



The Australian Institute of Judicial Administration Incorporated

HUMAN RIGHTS AND THE JUDICIAL ROLE

Delivered by

**Madam Justice Rosalie Silberman Abella
Court of Appeal for Ontario**

at

**School of Electrical Engineering and Computer Science
The University of Melbourne
Friday 23 October 1998**

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FOREWORD

The Convention on the Prevention and Punishment of the Crime of Genocide was approved by the General Assembly of the United Nations on 9 December 1948. The very next day the General Assembly adopted the *Universal Declaration of Human Rights*. They were two momentous days. The *Convention* and the *Declaration* are amongst this century's most important documents.

On 23 October 1998 in Melbourne Madame Justice Rosalie Abella of the Court of Appeal for Ontario delivered the *Ninth AIJA Oration in Judicial Administration* in tribute to the 50th anniversary of the *Convention* and the *Declaration*. As she reminded those of us privileged to hear the oration, both the *Convention* and the *Declaration* are products of the Holocaust. Each of them reflects a measure of loss of confidence in civil libertarian remedies founded on the rights of individuals to be free from government interference. They recognise that harms suffered by individuals because of their membership of particular groups call for action by governments.

As we learned from her Honour's thought provoking and moving address, her own remarkable career as a lawyer, law teacher, judge and jurist may also be seen as a product of the Holocaust. Justice Abella's parents spent four years of World War II in a European concentration camp, migrating to Canada in 1950. While her Honour's father, a qualified lawyer, was not able to become a member of the Canadian Bar, Justice Abella "became the lawyer he couldn't be in Canada" and thereafter achieved distinction nationally and internationally.

Justice Abella was appointed to the Court of Appeal for Ontario in 1992. Prior to her appointment she served as Chair of the Ontario Labour Relations Board, Chair of the Ontario Law Reform Commission, Judge of the Ontario Family Court, member of the Ontario Human Rights Commission and Sole Commissioner of the Royal Commission on Equality and Employment. She was Boulton Visiting Professor at the McGill Law School from 1988-1992. In 1997 she was elected to the Royal Society of Canada and in the same year she became the first non-American to be appointed a member of the American Bar Association's Standing Committee on World Order Under Law. Her Honour has 16 honorary doctorates and in 1966 received the Distinguished Alumnus Award from the Faculty of Law at the University of Toronto. She has published extensively in the fields of constitutional law, administrative law, family law and jurisprudence.

The Hon Justice Catherine Branson
President
Australian Institute of Judicial Administration
December 1998

HUMAN RIGHTS AND THE JUDICIAL ROLE

Justice Rosalie Silberman Abella

This lecture is about human rights, in tribute to the 50th anniversary of the *Universal Declaration of Human Rights* and of the *Genocide Convention*. The *Declaration* and the *Convention* were both products of the Holocaust, and represented the triumph of hope over history. Both screamed "Never Again" in their birth announcements, and both demanded the chance to grow with dignity and respect. They were the wings of a Phoenix that rose from the ashes of Auschwitz, the symbols of regret of a world shamefully chastened. They both knew they were viewed by some with hostile suspicion and by others with embarrassed resignation; and they both knew that the world which endorsed them, also feared them. But they both also knew that there were many whose world made no sense without them.

Both are looked to as symbols that notwithstanding despairing evidence to the contrary, the international community remains dedicated to the aspiration of universal accessibility of human rights and justice. We bask in the radiance of their symbolism because we so desperately need their illuminating vision.

Fifty years later, it is worth reflecting on how securely the commitment to tolerance is fastened to the spirit of our times. For me, not securely enough. All over the world, the arteries that pump justice into the hearts of our nations are growing sclerotic, clogged by a diet too rich in intolerance, the very substance we banished in disrepute after the Second World War.

In 1972, at the National Conference on the Law in Ottawa, then Prime Minister Pierre Trudeau committed this generation "to seek a society which emphasises human dignity in all its manifestations." That is the purpose of human rights, and that is the movie my generation thought they had parts in. But somewhere along the way, the projector got turned off. Obviously, somebody didn't like the plot.

This spring, an article appeared in the Sunday New York Times Magazine by Leon Higginbotham Jr., an African-American with a distinguished 45-year career as a lawyer, judge and professor. He wrote about how proud he felt 50 years ago watching Thurgood Marshall arguing before the US Supreme Court, successfully as it turned out, for the right of African-Americans to be admitted to an all-white law school. Less than half a century later, the judicial beneficence of this ruling had turned into the sclerotic jurisprudence that ended affirmative action measures in Texas and California law schools. The result was that out of a total of 736 first year law students at Berkeley and the University of Texas, only 5 were blacks. Higginbotham cites these statistics as introductory to the poignant ending of his opening paragraph: "I sometimes feel as if I am watching justice die."

