2018

Justice As Harmony: The Distinct Resonance of Chief Justice Beverley McLachlin's Juridical Genius

Marcus Moore
Allard School of Law at the University of British Columbia, moore@allard.ubc.ca

Citation Details

Marcus Moore, "Justice As Harmony: The Distinct Resonance of Chief Justice Beverley McLachlin's Juridical Genius" (2018) 87 Sup Ct L Rev (2d) 3.

Justice as Harmony: The Distinct Resonance of Chief Justice Beverley McLachlin's Juridical Genius

Marcus Moore*

PROLOGUE

Introduction

The recent retirement of the internationally esteemed and nationally treasured Chief Justice of Canada, Beverley McLachlin, has provided an occasion to reflect on the remarkable achievements of her long and brilliant career. A tremendous outpouring of tributes, both in public and in private, accompanied the initial announcement, with encores on the date of her retirement and upon her final departure from the Court following the release of judgments under reserve. The substance of these tributes is so diverse, and the sources so traverse the expanse of the legal community and of society at large that they remind us of our great fortune in having her as the leader of our justice system for so long. Of her career as Chief Justice of the Supreme Court of Canada, it is commonly noted that she was the first female to ascend to that post, and the longest-serving of any holder of it.[1] But beyond facts and figures such as these, her many qualities that have been praised, professional and personal, are the true measure of her distinction. They make clear that this outpouring of praise is not homage to high office, but gratitude for the particular way in which she discharged the

---

* Clarendon Scholar, Faculty of Law, University of Oxford, and Assistant Professor, Allard School of Law, University of British Columbia. Marcus is a former law clerk to Chief Justice McLachlin. His research is supported by the Margaret Thatcher Trust (Somerville College, Oxford) and by the Social Sciences and Humanities Research Council of Canada. The author would like to thank Daniel Jutras, Timothy Endicott, Leo Boonzaier and Helge Dedek for their valuable feedback and very helpful suggestions on this article.

[1] Supreme Court of Canada, News Release (June 12, 2017) online: SCC: <https://scc-csc.lexum.com/scc-csc/news/en/item/5552/index.do>.

duties of that office and delivered on its opportunities. It is, quite simply, admiration of Beverley McLachlin.

Granted the special privilege of serving as her law clerk, I benefited from the experience of witnessing these qualities at work. It was instructive to be able to perceive their value to the court-side of the adjudication process, to management of the institutional and interpersonal environments of a collegiate court, and to charting how to navigate her concomitant roles of public face of the judiciary and high-ranking civic leader. From an internal perspective, it was very evident how and why the qualities she cultivated were so vital to the success she achieved in the various aspects of the office of chief justice. Equally apparent was how much could go wrong in all these spheres, absent those qualities.

Praise of Chief Justice McLachlin often focuses, perhaps unsurprisingly, on virtues widely recognized: Integrity, dedication, honed intellect and reason, compassion, modesty, fairness, respect for tradition, common sense, and judgment are hardly novel, although not so easy to consistently adhere to, and not so commonly coinciding in a single person. In trying to understand what enabled her extraordinary achievements, much may be said of her nurture of these and other well-known attributes of excellence in judging, management, and leadership.

But are there other aspects of the conduct of her work that are less commonly perceived, at least in this context, and that may have contributed to the widespread and overwhelming admiration her career has earned? If so, arguably these aspects are harder to identify, articulate, and explain. And yet, because they are less appreciated, they may be among the qualities of greatest potential value to illuminate for the benefit of future jurists and professional leaders, as well as the citizens they serve.

Intricate Principle

One feature that has often been said to define the McLachlin Court is its decisions' degree of consensus among the judges within it as well as spectrum of support among the public outside it. Emmett Macfarlane notes, for instance, the frequency of its unanimity, in "sharp contrast" to some other courts, and a puzzle which "the predominant political science models of judicial behaviour are at pains to explain".[2] Not uncommon, it seems, are courts that have suffered and perhaps perpetuated greater

[2] Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver: UBC Press, 2013), at 122-23 [hereinafter "Macfarlane"].

fractiousness, whether rooted in ideology, rivalry, personality conflicts, or simply pressures of the job. Close at hand, Macfarlane cites the sharply divided Supreme Court of the United States as an example.[3] Closest of all, Kirk Makin reports that the Supreme Court of Canada, prior to Beverley McLachlin's move to the centre chair, itself "had become increasingly factionalized, overworked and demoralized".[4]

Yet, the McLachlin Court's distinct pattern of decisions boasting broad internal and external support was typically not a project of political pragmatism — Bismarck's *realpolitik* — although Beverley McLachlin certainly exhibited the exceptional practical sense essential in any masterful judge. The jurisprudence that emerged from the McLachlin Court, and the processes and practices that produced it, were profoundly principled. While not identifiable with any singular school of thought, her own opinions are replete with principle. In different cases, her judgments might promulgate normative ideals, prefer 'incremental' evolution, or address values' wider implications only in *obiter*. But in all cases, her judgments reveal themselves keenly alive to the principles involved, devoted to understanding each's relevance to a suitable resolution, and prudently thoughtful about the implications for foreseeable future cases. This is not to suggest these opinions are somehow devoid of error or sans shortcomings — there can be, as Justice Robert Jackson counselled, no doctrine of judicial infallibility;[5] and it is a truism to say that an opinion is only as good as the record on which it is based. But the judgments of Chief Justice McLachlin are always to be found earnestly and incisively probing the various values at issue. From this especially deep engagement with principle, not from pragmatism, springs the complex pattern that characterizes the McLachlin Court's jurisprudence and defies ideological identification.[6]

A Question of Balance?

Beyond it representing a complex pattern, how can we better understand the broadly supported and deeply principled jurisprudence of Chief Justice

---

[3] *Id*., at 123.

[4] Kirk Makin, "Shedding some light on the decline of a lion in winter", *The Globe and Mail* (May 6, 2011) online: <https://www.theglobeandmail.com/news/national/shedding-some-light-on-the-decline-of-a-lion-in-winter/article578974/>.

[5] *Brown v. Allen*, 344 US 443 (1953).

[6] Cynthia Ostberg & Matthew Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada* (Vancouver: UBC Press, 2011), at 207-209 [hereinafter "Ostberg"].

McLachlin, in order to draw guidance from it that may be valuable to future jurists and professional leaders serving the public interest?

One metaphor that had sometimes been used to describe her characteristic work was that of balance. Peter McCormick, for instance, wrote:

> The central notion … [f]or the McLachlin Court, it is balancing ... Balancing of elements within rights, balancing within ideas like fundamental justice, and balancing between rights: "balance" is a powerful metaphor. Still it involves the Supreme Court in much more complex exercises than finding clear-cut rights violations resulting in invalidity, or in "bright-line" standards that unambiguously signal what the court will be doing in similar or related cases.[7]

"Balance" was a word Chief Justice McLachlin often used, not only in judgments but in official speeches.[8] And although described by McCormick as bearing special distinction within the McLachlin Court, balance is a long-familiar legal notion. Indeed, dating to antiquity, the personification of justice — today marking the entrance to the Supreme Court of Canada and courthouses the world over — is the goddess Justitia, whose iconography involves scales of balance.[9]

Before joining the Chambers of the Chief Justice, the time-honoured idea of balance coloured my impression of her vision of justice. It was a quality I was perhaps disposed to perceive, having relied on it in other contexts.[10] To my surprise, however, I wound up finding this impression to be wrong.

Plurality and Unity

Based on my experience in the Chambers, I concluded that the aim that she was pursuing, although in important ways overlapping with balance, was more sophisticated and difficult than ably balancing relevant interests. It also appeared that this higher aim was a constant; and not just a routine feature, but fundamental to her approach. The Chief Justice, colleagues and aides, and others who closely followed her

---

[7] Peter McCormick, *The End of the Charter Revolution: Looking Back from the New Normal* (Toronto: University of Toronto Press, 2014), at 166 [hereinafter "McCormick"].

[8] See SCLR Vol. 87, Table A.

[9] The rendering outside the Supreme Court of Canada is rare in omitting the feature of her visibly holding aloft the scales of balance.

[10] In my book on athletic aspiration, I described it as part of an essential foundation for sustainable striving: "Chapter 6: Good Health & Balance" in *Making It in Hockey: What You Should Know, from the Experts and Pros* (Toronto: H.B. Fenn & Co., 2009), at 69-76.

work, all seemed to have a palpable sense of this quality and of the guidance it gave. Yet, there was no term for it consistently used and able to convincingly capture it.

Beyond balance, Chief Justice McLachlin had employed various concepts in different contexts to describe either the challenge, or the aim, or the exercise called for. For instance, in seeking to highlight the dynamic aspect, she stated that "a more appropriate metaphor may be that of equilibrium".[11] Elsewhere, instead of balancing multiple interests, she foresaw blending them as a "mélange"[12] or an "amalgam".[13] In another discourse, she described the "clash of forces" among the issues in dispute as a "dialectic [that] must reach synthesis".[14] Frequently, her remarks also invoked a holistic concern, hence describing the judicial aim as being "decisions that best represent the interests of the community as a whole".[15] Combining the notions evoking diverse strands with those evincing concern with integration, another metaphor Chief Justice McLachlin favoured was a "tightly woven fabric".[16] Like balance, these various other concepts overlapped in some way with the quality I described as intuitively understood and emulated by those in her orbit. They were not unrelated. There had to be a "general organizing principle … which underpins and informs the various" aspects invoked by these several metaphors, "in various situations and types of relationships".[17] However, a comprehensive conceptualization of it, which could be used to transmit it to others outside the sphere of her significant influence, still seemed elusive.

---

[11] Beverley McLachlin, *A Canadian judgment: the lectures of Chief Justice Beverley McLachlin in New Zealand, April 2003* (Christchurch: Centre for Commercial & Corporate Law, 2004), at 35 [hereinafter "NZ"].

[12] Beverley McLachlin, "Defining Moments: The Canadian Constitution", Remarks, online: <https://www.scc-csc.ca/> [hereinafter "Constitution"].

[13] Beverley McLachlin, "Canadian Rights and Freedoms: 20 Years Under the Charter", Remarks, online: <https://www.scc-csc.ca/> [hereinafter "20 Years"].

[14] Beverley McLachlin, "Freedom of Religion and the Rule of Law: A Canadian Perspective" in Douglas Farrow, ed., *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (Montréal: MQUP, 2014), at 22 [hereinafter "Religion"].

[15] Beverley McLachlin, "Judges in a Multicultural Society" (October 2003), online: <www.lsuc.on.ca/media/mclachlin_judges_multicultura_society.pdf> at para. 8 [hereinafter "Multicultural"].

[16] See *e.g.*, Supreme Court of Canada, *The Supreme Court of Canada and its Justices 1875-2000* (Toronto: Dundurn, 2000), at 6 [hereinafter "SCC"].

[17] *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 33 (S.C.C.).

Interpretation: An Adjudicative Microcosm?

One activity that is a staple of a court's work is interpretation. The Chief Justice enjoys this task. She seems to appreciate its elements of discovery, of creativity (in the sense of problem-solving, not invention), and of expressiveness (Montesquieu's *bouche de la loi*).[18] Yet, she broaches the task with great humility. Far from drawing impressionistic conclusions, then going through the prescribed formalities for the sole sake of justification, she treats it as a quest: not knowing where she will end up until the journey's end. Sometimes, that meant a different conclusion even than she anticipated following the post-hearing conference. As McLuhan said that the medium is the message,[19] McLachlin might have said that the process is the point.[20] But that process required her active participation at every step in order to arrive at the best possible interpretation.

The interpretive philosophy embraced by the Supreme Court of Canada, and employed by Chief Justice McLachlin, was termed by Elmer Driedger simply the "modern" principle:[21]

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[22]

But what it calls for is harmony among the various interpretive considerations: text, context, scheme, and purposes. Out of that harmony, sounds the interpretation sought.

---

[18] See *e.g.*, Robert Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003) 88 [hereinafter "Dickson"].

[19] Marshall McLuhan, *Understanding Media: The Extensions of Man* (New York: Mentor, 1964).

[20] Indeed, speaking of the judicial task generally, she has said that "public support for the courts is not tied to the popularity of any one opinion; rather, it appears that public approval of the Court is tied to the perceived integrity of the judicial process": Beverley McLachlin, "The Role of Judges in Modern Society", Remarks, online: <https://www.scc-csc.ca/> [hereinafter "Role of Judges"]. See also her statement, in the Conclusion to this volume, "I've always been a process person": "Kirk Makin in Conversation with The Right Honourable Beverley McLachlin — Chief Justice McLachlin in Her Own Words", at 330.

[21] Elmer Driedger, *Construction of Statutes*, 2nd. edition (Toronto: Butterworths, 1983).

[22] *Id*., See *e.g*., *Rizzo v. Rizzo Shoes*, [1998] S.C.J. No. 2, [1998] 1 S.C.R. 27 (S.C.C.); *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] S.C.J. No. 43, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26 (S.C.C.): "Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings".

Hence, when in a mentoring moment the Chief Justice said to me "interpretation is everything",[23] I wondered whether harmony might be a better conceptualization than balance of her approach to legal problem-solving overall: Was it a search for a harmonious resolution of the legal issues posed? For a resolution that would achieve harmony among the legitimate considerations to be accounted for?

Harmony was indeed another term she used in cases and public lectures discussing legal ideals.[24] Moreover, the various other conceptualizations, it seemed to me, converged on it. Meanwhile, the more I studied her work, whether the product or the process, the more that harmony emerged as a theme — often not explicit (interpretation being one exception), but very often powerfully implicit. To what extent was this particular conception a conscious focus for her, versus a quality achieved in practice, reflecting an acute appreciation at some subconscious level? I don't know. But whether or not it was consciously so prominent for her, or so perceived by others, for me at least, it echoed the intuitive understanding of her approach previously mentioned.

