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Chief Justice Makes a Grab for More Power

Chief Justice Beverley McLachlin of the Supreme Court of Canada was in Wellington, New Zealand at the end of November, when she gave an astonishing speech to the law students at the University of Wellington. According to this speech, the Chief Justice is of the belief that judges, upon their appointment to the Bench, acquire such wisdom and knowledge that they are able to determine with certainty what is best for all Canadians.

This conclusion is based on the fact that Judge McLachlin asserted in her speech that judges can render their opinions based on “unwritten” Constitutional norms, even in the face of clearly enacted laws or hostile public opinion. She defined her unwritten norms as those “essential to a nation’s history, identity, values and legal systems”. Such norms, according to Judge McLachlin, can only be properly understood and interpreted by appointed judges.

She bases this claim on the premise that there exist fundamental norms of justice so basic that they form part of the legal structure that must be upheld by the courts, even though they are not written into the law. She cited, as an example, the need to protect people from a government which believes in torture or denies citizens a fair trial. No one disputes that these policies are not acceptable and should not be implemented. That is, there is a consensus among reasonable people that a civilized society must provide citizens with basic protections. However, the Chief Justice went on to say in her speech that the courts must also support the “dignity of human beings” and honour rights to prevent “discrimination” on the basis of gender, race, and religion. “Human dignity”, however, is a vague term that means different things to different people, as does the word “discrimination”. These are concepts in fact, on which there are no necessarily established consensus or “norms”.

However, Judge McLachlin believes that only judges know how to accurately interpret these unwritten concepts. She skirts around the problem that these concepts have a wide variety of interpretations by stating that judges can look to guidelines provided by international treaties and commitments for direction in interpreting them. This ignores however, the profoundly significant fact that Canada’s international commitments i.e. treaties, are determined solely at the discretion and whim of the Prime Minister. They are not debated or approved by Parliament, and in no way can they be recognized as a reflection of Canadian “values”. These are the values of the government in power - yes - but not necessarily those of its citizens. A court, appointed by the government looking to these treaties for guidance is merely making an arbitrary decision, based on policies determined by that elitist government that has by-passed the democratic process. What a cozy arrangement.

Justice McLachlin also claims that judges have a legitimate role to play in determining “unwritten” laws because she argues that judges have a “judicial conscience” which is founded on the judges’ “sworn commitment to uphold the rule of law”. We beg to differ. This argument overlooks the fact that most Canadian judges are sitting on the Bench because of their politics, not because of any specific legal merit on their part. Moreover, they are using their appointment to change society, according to their own personal perspective. (See “Supreme Court Swings and Knocks Out Decency p.4). ...