In 1990, when the United Nations held its first review of progress since the end of the UN Decade for Women in 1985, it concluded:

The entrenched resistance to women's advancement and the reduction of resources available for change that has accompanied the world economic situation in the late 1980s have meant that there has been a loss of impetus and even stagnation in some areas where more progress would have been expected.

Why has the concept of human rights appeared to move from its early confident primacy in the justice picture, to the current defensive margins of the canvas? What happened to the enthusiastic, gender-collaborative, media-supported, unabashedly idealistic and legislatively-endorsed human rights initiatives of the 70s, those struggles to change the law of the family, to get more women into the work force, to close the wage gap, to end occupational segregation, to increase child care, to facilitate the balance between work and family responsibilities? Today, the wage gaps remain sturdily in place; occupational segregation survives intact; child care, nowhere endorsed as a universally desirable public policy, gets debated as if it were about maternal responsibilities and not about children's entitlement; and the work/family discussion has captured the public's attention but not its interest. Anyone who believed passionately in human rights, for women or anyone else, was, in the 70s, called a moderate. Today, those same views are called radical.

No one opposes equality or human rights. As principles of democratised civilisation, they are accepted without controversy, and always have been. But their definition and application produce controversy of a fundamental kind. The reasons for the remedial resistance are undoubtedly complex, but worth exploring nonetheless to try to unplug the attitudes clogging the progress we thought a generation ago was unstoppable.

I think there are two main dynamics directing the cultural environment in North America today, and they are both worrying for different reasons. The first is the New Puritanism and the second is the New Pluralism. Both profoundly affect our capacity to create ameliorating strategies and each offers explanations for strategic delays.

First, the New Puritanism or Fundamentalism. As far as I can tell, the Old Fundamentalism was about religious orthodoxy and the maintenance of clear distinctions between right and wrong, as ecumenically declared. In their personal firmament, fundamentalists found answers to most of life's tough calls and were spiritually content to resist moral ambiguity.

As time went on, as is the case with many who feel they categorically know the difference between right and wrong, there grew a zeal to impose more universally the moral certainty puritanism preached. By the 1950s, after decades of moral pluralism, exhausted and wounded as we were by the horror

and enormity of World War II, puritanism as secular morality surfaced as a majority phenomenon. It took the form of Dwight D. Eisenhower, the suburbs, bungalows, 2.5 children per family, one spouse per marriage, June Cleaver and her son Beaver, a station wagon, and a matching dog. The essence of the movement was conformity and the majority bought in. The "truth" was obvious, compliance was expected, and competitive truths and their adherents were squelched.

McCarthyism flourished in the name of this moral purity, and decent people behaved unforgivably for years. The people who started the movement were haters. Their followers were naive or worse. Anyone who resisted was labelled undemocratic, unpatriotic, Communist or Jewish—often interchangeable terms in those days. Careers were ruined, injustices blatantly encouraged or not discouraged, horrendous assumptions tacitly accepted, and all while the continent yawned and stretched and felt proudly unified by the purity of its monolithic and homogeneous morality.

Is it any wonder we had the turbulent sixties? Or the loquacious seventies? Or the amoral eighties? Or the indifferent nineties? A devastating World War shatters presumed civilities; the victims are humanism and humanity; the need for spiritual catharsis creates a search for purifiers; the purification which starts nobly at Nuremberg eventually ends ignobly at the House Committee on un-American Activities in Washington; the purified parents of the fifties create predictably bored progeny in the sixties; and a decade in the sixties is spent overreacting to the overpurification and oversimplification of the fifties.

But the purification of the sixties created its own new tyrannical truths—about adults over thirty and whether you could trust them, about respectability, about rules, and about traditions generally. The only thing the people raised in the fifties and those raised in the sixties had in common was that each group thought they had a monopoly on truth.

And that's why we did so much talking in the seventies. We had to try to figure out which value system was better, which side was right. So we discussed the environment, women, minorities, disabled persons, aboriginal people, marriage, sex, sexual orientation, religion, children, language, and education. We changed some laws and social norms, and started to regroup. We sought refuge in like-minded people, battered as we were by the increasing stridency of the national and local conversations.

We also started to divide. By the time we finished talking to or at each other in the seventies, we had no idea who was right and who was wrong. There were no villains, but there seemed to be a lot of victims, and we were utterly confused.

In the eighties we fervently became one of three things: conservatised, radicalised, or self-centred. And each side of the triangle mocked the other two, claimed to represent a broad consensus, and expressed cranky frustration

with public institutions. We lost our compass—and our tolerance. We held each other under siege, but we didn't know why we were giving ultimatums to each other.

So people who drew their lines through the debates of the seventies held tough and stayed tough through the eighties, comforted by the notion that the lines had become rights and that the rights had been enshrined. Everyone, in short, began to claim a monopoly now not only on truth, but on justice as well.