Justice as Harmony

Beyond merely presenting a different metaphor, how might harmony offer a better conceptual vehicle than balance for understanding Chief Justice McLachlin's framework for resolving legal problems? Two broad answers can be posited, which should emerge more clearly throughout the course of this article. First, harmony constitutes *a different aim* — one that is more complex and ambitious than balance. Indeed, to achieve harmony might well mean, in some cases, a commensurate *im*balance, or require in other cases the striking of several simultaneous balances of different factors operating at different levels. Harmony further supplies an answer

---

[23] Her public remarks confirm such an understanding of interpretation as definitive of the judicial role: "The task of the judiciary is to interpret the laws passed by the legislatures as well as the common law, and to resolve disputes … in accordance", and quoting Chief Justice Dickson that "it is only where the law is interpreted by an independent judiciary with vision, a sense of purpose, and a profound sensitivity to society's values, that the rule of law [is] safe": Beverley McLachlin, "The Supreme Court of Canada", Remarks, online: <https://www.scc-csc.ca/> [hereinafter "On SCC"].

Where values are at variance, she adds, "the judge must become the interpreter of difference": Beverley McLachlin, "Second International Conference on the Training of the Judiciary", Remarks, online: <https://www.scc-csc.ca/> [hereinafter "Training Judiciary"].

[24] See *e.g.*, 20 Years, *supra*, note 13; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, 2004 SCC 73, at para. 49 (S.C.C.) [hereinafter "*Haida*"]; *B010 v. Canada*, [2015] S.C.J. No. 58, 2015 SCC 58, [2015] 3 S.C.R. 704 (S.C.C.).

as to *why* (and when) it might be desirable to strike a balance: namely, where it is necessary to achieve harmony among conflicting legitimate considerations. Second, the *process* for pursuing harmony as an aim is significantly more diverse and sophisticated than balancing. In some circumstances, it might well involve balancing. But in others, it will call for different legal skills such as reconciliation, accommodation, a search for common ground, or the negotiation of compromise.

If these hypotheses harbour some truth, then the concept of harmony as a way of understanding a characteristic quality of the Chief Justice's *oeuvre* is worthy of study. In this article, I hope to break initial ground on that, relying primarily though not exclusively on public lectures by the Chief Justice, wherein she had opportunities to illuminate what she saw as the functional objectives, outlook, and operating procedures that lay behind the output of the Court — being the judgments themselves. As the discussion thus far may suggest, my examination and interpretation of these is from the standpoint of searching for the best way of understanding the challenge of resolving legal problems strictly in terms of consistency with my experience as an apprentice to Chief Justice McLachlin. I will not address conceivable evolution, experimentation, or variation in her style in conflict with that, much less address judicial aims and processes as a general field of inquiry, or the broader general proposition of legal problem-solving.

With that in mind, this first foray will address two overarching questions: One is to explore the nature of the pursuit of harmony as an averred theme in Chief Justice McLachlin's work. Along the way, it must be clarified what harmony means in that context, and how it can be pursued. The other question concerns harmony's potential wider significance for law and for society. To the extent it captures something significant in Chief Justice McLachlin's philosophy, how does it compare to other common approaches to the judicial task? Should harmony be better appreciated as a judicial aim, as a legal virtue, as a priority of civic leadership, as a vision and process of seeking justice in our society?

Structure of this Article

The sequence of this exploration will proceed as follows: Part I begins by reflecting on the relationship between harmony, law, and the pursuit of a just social order. Harmony's association with the just order is surveyed, and the question of how our legal system leaves room for

harmony is addressed. Part II fixes on the nuts and bolts of what harmony means in this context as an aim of legal problem-solving, and what process is entailed in pursuing it. Part III compares it to other approaches to resolving legal problems. Different applications of it are overviewed in Part IV, with examples or relevant commentary by the Chief Justice. Part V briefly considers a few potential factors in Beverley McLachlin's perfection of this technique.

I. HARMONY, LAW AND THE PURSUIT OF A JUST SOCIAL ORDER

1. Harmony's Association with the Just Social Order

Far from a novel or exotic notion, harmony has throughout the world and throughout history been central to many cultures' conception of a just order. Undoubtedly, harmony has somewhat different meanings across cultural contexts. But certainly there appears to be a significant overlap among these, a fact reflected in the sharing of that terminology. And the concept itself (in any of these incarnations) is sufficiently broad as to allow us to focus on a common core without undue fear that all meaning is thereby lost. For these reasons, I prefer to rely on common understandings, despite or perhaps because of potential variations, and shall not endorse any particular conception or definition of harmony.

While a comprehensive account of the conceptual life and work of harmony across cultures is far outside the ambit of this work — and no doubt to be better accomplished by an anthropologist than a lawyer — a brief look at a few examples of harmony's association with different cultures' ideal of a just order is important here for the purpose of illustrating how remarkably pervasive that association is.

In Aboriginal-American cultures, it has been said that the way to understand "traditional Indigenous legal orders [is] as embodiments of distinctive Indigenous approaches to restoring harmony within communities":[25]

> Indigenous legal orders in Canada are diverse; each stems from a particular vision of ecological order and each is rooted in a distinct language, tradition and worldview. Together, though, the sources indicate that four important things must be kept in mind when approaching the legal traditions of Indigenous peoples on this land.

[25] Michael Coyle, "Indigenous Legal Orders in Canada — a literature review" (2017) 92 Law Publications, v 4 [hereinafter "Coyle"].

> First, those traditions tend to place a central focus, not on individual "rights", but on maintaining harmonious relationships among members of the community and between the community, the land, and other life-forms ...[26]

That this understanding of harmony reaches well beyond social harmony is highlighted by the fact that the "traditional Indigenous focus on harmonious relationships generally includes accountability to the natural world, a stewardship-like concept".[27] Accordingly, the fundamental values of the Cheyenne people of the Prairies/Great Plains are said to include "respect for the spirit world; desire for harmony and well-being in interpersonal relationships; desire for harmony and balance with nature".[28] And for the Sto:ló people of British Columbia, the key term "*qui:quelstóm*" is translated as "a way of living in harmony".[29]

Harmony has also been closely associated with visions of the just order in Eastern cultures. For instance, "[t]he popularity of 'harmonious society' in China has deep political, economic and cultural roots".[30] In that context, the association encompasses, notably:

> … traditional Chinese perspectives on dispute and dispute resolution, which are deeply shaped by Confucian doctrines, especially the concept of "harmony" … "Harmony", in Confucian understanding, means "an orderly combination of different elements, by which a new unity comes into being". This new unity brings a state of peace and stability to the relationships between human beings and nature, between different hierarchies of society, and between individuals. In this sense, a harmonious society does not eliminate controversies but instead maintains them to a manageable extent and solves them in effective ways.[31]

In disfavour during China's Cultural Revolution, this traditional perspective has enjoyed a "resurgence" in the 21st century "throughout the entire legal system in China".[32] The official government aim of "constructing 'socialist harmonious society'" is a "restating" of the traditional perspective on "the importance of maintaining harmonious

---

[26] *Id*., at vi.

[27] *Id*.

[28] Aboriginal Justice Implementation Commission, "Aboriginal Concepts of Justice" in *Report of the Aboriginal Justice Inquiry of Manitoba*, v1 (1999), online: <http://www.ajic.mb.ca/volumel/toc.html>.

[29] Coyle, *supra*, note 25, at 7.

[30] Wei Pei, "Harmony, Law and Criminal Reconciliation in China: A Historical Perspective" (2016) 9 Erasmus L.R. 18, at 20.

[31] *Id*.

[32] *Id*., at 20-22.

relationships between individuals, between the government and people, between human beings and nature, and between China and foreign countries".[33]

Religious cultures have also perceived a connection between harmony and the just order. For example, in Christian teaching:

> Justice toward men disposes one to respect the rights of each and to establish in human relationships the harmony that promotes equity with regard to persons and to the common good.[34]

This notion is elaborated in the theology of Aquinas, which sees the virtue of justice as distinct from the other virtues by its social, rather than individual, vocation. Its first branch, "legal justice", provides that "everyone who is a member of a community stands to that community as a part to a whole … For this reason, we should expect the good community to enact laws that will govern its members in ways that are beneficial to everyone".[35] The second branch, "distributive justice", dealing with the apportionment of goods and responsibilities within the community, "seeks to preserve equality" which is "not a matter of equal quantity but 'due proportion'".[36]

Harmony is also a term often used in association with order and justice in attempting to translate complex concepts within the core of the Dharmic faiths.

Beyond religious groups, harmony has further been associated with a salubrious order in the context of other sorts of communities. Two such contexts recognized by the Supreme Court of Canada include the family[37] and labour.[38]

The picture in "official" Western legal systems is more complicated.[39] Harmony figures in notable philosophies, from the ancient Greeks (per

---

[33] *Id*., at 28.

[34] *Catechism of the Catholic Church*, at para. 1807.

[35] "Thomas Aquinas: Moral Philosophy" in *Internet Encyclopedia of Philosophy*, online: <https://www.iep.utm.edu/aq-moral/> [hereinafter "IEP"].

[36] *Id*.

[37] See *e.g*., *Young v. Young*, [1993] S.C.J. No. 112, [1993] 4 S.C.R. 3, at 80 (S.C.C.); *Dobson v. Dobson*, [1999] S.C.J. No. 41, [1999] 2 S.C.R. 753, at para. 47 (S.C.C.).

[38] See *e.g*., *Dunmore v. Ontario (Attorney General)*, [2001] S.C.J. No. 87, [2001] 3 S.C.R. 1016, 2001 SCC 94, at paras. 172, 192 (S.C.C.).

[39] I am referring here to law associated with sovereign states, and the statement therefore excludes what, from a legal pluralism standpoint, might be viewed as Western non-state "legal systems". I also exclude forms of alternative dispute resolution, such as mediation, where the concept of harmony may operate more straightforwardly. While interestingly, such forms of ADR are increasingly being co-opted into playing roles in the official legal system … that movement, in a sense, is part of the larger point.

the discussion in Section II.1(a) below), to Aquinas (mentioned above), to Kant (referenced in Section V). Philosophies involving harmony have, in turn, been influential in Western legal thought. Mediated by these philosophies, harmony has played a central role in defining justice, where justice is the aim of the legal system, similar to that association in other cultures. Beyond that, the earlier philosophies were a source of important constructs of Western law: due (and not undue) punishment in Criminal Law; proportionality in Constitutional Law; restitution in Private Law, as merely a few examples.[40] The earlier and modern philosophies also remain prominent in contemporary academic theory. Thus, in an indirect and often implicit way, harmony has had considerable impact in Western law.

But within the legal system itself, harmony's role is confined to the extent to which it is embodied in the rules that comprise the system. The extent of its embodiment in the rules is limited by the strong individualistic and weak communitarian focus of Western law.[41] Moreover, the system does not foresee a distinct role for harmony beyond the rules. Western legal systems' elaborate sets of rules are treated as sufficient, at any given time, to answer any question that requires a legal answer. The inboard presumption is that there is no need for a system to have recourse, distinct from the rules, to harmony as a guiding concept: to whatever extent harmony should bear on legal answers, it has been incorporated in rules which apply it in a more precise manner to more specific problems.

But as discussed in the succeeding Section I.2, the rules are — and will forever be — insufficient. Thus, although the system aspires to a just order, associated as elsewhere with harmony, the fiction of the system's claim to "completeness" cuts it off, in resolving insufficiencies, from further nourishment by the concept in aspiration of which the system is at some level considered to be born, and that the rules to some extent embody. In this way, the influence of harmony is attenuated in official Western legal systems.

This is acutely significant in the context of adjudication. As detailed in the next section, Chief Justice McLachlin has emphasized that the judicial function serves to resolve insufficiencies in the rules as they constantly reveal themselves in the legal problems that underlie disputes

[40] On the claim that harmony was a source for proportionality, see Thomas Poole, "Proportionality in Perspective", LSE Law, Society and Economy Working Papers 16/2010.

[41] I thank Professor Helge Dedek for this important observation, the factors behind which are outside the scope of the present article. This facet is touched on again within Section II.1 below.

calling for adjudication. From the standpoint of the system's aim of just order, associated with harmony, in turn concerned with the proper relationship among elements of the system and between elements and the whole, the insufficiency to be resolved in each case represents a particular constellation of elements whose proper interrelationships had not been worked out by the system — a disharmony. The judicial function itself, the Chief Justice adds, cannot be reduced to rules, but involves an essential human element. Inevitably, that element falls to the independence of each judge to decide how they will conceive of and execute. Induced perhaps by the adversarialism of Western legal systems' focus on disputation (as discussed in Section III), adjudication is often approached through the lens of conflict: ending the dispute by taking sides, but meanwhile compounding the system disharmony. By contrast, Chief Justice McLachlin's characteristic efforts appear consistent with a philosophy of striving to resolve legal problems in a way that would restore harmony to the system.

2. The Complementarity of Harmony and Legal Rules within a Just Legal Order

If harmony has, at least thus far, not played a role as a distinct and guiding principle within Western official legal systems, how is it that it could have characterized the approach of Chief Justice McLachlin, as suggested? The almost universal acclaim for the way in which she performed her official duties excludes any figment that she might have short-changed the expectations incumbent on a leading jurist of such a system and instead followed some other legal tradition in what, as legal transplants go, would amount to a brain transplant. If my claim concerning Chief Justice McLachlin's pursuit of harmonious resolutions is at all accurate, the praise she has earned also implies a strong complementarity between what an official Western legal system requires and what a philosophy aiming to achieve harmony allows, when used in synchrony, judged by those in or subject to the system.

(a) The Insufficiency of Legal Rules

What would explain, and shape, this complementarity? Like others with a sophisticated view of the law, Beverley McLachlin recognized as "myth that if the judge looks hard enough and long enough and wisely

enough, the judge will find in the law the single clear answer to the question before her".[42] Elaborate as a set of legal rules may be, it does not always provide complete answers to legal problems. And when those legal problems yield disputes, "there must be an institution to resolve what the law requires … That institution, quite simply, is the courts".[43]

The insufficiency of the set of rules is manifold.

(i) Imprecision

It includes the inevitable imprecision of the rules' expression. As the Chief Justice put it, "legal rules can be no more precise or absolute than the words of which they consist … The meanings of words vary from person to person and from context to context".[44] The judge is therefore called to decide rules' meaning through the process of interpretation.

