

Values and the Courts: Maintaining the Rule of Law in the Global World*

REMARKS BY THE RIGHT HONOURABLE BEVERLEY McLACHLIN, P.C.,
CHIEF JUSTICE OF CANADA**

Thank you for allowing me to be with you today. We are honored that this group, devoted to the study and practice of international law, have chosen to hold its meeting in Montreal, one of Canada's great cities.

La Ville de Montréal est un endroit bien choisi pour votre réunion. Depuis presque 400 ans, elle est un point de rencontre: pour les autochtones et les européens, pour les francophones et les anglophones, pour les catholiques, les protestants et les juifs, et, plus récemment, pour à peu près toutes les nations, religions et traditions du monde. C'est véritablement une ville internationale.

Montreal is a city of the world. Yet peer beneath its cosmopolitan surface, and you will see that it is a city of its place, and that its place is the Province of Quebec, in the country of Canada. It is a city where French is spoken, where steeples and street names recall its religious past, where poutine and foie gras flavor its cuisine. Canada, a land of immigrants overlaid on a tapestry of indigenous peoples, proclaims itself in this city's unique blend of colors and sounds and ways of interacting.

As you have been told, I, a person of no particular background or pretention, have the honor to serve as this country's Chief Justice—the first woman to be named to that position. I mention this not to boast, but because of what it says about my country. It is a fair country, a country committed to equality of opportunity and status. A country built on a firm belief in the inherent dignity of every individual—rich and poor; male and female; black, white, and all the hues of the human race.

Not that Canadians, whether we live in Montreal or Toronto or Vancouver, always live up to the ideals to which we aspire. *Trop souvent au cours de l'histoire de notre pays, nous n'avons pas traité les minorités aussi bien que nous aurions dû le faire; trop souvent nos lois ou nos*

* Remarks originally delivered at the American Bar Association – International Law Fall Conference in Montréal, Québec, Canada, on October 23, 2015.

** Chief Justice McLachlin serves as the Chief Justice of the Supreme Court of Canada, a position she has held since her appointment on January 7, 2000, and the first woman in Canada to hold this position. Prior to her elevation to this position, Chief Justice McLachlin was a Justice of the Supreme Court of Canada for ten years. In addition to her judicial duties at the Supreme Court, the Chief Justice chairs the Canadian Judicial Council, the Advisory Council of the Order of Canada and the Board of Governors of the National Judicial Institute. The Chief Justice is the author of numerous articles and publications.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

106 THE INTERNATIONAL LAWYER

politiques n'ont pas produit de résultats équitables pour tous. Too often, even today, fear of those unlike us turns to hate and belies the promise of our commitment to the dignity and equality of every person. Yet, although we may sometimes fail to live up to the values we profess, we remain committed to them. And that, I believe, is important. A nation that does not know its values is lost from the beginning; a nation that forgets its values is a nation that has lost its way.

One of the great missions of the law—be it the “bread and butter law” of contracts and torts, the supreme law of a nation’s Constitution, or the elevated norms of international law to which a nation has bound itself—is to remind a nation of its values and hold it true to them. When the law fails to do this, it betrays its purpose and promise. Not every litigant will appreciate the reminder the law brings about basic values; nor, in the cold light of hindsight, will every judicial reminder be seen to have struck the perfect balance between conflicting values. The law’s commitment to the fundamental values of the nation is a process and, like all processes, is imperfect. But that does not detract from its importance.

Justice Stephen Breyer of the United States Supreme Court begins his book, *Making Our Democracy Work: A Judge’s View*, by asking a question as profound as it is simple: why is it that the rulings of courts are enforced?¹ Courts have no armies, no enforcers; the orders they make are just so many words on paper. Yet they are respected and obeyed.

There are lots of answers to Justice Breyer’s question, and he provides a number of them in his book. Most boil down to acceptance by the people of the legitimacy of the judicial system. But this begs the question—why do people view the courts as the legitimate arbiters of legal issues? The answer to this question, it seems to me, is that courts are viewed as legitimate and their orders respected and obeyed because the people understand, at some deep level, that the rules the courts are enforcing reflect the basic values that bind them together as a society and as a people.

