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*Faculty of Law  
University of Zimbabwe  
P.O. Box MP 167  
Mount Pleasant  
Harare  
Zimbabwe*

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# THE JURISPRUDENCE OF LIMITATION CLAUSES WITH PARTICULAR REFERENCE TO SECTION 1 OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

L.X. MBUNDA\*

## 1. INTRODUCTION

Section 1 of the Canadian Charter of Rights and Freedoms which is part of the [Canadian] Constitution Act, 1982 is a general limitations clause applicable to all the rights and freedoms enshrined in the Charter. Under this Section, the Parliament or Legislature can enact any law which has the effect of limiting any of the guaranteed rights or freedoms, provided that the law is "reasonable and can be demonstrably justified in a free and democratic society".<sup>1</sup>

It seems that the intention of the drafters of this section was to bring forward the concept that the rights and freedoms spelled out in the Charter are not absolute. This is not a new phenomenon. As a matter of fact actual civic experience has shown that rights and freedoms are not found in such a fashion that citizens possess them in their entirety. Rights have got to be balanced against one another. The process of balancing of these rights against one another entails as of necessity the placement of limits on the extent to which these rights and freedoms are enjoyed. In the light of this, Section 1 of the Charter becomes an important provision because of its pervasive role in securing accommodation between the individual rights guaranteed and the interests of other individuals and of the entire community. This gives the courts the task of weighing countervailing public purposes against guaranteed rights and freedoms which in essence is an exercise of balancing competing interests. A court faced with a Section 1 issue has to draw a balance between the interests of the person whose rights are affected and the significance to society of the limits that are laid down in the legislation.

On the face of it, Section 1 strikes one as a model of liberal characterization of rights whereby general welfare or majoritarian preferences may sometimes trump individual rights. It invites judges at certain instances to uphold limitations on a person's rights because general welfare of majoritarian preference require placing those limitations. A liberal like Dworkin, as it shall be argued later, is obviously against this provision because to him individual rights are political trumps held by individuals and, therefore, nothing can deny any individual his rights once he holds them. This paper discusses Section 1 of the Charter as a model of liberal characterization of rights.

By examining cases already decided by the courts on Section 1, an assess-

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\* Lecturer in Law, University of Nairobi, and Advocate of the High Court of Tanzania

<sup>1</sup> Schedule B, Canada Act, 1982, C. 11 (U. U.).

ment will be made as to how the courts have so far responded to the liberal characterization nature of this Section.

The limitations clause as enacted in the Canadian Charter of Rights and Freedoms is the outcome of the debate which ensued on Constitutional entrenchment of rights and freedom and judicial review as its antecedent. Critics of this development expressed the view that entrenchment of rights and freedom were inconsistent with the well established doctrine of parliamentary supremacy and majoritarian democracy. The concern was that this leads to law-making by appointed judges instead of, and often in conflict with, elected Legislatures. Judicial review, the argument went, inevitably involves policy decisions, which decisions require value judgments typical of the legislative process. The fear was not only that judicial review would bring unwanted additions to existing laws, but that it will strike down popular measures for the general welfare purportedly because of some judicially-imagined conflict with constitutionally entrenched rights and freedoms of some individual or minority.<sup>2</sup>

The present wording in Section 1 differs significantly from that first proposed by the Federal government and tabled in both the House of Commons and the Senate. The first draft provided as follows:<sup>3</sup>

The Canadian Charter of Rights and Freedoms guarantees rights and freedoms set out in it subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.

This provision was subjected to serious criticism. The basic argument against it was that it left intact the doctrine of Parliamentary Supremacy. It was contended that the courts would read this as creating a presumption of validity of any limitations of the Charter rights and freedoms. This would result because any measure passed by the majority in a duly elected legislature of parliament would arguably be a reasonable limit imposed by law in a free and democratic society. Civil libertarian critics feared that the courts would be reluctant to rule any such duly legislated limit on Charter rights and freedoms a violation of the Charter. These fears were compounded by the historical backdrop of the supremacy of the parliament, the presumption of validity and the tradition of judicial submissiveness to parliamentary prescription exhibited most starkly by the conservative application of the Canadian Bill of Rights. This version of Section 1 was thought to be, in spirit, far less sympathetic to individual rights and freedom.

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<sup>2</sup> For detailed discussion on this debate see, generally, D.A.Schmeiser "The Case Against Entrenchment of a Canadian Bill of Rights" (1973), 1 *Dalhousie Law J.* 15; The Entrenchment of Bill of Rights (1981), 19 *Alta L.Rev.* 373; P.H. Russel, *A Democratic Approach to Civil Liberties* (1969), 19 *U. Tez. J.* 109; R. Dworkin, *Taking Rights Seriously*, Harvard University Press, 1977 pp. 197-204.