(ii) Incompleteness

Insufficiency also results from the incompleteness of the rules. That is, sometimes legal problems present themselves that no rule of the system responds to. This could be because of a legal oversight, or because the problem is novel and was therefore unanticipated when the rules were made. One way of interpreting the Supreme Court's decision in *Carter* on assisted-dying is that its prior decision in *Rodriguez* had already become a dead letter, due to its reliance on a context that had since changed, such that the trial court was not defying a Supreme Court precedent, but providing an answer where the law was incomplete as a result of a prior answer having, by its own terms, been rendered obsolete.[45] Where the rules, for whatever reason, are incomplete, the judge is tasked with filling "gaps" in the law.

---

[42] Beverley McLachlin, "Judging in a Democratic State", Remarks, online: <https://www.scc-csc.ca/> [hereinafter "Democratic State"].

[43] *Id*.

[44] Beverley McLachlin, "Rules and Discretion in the Governance of Canada" (1992) 56 Sask. L. Rev. 167, at 171 [hereinafter "Rules & Discretion"].

[45] See *e.g.*, *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, [2015] 1 S.C.R. 331, 2015 SCC 5, at para. 44 (S.C.C.).

(iii) Indeterminacy

Where multiple rules conflict, and it is unclear which of them governs a particular problem, the indeterminacy of that answer results in a further insufficiency in the system of rules. As the Chief Justice explains:

> [W]hich of two conflicting rules should be applied? ... Scholars call this the problem of indeterminacy in the law … Instead of being presented with one single certain answer, judges must choose between different answers, each of which may be argued to be "correct".[46]

(iv) Fixity

The inherently dynamic character of the law discloses another insufficiency in the rules as they exist at any particular point in time. Legal rules are created in pursuit of particular objectives (and in Canada, which as noted has endorsed Driedger's approach, are indeed purposive). Accordingly, a fixed rule is one whose fixity, at some level, reflects its embeddedness in context. When confronted with a new context, judges must determine whether the existing rule applies "as is", or whether it can and should be refined (or whether the law is actually incomplete and a new rule is needed). As Chief Justice McLachlin says:

> It is impossible in writing the law or pronouncing a judgment to envision all the situations which may arise in the future. When a new and unforeseen situation arises, it brings with it questions. Does a particular legal rule apply to the new situation? … Or, if a certain rule appears to apply, does it need to be modified to do justice in the new situation?[47]

(v) Abstraction

Additional insufficiency of the rules emerges from the law's need for application. The law is not self-applying. As the Chief Justice states, "our job as judges … is to settle questions about … how it should be applied".[48] The law could not rely on "a robot for a judge",[49] she adds, because application is not merely a matter of logic and evidence, but also of fitting abstract rules to the real world, and of practical sense, and

---

46 Democratic State, *supra*, note 42.

47 *Id*.

48 On SCC, *supra*, note 23.

49 Democratic State, *supra*, note 42.

judgment.[50] The issue here is not greater precision in the terms of rules in the abstract, discussed earlier, but translation of those terms into the real-life terms that cases involve. Identifying the proper correspondence is not a matter of computation: it is not a mathematical translation that is required, but a human translation from conceptual meaning to concrete experience.

These needs are particularly acute in the case of rules that provide only broad guidance while relying on judicial discretion to take account of case-specific circumstances unknown or unappreciable by a legislature. In McLachlin C.J.C.'s words, "judges faced with this sort of language must shape and carve and sometimes limit it, like a sculptor shapes a stone, finding the ultimate shape within the undefined block".[51]

(vi) Unjustification

Lastly, the law's need for legitimation admits a further insufficiency. Here, I do not mean merely a theoretical construct of its legitimation as emanating from sources authorized by and according to conditions prescribed by the legal order itself, whose legitimacy critics have also questioned.[52] The Chief Justice is concerned with "the problem of legitimacy"[53] in real terms — that is, as a matter of the perception of present stakeholders, and above all "public confidence in the legal process. Only when it is absent does one realize how vital it is to the rule of law and how difficult it is to achieve".[54] Without it, people "will not settle their disputes through the courts. They will not obey court orders. Judgments become" mere words or "clanging bells, full of sound and fury, but signifying nothing".[55] Sustaining legitimacy means that, regardless of the rule, "justice must also be delivered in a responsive *manner*, one that takes account of the social context" through judicial decision-making processes and justification.[56]

---

[50] NZ, *supra*, note 11, at 3.

[51] Rules & Discretion, *supra*, note 44, at 171.

[52] See, *e.g.*, Jacques Derrida, "Déclarations d'Indépendance" in *Otobiographies: l'enseignement de Nietzsche et la politique du nom propre* (Paris: Galilée, 1984), at 13-32, arguing that legal orders are born of legal rupture, and hence ultimately rest on illegitimate foundations.

[53] Democratic State, *supra*, note 42.

[54] Beverley McLachlin, "Judicial Independence", Remarks, online: <https://www.scc-csc.ca/>.

[55] Beverley McLachlin, "The Relationship Between the Courts and the Media", Remarks, online: <https://www.scc-csc.ca/>.

[56] Training Judiciary, *supra*, note 23.

(vii) The Law's Needs Beyond the Law's Rules

Together, then, these facets of the rules — their imprecision, incompleteness, indeterminacy, dynamic character, and need for application and legitimation — reveal the rules' insufficiency. And the judge must make up for this in each case through, respectively: interpretation; filling gaps; resolving conflicts among rules; developing the law; applying the law; and employing decision-making processes and justifications that strengthen rather than weaken the law's "living" legitimacy. How might a judge tackle this task?

(b) The "Modern" Approach to Dealing with the Rules' Insufficiency?

Chief Justice McLachlin observes that: "The role of judges is simply stated. Describing how judges actually go about discharging their duties, however, is more difficult. Over the years, myths have grown up — myths that obscure the true nature and challenge of judging".[57] Chief among these is "the myth of the declaratory theory" — just addressed: that the set of legal rules within a legal system is sufficient to answer all the legal problems generated by the society it governs. And the opposite myth is that the law is nothing more than judges' "idiosyncratic application of personal preferences".[58] This would not be law at all, but arbitrary rule. As the Chief Justice spells out:

> It is not for judges to … impose their personal views on society. The role of judges is to support the rule of law, not the rule of judicial whim. Judges are human beings; but they must strive to judge impartially after considering the facts, the law and the submissions of parties on all sides of the question.[59]

Equally inappropriate is to pour political ideology into the space left by legal rules' insufficiency. Chief Justice McLachlin declares that this "result-oriented, agenda-driven judging. I am the first to say that … this kind of judging would be bad";[60] it "breeds cynicism, and undermines public confidence in all of our institutions".[61] This is because "legislation

---

[57] Democratic State, *supra*, note 42.

[58] Macfarlane, *supra*, note 2, at 58.

[59] Beverley McLachlin, "Respecting Democratic Roles", Remarks, online: <https://www.scc-csc.ca/> [hereinafter "Democratic Roles"].

[60] Beverley McLachlin, "Courts, Legislatures, and Executives in the Post-Charter Era" (1999) 20:3 Policy Options 43 [hereinafter "Courts Legislatures Executives"].

[61] Democratic Roles, *supra*, note 59.

is often the product of compromise or conflict between various political factions, each faction pushing its own agenda. The judicial arena does not, and should not, provide simply another forum for the same kind of contests".[62] Such ideological "judicial activism" is self-defeating in the long run anyway: there is a native elasticity in the law, but pulled on too hard from one end, Newton's Third Law reminds us that every action produces an equal and opposite reaction.[63] In the meantime, harm is done to the Rule of Law, and all that rides on it.

Chief Justice McLachlin concludes that "the true nature of judging seems to me to lie somewhere between" either assuming the rules are complete or else trivializing their existence by parachuting in ready-made answers belonging to other normative systems.[64] It is therefore a matter of trying to extrapolate from the partial-answers to be found within the existing set of rules what would provide the best answer to the new problem at hand: "Judges have no choice but to give the answer that in the end, after deep reflection and consideration of all relevant facts and rules, they conclude is best".[65] This can be done in different ways, whether regularized or *ad hoc*. Each way embraces a complementarity between the rules and the approach used to transcend their insufficiency.

Harmony is one such way, for what it will suggest is only intelligible by reference to the elements, relationships among elements, and relationships between elements and the whole, that it consists in. As applied to legal problem-solving, those elements include the various rules and their insufficiencies to be found in the legal system, as well as relevant and legally recognized aspects of the subject and context of the problem to which they are being applied. Harmony is therefore among the approaches faithful to the system. But as between it and other approaches sharing that fidelity to the law as a system, harmony, with its pervasive association with the just order, is best-suited to guide such a process not simply to *some* answer to the legal problem, but to one that achieves the end of a just order. By no means can it ensure such a result, either in a particular case or across a court's docket, for all the usual reasons why adjudication is an imperfect science. But at least it is a conception oriented towards that aspiration, incorporating holistic and

---

62 Role of Judges, *supra*, note 20.

63 Isaac Newton, *Philosophiæ Naturalis Principia Mathematica* (London: Pepys, 1687): "Law III: To every action there is always opposed an equal reaction".

64 Macfarlane, *supra*, note 2, at 58.

65 Democratic State, *supra*, note 42.

individual elements and their complex interrelationship. As the Chief Justice states, "in performing this function [of seeking answers], judges inevitably are expected to perform a second function, namely, to ensure that the law develops in a way that is good for society and the men, women and children who are its members".[66] In short, "a good decision is one that is just, according to law".[67] Harmony ideally complements the *corpus* of legal rules, with which it shares the same ultimate end: "A civil society is an ordered society; but it is more: it is also a society concerned to ensure the conditions for collective and individual human flourishing".[68]

Thus, much as the modern approach to interpretation seeks harmony among text, context, scheme, and purposes, the "modern" approach to the broader judicial task responds to any brand of insufficiency apt to be resolved in that forum by seeking the answer which understands the problem in context, and in relation to it, best attains harmony among the relevant legal criteria and their purposes, including the legal system's ultimate intention of promoting order and justice in society: "a just society and the rule of law".[69] This is the style characteristic of the work of Chief Justice McLachlin.

II. HARMONY AS AN AIM AND AS A PROCESS OF RESOLVING LEGAL PROBLEMS

At this juncture, it may be useful to drill down further on what harmony means in this context as an overall aim of legal problem-solving, and what process is entailed in pursuing it. If it might be the case that this offers a worthwhile way of addressing the challenge of resolving legal problems, or even just a serviceable conceptual vehicle for thinking about that task, it must be explained such that it is neither nebulous nor left to the discrete imagination of each reader.

---

[66] Beverley McLachlin, "The Supreme Court and the Public Interest" (2001) 64 Sask. L. Rev. 309, at 311 [hereinafter "Public Interest"].

[67] Beverley McLachlin, "Respecting Democratic Roles", Remarks, online: <https://www.scc-csc.ca/>.

[68] NZ, *supra*, note 11, at 29.

[69] Beverley McLachlin, "Recipient of the G. Arthur Martin Medal from the Criminal Lawyers' Association", Remarks, online: <https://www.scc-csc.ca/> [hereinafter "Martin Medal"].

1. Harmony as an Aim of Legal Problem-Solving

(a) The Harmonious Resolution of Legal Issues

In using the term "harmony" to describe a distinctive feature of what Chief Justice McLachlin's resolutions of legal issues aspire to achieve, what is contemplated? It refers to an approach attuned to how a legal problem involves an ensemble of certain interrelated legal considerations, and which strives to resolve the problem through a certain composition of those considerations. The composition sought is one noteworthy for ensuring that the issue is heard as part of the way the composition orchestrates the collective expression of the ensemble.

Breaking this down further, a number of characteristics can be identified in the resolution of a legal issue which is successful in achieving harmony.

Preliminarily, one discerns that it is attained by a response preoccupied not with decision-making but with problem-solving. Chief Justice McLachlin describes a similar outlook on the part of Chief Justice Dickson: "whether we call it imagination, whether we call it flexibility", what stood out was "the way he approached problems"; and she adds, "I learned an enormous amount from him about judging".[70] Elsewhere, in describing the judicial task, she refers to the "challenge of governance",[71] and to "finding solutions".[72] This focus on problem-solving rather than decision-making is important because it frames the nature of the exercise that will follow.

A key characteristic of a resolution that achieves harmony is consciousness that no legal problem is a singular matter; each consists in a unique ensemble of multiple interrelated legal considerations. By this, I mean elements the law ought to take into account, whether because they are (already) recognized as or by legal authority, or because the social purposes served by the law so demand. In fact, these may not be strictly separable: as Chief Justice McLachlin highlights, "the idea that there's some law out there that has nothing to do with consequences and how it plays out in the real world is an abstract and inaccurate representation of what the law is".[73] Legitimate considerations could be

---

[70] Dickson, *supra*, note 18, at 88.

[71] Training Judiciary, *supra*, note 23.

[72] Beverley McLachlin, "Preface," in Dame Mary Arden, *Common Law and Modern Society* (Oxford University Press, 2015).

[73] Florian Sauvageau, *et al.*, *Last Word: Media Coverage of the Supreme Court of Canada* (Vancouver: UBC Press, 2011), at 164.

substantive, procedural, institutional, remedial, relational, or of some other level, depending on the issue. The qualifier "legitimate" is to exclude factors that are improper, irrelevant to the immediate issue, *etc*. However, the problem and its potential solution are not isolated, but dwell within a broader system, so that other background considerations (such as human dignity, or the Rule of Law) may be pertinent, or in the case of the system's ultimate object of a just order, an overarching interest that guides the composition of the others.

This composition of the considerations is another basic characteristic of a harmonious resolution of a legal problem. It requires figuring how these various constituents should be fit together, in the context given, to respond to the issue in the way that best gives effect to the ensemble of factors from the standpoint of the overall system intent of a just order of them as a collective. In turn, this relies on a belief that it is possible and preferable for legal solutions to give expression to multiple interests; that is, in the words of the Chief Justice, "It follows from what I have said that we cannot view the problem in terms of 'either-or'," among values at stake.[74] However, the various values' expression cannot be simply aggregated either, for they are incommensurable; it must be orchestrated, and attend to how they can together produce harmony. Isolated interests together constitute a whole, while the whole is composed of various isolable interests. Within the whole, each value has its proper place, plays a particular role, and dwells in due proportion. To put it in social terms, "the goal", the Chief Justice explains, "is decisions that best represent the interests of the community as a whole",[75] bearing in mind "the fact, proven through the millennia, that human beings can realize themselves only as part of a larger group".[76] Given the factors' incommensurability, justice can only be achieved by skilfully ascertaining and achieving their composition in a way that reflects their particular positions and distinctive roles in the ensemble, a feature impossible to explain more precisely but universally than through the notion of harmony.