People can and will differ, sometimes passionately, on particular issues. They may disagree with particular court decisions. But on some deep level, they understand that maintaining the values that bind them together as a people requires commitment to fair treatment and fair process through the courts. Because they accept this, they are willing to subvert their own particular view on an issue to the decision of the courts and the legal process that guarantees the nation’s most fundamental tenets. We have a fancy moniker for this complex societal understanding—we call it the *rule of law*—*la primauté du droit*.

Il aura fallu longtemps aux sociétés modernes pour reconnaître tacitement que la primauté du droit est une caractéristique fondamentale d'une nation. It took a long time for modern societies to arrive at the tacit understanding that the rule of law is fundamental to nationhood. Eight hundred years ago, on a muddy field west of London, England, King John reluctantly affixed the Royal Seal to the *Magna Carta*, which proclaimed the revolutionary idea that even the King was subject to the law. Centuries later, Lord Coke took up the cause and used it to cement the principle of Parliamentary supremacy and the role of the courts as the ultimate arbiters of justice.

The colonies that formed the United States understood this, and incorporated that understanding in the Constitution they drew up. The U.S. Constitution, more particularly the Bill of Rights, set out the basic values to which the fledgling nation committed itself

1. STEPHEN G. BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* 4 (2011)

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

VALUES AND THE COURTS 107

and, by the same stroke, made the Supreme Court of the United States the arbiter of questions involving those values. It took *Marbury v. Madison*, 5 U.S. 137 (1803), to make all this clear, but the commitment to fundamental values and the role of courts in maintaining them was implicit from the beginning of America's constitutional journey.

Canada's route to constitutional democracy was less direct. Whereas the United States was born of revolution, Canada was born of evolution. For much of our history, England's law—together with the Civil Code here in Quebec—was our law. That was not bad—the common law resonates with shared values and the rights of individuals—yet, for many Canadians, it was imperfect. In 1949, appeals to the Judicial Committee of the Privy Council—an adjunct of Britain's highest court—were abolished, making the Supreme Court of Canada Canada's ultimate court.² And in 1982, Canada adopted a constitutional bill of rights: The Canadian Charter of Rights and Freedoms.³ Henceforward, Canadian courts, like their American counterparts, would be charged with the heavy responsibility of defining the ambit of the rights guaranteed by the Constitution.

The challenge was daunting. The Charter rights were cast in the broad and eloquent language of international rights guarantees. It was up to the courts to fill in the blanks, define the ambit of the guaranteed rights, and decide, under s. 1 of the Charter, whether limits that laws placed on these rights were “demonstrably justified in a free and democratic society”.⁴

To meet this challenge, the Supreme Court of Canada turned to the common law and the rich lode of precedent developed over the centuries on issues like search and seizure, state detention and basic democratic rights—sources that reflected the fundamental values that animated our nation. But it did not stop there. It looked to the jurisprudence of other “free and democratic societies”—an invitation implicit in s. 1 of the Charter—to see how they had defined similar rights and where they had drawn the lines between conflicting rights. The Court's decisions were enriched by insights from the jurisprudence of the United States, Great Britain, and further flung realms.

In turn, the jurisprudence of the Supreme Court of Canada began to play a role elsewhere in the democratic world, from the United Kingdom,⁵ to realms as diverse as Hong Kong,⁶ Ireland,⁷ Israel,⁸ and South Africa.⁹ The work of the Court, as it struggled to flesh out the values inherent in modern democratic norms, has been described as international in its scope and impact.¹⁰

2. See Supreme Court Act, R.S.C., 1985, c S-26, s 52 (Can.).

3. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.) [hereinafter Charter].

4. *Id.*, s 1.

5. *E.g.*, R. [ex rel. Diane Pretty] v. Dir. of Pub. Prosecution, [2001] UKHL 61, para. 19 (HL) (citing *Rodriguez v. Attorney Gen. of Can.*, [1993] 3 S.C.R. 519).

6. *E.g.* *Libertarian Invs. Ltd. v. Hall* [2013] 16 H.K.C.F.A.R. 681, paras. 72, 80 (C.F.A.) (referring to *Canson Enters. Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534).