<sup>3</sup> T.J. Christian, "The Limitations of Liberty: A Consideration of Section 1 of the Charter of Rights and Freedoms (1982), *U.B.C. L.R.* 105, at pg. 107 (Charter Edition).

The inclusion of the limitation clause in its present wording of Section 1 is, therefore, an obvious and deliberate concerted attempt to reconcile the politically irreconcilable. It is an effort to reconcile entrenchment with parliamentary supremacy and majoritarian democracy. As a general qualifying clause, it recognizes in the most unequivocal terms that the guaranteed rights and freedoms are not absolute but must yield to certain limitations. The requirement that the limits to be effective must be "prescribed by law" is an indication that the right to restrict them is reserved to the legislatures only. To this extent, the effects of entrenchment of rights and freedoms as far as the elements of parliamentary supremacy and majoritarian democracy is concerned, have been at least watered down.<sup>4</sup>

The wording of Section 1 sets out a two step procedure. The initial burden is on the person challenging a particular government rule or action to show that a guaranteed right of freedom has been infringed. It is only when that is done, that the burden shifts to the government to show that it is a reasonable limitation which can be demonstrably justified in a free and democratic society. This means that the mere fact that a legislation is in relation to, or affects a constitutionally guaranteed liberty, does not *per se* invalidate it. It simply means that the person attacking the legislation or government action has satisfied his burden under the initial part of Section 1 of the Charter by showing that a guaranteed right is implicated. The impugned legislation or action can still be upheld if the government can show that it is reasonable and demonstrably justified in a free and democratic society.

This shift of burden of proof is a very important element of Section 1 for it certainly gives litigants a fairer chance in contesting enactments and the administrative interpretation given such enactments that may be inconsistent with the Charter.<sup>5</sup> So, although Section 1 invites judges sometimes to uphold limitations because of the general welfare of the society or because of majoritarian preferences, the burden of proof makes it difficult for the courts to allow this to happen. The burden is heavy because it demands a high standard of public purpose before allowing any government act to intrude upon a protected right or freedom. This is evidenced by the courts' construction of the words "reasonable limits prescribed by law" and "demonstrably justified in a free and democratic society" and the requirements of adducing evidence in support of all these as shown below.

## 2. WHAT ARE REASONABLE LIMITS

Prior to judicial consideration several attempts were made to identify the meaning of "reasonable limits" in Section 1. T.J. Christian suggested three considerations in judicial treatment of this component. The first is that any limit

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<sup>4</sup> B.L. Strayer, *The Canadian Constitution and the Courts. The Function and Scope of Judicial Review*, Second Ed. 1981, Butterworths, pg. 59.

<sup>5</sup> W.S. Tamopolsky & G.A. Beaudoin (Eds.), *The Canadian Character of Rights and Freedoms*, A Commentary, pg. 73.

on Charter rights should be rationally connected to the attainment of a legitimate state object. Secondly, it should not be more excessive than is necessary to attain the legitimate state object, that is, the limitation should be proportionate to the legitimate aim pursued. Lastly, limitations on Charter rights should not be inspired by arbitrary or capricious reasons or motivated by bad faith. In short, limitations should be *bona fide* and justifiable on sound social policy.<sup>6</sup>

The European Court of Human Rights has on several occasions considered the meaning of a similar, though not identical, expression found in Article 14 of the *European Convention on Human Rights*.<sup>7</sup> In the *Belgian Case*<sup>8</sup> the court set forth the following rule of interpretation:

... The principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration. A difference of treatment in the exercise of a right laid down in the convention *must not only pursue a legitimate aim*. Article 14 is likewise isolated when it is clearly established that there is *no reasonable relationship of proportionality between the means employed and the aim sought to be realized*. (Emphasis provided).

This test was endorsed again by the European Court in the *Handyside Case*<sup>9</sup> where it stated:

Freedom of expression is one of the essential foundations of a democratic society. . . . *Restrictions on that freedom must be proportionate to the aim pursued* and the court must decide whether the reasons given by the national authorities for their actions are relevant and sufficient. (Emphasis provided).