Used to describe this endeavour, the aspiration to achieve harmony in resolving legal problems makes for an approach to judicial decision-making that is complex and often difficult. Chief Justice McLachlin explains:

---

[74] Beverley McLachlin, "Unwritten Constitutional Principles: What is Going On?", Remarks, online: <https://www.scc-csc.ca/> [hereinafter "Unwritten Constitution"].

[75] Multicultural, *supra*, note 15, at para. 8.

[76] NZ, *supra*, note 11, at 30.

> The first difficulty is the intellectual and moral effort of struggling to find the best answer. The judge must not only evaluate the legal options but understand the implications of doing so. These may be complex and polycentric. Changing one rule may impact in myriad ways on other rules and legal values. Legal philosopher Lon Fuller likened the judge's task to pulling on one strand of a spider's web; in doing so she changes not only the strand on which she is pulling, but rearranges all the other strands as well. It is thus not surprising that judges may agonize long and hard in arriving at their ultimate conclusions on the law.[77]

The greater the number of considerations involved (*e.g.*, existing legal authorities, social realities to be governed), and the more intricate their interrelationship, the more challenging that task becomes.

In an extended passage from a public lecture offering precious insight into the big picture of this task, Chief Justice McLachlin tells a story from the Protagoras, "one of the greatest Socratic dialogues", in which Plato asks Socrates "the basic conditions of human society".[78] His answer, she relates in modern terms, is "two qualities — legal order and a shared sense of belonging, restraint and responsibility".[79] When disputes arise, it falls to judges to ensure these qualities' fulfilment. She goes on to explain that through "the deliberative function", judges "work out the myriad accommodations that make up the fabric of civil society … Conflicting interests are addressed, compromises worked out. The result is the body of rules by which we maintain social order".[80] Thus, "to sum up, the law makes the project of human beings living together possible by providing social order through governance, and a deliberative process by which groups and individuals work out their disputes and make the accommodations that allow peaceful co-existence".[81] Most vitally, she states that: "If, like Zeus in Socrates metaphor, our goal is to find a way in which people can live together in peace, harmony and productivity, we will seek not only the law, but law whose content will promote those goals".[82] The story is told from the perspective of people, whom the legal system exists to serve; but for their living experience to be that of a just order … a just order must first be composed in the mind of the judge, orchestrating the

---

77 Democratic State, *supra*, note 42.
78 NZ, *supra*, note 11, at 30.
79 *Id*.
80 *Id.*, at 32.
81 *Id.*, at 33.
82 *Id.*, at 35.

considerations involved as directly or indirectly affecting people, drawing on a mix of methods such as she describes.

Hence, to achieve harmony in resolving a legal problem is to respect all relevant legitimate considerations, and to identify the legal response which, in addressing the problem, best gives collective expression to these elements as part of an integral system of just order.

(b) Incongruous Uses of "Harmony" as a Legal Term

In order to avoid any confusion about the meaning of harmony in the context described here, it may help to dispel ambiguity by noting some other law-related uses of the term that are *not* what the term refers to in this article. All are faithful to "harmony" as a notion, but employ it in different spheres, focusing on harmony within a specific subject-class. These other usages may be encompassed by the one here, but are underinclusive of it, and on their own would distort a reader's appreciation of what the term refers to in this article's discussion. Examining the interrelationship of the various uses may help bring into sharper relief the usage of the term made here, described in Section II.1(a).

(i) Social Harmony

The term "harmony" is sometimes used as a short-form for "social harmony". What harmony refers to in this article may, in some cases, include social harmony as one of the legitimate interests. This would be the case, for instance, in Family Law where spousal harmony is linked to the best interests of children.[83] It would likewise be so in Labour Law, where harmonious labour relations have been recognized as a regulatory objective.[84] It may well be a background consideration in most cases: the Chief Justice speaks of "the creation of a harmonious society where every individual feels not only accepted but truly welcome".[85] However, what harmony refers to in this article is far from limited to social harmony constituting, in some cases, one factor in resolving disputes. Moreover, social harmony may conflict with the type of harmony

---

[83] See note 37 and associated text.

[84] See note 38 and associated text.

[85] Beverley McLachlin, "The Impact of the Supreme Court of Canada on Bilingualism and Biculturalism", Remarks, online: <https://www.scc-csc.ca/>.

described in this article where social harmony is used, in socio-legal contexts, to refer to a norm antithetical to litigation and/or impartial systems of dispute-resolution based on the application of legal principle.[86]

(ii) Harmony as Uniformity

The term "harmony" may also be employed to describe different laws or standards' concordance. The process of "approximation or coordination" which brings laws into some uniformity is sometimes referred to as "harmonization".[87] This is the case, for instance, in EU Law, where questions often arise of "maximum" (full) versus "minimum" (partial) harmonization.[88] This use of the term may be encompassed by the harmony that is the subject of this article in scenarios where striving for uniformity is an appropriate way of composing items. For instance, on the legislative front, Canada has a set of "harmonization" statutes, serving the need to co-ordinate federal law with Quebec civil law.[89] However, the harmony that is the subject of this article may be achieved by other means, and often must be, since pursuing uniformity is not appropriate where, for instance, the relevant elements reflect disparate considerations.

(iii) Harmony as Coherence

The word "harmony" is also sometimes used in the sense of coherence, internal consistency, or avoidance of repugnancy within the provisions or operational logic of a body of law. Interpretation's "Golden Rule" is a far-reaching example.[90] The judgment of McLachlin J. (as she then was) in *Hall v. Hebert*, that the Tort doctrine of illegality was

---

[86] See *e.g.*, discussion in Laura Nader, *Harmony Ideology: Justice and Control in a Zapotec Mountain Village* (Stanford: SUP, 1990).

[87] W.J. Kamba, "Comparative Law- A Theoretical Framework" (1974) 23 Int'l & Comp. L.Q. 485, at 501.

[88] See *e.g.*, Stephen Weatherill, "Maximum versus Minimum Harmonization: Choosing between Unity and Diversity in the Search for the Soul of the Internal Market" in Niamh Nic Shuibhne and Laurence Gormley, editors, *From Single Market to Economic Union: Essays in Memory of John Usher* (Oxford: Oxford University Press, 2012).

[89] A listing may be found at: <http://www.justice.gc.ca/eng/csj-sjc/harmonization/bijurilex/harmonization-loisdharmonisation.html#one>.

[90] See *e.g.*, Stéphane Beaulac and Pierre-André Côté, "Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimization" (2006) 40 R.J.T. 131, at 142.

concerned with the integrity of the justice system in the sense of "coherence … the need to prevent internal inconsistency in the law" is another example, famous throughout the common law.[91] Harmony in the sense of coherence may often be part of what is required to achieve the broader meaning of harmony detailed in this article. After all, a just order must be ordered. But, a just order requires much more than coherence. And internal consistency is of little use in some situations, such as in dealing with expressly opposing considerations.

2. Harmony as a Process of Legal Problem-Solving

Having set out what harmony comprises as an overall aspiration in legal problem-solving, and having distinguished that from other law-related uses of the term, the question arises: how can it be achieved? If it might provide a profitable way of conceiving of an aim of legal dispute-resolution, the ability of those interested to put it into practice imposes a need for an account of the process for pursuing it. Because harmony is a quality of relationships between elements which differ from case to case, and because the task it guides is a human task,[92] the process of pursuing harmony can only be described in broad terms, and beyond that necessarily relies on the judge's experience, skills, instincts, and judgment combined with the particularities of each case.

With that in mind, Chief Justice McLachlin sketched an overall picture of the process for pursuing the harmonious resolution of a legal problem in expressing that:

> The judge … She must struggle to enunciate the values at issue. Then she must attempt to strike the balance between the conflicting values which most closely conforms to justice as society, taken as a whole, sees it … to make decisions which are in the broader interests of society.[93]

I now break down this process into its principal steps, and elaborate some of the facets each may involve.

---

[91] *Hall v. Hebert*, [1993] S.C.J. No. 51, [1993] 2 S.C.R. 159, at 179 (S.C.C.).

[92] The process of pursuing harmony, of course, does not exhaust what is required of the task of resolving legal problems, but engages with that task in order to guide it towards the aim that it envisages.

[93] Role of Judges, *supra*, note 20.

(a) Identifying the Considerations at Stake

As the Chief Justice's quote suggests, the first step in striving to achieve a harmonious resolution of a legal problem is to identify the considerations legitimately implicated by the problem: "Before they decide a difficult issue", she explains, judges "should carefully consider and articulate the competing considerations".[94] The task is one of "'recognition' of the interests"[95] in order to "ensure that all aspects of the problem are considered",[96] with attention to how some "values may be at risk of being overlooked or overridden".[97]

How might judges do this? There is no mechanistic procedure; but certain human postures are vital. The Chief Justice cites above all a distinct brand of impartiality, which I would describe as an "active omnipartiality".[98] Rather than just passively and impassively hearing the opposing parties, which is sufficient strictly to deciding partisan dispute, active omnipartiality is concerned with the legal problem underlying that dispute, and consists of actively "considering the problem from all sides".[99] More precisely, "the judge must seek to see and appreciate the point of view of each of the protagonists",[100] perceived through the self-conscious lens of each of their "cultural commitments and assumptions, their particular voice and perspective".[101] In this way, the judge "takes into account (although not necessarily accepting) the parties' conflicting

---

[94] Multicultural, *supra*, note 15, at para. 32.

[95] Religion, *supra*, note 14, at 27.

[96] NZ, *supra*, note 11, at 5.

[97] Multicultural, *supra*, note 15, at para. 8.

[98] Chief Justice McLachlin has used a different phrase for this — "conscious objectivity": see *e.g.*, NZ, *supra*, note 11, at 6. However, what it refers to is much more complex, and perhaps different than what a literal or injudicious reading of that phrase may suggest. Partly, this stems from the fact that "objectivity" in law is still subjectivity, but non-particular (*e.g.*, not the particular defendant, but a reasonable person, in the objective test of intention in Contracts or objective standard of fault in Criminal Law). In one sense, the process the Chief Justice describes is *hyper*subjective, in that it *encourages* active engagement with subjective perspectives, and not just one, but *all* that are relevant: see also her extensive discussion (joint with L'Heureux-Dubé J.) in *R. v. S. (R.D.)*, [1997] S.C.J. No. 84, [1997] 3 S.C.R. 484 (S.C.C.) [hereinafter "*RDS*"] in the context of racial profiling and official bias, where she explains how subjectivity is not only unavoidable but valuable. It is from the affirmative action that incorporates all subjective perspectives, besides the judge's own, combined with use of a self-conscious lens in each instance, that impartiality or legal "objectivity" results. If this conscious objectivity (or active omnipartiality) is part of the proper adjudicative procedure, harmony might then be understood as its substantive counterpart in what it aims to help achieve.

[99] Dickson, *supra*, note 18, at 88.

[100] Role of Judges, *supra*, note 20.

[101] Training Judiciary, *supra*, note 23.

views on the facts, the law, and the interplay between them".[102] Beyond parties and perspectives, "the judge approaches the legal principles bearing on the question with the same" method.[103] "This practice enables the judge to see all the ramifications of complex conflicts and arrive at accurate and fair characterizations of the issues".[104]

Achieving this active omnipartiality, in turn, requires openness. As the Chief Justice expounds, the "judge's mind must be open and receptive to ideas and arguments", because a "willingness to receive and act upon new and different ideas, arguments, and views lies at the heart" of the task.[105] She clarifies that impartiality, in the sense of this active omnipartiality, "does not, like neutrality, require judges to rise above all values and perspectives. Rather, it requires judges to try, as far as they can, to open themselves to all perspectives … fairly taking into account all of the perspectives engaged".[106]

Besides openness, active omnipartiality seems to encompass a meditative aspect — "thoughtful reflection" — as she describes.[107]

Identifying the legal interests invoked by a problem also depends on familiar modes of legal reasoning. Chief Justice McLachlin specifies that "deductive reasoning helps judges decide how to apply a general rule in a particular case. Inductive reasoning may assist judges in identifying the appropriate general rule. Often [they] are used together".[108]

Besides reasoning skills, identifying the values legitimately at stake in a legal problem requires a quality of attunement. As the Chief Justice declares:

> It no longer suffices to be a competent legal scholar and a fair arbiter. To perform their modern role well, judges must be sensitive to a broad range of social concerns. They must possess a keen appreciation of the importance of individual and group interests and rights. And they must be in touch with the society in which they work, understanding its values and its tensions.[109]

---

102 Public Interest, *supra*, note 66, at 316.
103 *Id*.
104 *Id*.
105 NZ, *supra*, note 11, at 9.
106 *Id.*, at 6.
107 Multicultural, *supra*, note 15, at para. 32.
108 NZ, *supra*, note 11, at 4.
109 Role of Judges, *supra*, note 20.

This ability is not strictly innate; Chief Justice McLachlin highlights how attunement to social context "now constitute[s] an important part of judicial education in many countries".[110]

On that note, the interests to be identified must themselves be understood and articulated in contextual, not abstract, terms. The Chief Justice describes this "technique" as one "which requires judges to examine issues in their full social context and with awareness to how they impact on people's lives".[111] For example, in identifying the speech interest to be weighed against the legislative object in *Canada (Attorney General) v. JTI-Macdonald Corp.*,[112] McLachlin C.J.C. does not cast it in abstraction simply as "the right to freedom of expression", but considers the context, in which the expression consists more particularly of tobacco advertising, so that "the expression at stake is of low value".[113]

In general, identifying the factors requires care as to their definition and delimitation. A distorted rendering of a consideration could short-circuit the entire adjudicative analysis, leading to an unjust result; thus the judge "must learn to recognize her own biases, and struggle to keep them out".[114] Likewise, an insufficiently precise definition could lead to perceived conflict between multiple legitimate interests, which instead "should be resolved through the proper delineation of the rights and values involved".[115] The scope and bounds of each legal interest must be ascertained: "Past cases and hypothetical situations are analysed inductively to test how far a certain norm extends, or ought to extend".[116]

Factors that are *prima facie* identified as relevant must also be filtered to remove those in some way illegitimate in resolving the legal problem at hand. That is, they must be screened to keep out those which would, for some reason, be inappropriate to take into account. One example would be facts known to the judge but which are not in evidence, nor a proper subject for judicial notice. Public opinion polls on a matter *sub judice* would, in most cases, constitute another example.