7. *Heaney v. Ireland*, [1994] 3 IR 593 (H. Ct.) (adopting the proportionality test in *R. v. Oakes*, [1986] 1 S.C.R. 103, despite the absence of a constitutional clause like s. 1 of the Charter).

8. HCJ 721/94 *El-Al Israel Airlines Ltd. v. Danielowitz* 48(5) PD 749 (1994) (relying on Canadian precedents on rights for same-sex couples, like *Vriend v. Alberta*, [1998] 1 S.C.R. 493).

9. *S. v. Williams and Others* 1995 (3) S.A. 632 (CC) (referring to *R. v. Oakes*).

10. See, *e.g.*, Tania Groppi, *A User-friendly Court: The Influence of Supreme Court of Canada Decisions Since 1982 on Court Decisions in Other Liberal Democracies* (2007), 36 S.C.L.R. (2d) 337.

FALL 2015

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

108 THE INTERNATIONAL LAWYER

Canadian courts, like other courts in the western world, robustly embrace comparative law—not to usurp or undermine Canadian values, but to learn from the experience of other nations who share similar values. We share similar values and embrace similar rights with other democratic nations. We have our own distinct voice, but it is a voice infused by values common to other democratic countries. Why, we ask, should we not at least look to see how courts in those countries have drawn the difficult lines modern problems require courts to draw? And why, by extension, should we not look to the international covenants and conventions to which Canada and like-minded states have subscribed?¹¹

In the United States, matters are not so clear. Reference to the cases of other countries is the subject of debate—and a debate of Titans it is. On the one side of the debate, firmly fixed against ever referring to the law of any other country or international instruments on matters of domestic law, stand the forces of Justice Antonin Scalia of the Supreme Court of the United States and Justice Richard Posner of the Seventh Circuit Court of Appeals. On the other side of the debate stand those who argue that sometimes, on some issues, it may be helpful to look at how other courts, in countries espousing similar values, have dealt with issues facing American courts—jurists like Sandra Day O'Connor and Justice Breyer stand in this camp.¹²

At its base, this is a debate about how the courts can best perform their task of interpreting and protecting the fundamental values that animate the United States of America. The fear, as proclaimed by the titles of articles like *No Thanks, We Already Have Our Own Laws*¹³, *Against Foreign Law*¹⁴, and *Misusing International Sources to Interpret Our Constitution*¹⁵, is that reference to the jurisprudence of other free and democratic nations will cause American courts to stray from American values—to “dilute”, “pollute”, or “contaminate” American law and American values.

This debate is important. It should not be trivialized. If one believes that a fundamental task of the judicial process is to sustain the fundamental values of the nation, as I do, any threat to the discharge of this task should be the subject of serious debate.

We in Canada have firmly resolved the debate on using foreign sources in favor of the freedom to refer to foreign jurisprudence, where this is helpful. That does not mean we do it in every case, or that when we do it, we do it uncritically. But we do it. We take a look. We discard, we consider, we sometimes adopt new ideas or approaches. To us, this is part of the process of responsible judging. We believe it makes our jurisprudence richer, fairer, and more useful in relation to the complex, global issues that more and more confront courts, as they struggle to uphold their country's values in an increasingly interconnected world.

11. *E.g.* Baker v. Canada (Minister of Citizenship & Immigration), [1999] 2 S.C.R. 817, at para. 70; 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] 2 S.C.R. 241, at para. 30; Mugesera v. Canada (Minister of Citizenship & Immigration), [2005] 2 S.C.R. 100, at para. 82; Sask. Fed'n of Labour v. Saskatchewan, 2015 SCC 4.

12. STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* (2015).

13. Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFF. (July/Aug. 2004), available at http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp.

14. Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL. 291 (2015).

15. Roger Paul Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004).

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

VALUES AND THE COURTS 109

From comparative law—the use by domestic judges of foreign sources (including international instruments) in deciding legal issues within their own countries when appropriate and helpful—I move to international law—supra-domestic law created by international conventions, treaties and commitments, and the international order that supports it. When nations bind themselves to treaties and conventions, they declare that they adopt and commit to uphold the covenants and values set out in these documents. Just as the role of domestic judges is to articulate and uphold the common values of the nation, so the role of international tribunals and arbiters is to articulate and uphold the common values to which the state parties have committed themselves.