On top of all of this Canada imposed a *Charter of Rights and Freedoms*. I am a serious *Charter* fan and I always have been. But I think we have to be aware of what we coincidentally did in bringing in the *Charter* when we did. On top of a cynicism about whether democratically elected political institutions were properly accountable, we imposed unelected, unaccountable jurists to decide whether rights and freedoms no one understood but everyone passionately believed in, were being violated. On top of a debate about whether individual rights or collective rights were supreme, we imposed a *Charter* that was ideologically schizophrenic on the subject, and offered as a tool for brokering the issue the great jurisprudential problem-solving concept found in section 1: "It depends." On top of the public's relief that at last the concept of human rights was now constitutionally entrenched and therefore supreme, we imposed a notwithstanding clause, assuring people that in their own interests and for their own benefit, governments could suspend their otherwise constitutionally protected rights and freedoms (but not, ironically, their constitutionally protected division of powers). And on top of a nation increasingly divided over how to unify whatever it was that was holding it together, we imposed a unifying document that seemed to protect everyone's right to stay diverse. The *Charter*, in short, gave voice to the lines.

What could before have been labelled an individual's personal and idiosyncratic point of view, was now perceived by that individual as a *constitutionally protected* personal and idiosyncratic point of view. When individuals start to perceive that their points of view have constitutional validity, they start to take those views and themselves very seriously. And from there it's only a short leap to intolerance, to the kind of Pavlovian urge to impose your views on others and, more importantly, to exude the fumes of moral absolutism fundamentalism exhales. We were forgetting, it seems, that nothing, not even rights, is absolute, and as a result we were losing our balance. In short, by the 90s we came full circle back to the puritanism of the fifties, only now there were more truths demanding compliance and competing for primacy. And the voices were louder and more urgently strident.

What about the New Pluralism? In the fifties, it began with a burst of immigration adding to the existing collection of ethnic, racial, linguistic and religious groups; the beginning of human rights laws to protect them from discrimination; and a general concern about how to fit everybody in or, more pointedly, whether they would or should fit in even if we could. Many of these minority groups added their voices to those of the reawakened female ones in

the sixties, and spent the seventies adding to the discussion table, among others, Francophones outside Quebec, and disabled and aboriginal people. And, by the eighties, like the New Puritanism, lines had been drawn, sides taken, and expectations forcefully articulated.

When the *Charter* was introduced to *this* Ism, rights truly became Capitalised, and people started capitalising on their rights. This "rights" frenzy produced an interesting phenomenon. As groups and the individuals in them spoke with increasing confidence of their rights, bolstered by the *Charter* and inspired by the Supreme Court of Canada, more and more people *outside* these groups started asserting their right to be free *from* pluralism. People we used to call "biased" now felt free to raise insensitivity and intolerance to the level of a constitutionally protected right on the same plateau with the rights of minorities, or women, or aboriginal people. We started to think that all rights are created equal, even the right to discriminate.

But not all rights are created equal. Some are more equal than others. There is a difference between disadvantage and inconvenience. We should not be embarrassed to admit that yelling "fire" in a crowded theatre is fundamentally different from yelling "theatre" in a crowded firehall; or that teaching holocaust denial is different from teaching about the holocaust; or that promoting racist ideas is different from promoting race. Intellectual pluralism does not and cannot mean the right to expect that racism or sexism will be given the same deference as tolerance.

And yet, this is what the New Pluralism seemed to tolerate: a variety of groups and a variety of views about them, all of perceived equal legitimacy and weight. In the zeal to interpret equality as abolishing all distinctions by treating everyone and everything the same way, we forgot that equality sometimes means taking differences very much into account.

So, by the nineties, on the one hand we found different groups trying to integrate their distinctiveness into the mainstream, and on the other hand we found other groups trying to keep them or their distinctiveness out by setting homogenising terms and conditions at the gate. Just like the Old Pluralism, but multiplied and with louder and more urgently strident voices.

Too many people would not listen to anyone else. Too many were locked in old struggles, wearing old scars as uniforms, and using old vocabulary as weapons. Too many minds retreated into familiar compartments and labels. We became too "them and us" about too many things and we forgot how to listen. Too many people were claiming a monopoly on truth and insisting on imposing their truths on everyone else. We lost too much of our spirit of generosity and empathy, and grew far too judgmental. We were in danger of losing the ability to disagree with civility, and relied far too much on malicious monologues instead of constructive criticism. We started replacing discussions with harangues, debates with ridicule, and disagreement with sarcasm. We became almost indifferent to compassion.

Part of the problem—a big part—was in how we were allowing the premises behind civil liberties to checkmate the moves human rights wanted to make. There is a fundamental difference between the rights we protect with civil liberties and those we promote with human rights, but because it is a difference almost never articulated and even more rarely explained, we have allowed the individualism of civil liberties to trump the group realities of human rights.