In Canada the meaning of the phrase "reasonable limits" has been addressed by a few courts. In *Quebec Protestant School Board v A.G. Quebec* (No. 2)<sup>10</sup> the court expressed the view that defining "reasonable limit" means that the court has to deal with the means employed in the Bill or Act or Regulation to attain its objective. That is, whether the means are carried out within a reasonable limit, if not, the court held, they must yield to the Charter. Demographic evidence taken in support of and against the reasonableness of the legislation made the court accept the legitimacy of the legislative objective which was the Francisation of education in Quebec. However, the court found the restrictions on entry to English schools in Quebec to be unnecessarily or disproportionately restrictive of the Constitutional rights guaranteed by Section 23. The legislative flaw here was the means employed to achieve the legitimate purpose.

<sup>6</sup> T.J. Christian, "The Limitation of Liberty ..." op. cit. at pg. 107-108.

<sup>7</sup> ROME 1950 with Revisions.

<sup>8</sup> *Yearbook of the European Convention on Human Rights*, 1968, pg. 833 at 86.

<sup>9</sup> *Yearbook of the European Convention of Human Rights*, 1976 pg. 507 at pg. 511.

<sup>10</sup> (1982) 140, *D.L.R.* (3d) 33, at pg. 71.

In *Re Southam Inc. and the Queen*<sup>11</sup> the court found the statutory objective, which was protection of children, not unreasonable, but found the absolute and unqualified prohibition against any public access to the Family Division of the Provincial Court under S. 12 (1) of the *Juvenile Delinquents Act* an infringement of S. 2(b) of the Charter that could not be justified under S. 1. The same reasoning was adopted in *Ontario film and Video Appreciation Society v Ontario Board of Censors*,<sup>12</sup> where the court found justification for censorship or limiting of exhibitions of films but found the method used to have an unnecessarily inhibiting effect on the maker or exhibitor of the film. A limit on freedom of expression by censorship could be achieved by using a less drastic means.

In all the above cases the court accepted the rationality of the objective, but the legislation was found to be bad on account of a defective legislative technique. In summary, one may say that the standard by which the reasonableness of the limitation of a Charter right is to be assessed is that the court must be satisfied that a valid legal, social or other objective is served by the limitation of the right and that the limitation is restricted to that which is necessary for the attainment of the desired objective. In other words, a limit is reasonable if it is a proportionate means to attain a legitimate purpose of the law. It will be argued later in this paper that the interpretation of the courts of this phrase and the others in section 1 is vague and makes reliance on it unsafe for purposes of achieving any majoritarian preferences at the expense of the rights and freedoms of an individual.

## 2.2 PRESCRIBED BY LAW

The expression "prescribed by law" has also been the subject of both judicial and extra-judicial consideration. Two requirements were stated to be implicit in this phrase in *Sunday Times v United Kingdom*:<sup>13</sup>

First the law must be adequately accessible. The citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "Law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able . . . to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail . . .

In the *Federal Republic of Germany v Rauca*<sup>14</sup> the court was more concerned with the criterion of the legal validity of the limitation when it said:

The phrase "prescribed by law" requires the limitation to be laid

<sup>11</sup> (1983) 146 D.L.R. (3d) 408.

<sup>12</sup> (1983) 41 O.R. (2d) 583.

<sup>13</sup> 2 E.H.R.R. 245.

<sup>14</sup> (1983) 38 O.R. (2d) 705, at pg. 716.



down by some rule of law in a positive fashion and not by mere implication. The rule of law containing limitation will normally be statutory although it is possible that it may be found in delegated legislation or in the form of a common law rule.

For the purpose of Section 1, a limitation on the rights and freedoms set out in the Charter is prescribed by law, if the law containing the limitation is properly promulgated by a duly authorized legislator or by an official acting within the bounds of statutory jurisdiction to enact delegated legislation. Not only that, but it must also provide for detailed criteria for its application, sufficiently precise to permit all those potentially affected to determine when and how it applies.<sup>15</sup> This requirement is consonant with Dicey's view of the rule of law and the principle that there should be absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power. It excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.<sup>16</sup>

It may be argued that the courts' interpretation of the phrase "prescribed by law" is an acknowledgement and reaffirmation of the doctrine of parliamentary supremacy and majoritarian democracy. This can, therefore, be taken as a consolation for those who were against entrenchment of rights and freedoms for fear that judicial review arising from this entrenchment would either substitute democratically enacted legislations with judge-made laws or strike out general welfare schemes so as to protect individual or minority rights. Indeed, Justice Steele in *Justine Elizabeth Blainey and the Ontario Hockey Association and The Ontario Human Rights Commission*<sup>17</sup> seems to suggest so when he stated:

In the agrément reached by the Parliament of Canada and the Legislatures of the provinces resulting in the United Kingdom Parliament enacting the Charter, the legislative bodies did not surrender all their powers to the individuals. While the Charter is powerful, *the legislative bodies, in S. 1, retained to themselves the protection of society as a whole*. Section 1 must be interpreted in this light. (Emphasis provided).