---

[110] Training Judiciary, *supra*, note 23.

[111] Beverley McLachlin, "Foreword" in Constance Backhouse, ed., *Claire L'Heureux-Dubé: A Life* (Vancouver: UBC Press, 2017), at 2. See also *RDS*, *supra*, note 98.

[112] [2007] S.C.J. No. 30, [2007] 2 S.C.R. 610, 2007 SCC 30 (S.C.C.).

[113] *Id.*, at paras. 68, 94.

[114] Training Judiciary, *supra*, note 23.

[115] *Trinity Western University v. British Columbia College of Teachers*, [2001] S.C.J. No. 32, [2001] 1 S.C.R. 772, 2001 SCC 31, at para. 29 (S.C.C.).

[116] NZ, *supra*, note 11, at 4.

(b) Piecing Together the Considerations

As alluded to in the initial sketch by Chief Justice McLachlin of what depicts the overall process of striving to achieve a harmonious resolution of a legal problem, the second principal step is to bring together the various considerations involved, and respond to the issue posed in a way that gives collective expression to those elements and represents a just order as a whole.

Finding the best collective expression that can be given to the values requires study of their interrelationship within the problem: Do they share common ground? Do they conflict? Are they reconcilable? Depending on the nature of their interrelationship, distinct methods are needed in order to compose them into a harmonious whole. Several such methods of composition exist, each suited to differing scenarios. Examples of these methods may include consensus, proximity, reconciliation, accommodation, balancing, and compromise. Resolving the overall legal problem entails, in most cases, the use of multiple methods, each dealing with separate aspects or steps of the composition as a whole.

In order to most clearly explain and illustrate the operation of these various methods, it is convenient to examine them one at a time.

(i) Methods of Composition

(A) CONSENSUS

One key method of composing elements is by consensus. Consensus here means finding common ground among multiple legal positions. Consensus needn't be complete, encompassing comprehensive accord. Partial consensus, comprising agreement within an area of overlap, can still be fruitful, and is more often possible. A prominent example leveraging the method of consensus is as applied to the views on a case of the justices of the McLachlin Supreme Court. It being a collegiate court, those views constitute nine institutionally legitimate considerations bearing on its resultant caselaw. For this and related reasons, when Beverley McLachlin became Chief Justice, she identified consensus on the bench as a top priority.[117] She reinforced that "consensus doesn't

[117] Susan Harada, "The McLachlin Group: How Canada's first female Chief Justice has taken the heat off the Supreme Court", *The Walrus* (12 May 2009), online: <https://thewalrus.ca/> [hereinafter "Walrus"].

mean we're all going to agree on everything … But consensus is valuable, in the sense that our goal is to try to reduce to a minimum the number of things we differ on".[118] The success of her efforts is confirmed by her successor, Richard Wagner, who remarked at his inauguration as Chief Justice that "she moved us to see what united us rather than what divided us. The Court, and our law, are the better for it".[119] Another example, this one dealing with consensus among multiple legal doctrines not judicial views, was Lord Denning's famed but ill-fated claim that duress, undue influence, and unconscionability in Contract were instances of an underlying principle of "inequality of bargaining power" — a view refuted by the House of Lords.[120]

(B) PROXIMITY

A related means of combining factors is through finding a proximity between them, referring here to: identifying a close relationship *or* a meaningful similarity between them. In some cases, this may involve refining and recasting considerations so as to render more apparent the ways in which they are proximate, thereby correspondingly de-emphasizing their divergences. In other cases, it may involve seeking a nexus between them, that illuminates an important link or connection they share that, in turn, supports the conclusion that they dwell in a certain proximity. Proximity, like consensus, reduces conflict between considerations. Yet, it is distinct from consensus in that it does not find common ground but finds perhaps neighbouring land or similar ground. Hence, where full consensus is unattainable or undesirable, proximity may serve to shrink disparity between considerations by loosening the *degree* of coterminacy or conformity sought between them, rather than by lessening the *extent* of accord sought between them as partial consensus does. One example is whether there is a relationship between a plaintiff and defendant that would suggest that they were in proximity, justifying a duty of care under the tort of negligence.[121] Another example, aimed at criminal punishments pursuing proximity in the form of

---

[118] *Id*.

[119] Richard Wagner, "Official Welcome Ceremony for the New Chief Justice", Remarks, online: <https://www.scc-csc.ca/> [hereinafter "Wagner"].

[120] Marcus Moore, "Why Does Lord Denning's Lead Balloon Intrigue Us Still? The Prospects of Finding a Unifying Principle for Duress, Undue Influence and Unconscionability" (2018) 134 L.Q.R. 257, at 258, 263-67.

[121] *Cooper v. Hobart*, [2001] S.C.J. No. 76, [2001] 3 S.C.R. 537, 2001 SCC 79 (S.C.C.).

similarity, is the principle of "parity in sentencing" (*harmonisation des peines*), which provides that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances".[122]

(C) RECONCILIATION

Another way to assemble facets is through reconciliation. As used here, reconciliation consists in seeking an interpretation of different legal considerations that avoids repugnancy between them, so that expression can be given to each. One important example, which reconciles multiple legal provisions, is the Golden Rule of interpretation, mentioned earlier.[123] Another prominent application is to the reconciliation of the rights of Aboriginal peoples and the Crown.[124] As a method, it presents difficulties; as the Chief Justice notes, "reconciliation requires openness of spirit, endurance and great patience. But I believe that it is worth the effort" in what it enables.[125]

(D) ACCOMMODATION

Composition of interests can also be accomplished through accommodation. By this term, I mean: realizing the collective expression of multiple values by giving effect to only certain aspects of each, mutually tailored so as to avoid clashes between them. Accommodation is related to reconciliation in that both seek to avert the "exclusion" of legitimate considerations.[126] Whereas reconciliation tries to understand each of the factors in a way that prevents conflict in the first place, accommodation initially accepts the existence of conflict but then strives to eliminate it by adapting each consideration to a reality in which they must

---

[122] Now codified as *Criminal Code*, R.S.C. 1985, c. C-46, s. 718.2(b). See *R. v. Lacasse*, [2015] S.C.J. No. 64, [2015] 3 S.C.R. 1089, 2015 SCC 64, at para. 56ff (S.C.C.).

[123] See note 90 and associated text.

[124] See *e.g.*, *R. v. Van der Peet*, [1996] S.C.J. No. 77, [1996] 2 S.C.R. 507, at para. 31 (S.C.C.). Chief Justice McLachlin describes this reconciliation as an "overarching project": "Canada's Legal System 150: Democracy and the Judiciary", Remarks, online: <https://www.scc-csc.ca/> [hereinafter "Canada 150"].

[125] Constitution, *supra*, note 12.

[126] Beverley McLachlin, "The Civilization of Difference", Remarks, online: <https://www.scc-csc.ca/> [hereinafter "Civilization"].

coexist without either's entire individual expression. The Chief Justice describes accommodation as a "delicate task"[127] that involves "working out" or "brokering" differences.[128] Accommodation plays a central role in Disability Law, giving effect to equality for disabled persons.[129] Another notable example of its use is in Aboriginal Law, where the Crown may have a duty to adapt affected policies to accommodate Aboriginal interests.[130]

(E) COMPROMISE

Another mode of orchestrating diverse elements is through compromise. Faced with unavoidably competing interests, compromise operates to negotiate a give-and-take among them that gives partial effect to each, but also denies partial effect to each. Though related to balancing, compromise as here employed is distinct in applying where a conflict-dynamic arises out of the circumstances, rather than being inherent to the relationship between the considerations. Further, compromise is not a weighing of considerations, but a balance of expectations, factoring in expediency, other pragmatic matters, and circumstantial contingencies. Compromise is central to the "Co-operative" conception of Canadian federalism favoured by the McLachlin Court.[131] Another use was achieving restraint in the issuance of concurring opinions in the McLachlin Court, which colleagues of McLachlin C.J.C. cite as resulting from her encouraging justices to "'compromise' or 'accommodate' the views of others", where appropriate.[132] These examples point to how compromise may often be used in tandem with accommodation, as part of the set of methods required to resolve a legal issue. As the Chief Justice put it, "solutions to our problems" require "constant compromise and negotiation between conflicting ideas and groups".[133]

---

[127] Courts Legislatures Executives, *supra*, note 60, at 72.

[128] Civilization, *supra*, note 126.

[129] See *e.g.*, *Eldridge v. British Columbia*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624, at para. 65 (S.C.C.).

[130] *Haida*, *supra*, note 24, at para. 47.

[131] W. Wright, "Federalism(s) in the Supreme Court of Canada During the McLachlin Years" in M. Moore & D. Jutras, eds. (2018) 86 S.C.L.R. (2d) 213.

[132] Donald Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press), at 136 [hereinafter "Songer"].

[133] Beverley McLachlin, "Symons Lecture- 2008", Remarks, online: <https://www.scc-csc.ca/> [hereinafter "Symons"].

(F) BALANCING

Balancing, discussed earlier, is likewise a technique commonly used to deal with divergent values present within a legal problem. Like compromise, balancing serves to resolve unavoidable conflicts. It endeavours, through a relative weighing of the considerations, to balance them in some way. Two scenarios can be discerned. The first is where the conflict arises from a natural opposition between the considerations, so that giving more effect to one entails giving less to another. An example might be the regulatory interests of legal certainty versus flexibility. As the Chief Justice observes, "lawyers facing oppositions such as these use the metaphor of balancing … we add or take away until we reach the proper balance".[134] In this scenario, then, the aim is to find a balance point that gives partial effect to each (or by another legal metaphor, determining "where to draw the line").

In the second balancing scenario, the conflict arises, as in compromise, from the circumstances — *however*, those circumstances also include the conflict's uptake into a legally prescribed balancing test. Such a test might be necessary where, because of some factual or legal imperative, neither the first balancing scenario nor compromise are possible or practical. One value must then be given effect at the expense of the other. In order to decide which one, the test weighs their relative importance to a just result. The weighing is context-specific, not *in abstracto*, so that different interests may prevail in different contexts. This, Chief Justice McLachlin reports, helps achieve the "balances necessary for a workable [body of] law acceptable to society as a whole".[135] A prime example of balancing of this kind is the proportionality test for limiting Charter rights.[136]

(ii) The Logic in Choosing a Method

The preceding discussion should render evident the fact that there is a logic to the different methods, which informs how they work and the scenarios they are suited to. Recourse to them at random will not

---

134 NZ, *supra*, note 11, at 35.

135 Courts Legislatures Executives, *supra*, note 60, at 72.

136 *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.). This balancing most obviously occurs at the final step of "proportionality of effects": see Marcus Moore, "R. v. K.R.J.: Shifting the Balance of the Oakes Test from Minimal Impairment to Proportionality of Effects" (2018) 82 S.C.L.R. (2d) 143 [hereinafter "Proportionality"].

produce harmony (other than coincidentally). Rather, the harmonious resolution of legal problems envisages that each of these methods is necessary at certain times and in certain contexts. And thus, harmony as a process is knowing (whether by intuition, or more formalized reasoning, or some combination of these) which method to use in what scenario.

Related to this point, and as an example of it, the order in which the different methods were presented above lay on a spectrum from no conflict between considerations (consensus) to unmediated conflict (the second form of balancing). One would expect that, generally speaking, modes of composition which better avoid clashes, where possible, will enable the fullest collective expression, yielding a more harmonious resolution. For example, in constitutional review, the Chief Justice proposes that:

> First, it seems to me, the judge must seek to interpret a suspect law in a way that reconciles it with the constitutional norm, written or unwritten. Usually, this will resolve the problem. But in rare cases, it may not. If an ordinary law is clearly in conflict with a fundamental constitutional norm, the judge may have no option but to refuse to apply it.[137]

Notable in that regard: the concept I previously thought definitive — balance — is in fact the crudest way of pursuing the harmony that characterizes Chief Justice McLachlin's resolution of legal problems. Nonetheless, it must be acknowledged that balancing is often necessary due to the structure of litigation, the form of many legal tests, and the myriad conflicts typical of life and law in modern society.

(iii) Mixed Methods in Complex Problems

Above all, what the complexity of contemporary legal problems signals is that in any given case, the process of composing considerations is likely to involve a mix of multiple methods, each targeted to deal with different parts of the polyphony of elements seeking expression. This includes parts dwelling at distinct levels: substantive, procedural, institutional, remedial, relational, *etc*. As Section II.2(b)(ii) may imply, harmony as a process is also knowing, in the specific circumstances of a given problem, which methods to use in what sequence in dealing with different parts of the

---

[137] Unwritten Constitution, *supra*, note 74. For similar conflict-avoidance staging in other contexts, see *e.g.*: *R. v. N.S.*, [2012] S.C.J. No. 72, 2012 SCC 72, [2012] 3 S.C.R. 726 (S.C.C.) [hereinafter "*NS*"]; and *R. v. Appulonappa*, [2015] S.C.J. No. 59, 2015 SCC 59, [2015] 3 S.C.R. 754, at para. 45 (S.C.C.) [hereinafter "*Appulonappa*"].

overall problem. A more extensive elaboration of patterns of use of different methods, alone and in mixes, may offer a fruitful topic for future study. However, as mentioned, the process is not reducible to an algorithm, for it requires a full array of judicial skills and human qualities of judgment and common sense.