We have to start at the beginning of the story. The human rights story in North America, like many of our legal stories here, started in England. The rampant religious, feudal and monarchical repression in 17th century England inspired new political philosophies like those of Hobbes, Locke, and eventually John Stuart Mill, philosophies protecting individuals from having their freedoms interfered with by governments. These were the theories of civil liberties which came to dominate the rights discussion for the next 300 years. They were also the theories which journeyed across the Atlantic Ocean and found themselves firmly planted in American soil. Watered by colonial discontent and the persuasive polemics of pamphleteers like Adams, Paine, and Jefferson, the roots took permanent hold in the American Revolution and blossomed into the language of the *Declaration of Independence*. The words confirmed that every "man" enjoyed the right to life, liberty and the pursuit of happiness and that government existed only to bring about the best conditions for the preservation of those rights. Thus was born the essence of social justice for Americans—the belief that each individual, independent of every other individual and of government, was free to pursue his version of happiness in his own way. It was an atomised and atomising political philosophy, and it venerated the individual over the community. It was the right of every American to have the same right as every other American to be free from government intervention. To be equal was to have this same right. No differences.

Thomas Jefferson's rhetoric in the *Declaration of Independence* was noble and inspiring. But in offering an equal right to be free from government, it thereby introduced egalitarian language to an unequal society, since these resoundingly noble rights were available neither to women nor to the slaves many of the framers of the *Declaration of Independence* owned. This illusion of equality soon became what a respected British historian designated as "one of America's most vital forces for hope and for disappointment."

Regardless, however, of the historical realities, it is nonetheless the case that the individualism at the core of the political philosophy of rights articulated in the American constitution ascribing equal civil, political, and legal rights to every individual *regardless* of differences, became America's most significant international export and the exclusive rights barometer for countries in the Western world. It was formal equality, it was Diceyan, it ignored group identities and realities, and indeed regarded collective interests as subversive of true rights. Concern for the rights of the individual monopolised the remedial endeavours of the pursuers of justice all over the world.

It was not until 1945 that we came to the realisation that having chained ourselves to the pedestal of the individual, we had been ignoring rights abuses of a fundamentally different and at least equally intolerable kind, namely, the rights of individuals *in different groups* to retain their different identities without fear of the loss of life, liberty or the pursuit of happiness, what we have come to understand true equality means.

In our evolutionary relationship with rights theories, the drama of socioeconomic disparities during the Depression coaxed western governments into a newly activist and redistributive role, which the public came to see as a necessary and reasonable limit on the historic right to be free from government intervention. But it was the Second World War which jolted us permanently from our complacent belief that the only way to protect rights was to keep government at a distance and protect each individual individually. What jolted us was the horrifying spectacle of group destruction, a spectacle so far removed from what we thought were the limits of rights violations in civilised societies, that we found our entire vocabulary and remedial arsenal inadequate. We started talking about crimes against humanity, genocide, and international enforcement mechanisms. We transcended civil rights with human rights, and shifted focus from the civil libertarian remedies for individual harm to a search for human rights remedies for collective harm. We were left with no moral alternative but to acknowledge that individuals could be denied rights not in spite of, but because of their differences, and started to formulate ways to protect the rights of the *group*.

We had, in short, come to see the brutal role of discrimination, a word we had never and could never use in a concept like civil rights that permitted no differences, and invented the term "human rights" to confront it. We clothed governments with the authority to devise remedies to prevent arbitrary harm based on race or religion or gender or ethnicity, and we respected government's *new* right to treat us differently to redress the abuses our differences attracted. We saw how the neutral purpose of civil libertarian individual rights had an unequal impact on the opportunities of many individuals, and eventually we saw that all the goodwill in the world could not protect us from our own prejudices and stereotypes, or from restrictively designing systems and institutions accordingly. So we blasted away at the conceptual wall that had kept us from understanding the inhibiting role group differences played, and extended the prospect of full socio-economic participation to women, non-whites, aboriginal people, persons with disabilities, the elderly, and those with different sexual preferences. And, most significantly, we offered this full participation and accommodation based on and notwithstanding group differences.

Civil liberties gave us the universal right to be equally free from an intrusive state, regardless of group identity; human rights gave us the universal right to be equally free from discrimination *based* on group identity. Human rights took over where civil liberties left off, but both became crucial rights visions.

It was as if we had awoken from a 300 year sleep, looked around us, realised how limited our rights vision had become, and, with stunning energy and enthusiasm, acknowledged more rights and remedies in one generation than we had in all the centuries since the Glorious Revolution in England in 1688-9. In the United States, a new rights approach based on difference and group diversity was reflected in *Brown v Board of Education* banning school segregation, in Title VII of the *Civil Rights Act* banning discrimination, and in President Johnson's Executive Orders mandating affirmative action.