The challenges of enforcing international norms are considerable, as you know better than I. Justice Breyer’s question—why are court orders obeyed?—resonates more intensely in international law than in domestic law.

The first and most fundamental challenge in the enforcement of international norms is national sovereignty. To the extent that states commit themselves to international norms, they limit their sovereignty—their ability to do whatever may seem best in their own country. The price of adherence to international norms is reduction in sovereignty.

This is tied to a second difficulty: the problem of legitimacy. The legitimacy of domestic courts, I suggested a moment ago, rests on a deep appreciation and acceptance of shared national values. That level of commitment to shared values and the common good is attenuated in the arena of international commitments. A newly created international court, like the International Criminal Court, may not enjoy the same confidence and legitimacy as domestic courts enjoy. And as you know better than I, respect for international courts and tribunals is of critical importance in maintaining obligations.

Yet another challenge in the arena of international law is that conflicts inevitably arise between international norms, on the one hand, and domestic interests and values, on the other. The interaction of Investor-State Dispute Settlement clauses in international investment agreements with domestic courts is one example. The drug manufacturer Eli Lilly currently has a claim pending against Canada under the North American Free Trade Agreement (NAFTA).¹⁶ The interpretation and application of the doctrine of “utility” by Canadian courts led to the invalidation of Eli Lilly’s patents in Canada, and Eli Lilly claims that the judicial pronouncements amount to an uncompensated expropriation in breach of Canada’s obligations under NAFTA.¹⁷ This has raised concerns about the use of arbitral tribunals to review decisions by domestic courts.¹⁸

A final challenge for international law and international tribunals is the challenge of reconciling different national views on the ambit of the obligations undertaken. Law is embedded in culture, and legal obligations are necessarily viewed through the prism of a particular state’s culture. On the national level, common cultural assumptions support a more or less homogenous view of legal obligations. As one jurist put it to me, while people may disagree, at least they are in the same conversation.

16. *Eli Lilly v. Canada*, ICSID Case No. UNCT/14/2, available at <https://icsid.worldbank.org/apps/icsid/web/cases/Pages/casedetail.aspx?caseno=UNCT/14/2> (last visited Apr. 4, 2016).

17. Notice of Intent to Submit Claim to Arbitration under Chapter Eleven, available at <http://www.italaw.com/sites/default/files/case-documents/italaw1172.pdf>.

18. See, e.g. Ruth Okediji, *Is Intellectual Property ‘Investment’? Eli Lilly v. Canada and the International Intellectual Property System* 35 U. PENN. J. INT’L L. 1121 (2014).

FALL 2015

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

110 THE INTERNATIONAL LAWYER

On the international level, this may not be true. Different cultures and different basic assumptions may lead to different conceptions of rights and obligations. This problem is particularly acute in less defined areas, like human rights law, international criminal law, and international laws on the exploitation of resources and preservation of the environment—witness the difficulties now facing the International Criminal Court and the challenges in store for the next round of environmental negotiations on climate change, soon to open in Paris. Even within nation states, disputes routinely arise as to the ambit of particular rights or where the line lies between breach and compliance. How much more likely is this at the level of international norms, where the basic cultural substructure for consensus may be weak or absent?

Despite these difficulties, the reality is that international action on a wide array of fronts, from the environment to immigration to trade to human rights—is as imperative as it is inescapable. If we are to solve the problems we face, we must move beyond shared national values to shared international values. At stake is not just the welfare of individuals and nations, but the prosperity and the future state of the planet we share.

I began this talk with the suggestion that domestic courts perform the function of iterating and preserving the fundamental values of a nation. I end with the suggestion that international courts and tribunals play a similar role on the international stage—it is they who, through their acts, large and small, iterate the emerging international values, and it is they who act to cement them into emergent global consensus and conscience.

This is the work you have undertaken as international law lawyers; this is your vocation and responsibility. It is important work. I wish you great success in its execution.