I am, however, of the view that far from protecting majoritarian preferences or society as a whole as Steele, J. suggested, the fact that restrictions or limitations protecting majoritarian preferences must have legal force is more in line with protecting individual or minority rights than majoritarian preferences. If limitations were not to be prescribed by law, individual or minority rights would be more vulnerable to violation because they would be left to the whim of the executive. If it decided, the executive could take any measures which

<sup>15</sup> B. Hovius & R. Martin, "The Canadian Charter of Rights and Freedom in the Supreme Court of Canada (1983), 61, *The Canadian Bar Review*, at pg. 235.

<sup>16</sup> A.V. Dicey, *Introduction of the Study of the Law of the Constitution*, London MacMillan & Co. Ltd. at pg. 202.

<sup>17</sup> Supreme Court of Ontario, 25th September 1985 (unreported) pg. 20 of the judgment.

infringed upon individual rights at will in the name of general welfare of the society.

This argument was well canvassed by the Ontario Court of Appeal in *Re Ontario film and Video Appreciation Society and Ontario Board of Censors*.<sup>18</sup> In this case while the courts conceded that the statutory law, regulations and even common law limitation may be permitted, it held, however, that to be accepted the limit must have legal force. The court was of the opinion that precise legal criteria for the exercise of discretion helped to prevent arbitrary decisions. Moreover requiring these criteria to be contained in the law itself rather than in administrative guidelines, the court opined, strengthens political accountability and makes it more likely that the law will be subject to public discussion and scrutiny. Crown Counsel, on the other hand, argued that the board's authority to curtail freedom of expression was prescribed by law in the *Theatres Act*, SS. 3, 35, and 38. To this end, the court took the view that, although there had certainly been a legislative grant of power to the board to censor and prohibit certain films, the reasonable limits placed upon that freedom of expression of film-makers had not been legislatively authorized; that the Charter requires reasonable limits that are prescribed by law; and that it was not enough to authorize a board to censor or prohibit the exhibition of any film of which it disapproved. That kind of authority, the court held, is not legal for it depended on the discretion of an administrative tribunal. That kind of regulation could not be considered as law because the limits placed on the freedom of expression were left to the whim of officials. The standards and pamphlets published by the Board and to which it purported to adhere in exercising its authority were found by the court to have no legislative or legal force of any kind because the Board was not bound by those standards. Since they did not qualify as law, they could not be employed so as to justify any limitation on expression, pursuant to Section 1 of the Charter.

### 2.3 DEMONSTRABLY JUSTIFIED

The word "justified" is the key word in this phrase and forms the cornerstone of the expression. In its ordinary meaning the phrase means to show, or maintain the justice or reasonableness of an action; to adduce adequate grounds for; or to defend as right or proper. The legal use of the word is to show or maintain sufficient reason in court for doing that which one is called upon to answer for.<sup>19</sup>

Justification in this phrase, is however qualified by the word "demonstrably" which means in a way which admits of demonstration. This in turn means capable of being shown, or made evident or capable of being proved clearly and conclusively. For the justification to be demonstrable the reasons for limitation can not merely be hypothetical. There must be evidence or grounds for the limitation which must be shown to have existed prior to or at the time of the limitation of a guaranteed right or freedom.<sup>20</sup> It will be argued later that the whole

<sup>18</sup> (1983) 41 O.R. (2d) 583 at 592.

<sup>19</sup> *Federal Republic of Germany v Rauca*, op. cit. at pg. 716.

<sup>20</sup> W.E. Conklin, "Interpretation and Applying the Limitations Clause. An Analysis of Section 1" (1982), 4 *Suprcmc Court L.L. Rev.* 75 at pg. 82.

question of discharge of burden of proof under Section 1 is in fact centred on evidence, although so far it is unclear as to what type of evidence would suffice for this purpose.

#### 2.4 IN A FREE AND DEMOCRATIC SOCIETY

The phrase imports the notion of comparison with other free and democratic societies. The obvious question which arises is which free and democratic society is relevant for comparison. Case law indicates at least three comparators to which the courts have been very responsive. These have been referred to either by the courts *suo motu*, or at the instance of Crown Counsels. The first is legislation and judicial decisions made in Canada before the proclamation of the Charter on 17th April 1982. Courts have in many Charter cases examined whether a Canadian consensus exists when a provincial law or practice has been in issue.<sup>21</sup> The second is legislation and judicial decisions made in other Western democracies like the U.K., the U.S.; New Zealand and other countries of Western Europe. This has occurred mostly where a federal law or practice has been challenged and courts have been greatly influenced by whether similar restrictions exist in other democratic societies. Where other democratic societies operate without similar restrictions the government has been required to show why the Canadian situation uniquely requires it.