In Canada, bilingualism, multiculturalism, human rights commissions at both government levels, and the promulgation of an inclusive *Charter of Rights and Freedoms* were the policy reflections of this new anti-discrimination human rights approach we had come to embrace.

Having decided half-way through this century to endorse a commitment to diversity as integral to our understanding of rights and justice and community, why do we now appear to be abandoning the commitment as the century closes?

The underlying concept of human rights—that no arbitrary barrier should be allowed to stand between a person and his or her aspirations—is not, it seems to me, a seriously deniable proposition. One would not have expected that the pursuit of the elimination of discrimination, the heart of social justice, could ever trigger serious rebuttal. What, after all, is the argument against equality? Inequality? Yet controversy swirls intensely all around the diversity stage, and in creating so much protection for social pluralism, we have also created a backlash.

What we appear to have done, having watched the dazzling success of so many individuals in so many of the groups we had previously excluded, is concluded that the battle with discrimination has been won and that we can, as victors, remove our human rights weapons from the social battlefield. Having seen women elected, appointed, promoted and educated in droves; having seen the winds of progress blow away segregation and apartheid; having permitted parades to demonstrate gay and lesbian pride; having constructed hundreds of ramps for persons with disabilities; and having invited aboriginal people to participate in constitutional discussions we had started to protect distinct cultures, many were no longer persuaded that the diversity theory of rights was any longer relevant, and sought to return to the simpler rights theory in which everyone was treated the same. We became nostalgic for the conformity of the civil liberties approach, and frightened by the way human rights had dramatically changed every institution in society—from the family to the legislature.

And this, I think, is at the heart of why we are marginalising human rights, because unlike civil liberties, which re-arranges no social relationships and only protects our political ones, human rights is a direct assault on the status quo. It is inherently about change—in how we treat each other, not just in how

government treats each of us. And so in North America, we tend to yearn for the rights that are less expensive, less confusing, and less frightening. The intellectual baskets into which we place information once again takes the shape of civil rights, and we end by dismissively calling a differences-based approach "reverse discrimination", or "political correctness", or an insult to the goodwill of the majority and to the talents of minorities, or a violation of the merit principle. Personal aspirations, we are now convinced, will be realised by those who deserve them, and no one qualified will be turned away. Civil rights trumps human rights. Social and economic Darwinism trumps social and economic reality.

In Canada, we constitutionally guaranteed human rights in 1985 through s.15, the equality section of the *Charter of Rights and Freedoms*. Thirteen years later, it has gone from being the newest kid on the constitutional block to being called the neighbourhood bully. In less than a generation, this remedy for discrimination has been seen to be sufficiently powerful that people struggle urgently to find a remedy *from* equality. How ironic that "equality-seeker" has become a pejorative term, denoting someone whose claim to fairness is a menace to the nation's economy and psyche. The very people for whom equality was introduced—history's victims of discrimination—find themselves suddenly accused of being the *victimisers*. Equality, introduced to guarantee the equal right of tolerance, has itself produced an intolerance the likes of which I have not seen in the almost 30 years since I graduated from law school.

Somehow we have let those who have enough, say "enough is enough", leaving thousands wondering where the equality they were promised is, and why so many people who already have it, think nobody else needs it.

The reality is there are still built-in headwinds for those who are different, who are thwarted in their conscious choices by stereotypes unconsciously assigned, and who cannot be expected to understand why the evolutionary knowledge we came to call human rights has suffered such swift Orwellian obliteration. We have forgotten the courage our outrage after the Second World War gave us to expand our understanding and generosity, and have, I fear, been lulled into a false sense of complacency by the formidable human rights successes that resulted from our post-war courage.

We know from history that all rights, especially in their infancy, are fragile and need nurturing. Democratic communities need their civil liberties rigorously protected, but unless they also protect their human rights, they do a disservice to justice. Of course we need the right to vote and think and speak freely, but no less do we need the right to eat and work and aspire freely. Before we relinquish the lessons of history to those who fear its transforming vision, before we allow the civil libertarian spirit to hold us in exclusive thrall, and before we are lured into intellectual lassitude by the successes of the lucky and the tenacious, we need to remember the rights lesson of the Second World

War: the enormity of its intolerance shocked us into a new understanding of diversity; we should need no more shocks to retain that understanding.

Because not all people are, should be, or can be the same, it is hard to see how the objective measure of equality or human rights can be assimilation. What *is* easy to see, however, is the seductive appeal that assimilation offers. Its carrot is the mainstream, and membership is premised on homogenisation.

If this means conformity to values of civility and tolerance, assimilation is devoutly to be wished. But if it means, as it usually does, obliterating racial, cultural, linguistic, religious or gender differences, let alone pride in any of them, then it is neither realistic nor equitable. Access to the mainstream must be *based* on those differences; and integration, not assimilation, must be seen as the social goal. A melting pot if necessary, but not necessarily a melting pot.

