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par Elizabeth Foster

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Divisé en cinq grandes parties, l'*Aide Mémoire* est comme à l'habitude présenté sous forme télégraphique, ce qui rend la consultation plus facile. Les deux premières parties placent le lecteur dans la peau du procureur du requérant, puis de l'intimé. Tous les aspects matériels sont évidemment examinés (ce qu'il faut demander au client, les démarches préliminaires, etc.), sans oublier les références législatives constantes ainsi que des renvois à certains jugements importants. Il faut également souligner que les auteurs n'hésitent pas à y aller de conseils et directives, fruits de leurs expériences personnelles[4].

La troisième partie concerne l'aide financière. Les fonctions antérieures de Me Lauzon, qui fut directeur du Fonds d'aide au recours collectif, sont ici un gage de l'exactitude des renseignements fournis. On passe ensuite à un bref rappel théorique (6 pages), peut-être trop bref d'ailleurs, même en tenant compte des objectifs propres à cette collection. À titre d'exemple il nous semble que de courtes explications sur les quatre critères de l'art. 1003 C.P., relatifs à la requête en autorisation, n'auraient pas été superflues. Enfin, une dernière partie, occupant près de la moitié de l'ouvrage, renferme tous les modèles d'actes de procédure pouvant être utilisés dans le cadre d'un recours collectif.

Bref, cet *Aide-Mémoire* se révèle généralement bien conçu et d'une utilité certaine pour le praticien. Il représente un excellent outil de démystification face à la procédure quelque peu inhabituelle du recours collectif. Mais si l'outil est bon, encore faut-il qu'il soit utilisé à partir d'un bon « plan de travail ». Or, il n'est pas rare que l'on émette des doutes sur l'efficacité réelle de cette procédure[5]. Serait-ce parce que le recours collectif apparaît trop tardivement comme instrument régulateur des situations conflictuelles impliquant des individus ? Le législateur français a récemment donné aux associations de consommateurs le pouvoir de « demander à la juridiction civile d'ordonner, le cas échéant sous astreinte, la suppression de clauses abusives dans les modèles de conventions habituellement proposés par les professionnels aux consommateurs »[6]. Le processus mis sur pied est intéressant. Plutôt que de permettre à un regroupement d'individus d'obtenir un remède ponctuel à leurs maux, on les incite à faire cesser, pour le futur, l'utilisation de clauses contractuelles jugées abusives. Le recours collectif « préventif » a-t-il de l'avenir ?

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4. Un exemple concernant l'al. 1003b) C.P. : « Bon nombre de recours collectifs n'ont pas été autorisés au motif de la généralité des allégations de fait. » (p. 7).
5. Voir par exemple P. GLENN, « Class action in Ontario and Québec », (1984) 62 *R. du B. can.* 247, notamment p. 257 et s.
6. Loi du 5 janvier 1988, art. 6.

Michael MANDEL, **The Charter of Rights and the Legalization of Politics in Canada**, Toronto, Wall & Thompson, 1989, 368 p., ISBN 0-921332-05-X.

The *Canadian Charter of Rights and Freedoms*, in its substitution of judicial for representative forums and of abstract principle for concrete policy forms of argument in the resolution of political controversy, has brought about a fundamental charge in the structure of Canadian political life. In his study of this "legalization" of politics, Osgoode Hall Law School professor, Michael Mandel combines careful technical detail and legal analysis with fascinating and — if you happen to agree with his philosophical premises — brilliantly incisive political and social commentary, expressed in clear, concise and often amusing terms.

Contrasting legal and social importance, Mandel questions the validity of some of our basic assumptions, including the notion that Charter rights are more important than other legal rights. In a legal sense, the Charter is the "supreme law". No law deemed by the

courts to be inconsistent with it is valid. Put is anyone really so silly, he asks, as to believe that the rights in the Charter are uniformly of such paramount importance in any real, concrete, social sense? That, for example, the Charter right to be informed without unreasonable delay of the specific criminal offence with which one may be charged is of greater social importance that the law prohibiting murder?

An entrenched Charter of Rights is seen in the context of an ongoing historical process, involving the growing importance in the Western industrialized world of judicial forms of political power. In Canada, as elsewhere, the entrenched Charter owes its existence not to the humanitarian or democratic impulses of its sponsors, but rather to their awareness of its value as a political expedient, whether to fight the Québec independence movement or the Cold War, or to preserve the *status quo* of social power.

The argument in favour of judicial as opposed to legislative decision-making stresses the impartial nature of Charter adjudication. This depends upon two interrelated factors : the nature of the rights involved and the nature of judicial reasoning.