(c) Justification of How the Process Has Been Conducted

A final aspect of the process of pursuing a harmonious resolution of a legal problem is justifying the conduct of that process. This is not a separate step, but woven into the prior steps of identifying and combining considerations, where it addresses the aforestated need for legitimation. In the initial step, it does so by calling for legitimate factors' frank acknowledgment, even if they are not given effect in how the elements must be put together at the subsequent step. In that latter step, it does so by explaining *why* those legitimate interests could not be given effect in the resolution rendered, including clarifying what was distinct about that context versus others where they could find expression. Chief Justice McLachlin underlines this need "to explain to those Canadians who feel that their moral opinions have been left behind why they should nonetheless celebrate and feel invested in the [legal] morality upon which their communal co-existence is based".[138] As such, this justification is sometimes said to have a "therapeutic" effect on society, by mitigating conflict and fostering social harmony.[139] By contrast, a style of justification that lapses into the one-sidedness of advocacy, by only validating considerations consistent with a judgment's own resolution, is — regardless of the justness of that outcome — a fundamental failure of justice at multiple levels.

III. THE COMPLEXITY OF JUSTICE: HARMONY AS COMPARED TO OTHER APPROACHES TO LEGAL PROBLEM-SOLVING

1. Hearing More Voices Allows Pursuit of a Higher Order of Justice

As noted in Section I.2.(b), seeking a resolution which achieves harmony among the factors properly involved is not the only way of

---

[138] Multicultural, *supra*, note 15, at para. 33.

[139] See *e.g.*, Nathalie Des Rosiers, "Rights are Not Enough: Therapeutic Jurisprudence Lessons for Law Reformers" (2015) 18:3 Touro L. Rev. 443.

responding to a legal issue that is faithful to legal principles, extrapolating from them, despite their own insufficiency. How does harmony relate to some other regularized potential approaches?

Various possibilities can be distinguished based on how they address the nature of the legal problem as involving multiple interrelated legitimate interests.

(a) Singularity

From that perspective, a singular approach, which hears and gives effect to only one consideration, while deaf to the others, presents generally the lowest chance of attaining justice. It does not seek expression of other legitimate interests, or account for them as part of the whole. Even where one consideration is overriding, such a technique fails to minimize collateral damage to the others, and thus to the whole of which they are part. Special interest advocacy groups, not unsurprisingly, often present problems this way, as if there is a single issue — free speech, for instance. The risk of this is to drown out other voices; turning legal problem-solving into a contest in which the loudest voice "wins". Yet justice fails by the neglect of others.

(b) Hierarchy

Alternatively, a hierarchical approach, which recognizes multiple interests but relies on a categorical ranking of them, and so gives effect to higher ranking interests over lower, is also generally inapt to achieve justice. In practice, it does consciously what the singular approach does unconsciously. This deep-seated *modus operandi* remains common throughout the law, though out of favour in Canada under the McLachlin Court — the Chief Justice repelled by the "Manichean logic of either-or", of all-or-nothing, of extremes and absolutes.[140] Her reflection is that "when we have made mistakes, it has been because we ... imposed black-and-white solutions on complex situations".[141]

For the above two methodologies, the greatest concern is that, over the totality of cases, they can cause systemic amplification of some interests and silencing of others.

---

[140] NZ, *supra*, note 11, at 35.

[141] Symons, *supra*, note 133.

(c) Balance

Used as a standalone approach, balancing (described earlier) is perhaps the most prevalent and familiar. In the "line-drawing" type of balancing, multiple interests can obtain partial expression in any given case. In the "seesaw" type of balancing, one value is granted expression at the expense of another. However, unlike the hierarchical approach, this is not based on a categorical determination, but a case-by-case weighing, factoring in context. Over the totality of cases, this allows different considerations to gain expression, and on the whole for some account to be taken of each. Hence, balancing is significantly better able to pursue justice. Yet, on its own, it too sees the task as one of resolving conflict — thus overlooking ways of diminishing conflict that could allow for greater expression of appropriate considerations, and justice in the whole that is composed of them. In this, balancing echoes the adversarialism of the adjudicative process, where the sides demand opposing outcomes, and the court must decide between them.[142]

The existence of the hierarchical and balancing techniques shows that, as Chief Justice McLachlin concludes, "the problem is not in combining [different] attributes in a single legal system, but in our thinking about how we combine them. We need a new way of thinking about how we combine them. We need a new way of looking at tension".[143]

(d) Harmony

Compared with these other approaches, harmony represents a more nuanced, versatile, and sophisticated framework for legal problem-solving. It strives to recognize as many different interests as are actually at stake in a legal problem, rather than to reduce a complex reality to the limited dimension(s) of preconceived legal devices designed primarily for the simpler task of deciding disputes. "How can we better manage difference?" asks the Chief Justice rhetorically: by a "response of respect, inclusion, and accommodation".[144] On that last point, harmony engages with the interrelationship between considerations as something

---

[142] Given that adjudicants have sought dispute-resolution according to law, the legal problem underlying their dispute must be tended to. Doing so by striving for harmony could conceivably influence litigation, tempering the well-chronicled excesses of adversarialism that have come to afflict it.

[143] NZ, *supra*, note 11, at 35.

[144] Civilization, *supra*, note 126.

dynamic — not only reflecting the context, but capable of adapting in meaning or application to what a just resolution on the whole requires. Harmony also perceives proximities, not just disparities. Yet, where conflict among values cannot be avoided, or for other reasons should not, harmony as noted encompasses tools of compromise and/or balance apt to resolve such clashes. It has all the associated ways, suited to different scenarios, of orchestrating the collective expression of different elements, rather than limiting that expression because of passing every such interrelationship through the thin filter of conflict.

Thus, among these various approaches to legal problem-solving that, despite legal rules' insufficiency, remain faithful to legal principles rather than defecting to idiosyncrasy or ideology, the one which gives best expression to those principles as an integral system which aspires to a just order is harmony. It cannot promise results, but does provide to those charged with pursuing it the right orientation, and equips them with wide-ranging and deep-extending guidance.

2. Understanding Poor Adjudication as Disharmony

Again putting aside decisions that are bad because of being tainted by idiosyncrasy or ideology, it follows from what has been said here that poor adjudication can be understood as leaving a state of disharmony. While the merit of particular resolutions of particular disputes will often be debated, there are certain types of decisions that are widely seen as failures. If pursuing harmony might be an optimal tack for legal problem-solving, it should be possible to rethink why these decisions are bad by pegging how they fall short in the pursuit of harmony. Some examples are outlined below.

(a) "Splitting the Baby"

One type of decision commonly seen as bad is "splitting the baby", or hedging. Viewed from the standpoint of striving for harmony as the way to resolve legal problems, splitting the baby fails because it relies on compromise where compromise is inappropriate. The parties could have compromised, but came to court. Adjudication's role in the system is *decision*, and at that stage, the parties may be viewed as having more of a stake in that process than in the substance of their dispute, given each side's inherent risk of losing. Striving for harmony requires respect for the logic of the overall system and the distinct role of adjudication within

it. This, and the associated aspect of the parties' interests, are fundamental institutional and procedural interests among the ensemble of considerations legitimately at stake. From veterans of the Bar, one of the compliments of Chief Justice McLachlin I have heard often is that "she never splits the baby".

(b) The Path of Least Resistance

Another type of bad decision is taking the path of "least resistance", or that is least opposed to popular expectations. Through the lens of harmony as the way to resolve legal problems, this path can be seen to lead astray, by misidentifying which factors are legitimately invoked by the problem. I earlier quoted Chief Justice McLachlin on how judges must be sensitive to society's values.[145] It is essential to appreciate that, except where the following are proper evidence, this does not mean majority public opinion, or the opinion of powerful segments of society or of vocal groups, on moral questions that have become subjects of legal dispute. Rather, it means deeper, more basic, and consensus values: what she calls the "fundamental values upon which the society is premised — the shared commitments and values that constitute the deeper community constitutional morality".[146] Were it otherwise, "members of minority and disadvantaged groups", for instance, might not be protected, which the Chief Justice has noted is important to the social harmony of "the larger polity", and consistent with courts' role as the non-political branch of government in the separation of powers — key institutional considerations at stake in court decisions.[147] She did not herself shrink from conclusions sometimes unpopular, including, for instance, striking down a government monopoly of health insurance,[148] or even curbing the scope of prohibited possession of child pornography.[149]

(c) Legal Error

The types of decisions reversed on appeal for errors of law, whether by using the wrong legal test, or misinterpreting or misapplying it, are

---

[145] Text to note 109.

[146] Multicultural, *supra*, note 15, at para. 8.

[147] Democratic Roles, *supra*, note 59. On minorities, see also: 20 Years, *supra*, note 13.

[148] *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791, 2005 SCC 35 (S.C.C.).

[149] *R. v. Sharpe*, [2001] S.C.J. No. 3, [2001] 1 S.C.R. 45, 2001 SCC 2 (S.C.C.).

also explicable by the harmony framework for legal problem resolution. The insufficiency of legal rules is not total; there are countless reasonably settled principles — structures, rules about rules, doctrines, *etc*. that define in part how different interests relate to one another in various contexts, and prescribe how certain kinds of legal issues are to be resolved. Harmony works complementarily with these settled parts of the law, it does not displace them with unbridled discretion based on all of the factors. Indeed, without the settled parts, there would be nothing to guide the factors' identification. Harmony does not exist in a vacuum. It extrapolates from existing elements to perform its limited role of guiding the problem-solving made necessary when the "right" answers are not already clear. I quibble "right" because sometimes a court may conclude that a clear precedent is wrong, and in appropriate cases, may develop the law. In that case, the court in justifying the change by reference to the considerations involved and the system's aim of a just order, explains why the new rule produces greater harmony than the old.

(d) Utopian Decisions

Given the law's societal functions, decisions that are unduly complicated or impracticable are also bad. From the perspective of harmony as a guide to legal problem-solving, the failure in this case can be crudely summarized as "quantity over quality" with respect to the considerations. Harmony does not dictate giving effect, at all costs, to the maximum number of values possible. Indeed, important regulatory considerations associated with legality like clarity, intelligibility, and consistency highlight the magnitude of practicability as a quality required of a resolution that achieves harmony in real terms. Chief Justice McLachlin has often commented on the need for practical sense;[150] and certainly it is a dimension of problem-solving in which she excelled.[151]

(e) Reductionist Decisions

The opposite type of decision, which reduces the complexity of a problem to fit an oversimplified legal frame is also bad. Harmony, as a

---

[150] See *e.g*., On SCC, *supra*, note 23.

[151] See D. Jutras, "Practical Wisdom as Judicial Virtue: Assessing Chief Justice McLachlin" in M. Moore & D. Jutras, eds. (2018) 87 S.C.L.R. (2d) 163.

philosophy for resolving legal problems, would recognize this as the result of short-changing the tasks of identifying and/or of composing the various factors involved. Section III.1 ("Hearing More Voices Allows Pursuit of a Higher Order of Justice") cited approaches that provide common examples of how this can happen.

IV. Some Dimensions of Application of Harmony in Resolving Legal Problems

I now turn to surveying some of the types of considerations to which may be applied this framework for legal problem-solving: of addressing the issue at hand in such a way as to achieve harmony among the set of legitimate considerations involved. This will serve two purposes. First, the range of specific illustrations will serve to actively demonstrate the breadth of the framework's capacity of application. Second, as part of that, the defined contexts in which its application will be surveyed may help better concretize various aspects of its operation.

A full picture of the approach, encompassing its application to all the dimensions that concurrently arise in any given legal problem, would require something akin to an annotated "intellectual biography" of the resolution of a case. This information being confidential, unless the Supreme Court and the relevant members were willing to oblige, that simply may not be possible.[152] Nonetheless, recalling the co-existence in a single problem of several of these "polycentric" dimensions of potential application, the reader may be better equipped by the survey which follows to imagine an approximation of a significant part of that picture.[153]

Within the categories of considerations included below as illustrations of the framework's capacity of application, many examples can be found in the career of Beverley McLachlin and the work of the McLachlin Court. The succeeding sections offer glimpses of six different dimensions of the challenges the Chief Justice faced, whether in adjudication, in nurturing the legal system, in civic leadership, or combinations thereof.

---

[152] However, considerable insight might be obtained by scrutinizing, as an example, the process the Chief Justice suggests in *NS*, *supra*, note 137, that trial judges follow, having ruled in that case that whether a witness can wear a niqab while testifying in court should be a case-by-case determination for the trial judge.

[153] Role of Judges, *supra*, note 20, quoting her predecessor, Chief Justice Antonio Lamer.

1. Sources

A dimension of many legal problems, which the harmony-seeking approach to resolving legal problems can be applied to, is what to do about an ensemble of disparate sources legitimately bearing on the problem's resolution.

Such an application is called for by the Law of Evidence in determining the adjudicative facts of a case. The trial judge must decide which relevant sources of evidence to exclude as in some sense illegitimate. Of the evidence admitted, the trier of fact must then synthesize from among portions that corroborate, complement, or contradict one another, in order to form conclusions on the essential facts.

The scenario which this article started with as a potential archetype — interpretation — determines the meaning of provisions also by drawing harmoniously on different sources (text, context, scheme, intent). The same is true of construction of statutory purpose.[154] Even unwritten constitutional principles, Chief Justice McLachlin recalls from the *Secession Reference*[155] having emerged by a similar exercise: "how can unwritten constitution principles be identified? The answer is that they can be identified from a nation's past custom and usage; from the written text, if any, of the nation's fundamental principles; and from the nation's international commitments",[156] which again must be considered together, harmoniously.

A significant function of appellate courts is to produce harmony at the level of the system, from diverse sources. For example, from scattered decisions of different courts at lower levels, they must organize a body of law, credible to those inside and outside of the system as comprising a just order. They must update the law as social realities change. To be particularly appreciated, given the relatively few cases appellate courts decide in comparison with the countless decisions made by lower courts, administrative decision-makers, and even private lawyers advising clients based on appellate courts' guidance, is the effort Chief Justice McLachlin devoted to maintaining the harmony achieved by an appellate judgment beyond the instant of its release, by transmitting to front-line legal decision-makers the means to preserve, and indeed further enhance, that harmony. One way she did this was through what one encounters as

---

[154] See M. Moore, "R. v. Safarzadeh-Markhali: Elements and Implications of the Supreme Court's New Rigorous Approach to Construction of Statutory Purpose" (2017) 77 S.C.L.R. (2d) 223.