An integrated community is one whose members feel that their unique participation is both desired and desirable; an assimilated one denies fair participation to those who seek to assert the relevance of their differences. If we want to include the widest possible number of individuals in the distribution of social amenities, we must appreciate that they were excluded not simply as individuals equally free to pursue legally sanctioned objectives, but as individuals whose group affiliation created physical and psychological prophylactics to access and outcome.

Human rights is the remedy for this exclusion. It argues that there is a difference between social evolution and social Darwinism. One accommodates, the other neglects. One narrows the gap, the other tolerates it. Disadvantage occurs for different people for different reasons and each disadvantage is entitled to its own policy response.

The issues are very different for different groups, but each should be presumed to have the same entitlement: to have their uniqueness acknowledged and accommodated from their perspective, and not to be arbitrarily excluded or disadvantaged because of it; and that choices be genuinely available, either to assimilate or to integrate. Where in human rights every individual is the same, however, is in his or her equal right to be free from discrimination.

Making the competition fairer may change the composition of who gets the rewards, but if some of the new people getting rewards are people who ought to have been among the old ones, the system is not being unfair, it is catching up.

It is a staggeringly insulting assumption to suggest to women and minorities that their increased participation is an invitation to violate the merit principle, rather than an attempt to acknowledge it. It seems to me to be premature to talk about how women and minorities are destroying the merit principle unless we are satisfied that that is what we have had up until now.

The philosophy of human rights represents an attempt to add layers of tolerance. It is a philosophy which is the opposite of intolerance, not its tautology. It wants to expand rights for everyone by *including* women and minorities. Adding layers of tolerance is good for everyone, not just women and minorities. But preventing tolerance is bad for everyone, especially women and minorities. It is not, in my view, a bias to understand the systemic discrimination of women and minorities; it may be a bias not to. Neutrality is not compromised by treating some social differences differently; ignoring them may be.

Education is critical, and a good economy and stable political environment help, but in the end, these factors are conducive only of the possibility of an improved attitude over time. They do too little to alter behaviours, and while attitudes may open doors, only behaviour lets people in. And letting people in is what human rights is about.

It is not reverse discrimination, it is *reversing* discrimination. Neither the merit principle, the economy, nor productivity are jeopardised by an opening of the minds and systems of a country to a pluralistic competition—these are the very measures in fact that human rights invokes in attempting to reverse discrimination by urging inclusion for all who are qualified or qualifiable, but were traditionally and unjustifiably not so designated. We all lose by denying options to those who would contribute.

Human rights is about fairness, an ethereal objective. But it is also a realistic vision. To have the benefit of diversity is to have the benefit of heterogeneous input—human, intellectual, economic, cultural and political. It is to appreciate that the social orchestra, conducted by democracy, sounds best when it is harmonious. The sounds blend, they do not merge. It is a symphony, not a concerto. All the players expect to contribute to the melodious whole, and are interdependent on one another for support. It is a blend based on understanding the unique value each different instrument brings to the whole orchestra. It is a blend we must never stop trying to achieve.

The joyful cacophony of competing sounds produced when the democratic symphony is conducted by tolerance, however, is giving way to a percussion solo. Less and less is the intricate social blueprint we collaboratively designed after the Second World War being followed, and more and more do we appear to value ideological conformity over intellectual pluralism. We are at risk, from bullying intimidation, of having our marketplace of ideas turn into the marketplace of idea.

Not surprisingly, the preoccupation with rights and the attempt to reign them in, is focussing the spotlight on the judicial stage. Nowhere is the question of what is the proper scope of judicial decision-making asked more often than when the applicable values relate to human rights, often calling into question the very legitimacy of the judicial function.

It has, to say the least, been somewhat unsettling to watch the increasing demonisation of the judiciary, not because judges should not be criticised, but because what is really going on is a political struggle by the right for the hearts and minds of the middle, with judicial decisions on human rights being caught in the cross-fire.

But it is probably also true that much of what is being said about judges is a reflection of a lack of understanding of, or an unwillingness to understand, the judicial role.

That is certainly the case in Canada, and so, for the remainder of the talk, I would like to offer a Canadian perspective on the judicial role.

The constitutionality of rights in Canada, has brought some judicial myths out of the closet, dusted them off, and paraded them in public even though the styles do not fit. The primary magnetic myths to which the public seems to have become attracted, are those four which hold that judges should only interpret, not make law; that "biased" means having opinions; that the courts have become politicised; and that the courts should defer to public opinion.

