveries.⁴⁰

4. Accepting Uncertainty: The Rational Basis Test

Scientific uncertainty as regards certain social and psychological phenomena, and the consequent need for evidentiary refinements, have been acknowledged once again in the recent constitutional case law.

³⁴ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69.

³⁵ *Little Sisters*, *id.*, majority, at para. 150.

³⁶ *Id.*, at para. 153.

³⁷ *Id.*, at para. 218.

³⁸ *Id.*, at para. 219.

³⁹ *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2.

⁴⁰ She writes, at para. 111, in fine: “Why, one might well ask, should a law that is substantially constitutional be struck down simply because the accused can point to a hypothetical application that is far removed from his own case which might not be constitutional?”, and at para. 112: “Another alternative might be to hold that the law as it applies to the case at bar is valid, declining to find it unconstitutional on the basis of a hypothetical scenario that has not yet arisen. ... While the Canadian jurisprudence on the question is young, thus far it suggests that laws may be struck out on the basis of hypothetical situations, provided they are ‘reasonable.’ ”

In *Little Sisters*,⁴¹ applying a test that had been crafted and applied in a number of earlier cases, the Court was satisfied with the demonstration of a reasoned apprehension of harm caused by homosexual pornography.⁴²

In *Sharpe*,⁴³ the Court used a “reasoned apprehension of harm standard,” as opposed to “scientific proof based on concrete evidence,” for the determination of the harm caused by possession of child pornography.⁴⁴

It is interesting to note that the same wording was used in the two cases to explain the Court’s refusal to impose on governments “a higher standard of proof than the subject matter admits of.”⁴⁵ One cannot be more blunt as to the uncertainty inherent in some phenomena, and the consequent need for the adjustment of evidentiary requirements.

III. CONCLUSION

The law has been able, for a long period of time, to feed itself on its own rules, constructs and principles. But many different factors have forced it to become more “contextual,” more knowledgeable and to take into consideration how the real world works.

The trend towards an administration of justice which is more concerned with social context does, however, encounter difficulties when it comes to translating it into hard rules of evidence. The transition between the ethical concerns for a contextualized justice and the concrete domain of evidence is apparently a difficult one to manage.

It seems that the law world will always entertain an ambivalent attitude toward the empirical world.

We pretend that what happens in the world out there matters, but we arrange things a bit. For example, we elaborate a community standard to evaluate obscenity, but that standard then “involves an attribution rather than an opinion poll.”⁴⁶

⁴¹ *Supra*, note 34.

⁴² The Court was unanimous on that issue: *Little Sisters*, majority at para. 66, and minority at para. 198.

⁴³ *Supra*, note 39.

⁴⁴ The Court was once again unanimous on that issue: *id.*, majority, at para. 88, and concurring opinion, at para. 198.

⁴⁵ See *Little Sisters*, *supra*, note 34, majority opinion, at para. 67: “While the social science evidence is thin, it must be remembered that in *Butler* itself [*R. v. Butler*, [1992] 1 S.C.R. 452] the Court accepted that the Crown could not be required to adduce a higher level of proof than the subject matter admits of,” and *Sharpe*, *supra*, note 39, majority at para. 89: “Complex human behaviour may not lend itself to precise scientific demonstration, and the courts cannot hold Parliament to a higher standard of proof than the subject matter admits of.”

⁴⁶ *Little Sisters*, *supra*, note 34, majority opinion, at para. 56.

Distinctions like the one between adjudicative and legislative facts, which for a while gave the impression of magically opening all doors to social facts, are subsequently dismissed as incapable of playing that role.⁴⁷

We want facts, but we sometimes settle for common sense and inferential reasoning,⁴⁸ value judgments or reasonable hypotheticals.

There may be some sophisticated theoretical constructs justifying these different devices, but the bottom line is that one does not know which tack to adopt anymore: whether one should prepare concrete evidence or come up with reasoned hypotheticals or raise common-sense arguments.

I wrote elsewhere that unpredictability of approach can be the most insidious form of judicial activism.⁴⁹ But perhaps it is unavoidable.

In principle, the law can only ignore the empirical realities of the outside world at the expense of its own credibility. At the same time, however, there are some legal constructs that exist independently of the outside world. Some basic assumptions of the legal system will survive a challenge on empirical grounds.⁵⁰ There are certainly very good reasons why judges should have the last say on some factual issues and, as Mr. Justice La Forest once wrote, avoid becoming the hostages of the parties.⁵¹

⁴⁷ See *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, [2000] 1 S.C.R. 44, Mr. Justice Binnie delivering an order denying a motion to introduce fresh evidence of legislative facts on appeal. He wrote, at para. 5: "The usual vehicle for reception of legislative fact is judicial notice, which requires that the 'facts' be so notorious or uncontroversial that evidence of their existence is unnecessary. Legislative fact may also be adduced through witnesses. The concept of 'legislative fact' does not, however, provide an excuse to put before the court controversial evidence to the prejudice of the opposing party without providing a proper opportunity for its truth to be tested."

⁴⁸ See, for example, *Sharpe*, *supra*, note 39, at para. 78: "To justify the intrusion on free expression, the government must demonstrate, through evidence supplemented by common sense and inferential reasoning, that the law meets the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103."

⁴⁹ Pinard, "Activisme ou retenue dans la méthode: démarche en quête de points de repères," in *The Judiciary as Third Branch of Government: Manifestations and Challenges to Legitimacy, Proceedings of the Canadian Institute for the Administration of Justice Conference* (Montréal: Éditions Thémis, 1999), at 213-41.

⁵⁰ See for example, *R. v. McIntosh* (1997), 35 O.R. (3d) 97 (C.A.), quoted in *R. v. J. (J.-L.)*, [2000] 2 S.C.R. 600, 2000 SCC 51, where the Ontario Court of Appeal rejected expert evidence on the limits of eyewitness testimony.

⁵¹ Mr Justice La Forest wrote, in *R. v. Edwards Books and Art*, [1986] 2 S.C.R. 713, at para. 195: "I do not accept that in dealing with broad social and economic facts such as those involved here the Court is necessarily bound to rely solely on those presented by counsel. The admonition in *Oakes* and other cases to present evidence in *Charter* cases does not remove from the courts the power, where it deems it expedient, to take judicial notice of broad social and economic facts and to take the necessary steps to inform itself about them."

One is therefore compelled to admit that it seems inherently impossible to achieve absolute logical consistency in judicial approach within constitutional cases.