The third is composed of the standards expressed in International conventions. This has been so because much of the wording employed in the Charter bears a strong similarity to that found in International conventions.

One point is worth mentioning here. Although determining whether a particular limitation is reasonable and demonstrably justified in a free and democratic society involves considering whether similar restrictions exist in other democratic nations, the fact that a State's law or practice is out of step with that prevailing in other states does not necessarily imply that it can not be considered necessary in a democratic society. The technique of comparative surveys of the laws of member states is employed on occasion at most as an indicator of what measures are justified in a democratic society.

So far the discussion has dwelt on what has been the courts' interpretation of Section 1. This has been important in advancing the thesis that the liberal characterization of rights and freedoms under Section 1 is not in fact a blanket tool catering for majoritarian preferences as it may look at its face value.

The interpretation of the courts of the different components of that Section, and the shift of burden of proof shows how difficult it is to use it for furtherance of the general welfare of the society at the expense of individual rights and freedoms.

It is obvious that Section 1 of the Charter requires the courts to engage in a

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<sup>21</sup> *Federal Republic of Germany v Rauca*, op. cit.

balancing process. The permissible limits of government action on one hand must be measured against the rights of the individual on the other.<sup>22</sup>

I am aware that Section 1 as a general limitation clause with its balancing process may seem to offend several Dworkinian theories. The first is his concept of rights which is basically anti-utilitarian. To Dworkin individual rights are political trumps held by individuals. Accordingly, if someone has a right to something then it is wrong for the government to deny it to him, even though it would be in the general interest to do so. His harm principle is such that it is wrong to deliberately deny an individual his right even if there were long term utilitarian benefits to be gained. Someone suffers harm according to Dworkin if the deprivation of his rights causes him pain or frustrates plans that he deems important to his life. Since moral harm is a subjective notion, it follows that moral harm occurs whenever someone is morally harmed, even when no one knows or suspects it. Therefore, a system that subjects individual rights to ordinary utilitarian calculus does not recognize the independence or importance of moral harm, or if it does, does not recognize that even an accidental denial of an individual right is an occasion of moral harm. Dworkin's postulate of moral political rights requires the government to treat all its citizens as equals, that is, as equally entitled to concern and respect. In the same vein no political decision may deliberately impose on a citizen a much greater risk of moral-harm than it imposes on any other, although a greater bare harm on some than on others may be imposed.<sup>23</sup>

In relation to limitation clauses under the Charter, the writer is of the view that Dworkin's concept of rights with his acceptance of the harm principle is not offended so long as it presupposes that rights are not absolute in the sense that individuals either possess them in their entirety or not at all. Even civic experience has shown that rights can not be absolute because they have to be balanced against one another. This process of balancing against the other, entails, as of necessity, placing limits on the extent to which these rights are enjoyed. This is what the courts are called upon to do in Section 1 of the Charter. Dworkin, however, takes issue with this process of striking a balance between the rights of the individual and the demands of society at large. According to him, this balancing model does not give sufficient weight to the value of individual rights and freedoms. He finds this model to be indefensible because it rests on a mistake of confusing society's rights with the rights of members of the society. It assumes that the rights of the majority is a competing right that must be balanced in some way. This, he says, threatens to destroy the concept of individual rights.<sup>24</sup> The most cogent answer to this argument is that this approach, that is, the balancing model, contrary to what Dworkin assumes, does not require that the right or freedom at issue and any countervailing interests be viewed as qualitative values.

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<sup>22</sup> Justice Blain in *R.V. Bryant*, (1984) 48 O.R. 201.

<sup>23</sup> Ronald Dworkin, *A Matter of Principle*, Harvard University Press, 1985, pp. 72-103 and pg. 359

<sup>24</sup> Ronald Dworkin, *Taking Rights Seriously*, 1977, op. cit. at pg. 197.