It is, with respect, unrealistic to say that judges should not make law, they should only interpret it. Almost every time judges interpret, they make law and, implicitly, weigh competing values. Long before we constitutionalised rights in 1981, we had judges saying they were not making law or trespassing on legislative territory or taking values into account when they interpreted statutes or phrases or legal entitlements. But when we consider the following examples, we see how difficult it is to say that those judges were not reaching legal conclusions based on their understanding of, or sympathy or antipathy for, current social values:

The judge who in 1873 said "the paramount destiny and mission of women are to fulfil the noble and benign office of wife and mother"; the judge who in 1915 thought admitting women into the legal profession would be a "manifest violation of the law of... public decency"; the judge who said in 1905 that fault-based support laws were desirable because wives "ought to be preserved from imminent temptation"; the House of Lords who said in 1959 that privative clauses ousting the jurisdiction of the courts were to be disregarded; the court that said in 1975 that property rights take precedence over peaceful picketing; the courts that said in 1949 that sanctity of the contract and restrictive covenants took precedence over the rights of Jews to purchase property; and the court that said in 1939 that freedom of commerce took precedence over the rights of Blacks to be served beer; not to mention the entire history of common law. This was all lawmaking, it was all weighing and applying values and policy, and it was all before we entrenched rights in the constitution.

Weighing values and taking public policy into account do not impair judicial neutrality or impartiality. Pretending we do *not* take them into account, and refusing to confront our personal views and be open in spite of them, may be

the bigger risk to impartiality. Walter Lippmann said in his brilliant 1920 book *Public Opinion* that:

The image most people have of the world is reflected through the prism of their emotions, habits and prejudices. One person can look in a Venetian canal and see rainbows, another only garbage. People see what they are looking for and what their education and experience have trained them to see.

It is fundamental that judges be free from inappropriate or undue influence, independent in fact and appearance, and intellectually willing and able to hear the evidence and arguments with an open mind. But neutrality and impartiality do not and cannot mean that the judge has no prior conceptions, opinions or sensibilities about society's values. It means only that those preconceptions ought not to close his or her mind to the evidence and arguments presented. We must be prepared, when the situation warrants, to experience what Herbert Spencer called "the Tragedy of the Murder of a Beautiful Theory by a Gang of Brutal Facts". In other words, there is a crucial difference between an open mind and an empty one.

In assessing how impartial the courts are, however, I think the tendency to use labels or epithets instead of analysis is not particularly enlightening. Provocative phrases may all too easily become shorthand ways to avoid thinking through rights issues. The phrase "political correctness" may replace the need to think about disadvantage; the phrase "special interest groups" may replace the need to entertain valid grievances; the phrase "reverse discrimination" may replace the need to open the competition; and the phrase "the merit principle" may replace the need to discuss whether we have it. And attributions like "progressive" and "conservative" are meaningless in most judicial contexts.

One of the labels which is the least helpful and the most inappropriately inhibiting is that the courts, with the constitutionalisation of rights, have become "politicised".

The courts are not becoming politicised. They are becoming nothing they have not always been, namely, reviewers and interpreters of the rules to which society has proclaimed itself subject—through the legislature. Charters of Rights are flashlights that expose this judicial reality, they are not the instruments of a new judicial norm. The relationship between courts and legislatures in the interpretation of public values has never changed; only the public's interest has. Nothing about the institutional role of the courts has changed with the introduction of charters of rights except the extent to which people notice what it is that courts do.

Yet we never called it a "politicised" judiciary in Canada until the advent of the *Charter*. But all the *Charter* did was to allow public policy to participate

more openly in the policy partnership which courts and legislatures have, in reality, been parties to for centuries.

In the 19th century, for example, the British Prime Minister, Lord Salisbury, felt sufficiently moved to rebuke Lord Halsbury as follows for the House of Lords' routine declawing of social welfare and labour legislation: "The Judicial Salad requires both legal oil and political vinegar, but disastrous effects will follow if due proportion is not observed." And in the 1930s, President Roosevelt was so incensed by the US Supreme Court's striking down of his New Deal legislation that in 1937, just two weeks after his second inauguration, he introduced his court-packing *Judicial Reform Bill*, only to withdraw it discreetly six weeks later when one of the judges switched sides to help form a pro-New Deal majority.

But courts *preventing* rights were rarely dismissed as being politicised, even though they were no less active than later courts which *expanded* them. One wonders why courts are deemed to be "politicised" only when they interpret rights expansively.

And if one feels that this interpretive role has the potential for interfering with the Parliamentary supremacy which emerged triumphant from the Glorious Revolution of 1688-89 overthrowing the obstructive Stuart Kings, it was ever thus. The interpretive judicial function, whether of statute or common law, has always necessarily involved the sifting of normative considerations, not only because laws derive from and operate in a social system and culture of values, but because judges do too. Insofar as the sifting of legal choices is the sifting of policy values, judges, in interpreting law, do consider and always have considered, in addition to logic and precedent, the values or policy implications their legal conclusions represent. All the *Charter* did was to allow public policy to come out of the judicial closet and participate more openly in the policy partnership which courts and legislatures have, in reality, been parties to for centuries.