[155] [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.).

[156] Unwritten Constitution, *supra*, note 74.

also a mainstay of her renown among law students — what they often call "multi-part tests" — which are only sometimes tests, but are always an unmistakable rendering of the *ratio decidendi*, along with clear guidance of how to apply it, and the highlighting of factors to be considered by lower courts in adapting it and extending it to foreseeable future cases. *Bazley v. Curry*,[157] discussed in Sections IV.4-5 below, well illustrates this.

A final example of the approach's application to sources is in striving for harmony among the law's institutional sources. This includes, by the logic of the separation of powers, the legislature and the judiciary: while legislation tends to be carved by the political winds prevailing at any given time, jurisprudence can "support long-term values that may be compromised or difficult to support given the need of elected members to secure re-election and popular approval".[158] Our system of governance through law is therefore "a complex, polycentric enterprise",[159] and for it "to function well, each branch of government must respect the peculiar role of the other".[160] Another institutional diversity of sources to be brought into harmony lies in the distinction between judicial and administrative law. "That results in a multi-layered dialogue", the Chief Justice explains: "From their different vantage points, the institutional actors … play their parts".[161] Like other skilful judges, Chief Justice McLachlin was also adept at integrating important legal sources lying outside branches of government, including the academy, law reform commissions, and other authorities. Meanwhile, she excelled in her appreciation of the social facts in which the law is embedded and inextricable — in her phrase, "this complex mix of rules, practices and values that we call the law".[162]

2. Legal Orders

Certain legal problems implicate distinct legal orders. This is another dimension which the legal problem-solving strategy of striving for harmony may be applied to.

One example of this application has been to enhance harmony in the relationship between federal and provincial jurisdiction. The principle of

---

157 [1999] S.C.J. No. 35, [1999] 2 S.C.R. 534 (S.C.C.) [hereinafter "*Bazley*"].

158 Democratic Roles, *supra*, note 59.

159 *Id*.

160 On SCC, *supra*, note 23.

161 Beverley McLachlin, "Globalization, Identity and Citizenship", Remarks, online: <https://www.scc-csc.ca/>. [hereinafter "Globalization"].

162 Democratic State, *supra*, note 42.

"co-operative federalism" gained favour in the McLachlin Court as a way to "facilitate interlocking federal and provincial legislative schemes".[163] With flexibility tempering the rigidity and crudeness of the doctrines of paramountcy and interjurisdictional immunity, it is thus possible to "avoid blocking the application of measures … enacted in furtherance of the public interest".[164]

Harmony also characterizes attending to the relationship between domestic and international law. As McLachlin C.J.C. summarized in a recent case: "legislation is presumed to comply with Canada's international obligations, and courts should avoid interpretations that would violate those obligations. Courts must also interpret legislation in a way that reflects the values and principles of customary and conventional international law".[165] Under her tenure, the Court has also made important use of Comparative Law, achieving a certain level of harmony with foreign law dealing with parallel issues.[166]

As far as orders corresponding to different legal traditions, discussed already have been the examples of the Harmonization Acts between federal common law and Quebec civil law,[167] as well as efforts to reconcile European and Aboriginal-American legal traditions, still very much a work-in-progress due to the challenge, as the Chief Justice notes, that "Indigenous ideas about justice may differ radically from the adversarial and punishment-focused approaches we see in our courts".[168]

In former times, court justice and administrative justice were seen as on different planes; however, these too have taken strides in the McLachlin Court — sometimes spurred by the Chief Justice — towards a more harmonious relationship.[169] As she confirms: "the choice is not between either the rule of law or administrative discretion, and the issue is not the extent to which the 'law' represented by the courts, should curb

---

[163] *Quebec (Attorney General) v. Canada (Attorney General)*, [2015] S.C.J. No. 14, [2015] 1 S.C.R. 693, 2015 SCC 14, at para. 17 (S.C.C.).

[164] *Id*.

[165] *Appulonappa*, *supra*, note 137, at para. 40.

[166] J.G. Stein & B. Smalley, "The Global and the Local: Connections across Borders in the Thought of Beverley McLachlin" in M. Moore & D. Jutras, eds. (2018) 86 S.C.L.R. (2d) 249.

[167] Note 89 and associated text.

[168] Martin Medal, *supra*, note 69.

[169] L. Sossin, "McLachlin's Holy Grail and the People's Charter" in M. Moore & D. Jutras, eds. (2018) 87 S.C.L.R. (2d) 101 and K.G. Berger, "The Constitution of the Administrative State" in M. Moore & D. Jutras, eds. (2018) 86 S.C.L.R. (2d) 167.

administrative discretion … the real question: how can we achieve optimum decision-making in terms of quality and efficiency in both the legal and administrative fields?"[170]

A harmonious relationship has also been sought between the supreme law of the Constitution and the ordinary law subject to it by virtue of constitutional review. Given that failure in this carries risks of charges of judicial activism on one hand, or abdication of constitutional duty on the other, this has not been an easy task. As Chief Justice McLachlin reflects, "it was delicate work. It required judges to balance interests and calibrate outcomes in a way that was both respectful of the role of elected legislators and administrators on the one hand, and true to the country's constitutional guarantees on the other".[171] Prior to her retirement, she even projected:

> The most fundamental challenge for the judiciary in the years to come — one without which all other efforts will fail — is to maintain the proper constitutional balance between the judiciary on the one hand and the legislative and executive branches of governance on the other. This is a task in which all branches of governance must engage. Each branch must understand its role and respect the roles of the other.[172]

3. Perspectives

Every case involves a diverse set of legitimate perspectives on the resolution of the problem it presents. The harmony-seeking framework also applies to this dimension of a case.

To begin with are the perspectives of the case actors contemplated by the system. In an appellate court, this includes the bench. Even before a panel is struck, the approach may be operative. For example, McLachlin C.J.C. was noted for preferring to have all nine judges sit on cases where possible.[173] The process from then on, far from being intelligible as comprising individual judicial decisions and "voting", is rather a complex matter of striving to compose judges' different perspectives. Puisne justices confirm that, on the McLachlin Court, judicial case conferences were "comprehensive" in scope, with a high "level of deliberation".[174] Deliberation as a "professional responsibility requires

---

170 Rules & Discretion, *supra*, note 44, at 168.
171 Canada 150, *supra*, note 124.
172 *Id*.
173 Songer, *supra*, note 132, at 117-18.
174 Macfarlane, *supra*, note 2, at 104, 120.

them to lay out both their own position and the defects they see in their colleagues' positions … with respect and civility",[175] so that their "collective knowledge" can generate better judgments.[176] Her successor as chief justice, Richard Wagner, summarized, "we, on this bench, help each other do better, and help this institution do better".[177]

As McLachlin C.J.C. explains, the process does not end there:

> Writing reasons is a continuation of the process of deliberation. The justice writing wrestles with the legal and sometimes factual problems the case presents, and when the first draft is sent out, other justices offer comments, criticisms and suggestions for improvement. The product that finally emerges after innumerable redrafts often looks quite different than what we envisioned around the conference table.[178]

The product that emerges will not always be consensus. Justices of the McLachlin Court report that there was "widespread agreement with the view" of the aim being a "blend of individuality and collegiality"; as one put it, "I try to remind myself that we are not just soloists, but instead are members of a choir".[179]

Judicial conclusions are informed, in turn, by the perspectives brought by the parties and by the evidence they adduce based on their perspectives. The views of others involved in the case play a part as well. As Chief Justice McLachlin describes:

> We read the judgments below. We look at critical pieces of evidence. We study the written briefs of the parties and interveners. Usually, we ask one of our law clerks for a memo outlining all the arguments and possible dispositions. When we walk into the courtroom for the hearing, we know all about the case. Our minds, however, are open. We need to listen to the parties and interveners and ask them the questions that are troubling us.[180]

Beyond the case actors that the system recognizes, society comprises individuals and groups with different outlooks (political, philosophical, religious, *etc*.) — representing another consideration that may need to be taken into account in meeting the challenge of legitimation and in

---

175 Democratic State, *supra*, note 42.
176 Training Judiciary, *supra*, note 23.
177 Wagner, *supra*, note 119.
178 On SCC, *supra*, note 23.
179 Songer, *supra* note 132, at 137.
180 On SCC, *supra*, note 23.

respecting multiculturalism.[181] The Chief Justice explains that "a multiplicity of worldviews grounded in alternative sources of authority does not necessarily threaten the rule of law, but rather strengthens and completes public life and discourse".[182] In order for each view to be heard by the legal system without overwhelming it, the judge must be their mediator. As Chief Justice McLachlin says, "the judge must become the one who understands every voice",[183] and must be able to compose and conduct them towards the overall goal of a just order. This, she observes, "provides a way to reconcile the moral opinions of divergent groups, within the context of the fundamental constitutional morality upon which the society as a whole rests".[184]

But it is not all about difference. She explains that "while we may find no consensus on values and conceptions of the good in the narrow sense, the reality is that we hold much in common as human beings. Searching for this commonality brings us to share deeper values, basic principles which should govern our interaction".[185] Through this search, "case by case, we define and reinforce the common space that unites us",[186] with room to recognize our "shared humanity" and "shared values".[187]

4. Case-Specific Interests

The legal problem at the heart of a case embraces multiple legitimate interests. These may include individual, group, and societal interests where implicated by a case. Resolving these issues by striving for harmony among legitimate considerations is an approach that certainly applies to this dimension of a problem. Given the Supreme Court of Canada's comprehensive jurisdiction, and the span of the Chief Justice's engagement with it, examples could be offered in almost any area. A few suffice by way of illustration.

A first example comes from the Law of Evidence. *R. v. Khan* concerned a doctor's alleged sexual assault of a young child unfit to

---

[181] *Canadian Charter of Rights and Freedoms*, *Canada Act 1982* (U.K.), 1982, c. 11, s. 27 [hereinafter "Charter"]. See also Civilization, *supra*, note 126.

[182] Religion, *supra*, note 14, at 72.

[183] Training Judiciary, *supra*, note 23.

[184] Multicultural, *supra*, note 15, at para. 22.

[185] Globalization, *supra*, note 161.

[186] *Id*.

[187] *Id*.

testify, whose telling of the incident to her mother was excluded as hearsay.[188] Justice McLachlin (as she then was) framed the legal problem thus: "The question then is the extent to which, if at all, the strictures of the hearsay rule should be relaxed in the case of children's testimony".[189] Besides fair trial rights, she identified as other factors the frequency of such offences, the risk of obstructing their prosecution, and forcing children to relive trauma in giving evidence.[190] The rigidity of the rule and its exceptions being insufficient to address these, McLachlin J. found harmony among them through "two general requirements: necessity and reliability", reflecting "the principle and the policy underlying the hearsay rule".[191] This resolution has formed a cornerstone in the development of the Canadian Law of Evidence.[192]

A second example, drawn from Tort Law, concerns when employers should be vicariously liable for intentional torts committed by their employees. In *Bazley*, McLachlin J. found the existing rule — the second arm of the Salmond Test, which asks whether the tort was an "unauthorized mode of performing an authorized act" — to be indeterminate, comprising "artificial or semantic distinctions".[193] She identified as appropriate considerations: effective compensation for victims, deterrence of future harm, and fairness in holding employers responsible.[194] Harmony among these interests was achieved through the principle of enterprise risk: in this case providing that "employers may justly be held liable where the act falls within the ambit of the risk that the employer's enterprise [materially] creates or exacerbates".[195] The harmony achieved by this resolution has since resonated in common law courts around the world.[196]

National Security Law provides a third example. Chief Justice McLachlin rejects the reductionism of framing the relationship between

---

188 *R. v. Khan*, [1990] S.C.J. No. 81, [1990] 2 S.C.R. 531 (S.C.C.).

189 *Id.*, at 540.

190 *Id.*, at 539-40.

191 *Id.*, at 540-42.

192 See, *e.g.*, B.L. Berger, "What Humility Isn't: Responsibility and the Judicial Role" in M. Moore & D. Jutras, eds. (2018) 87 S.C.L.R. (2d) 277.

193 *Bazley*, *supra*, note 157, at paras. 11, 36.

194 *Id.*, at paras. 34-36.

195 *Id.*, at paras. 37-40.

196 See, *e.g.*, J. Goudkamp, "International Impact and Influence: Three Landmark Cases from the Canadian Law of Obligations" in M. Moore & D. Jutras, eds. (2018) 87 S.C.L.R. (2d) 255.

the values as strictly a conflict between rights and security.[197] She quotes President of the Supreme Court of Israel Aharon Barak that "individual liberties constitute an important component of … security", of what a country governed by the Rule of Law seeks to secure.[198] At the same time, without security, there can be no rights. Different values, she notes, may therefore have an "intercourse" that confounds the assumption of discreteness upon which the balancing approach rests.[199] Thus, in *Charkaoui v. Canada (Citizenship and Immigration)*,[200] she struck down parts of the government's security certificate regime, which violated basic legal rights guaranteed by the Charter; for instance, secret government evidence impeded rights to know and answer the case against one.[201] But to avoid leaving security unprotected, she sought harmony by temporarily suspending the declaration of invalidity, while noting that measures such as special advocates to review secret evidence on behalf of detainees might comply with the Charter.[202] Federal legislation was amended accordingly, and when subsequently challenged, was found to be constitutionally valid.[203]

A fourth example pertains to proportionality as the framework for assessing whether rights limitations are justified under section 1 of the Charter.[204] Proportionality centres around a balancing test — actually two balancing tests, as the Chief Justice clarified in *Hutterian Brethren*.[205] Yet, what is interesting is how McLachlin C.J.C. sees the conflict inherent in that exercise as again dwelling within a larger harmony. Evoking the "co-operative approach" to federalism, she uses the word "interlocking" to describe the "rights and responsibilities of the individual and the state" balanced through proportionality.[206] Indeed, they are inseparable: "For all the celebrated individualism of recent decades, human beings are social beings. 'A person only becomes a person through other people,' proclaims

---

[197] Beverley McLachlin, "The Challenge of Fighting Terrorism While Maintaining our Civil Liberties", Remarks, online: <https://www.scc-csc.ca/>.