Constitutional rights are popularly portrayed as so precise and non-controversial in their meaning that they practically enforce themselves. Mandel identifies this as the central conceit of legalized politics, the notion that one can talk meaningfully about the "rights in the Charter" as if they had any independent existence, apart from the more or less creative meaning the judiciary might put on them. (Putting the bare phrase "freedom of association", for example, in a document administered by an unfettered judiciary not responsible to anyone is unimaginable in any society we would call democratic.) Without this conceit, section 33 is not override of the Charter at all, but a refusal to let the legal profession have the final say in politics. It is not a "denial of rights" but a refusal to abide by a particular judicial conception of them. Every confrontation over section 33 involves essentially the same scenario : different political conceptions contending with one another. That one wears the mantle of the Charter should not obscure the fact that the other wears the mantle of representative government.

What is supposed to distinguish judicial reasoning? While it is proper for a legislature to take into account both arguments of "principle" and arguments of "policy" (the basic distinction according to Dworkin), a court must restrict itself to the former, ignoring "utilitarian" types of policy analysis — which generally involve collective goals. But, as Mandel points out, issues do not come pre-packaged and brightly labelled as "principle" or "policy". If the courts are inclined to intervene, they can characterize the question as principle (*Big M, Morgentaler*), if not, they can call it policy (*Edwards Books, Re Public Service Employee Relations Act (Alberta)*).

Arguments of principle are forced to derive their premises from *existing* social arrangements (principles must have "institutional support"). They must start from, take for granted and indeed justify basic social relations — which in Canada are also relations of unequal social power. The denial of the relevance of these existing relations of social power (they are irrelevant in the sense that the "principle" argument requires that they be considered part of the natural order of things) merely ratifies existing inequalities. Social advantages are ignored in the distribution of rights, something like ignoring weight in prize fights.

The judiciary's unwillingness to allow the Charter to be used to tilt the balance of power is seen in the labour relations cases and is contrasted with the fearless activism of the courts in the defence of the weak when purely formal, abstract values are at stake. For the majority in *Re Public Service Employee Relations Act (Alberta)*, the right to strike involved a matter of policy not principle and was therefore impossible to cast in terms that avoid questions of social power. To constitutionalize the right to strike would be to upset the delicate balance. So

organized labour finds itself fighting *against* the Charter just to hold on to what they have achieved through more conventional political means. To this same end — the preservation of the *status quo* of power imbalance — the common law rules of private property and "freedom" of contract, the basic building blocks of private power, were declared out of bounds to the Charter in *Dolphin Delivery*.

Judicial activism in the preservation of the *status quo* of social power and in the achievement, by judicial means, of solutions not possible by ordinary means of representative government are illustrated by the language cases. In Québec, the latter meant overruling a popular law enacted by a popularly elected government. In Manitoba, the law and the constitution were deaf to the demands of the French-speaking minority until their strategic importance to the protection of other, more important interests became apparent. Only when they became useful to the political struggles of the powerful, English-speaking minority of Québec were these formerly abandoned people swept under the wing of constitutional protection.

Mandel examines in detail some apparent exceptions to the argument that the legalization of politics is fundamentally conservative. Contrary to the case of language rights in Québec, the most direct and obvious beneficiaries of the procedural rights guaranteed by the Charter are groups without social power. But fair procedure changes neither the political nature nor the political context of criminal law. Due process puts a blindfold on Justice (the accused criminal must be treated as an equal of he or she is to be credibly punished as an equal) but it does not put her sword in the hands of those without social power. That it in fact reinforces existing arrangements is demonstrated by cases such as *Hunter v. Southam* where the Charter is invoked to share with the socially powerful the procedural guarantees that legitimate the punishment of the socially weak. Similarly, the substance cases which ensure that the final determination of important questions of criminal liability and punishment are gathered into the hands of the judiciary and not transferred to bureaucratic administration, pose few if any obstacles to the objective of law enforcement and do nothing to shift the balance of power.

The *Morgentaler* decision, "the biggest challenge yet to a critique of the Charter and the legalization of politics", is considered in the context of a potential right-wing backlash (shades of *Roe v. Wade*) and the difficulty of enforcing even the most progressive of decisions. Through funding and hospital restrictions, provinces and hospitals have enacted their own restrictive abortion laws to replace the one struck down by the Supreme Court. The difference is that the penalty is no longer imprisonment but rather a fine and thus the deterrent is only effective against poor women.

Ending on the practical note of "What to do about the Charter?", Mandel concludes that it has to be handled with care, "something like nitroglycerine". We may be obliged to use it defensively, but to use it offensively, as just another stragegy, can be disastrous, legitimating a form of politics we should be doing everything we can to *de*-legitimate. Democratic politics, in a deepened and strengthened form, have to be brought into the courtroom to undermine legal politics at their source. The authority of the court and thereby authoritarianism in general must be challenged — which is what Mandel tries to do with this book.

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Jane MATTHEWS GLENN, **Structures agricoles et législation québécoise**, Cowansville, Les Éditions Yvon Blais, 1988, 163 p., ISBN 2-89073-674-1, 19,50 $.

S'il est un domaine du droit auquel nos Facultés laissent peu de place dans leurs programmes, c'est bien celui du droit agraire. Quelques aspects de cette matière sont couverts en droit urbain, d'autres en sûretés, mais la connaissance globale du domaine