This point is well illustrated in *Dudgeon v United Kingdom*.<sup>25</sup> In this case the appellant was a homosexual who alleged that his right to respect for his private life, protected by Article 8 of the *European Convention on Human Rights*, was violated by the existence of laws making it a criminal offence for consenting male adults to engage in certain homosexual acts even in private. These laws were still in force in Northern Ireland though not in the rest of the United Kingdom. The government argued that the alleged interference was “necessary in a democratic society . . . for protection of . . . morals, or . . . the rights and freedoms of others. The court agreed that the laws promoted legitimate aims, but concluded:

Such justifications as these for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this can not on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.<sup>26</sup>

Dworkin’s second theory which may also appear to be offended by Section 1 of the Charter and which is partly related to his rights theory is that which requires judges to decide cases on grounds of principle rather than policy. He gives an example of two different questions which a judge might ask himself to distinguish questions of principle from questions of policy. A judge asking himself whether the plaintiff, all things considered, has a right to what he asks, addresses himself to a question of principle because this one appeals to the judge’s theory of legal rights. On the other hand, a judge asking himself whether if he decides for the plaintiff, his decision will make the community better off as a whole addresses himself to a question of policy because this draws on his convictions about the ideal society and the best strategy for reaching that ideal.

There is an inconsistency at once apparent between this theory and Section 1 of the Charter of Rights and Freedoms. Section 1 says that there are circumstances where infringement of these rights is reasonable. This requires the judges to articulate the fundamental values of society and set their order of priority. The judges have to decide whether a given societal value is more important than one or the other of the fundamental rights and freedoms guaranteed by the Charter.<sup>27</sup> Dworkin urges these judges to appeal to considerations of principle, that is, considerations specifying their rights, and not to considerations of policy or appeals to the general welfare. This proposition of Dworkin is strange and laughable, especially because he himself argues that law is a “deeply political”

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<sup>25</sup> 4 E.H.R.R. 149 (European Court of Human Rights 1981).

<sup>26</sup> *Ibid* at pg. 167.

<sup>27</sup> *Big M. Drug Mart Ltd. and Her Majesty The Queen* (1984), 5 D.L.R. (4th) 121 at 142.

matter. Indeed laws are nothing but policies or political will of the ruling class couched in the most general way, to impose and declare duties, liabilities, prohibitions and rights of particular groups of people in the general public. Courts, and, therefore, judges for that matter, are in the arena of politics from their inception. It is curious to suggest that any institution of the state is apolitical in functions or nature. The courts will therefore find it difficult not to allow a limitation on a guaranteed right or freedom, where if it is not permitted then harm will be caused to other values in society.

Again, on the face of it Section 1 may appear to be a utilitarian characterization of rights and freedoms for utilitarianism regards a decision as correct if it maximizes utility across some community. This is generally taken to mean maximizing average happiness or the degree to which people's preferences are satisfied. On this account, utilitarianism requires law and its institutions to serve the general welfare and nothing else. It requires some citizens to give up or even be made to give up something to which they are otherwise entitled for the goal of the community as a whole. As can be seen, utilitarianism runs contrary to Dworkin's rights theory.

The courts' approach to Section 1 however, clearly negates any attempt of characterizing rights and freedoms under it on utilitarian grounds. Two decisions of the Supreme Court of Canada show this. The first is the case of *Regina v Big M., Drug Mart Ltd.*<sup>28</sup> At issue in this case was S. 4 of the *Lord's Day Act*<sup>29</sup> which was challenged as being unconstitutional by reason of its contravention of the guarantee to freedom of religion and conscience in S. 2(a) of Canadian Charter of Rights and Freedoms. The most outstanding utilitarian argument is found in the dissenting judgment of Belzil, J.A. of the Alberta Court of Appeal who stated:

It is not inconsistent with the basic principles of democracy of the Charter that the views of the majority should receive preferred attention from government . . . Civil authority, while bowing to pressure from religious groups, recognized the moral value of a day of rest — that it should have selected the day of the week regarded as holy by the great majority of Canadians is not inconsistent with the basic principles of democracy . . .<sup>30</sup>

The Supreme Court of Canada, speaking through Dickson, C.J. rejected this argument in the strongest terms in the following words:

What may appear good and true to a majoritarian religious group, or to the state acting on their behest, may not for religious reasons, be imposed upon citizens who take the contrary view.

<sup>28</sup> (1984) 5 D.L.R. (4th) 121.

<sup>29</sup> R.S.C. 1970, C L-3.

<sup>30</sup> (1984) 5 D.L.R. (4th) 121 at pp. 156-157.