And in response to the argument that it is anti-democratic for unaccountable persons to impose their will on the majority, there is the belief that there should be an institution in society which can independently and fairly, and without fear of consequences, safeguard against what Lord Scarman called the "modern menace of unbridled majority power." Human rights essentially concern the protection of minority rights from arbitrary erosion or violation by the majority. The Legislature, which relies on majority support, cannot be expected routinely to risk political self-destruction by promulgating minority causes; on the other hand, the courts, who do not rely on any constituency, risk nothing in protecting them. What body can better attenuate the impact of majoritarian expectations when they may unfairly circumscribe minority ones, than a body which does not depend for its survival on popularity with the majority?

This exposes the judiciary's role to controversy—inevitably and unavoidably. Controversy attracts attention. Attention attracts criticism, and the favourite criticism of courts in the enforcement of rights is the suggestion that they have become politicised, when in fact all they have done is their interpretive duty, thereby drawing attention to their assigned power.

And here we come to the role of public opinion. Society is horizontal and vertical, and it is practically impossible to know at which point a consensus emerges. Until we know who the public is and how it forms its opinions, courts deciding cases are entitled scrupulously to regard public opinion as the responsibility of the legislature and generally as immaterial to judicial determinations. In Edith Wharton's *The Age of Innocence*, the van der Luydens and Mrs. Manson Mingott were the custodians and interpreters of social norms in old New York. They were the self-appointed and accepted arbiters of what passed for public opinion at the time. Judges have no such omniscient oracles of prevailing social opinions. Nor should they.

Public opinion, in its splendid indeterminacy, is not evidence. It is a fluctuating, idiosyncratic behemoth, incapable of being cross-examined about the basis for its opinion, susceptible to wild mood swings, and reliably unreliable.

Part of the risk, in fact, may be to reach a conclusion despite the perceived, prevailing public opinions. When we speak of an independent judiciary, we are talking about a judiciary free from precisely this kind of influence. As Lillian Hellman once said: "I will not cut my conscience to fit this year's fashions." Whatever evidentiary tool the legislatures use to gauge public acceptance, judges use a totally different measurement of evidentiary relevance and reliability, because the object of *their* task is totally different. In framing its opinions, the public is not expected to weigh all relevant information, or to be impartial, or to listen to both sides. The same cannot be said of judges.

But although judges are not accountable to the public in the same way as are elected officials, this does not mean that they are not accountable. While they may not be accountable to public *opinion*, they are nonetheless accountable to the public *interest* for independent decision-making based on discernible principles rooted in integrity. Interpreting justice involves a complex balancing of legal principle and public interest. Performing the task properly may mean controversy and criticism. But better to court controversy than to court irrelevance, and better to court criticism than to court injustice.

I remain tenaciously optimistic that the generosity of a generation ago will recover from the sclerosis it is experiencing as the century closes. And I remain so because I have confidence that a sense of justice is so firmly embedded in our best sense of who we are and what we want to be, that not for long will it be permitted to languish behind less tolerant policy priorities.

Permit me to close, as I started, by paying tribute to the spirit of the *Universal Declaration of Human Rights* and of the *Genocide Convention*. I want to do it with a story that explains one lawyer's passionate belief in the justice system. Seventy years ago, a young Jewish man from a small town in Europe won a scholarship to the Jagiellonian University in Krakow to study law. There was a quota on the number of Jews, and he was one of only 4 admitted to the law school in a class of over 100. The Jewish students were assigned special seats in the lecture rooms. Rather than sit in them, he stood through most of his first year at University. World War II broke out one year after his graduation as a lawyer and the day of his marriage. He and his wife spent 4 years in a concentration camp. Their 2 Ω year old son and the man's parents and three brothers died in a concentration camp.

After the war, the man and his wife went to Germany. They had two more children. He learned English and German, and was appointed by the Americans to develop the system of legal services for displaced persons in Southwest Germany and to act as their senior legal adviser.

He applied for, but was denied entry into Canada because his legal training was not a skill then considered necessary to Canada.

He eventually was permitted entry after teaching himself and passing licensing tests. He was admitted as a men's underwear cutter and as a shepherd, and arrived in Canada in 1950 with his wife and two children. In Canada, he was not permitted to become a member of the bar because he was not a Canadian citizen. This would have taken five years so he became an insurance agent instead to support his family.

He did very well as an insurance agent. He loved Canada and for the rest of his life felt deeply grateful for the opportunity it gave him to live here and raise his two daughters.

One of his daughters became the lawyer he couldn't be in Canada, but he died two months before her graduation. That daughter stands before you today, believing as did her father, that democracies and their laws represent the possibility of justice, and that the people in the legal system have a duty to make that justice happen. I am very proud to be a member of that system, but I will never forget why I joined it.