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# “THE DEFENDER OF OUR CIVIL LIBERTIES”

By JOSEPH M. STEINER\*

In a world of finite resources, government is necessarily engaged in a continuous process of accommodating the desires of different individuals who can be categorized in terms of any number of attributes. Such accommodation involves the promotion of some interests of some individuals at the expense of other interests of the same individuals and of the interests of other individuals. My concern here is with two aspects of that process of accommodation: the “legitimacy” of its output and the boundaries of its operation.

In Western societies, at least, the legitimacy of the output of the process is perceived to depend, in part, upon the responsibility and responsiveness of the decision-making organs of government to the individuals making up the society. In short, legitimacy and democracy are related, albeit in complex, even mysterious, fashion. That complexity stems in part from the widely-shared conviction that there are limits on the capacity of majorities to confer legitimacy, that there are some acts which cannot be justified by comparing the resultant benefits to one individual or group with the resultant costs to another individual or group. These limits define the boundaries of the field in which the governmental accommodation process is to operate and make up what we call “civil liberties”.<sup>1</sup>

But the problem is more complex still. Few of us cling to the belief that divine revelation can provide a sketch map of the boundaries we seek. Nor can pure reason do the job. We are here into an area of genuine controversy with factual, political and moral aspects. It follows that the nature of the process of authoritatively determining the boundaries of government action is itself an essential determinant of the legitimacy or illegitimacy of the governmental accommodation process. It is with the role of the Supreme Court in this process of boundary determination that Professor Weiler deals in the chapter here under consideration.<sup>2</sup>

I shall argue that Professor Weiler’s treatment is fundamentally unsatisfactory. This is so for two reasons. First, underlying the entire work is the unstated belief that all persons of good will would agree on the solution to any particular problem if only they were sufficiently familiar with the area of controversy. On this view the jurisprudential problem of institutional competence (of “jurisdiction”) becomes a technocratic problem of institutional expertise. The second basic flaw is Professor Weiler’s failure adequately to elucidate a

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<sup>1</sup> Similarly, the field in which individuals may exercise their rights vis-a-vis other individuals has come to be circumscribed by a set of boundaries which we call “human rights”.

<sup>2</sup> Paul Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell/Metheun, 1974) at 186-224 (c. 7, “The Defender of our Civil Liberties”).

concept of "law". Given a sufficiently fuzzy conception, it is no problem at all to "legalize" any position arrived at on the basis of the technocratic criterion. I shall deal with the latter point first.

In his discussion of legal reasoning, Weiler argues that the genus "legal materials" is not exhausted by legal rules. In addition,

There is a legal instrument which summarizes and integrates the thrust of these many factors lurking in the background of any judicial decision. This indispensable weapon in the judicial armoury is the *legal principle*. A principle is a very different kind of legal doctrine than a rule. A rule is applied directly to a fact situation in order to prescribe a specific legal result. A principle is an argument which is appealed to as a justification for the adoption of such a legal rule in the trouble case where this is necessary.<sup>3</sup>

Furthermore,

These principles are located in much the same public sources of law as the bare rules which are conventionally supposed to control our judges.<sup>4</sup>

Let us examine the notion of legal principle at work in a case which Professor Weiler offers as a model for judicial reasoning. In explaining the majority position in *Boucher v. The King*,<sup>5</sup> we are assured that the justices were not expressing mere preference. Rather,

The judges maintained continuity with the flow of the law by trying to fathom the rationale of the offence of sedition, to formulate *the* principle which reconciles the competing values in the area.<sup>6</sup>

But in the very next paragraph we are told:

Its [the Supreme Court's] tacit *assumption* was that this freedom [of expression] was a basic value which was protected by legal principles built into the structure of our legal system.<sup>7</sup>

Now this is indeed peculiar. First we are told that the guiding principle emerges as the *unique* rationalization of the competing values at issue. Then we are told that the priority of one of those values is *assumed*, and, given that assumption, the principles necessary to support that priority can be deduced.

Obviously the two decision processes are inconsistent. Moreover, the role of principle as a guidance device is problematic in both formulations. To assert, as the first formulation must, that there is a unique rationalization of competing values is to adopt the view to which I alluded above, namely that there are no genuine controversies among fully informed persons of good will. While this is a normative rather than an empirical premise (the normative "play" being contained in the adjective "genuine") and is therefore incapable of refutation, it reflects an absolutist view of morality which has little to recommend it. As to the second formulation, I think that it is abundantly clear

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<sup>3</sup> *Id.* at 49; emphasis in original.