The Charter safeguards religious minorities from the threat of "the tyranny of the majority".<sup>31</sup>

The Supreme Court of Canada had occasion to reiterate this statement in *Harebhjan Singh & Six Others et. v Minister of Employment and Immigration*.<sup>32</sup> The appellants in this case claimed that the procedure for determining refugee status claims established in the *Immigration Act, 1976*, ss. 55 was inconsistent with the requirements of fundamental justice articulated in S. 7 of the Charter because it did not provide a refugee claimant with adequate opportunity to state his case and to know the case he has to meet. Counsel for the Minister submitted with respect to Section 1 that Canadian procedures with respect to the adjudication of refugee claims had received the approbation of the Office of the United Nations High Commissioner for Refugees and that it was not uncommon in commonwealth and Western European countries for refugees claims to be adjudicated administratively without a right to appeal. Counsel submitted further that a requirement of an oral hearing in every case where an application for redetermination of a refugee claim has been made would constitute an unreasonable burden on the Board's resources. It was Dickson, C.J. again, who came out very strongly against this utilitarian argument. She said:

I have considerable doubt that the type of utilitarian consideration brought forward . . . can constitute a justification for a limitation on the rights set out in the Charter. Certainly the guarantee of the Charter would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice, but such an argument . . . misses the point of the exercise under Section 1.<sup>33</sup>

Limitations can sometimes be compromised with liberalism albeit to a limited extent. Liberalism claims that individuals' rights cannot be sacrificed for the sake of the general good, and that the principles of justice that specify these rights can not be premised on any particular vision of the good life. Liberalism sees the self as prior to and independent of its interests and ends. The priority of the self does not define one with his claims and attachments, that is, one's identity is never tied to his aims and interests. One may at any moment choose his own plan of life. Liberalism counts at satisfaction of an individual's personal preference which is found by the assignment of goods or advantages, including liberties, to himself; whereas his external preferences are for such assignment to others. Liberalism is therefore a refined or purified kind of utilitarianism in the sense that it counts only personal preferences in assessing the balance of social welfare to where the balance of personal self-interest preferences supports some restriction on freedom, the restriction is justified because the freedom restricted

<sup>31</sup> *Her Majesty The Queen and Big M. Drug Mart Ltd.* Supreme Court of Canada, April 24, 1985 (unreported) pg. 56. Now reported (1985) 1 S.C.R. 295.

<sup>32</sup> Supreme Court of Canada, April 4, 1985 (unreported) Now reported (1985) 1 S.C.R. 177.

<sup>33</sup> *Ibid* at pg. 63 of the judgment.

is not a moral or political right. In this way liberalism may justify laws diminishing or limiting rights and freedoms.

The remaining part of this paper discusses the requirement of adducing evidence to justify any limitation under Section 1 as a means of discharging the burden of proof. This is done because this requirement puts the last nail in the coffin of liberal characterization of rights and freedoms under Section 1.

The requirement of adducing evidence was introduced in *Re Southam Inc. and The Queen* (No. 1) where the court stated:

... The wording imposes a positive obligation on those seeking to uphold the limit or limits to establish to the satisfaction of the court by evidence, by terms and purpose of the limiting law, its economic, social and political background ... that such limit or limits are reasonable and demonstrably justified.<sup>34</sup>

The Saskatchewan Court of Appeal put it more succinctly in the following words :

... To decide the issue of reasonableness the decision maker will need to know the circumstances that bear upon the issue, the circumstances of those who will be detrimentally affected if the limit is imposed and the circumstances of those who will be detrimentally affected if the limit is not imposed. He will need information from which he can determine the effect and the consequences of imposing the limit and of not imposing it. The decision maker will also need to know what choices or limits the legislator had when they made their selection ...<sup>35</sup>

From the above quoted statements, it is clear that judges must be provided with a broad range of evidence. Extensive materials documenting various arguments for justifying limitations must be prepared. There is also need to adduce extrinsic evidence to document the evolution and rationale of legislation under consideration. Section 1, however, is pregnant with a lot of problems. A party seeking to shelter under a limitation clause can not know for sure whether to adduce evidence or not and what evidence to adduce so as to discharge his onus of proof.

In *Re Federal German Republic v Rauca*<sup>36</sup> for instance, a common sense approach to the reasonableness of the *Extradition Act* was employed by the court. It found the Act to be a response to the international mobility of criminals and the need for international cooperation in dealing with that problem. The court reviewed various international undertakings that relate to the right under Section

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<sup>34</sup> (1982) 41 O.R. (2d) 113 at pg. 118-119.

<sup>35</sup> (1985) 5 W.W.R. 95, at 119.

<sup>36</sup> Op. cit.



6 of the Charter and concluded that extradition constituted the remedy that is most consonant with the overall structure of the administration of justice in Canada. There was little, if any, evidence as to the abstract rationality of the Extradition Act. The onus of reasonableness was clearly discharged on the basis of argument not fact.

The same approach was adopted in *Re Southam Inc. and The Queen* (No. 1)<sup>37</sup>, though with different results and in *Re Ontario Film & Video (Appreciation Society) and Ontario Board of Censors*.<sup>38</sup>

On the other hand, the Ontario Court of Appeal expressed disappointment over the Counsel for the Attorney General's failure to adduce evidence so as to discharge the burden in Section 1. It said:

Despite the fact that this court has affirmed on several occasions that the onus of proof under Section 1 is on the party seeking to uphold the validity of impugned legislation, Counsel for the Attorney General submitted no evidence beyond referring to the fact that Sunday was a common day of closing in such countries as the U.S., the U.K., Australia, New Zealand and Japan as well as British Columbia and Manitoba. She presented no other evidence, however, showing why such limitations in other jurisdictions are reasonable nor did she show how they were justified.<sup>39</sup>

Although the court in this case concluded that there may be instances where such bare analogies might be sufficient proof to meet the requirements of Section 1, it however held that they were certainly not sufficient in this case:

A similar disappointment was expressed by the Saskatchewan Court of Appeal in *Retail, Wholesale and Department Store Union v The Government of Saskatchewan*, where it said:

... In the end, I am compelled to say that there was sufficient material before the Chambers of the judge to enable him to engage in the balancing process he needed to engage in to arrive at a reasoned decision, upon the reasonableness of the limit. . .<sup>40</sup>

Case law also suggests that not every case of justification will require evidence though others may do so. In the *Retail Wholesale Case*, the court was quick to point out in one of its cautionary notes that

... The outline of the need in the present case for evidence of

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<sup>37</sup> Op. cit.

<sup>38</sup> Op. cit.

<sup>39</sup> *Regina v Videoflicks Ltd.* (1984) O.R. (2d) 395 at 428.

<sup>40</sup> (1985) 5 W.W.R. 95 at 119.

circumstances of a certain scope is not to be taken as laying down an inflexible rule of universal application in cases engaging the limit provision of Section 1 of the Charter. Some cases will dictate the need for evidence of a lesser scope, some of a greater scope, some (where the reasonableness of limit is self-evident) of no evidence of circumstances whatever, depending where on the *continuum* the case falls.<sup>41</sup>

Whatever the case, the problems of Section 1 remain unresolved and will remain so for quite some time. The court has acknowledged that fact in the *Law Society of Upper Canada v Skapinder* where it stated:

... Section 1 and this very process are difficult to many. As experience accumulates, the law profession and the courts will develop standards and practices which will enable the parties to demonstrate their position under Section 1, and the courts to decide issues arising under that provision.<sup>42</sup>

The problem is how Counsel for the Crown is supposed to distinguish between cases which dictate the need for evidence from those which do not, let alone those which dictate the need for evidence of a lesser scope or a greater scope. Even if he is able to draw such a distinction, the type of evidence he should adduce so as to discharge his burden of proof is still unclear. What information should the government provide the court with to enable it to balance the factors inherent in the circumstances of each individual case with a view to making a reasoned decision in respect of the justification of any limit? All these are still begging questions.

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### 3. CONCLUSION

It is contended that with the present absence of any criteria as to what is a reasonable limit, or what is demonstrably justified in a free and democratic society, the burden of the government is a heavy one and difficult to discharge. This difficulty is compounded by the fact that most of the decisions of the government are made on empirical speculation without any feasibility study which makes it difficult to predict what will happen in the future. To require the government to justify any legislation by adducing evidence or providing reliable information going to the circumstances of its enactment is almost to ask for an impossibility. To this extent the Charter does not provide much aid because it does not elaborate on the considerations which are relevant or the material which is probative in determining whether a controverted law is reasonable and demonstrably justified in a free and democratic society. It is hard to escape the conclusion that the test for limitations on rights and freedoms in Section 1 of the

<sup>41</sup> Ibid at pg. 119. See also a similar observation by the Alberta Court of Queen's Bench in *Re Reich and College of Physicians and Surgeons of Alberta* (1984) 8 D.L.R. (4th) 691 at 715.

<sup>42</sup> (1984) 1 S.C.R. 357 at 384.

Charter is a subtle and flexible one. The state's burden varies depending on the nature of the right or freedom involved, the context in which it is asserted and the extent of the limitation in question. The limitation clause unlike the override clause, is too vague to be employed with confidence by Parliament or the Legislature itself because it is only a judicial decision which can settle conclusively the question whether a particular law transgresses the Charter or is saved by the limitation clause. These are the facts which support the contention made earlier in this paper that the liberal characterization of rights and freedoms under Section 1 by itself does not necessarily make general welfare or majoritarian preferences trump individual rights and freedoms. Utilitarians cannot take comfort in it nor can Dworkin or Liberals take offence from it.



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