<sup>4</sup> *Id.* at 52.

<sup>5</sup> [1951] S.C.R. 265; [1951] 2 D.L.R. 369; 99 C.C.C. 1.

<sup>6</sup> *Supra*, note 2 at 191; emphasis added.

<sup>7</sup> *Id.* at 192, emphasis added.

that principle is not guiding the decision, but following it as the embodiment of the majority's preferences, its assumptions, regarding the ordering of values.

That legal principle is an adaptable beast capable of doing anyone's bidding is illustrated by Professor Weiler's reaction to *The Queen v. Osborn*.<sup>8</sup> Here Professor Weiler asserts that, "Clearly this second prosecution offended the principle of double jeopardy . . ." <sup>9</sup> Is he suggesting that there is a legal principle (i.e. one which judges must weigh) which extends beyond the pleas of *autrefois acquit* and *autrefois convict* and the defences of *res judicata* and issue estoppel? If so, what is its source and what is its content? I should have thought that the view of Pigeon, Martland and Judson, JJ. was very much in the spirit of the restricted and technical nature of the above pleas and defences, and in tune with the provisions for new trials when convictions are quashed and with the limited right of the Crown to appeal acquittals. Many of us may find the conduct of the Crown in this case offensive and wish that it were outlawed. But wishing does not make it so.

It is Professor Weiler's terribly imprecise notion of law that leads him to measure consistency of Court performance in the wrong dimension. He examines *Osborn*,<sup>10</sup> *Wray*,<sup>11</sup> and *Drybones*,<sup>12</sup> and, taking *Osborn* and *Wray* as a unit, concludes that of the four possible sets of outcomes, the Court adopted the least consistent. Why? Because *Drybones* promoted civil liberties and *Wray/Osborn* did not, although it would have been easier, in some sense, to go the opposite route in each case.

But consistency in the promotion of certain interests is surely not the criterion to apply to judicial performance. What we want is consistency in the interpretation of legal materials and in the mode of dealing with legal materials. Professor Weiler would have the Court adopt a political programme, so long as it is his programme. After all, if principles are part of the law, just about anything can be rationalized in legal terms.

I would suggest that the real issue is between strict constructionism and activism. Strict constructionism is the view that the received body of legal rules, whether common law or statutory, should be applied to situations which fall within the central core of the meaning of the words in which the rules are expressed. It is a position which emphasizes certainty and predictability in judicial response and the pre-eminence of the popularly elected organs of government in law reform. Activism, on the other hand, is the view that courts ought to be receptive to broadening the scope of the received body of rules to embrace situations which fall into the penumbra of the meaning of the words in which the rules are expressed. It is a position which emphasized the continuous adaptation of legal rules to changing social and technological conditions.

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<sup>8</sup> [1971] S.C.R. 184; 15 D.L.R. (3d) 85; 1 C.C.C. (2d) 482.

<sup>9</sup> *Supra*, note 2 at 203.

<sup>10</sup> [1971] S.C.R. 184.

<sup>11</sup> *The Queen v. Wray*, [1971] S.C.R. 272; 11 D.L.R. (3d) 673; [1970] 4 C.C.C. 1.

<sup>12</sup> *R. v. Drybones*, [1970] S.C.R. 282; 9 D.L.R. (3d) 473; [1970] 3 C.C.C. 355.

Professor Weiler is *not* an exponent of the activist stance. Rather, his approach is *programmatic*. The Court should promote this set of values in one branch of the law, that set of values in another branch of the law, and should avoid messing around in a third branch of the law altogether. All this is possible within the framework of law only because of the very shadowy nature of that framework as he defines it.

The set of decisions in *Wray*, *Osborn* and *Drybones* can be seen as a consistently strict constructionist response to the legal problems encountered. In the *Wray* situation the great weight of authority supported the view that relevant evidence (other than confessions) is not rendered inadmissible by virtue of the manner in which it was obtained. In *Osborn* the accused could point to no rule of common law or provision of the Criminal Code which would have permitted the judge to quash the indictment.

*Drybones* presented a totally different type of legal problem, that of determining *for the first time* the effect of an Act of Parliament, the Canadian Bill of Rights, on conflicting federal legislation. For an analyst anywhere along the strict constructionist/activist spectrum, the problem was one of interpreting the words of the Bill within the legal context in which it was passed. I see no reason why a strict constructionist might not conclude that the most reasonable reading of the Bill imposed a *duty* on the courts to evaluate federal law in terms of a set of standards which the courts themselves would be required to elucidate. The point is that that conclusion, or the opposite one, is in no way dependent upon the analyst's view of the wisdom of such a measure. For Professor Weiler, with his programmatic approach, it is precisely the wisdom of the measure that is the keystone. For him the question is whether a Bill of Rights conferring substantive power on the courts to review federal legislation is a good idea, and if not, how can the courts contrive to ignore it.

This brings us to a consideration of the other basic flaw in Professor Weiler's analysis, the notion that jurisdiction is a function of expertise. That this is his view is, I think, clear, for he himself says:

This question is the focus of this book, in which I have tried to develop a view of the different *capacities* of our several institutions which are implied by their differences in design.<sup>13</sup>

If he were making an argument as to the jurisdiction which ought to be conferred upon the courts, then, of course, technical competence would be an important consideration. In this regard it is noteworthy that his whole discussion of "The Wisdom of Judge-Made Law"<sup>14</sup> appears, until the last few paragraphs, to be an argument concerning the desirability of a Bill of Rights. Yet, at the end of this section, he attempts to turn it into an argument for restraint in *Drybones*-type situations.

But that simply will not do. No coherent conception of law could lead to the conclusion that the effect of the Bill of Rights on conflicting federal

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<sup>13</sup> *Supra*, note 2 at 206; emphasis added.

<sup>14</sup> *Id.* at 212-217.

legislation depends upon the facts of or law applicable to a particular situation. Surely it must be the case that irreconcilable conflict *always* implies the invalidity of the offending legislation or that it *never* does. The English language permits no middle ground. That being so, and no one, even among the dissenters, having denied such a conflict in *Drybones*, what room is there for restraint? Yet Professor Weiler tells us that the decision for or against judicial intervention should turn on the relative desirability of the two possible outcomes.<sup>15</sup>

Professor Weiler denies that the Bill of Rights possesses "the same substantive characteristics as the ordinary laws which courts normally and legitimately apply".<sup>16</sup> It follows, for him, that its status as an Act of Parliament does not confer legitimacy upon the judicial review of federal legislation. But the argument is unconvincing and is inconsistent with his views on tort and criminal law. If one accepts the argument that the nullification effect of the Bill is a reasonable reading of its terms, then it follows that Parliament has conferred upon the courts the power to develop the meanings of "due process", "equality before the law" and the other, admittedly vague, declared rights. This the courts, and the Supreme Court in particular, can do in a series of decisions lending greater precision to the words used. These decisions will fail to communicate standards only if the courts refuse to discipline themselves by remaining within the confines of reasonable readings of the rules which they themselves have enunciated. The task is essentially similar to that of fleshing out the "reasonable man" and "*mens rea*" rules of tort and criminal law respectively. Is Professor Weiler suggesting that these areas too are lawless?

Towards the end of his discussion of the judicial role in protecting civil liberties, Professor Weiler presents us with a passage that is remarkable for its inconsistency with all that has gone before:

The distinctive feature of courts is that they entitle the individual to demand, as a matter of legal right, a public, reasoned pronouncement about the validity of a law or official decision. The private citizen cannot be fobbed off by arguments of political expediency or left to wander in a bureaucratic maze looking for someone with the responsibility of giving him an answer.<sup>17</sup>

But in a legal system which is befuddled by a vague notion of legal principle and whose component agencies defer to each other's supposed expertise, there is no room for a claim of right. There can only be the plea of the supplicant, oft-times to be met with a pitying, "I'm sorry; we're just not very good at that sort of thing."

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<sup>15</sup> "Only if judicial intervention on behalf of the Indian will be worse than judicial non-intervention is judicial restraint warranted." *Id.* at 206.

<sup>16</sup> *Id.* at 207.

<sup>17</sup> *Id.* at 220.