[198] *Id*.

[199] NZ, *supra*, note 11, at 35.

[200] [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350, 2007 SCC 9 (S.C.C.).

[201] *Id.*, at para. 29.

[202] *Id.*, at paras. 69-87.

[203] *Canada (Citizenship and Immigration) v. Harkat*, [2014] S.C.J. No. 37, 2014 SCC 37, [2014] 2 S.C.R. 33 (S.C.C.).

[204] Charter, *supra*, note 181, s. 1.

[205] *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37, 2009 SCC 37, [2009] 2 S.C.R. 567 (S.C.C.) [hereinafter "*Hutterian Brethren*"], explained in Proportionality, *supra*, note 136, at 150, 170-72.

[206] 20 Years, *supra*, note 13.

the African aphorism".[207] She judges, in fact, that "Canada's history demonstrates a commitment to a positive partnership between the state and the individual, between the private interest and the public good … . Historically, we have tended to view rights, not as threatened by, but as existing in harmony with collective rights".[208] This distinctive "Cooperative Charter" theory is reflected in her jurisprudence, evident for example in cases like: *Khawaja*, where she upheld legislation implicating several freedoms but tailored to accommodate them;[209] *Nur*, where she struck down legislation that made no such effort;[210] and *Hutterian Brethren*, where she rejected a claim in which government attempts at accommodation were declined by the claimants who required a resolution that went beyond allowing reasonable government options.[211]

Her broader interpretation of the Charter reprises a similar theme, evoking harmony:

> In my view, the uniquely Canadian character of the Charter is reflected in its emphasis on three kinds of rights: individual rights, tied to a conception of tolerance and respect; collective interests, bound up with an appreciation of the relationship of support and obligation between individual and community; and group rights, tied to a recognition that pluralism is one of Canada's animating values.
>
> The Charter reconciles these three types of rights, not as contending forces balanced precariously against each other in basic opposition, but as complementary rights, drawing strength and support from each other. This, I think, is the Charter's defining characteristic. And, to the extent this is so, it resonates with Canadians' conception of themselves.[212]

5. General Regulatory Interests

Besides the interests specific to a given case, almost every legal problem involves interests associated with the law's general societal function, which also may be orchestrated to achieve a harmonious resolution. These include considerations of legality (consistency, predictability, intelligibility, *etc*.) and of good governance (effectiveness, efficiency, coherence, adaptability, *etc*.).

---

207 Civilization, *supra*, note 126.
208 20 Years, *supra*, note 13.
209 *R. v. Khawaja*, [2012] S.C.J. No. 69, 2012 SCC 69, [2012] 3 S.C.R. 555 (S.C.C.).
210 *R. v. Nur*, [2015] S.C.J. No. 15, 2015 SCC 15, [2015] 1 S.C.R. 773 (S.C.C.).
211 *Hutterian Brethren*, *supra*, note 205, at paras. 56-62.
212 20 Years, *supra*, note 13.

Here, the aforementioned "tests" for which Chief Justice McLachlin is beloved among law students are a remarkable manifestation of the philosophy of seeking harmony. They tend to embody "principles-based regulation" — that is, high-level standards that guide rather than displace the judgment of front-line decision-makers.[213] This form of regulation has been validated in many contexts for its capacity to deliver on multiple good governance objectives.[214] Simultaneously, applied in this context by Chief Justice McLachlin, it achieves harmony among important interests of legality.

The tests' multiple parts are an incarnation of the compound and complex way in which the Chief Justice deploys principles-based regulatory techniques: Often, a primary "rule" directly embodies an overarching policy consideration, which is then complemented by a finite enumerated list of secondary factors. The secondary factors tend to either: (a) concretize the application of the abstract primary principle in various factual contexts (thus serving as presumptive quasi-rules); or (b) incorporate secondary but important policy considerations; or (c) encapsulate fact-based or principle-based exceptions to the general rule.

In terms of interests of legality, casting governing *rationes* in this way can self-evidently be seen to allow substantial predictability *and* flexibility. Moreover, it *integrates* adaptability and stability, by anticipating concrete fact-driven incremental elaboration and evolution of the law, and infusing it *within* a guiding conceptual rational-universalism. *Bazley*, discussed earlier, illustrates this. Besides the primary principle already detailed,[215] McLachlin J. added:

> (3) In determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:
>
> (a) the opportunity that the enterprise afforded the employee to abuse his or her power;
>
> (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);

---

[213] See *e.g.*, Cristie Ford, "Principles-Based Securities Regulation in the Wake of the Global Financial Crisis" (2010) 55 M.L.J. 1, at 5ff.

[214] *Id*.

[215] Notes 194-195 and associated text.

> (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
> (d) the extent of power conferred on the employee in relation to the victim;
> (e) the vulnerability of potential victims to wrongful exercise of the employee's power.[216]

Beyond the terms of the test itself, her typical non-exhaustive style of articulation preserves a residue of judicial discretion to accommodate the emergence of unanticipated new policy concerns. Meanwhile, on the other hand, McLachlin J. states that the test applies "where precedent is inconclusive", thus encouraging legal certainty and consistency of adjudication as precedent accumulates.[217]

In these ways, the "McLachlin multi-part tests" may also, from a Comparative Law perspective, be hypothesized as pursuing harmony in the two main influences on Canadian common law — *viz*., by combining the characteristic strengths, and avoiding the characteristic weaknesses, of the contrasting stereotypes of English legal formalism and American open-ended policy reasoning.[218] Chief Justice McLachlin resisted extremes of either. For instance, *R. v. Jordan*'s numeric rendition of the right to be tried in a reasonable time is a crude example in Canada of the rigid-rule tack. In that case, the Chief Justice joined Cromwell J.'s sharp rebuke of the majority approach as "wrong in principle and unwise in practice".[219] Conversely, in *R. v. Labaye*, the Chief Justice rejected as excessively subjective the Supreme Court of Canada's prior reliance on "community standards of tolerance" to decide criminal indecency.[220]

6. In Leadership in Law

Cases and other legal problems are decided within an institutional, professional, civic, and international context by which they are influenced and which they reciprocally influence. Harmony as a philosophy of legal problem-solving is also applicable to the dimension

---

[216] *Bazley*, *supra*, note 157, at para. 41.

[217] *Id*.

[218] See, *e.g.*, Patrick Atiyah & Robert Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Oxford: Clarendon Press, 1987).

[219] *R. v. Jordan*, [2016] S.C.J. No. 27, 2016 SCC 27, [2016] 1 S.C.R. 631, at para. 302 (S.C.C.).

[220] *R. v. Labaye*, [2005] S.C.J. No. 83, [2005] 3 S.C.R. 728, 2005 SCC 80, at para. 18 (S.C.C.).

consisting of this broader context. Far more than in any previous era, during the tenure of Beverley McLachlin the role of Chief Justice of Canada carried with it an *enormous* array of leadership duties, both substantive and symbolic.[221] Across the several contexts cited, her leadership characteristically exemplified successful application of a harmonious approach.

The most immediate context is her institutional leadership of the Supreme Court. Based on interviews with her fellow justices, Macfarlane adjudges that "there is no doubt that the whole environment of decision-making is influenced at an important level on the Court by the chief justice".[222] This is so through a blend of practical matters, such as the Chief Justice assigning judgment writing responsibilities, and metaphysical matters, such as the cultivation of organizational culture. Of the latter, Macfarlane finds that the McLachlin Court "is driven by norms of consensus and collegiality. These norms so infuse the process of decision-making at the Court that in any given year, a majority of the cases are resolved on a unanimous basis".[223] He adds that the ideological model of judicial decision-making, which commonly explains the behaviour of other courts, "cannot account for the high degree of collegiality" on the McLachlin Court.[224]

In order to function harmoniously as intended by its collegiate design, an appellate court requires collegiality among the members.[225] Chief Justice McLachlin made a "concerted effort to foster collegiality",[226] and Chief Justice Wagner has since credited her "strong leadership" as a reason for the collegiality for which the Supreme Court of Canada has become known.[227] Justice Louis LeBel, the longest-serving member of the McLachlin Court, concluded that she was "quite successful in preventing what happened in other courts — the court splitting into different groups and clans".[228] Some of the ways she accomplished this

---

[221] See, *e.g.*, R. Albert, "The Expositor and Guardian of Our Constitutional Values" in M. Moore & D. Jutras, eds. (2018) 86 S.C.L.R. (2d) 193.

[222] Macfarlane, *supra*, note 2, at 125.

[223] *Id.*, at 122.

[224] *Id*.

[225] See, *e.g.*, The Right Honourable Lady Justice Mary Arden, DBE, "The Distinct Leadership Profiles of Intermediate and Final Appellate Courts" in M. Moore & D. Jutras, eds. (2018) 86 S.C.L.R. (2d) 61.

[226] Ostberg, *supra*, note 6, at 37.

[227] Wagner, *supra*, note 119.

[228] Walrus, *supra*, note 117. This is not to say judgments did not have dissents, particularly near the end of her term with high turnover on the bench and her impending succession in sight. But even then, the Court remained collegial, largely avoiding voting blocs: "The court splits frequently

were deceivingly simple, such as having a single small table in the judges' dining room, so that they would share lunch together. If she was proactive in preventing conflict on the bench, she was equally aggressive in diffusing it.[229] Her intolerance of disharmony was sufficiently respected that, on a rare occasion where sharp words were exchanged in competing draft judgments during her absence on other official business, those phrases suddenly vanished just as the Chief Justice's plane touched down on her return to Ottawa.

Appellate courts' collegiate constitution, as well as vocation of rendering the law clear and coherent, also makes consensus another measure of institutional harmony. McCormick remarks that Chief Justice McLachlin attached "real importance to a more unified court".[230] This was buttressed by her belief that "nothing meaningful could happen without consensus from everyone involved".[231] Certainly, consensus' strength creates solidity which enhances sustainability. Hence, colleagues described, "she may … find ways of reconciling divergent views".[232] That, and other methods described in Section II.2, "sometimes led to consensus that didn't exist initially", as Donald Songer found; consensus was not "the state of nature", but a quality "gradually emerging" from the institutional processes of the McLachlin Court.[233]

Regarding writing assignments, Chief Justice McLachlin eschewed a singular approach based on seniority, and again sought to harmoniously combine several considerations (preferences, workload, regional representation, expertise, *etc*.) in a way that would best serve the Court docket as a whole.

In the professional and civic contexts too, the Chief Justice exhibited harmony in tending to legal problem-solving. As reflected in the oft-repeated remark that she took less time to rise to the Supreme Court than most cases heard by the Court,[234] the legal system's overwhelming

---

but it is often very difficult to predict who is in which camp" in any given case: Kirk Makin, "Justice Ian Binnie's exit interview" *The Globe and Mail* (23 September 2011).

229 Sean Fine, "How Beverley McLachlin found her bliss: Where she came from and what she leaves behind", *The Globe and Mail* (12 January 2018) online: <https://www.theglobeandmail.com/>, *per* Binnie J.

230 McCormick, *supra*, note 7, at 121.

231 Martin Medal, *supra*, note 69.

232 Macfarlane, *supra*, note 2, at 124.

233 Songer, *supra*, note 132, at 235.

234 The Honourable Warren K. Winkler "A Leader Born and Bred: The Story of Beverley McLachlin" in M. Moore & D. Jutras, eds. (2018) 86 S.C.L.R. (2d) 3.

problems of access to justice call for bold action. Recognizing that all stakeholders would need to act in concert for meaningful change to occur, her vision was to "bring together a collaborative, wide-ranging, and nationally diverse group that represents as many aspects of and voices in the civil and family justice system as possible".[235] Another problem in the legal profession, and with a particularly adverse impact on women with child care responsibilities, is its culture of workaholism.[236] The Chief Justice, having the most onerous array of responsibilities (adjudicative, executive, public and foreign representative, *etc*.) in the profession, but also autonomy over how to execute them, led by example, practising what she preached: "you have to train yourself to get away for periods of time, whether it's a weekend at a cottage, a day in the garden, or a few hours … being outdoors and taking long walks".[237] This was not a question of balance, of sacrifices, as commonly framed; again, in Chief Justice McLachlin's view, the work sphere as well as the other spheres (family, personal, culture, nature, *etc*.) mutually *benefit* from a harmonious relationship among them.

In the international context, Chief Justice McLachlin saw clearly how the harmony of Canadian law, mirrored in Canada's harmonious relations in a globalized world, made it attractive to other countries, creating the opportunity of leadership in their seeking to strengthen their own legal systems: "Canada has no colonial past, and global strategic plan, and is not a threat to anyone. For this reason, it can be a model. And in my experience, when Canadians speak of the institutions that foster tolerance, inclusion, and respect for human rights, many around the world are willing to listen. We must continue to speak, and we must continue to be heard".[238] Although past the age of retirement from the Supreme Court of Canada, she will continue this leadership part-time in the Far East, where harmony is already a force.[239]

---

[235] Trevor Farrow, "A New Wave of Access to Justice Reform in Canada" in Alice Woolley, ed., *In Search of the Ethical Lawyer* (Vancouver: UBC Press, 2016), at 170.

[236] Beverley McLachlin, "The Legal Profession in the 21st Century," CBA, online: <http://www.nationalmagazine.ca/NationalMagazine/media/MediaLibrary/pdf/2015-08-mclachlin.pdf>, 4.

[237] Alexander Herman, *et al*., *Kickstart: How Successful Canadians Got Started* (Toronto: Dundurn, 2008), at 125 [hereinafter "Kickstart"].

[238] Globalization, *supra*, note 161.

[239] ZI-Ann Lum, "Beverley McLachlin Appointed To Hong Kong's Highest Court" *Huffington Post* (21 March 2018), online: <https://www.huffingtonpost.ca/>.

V. HARMONY'S POTENTIAL GROUNDS OF APPEAL TO BEVERLEY MCLACHLIN

In making the case in this article that Chief Justice McLachlin's resolution of legal problems was characterized by addressing issues in a way that pursued harmony among the legitimate considerations involved, the question naturally arises of what might have led her to such an approach?

Ultimately, she is the best judge of the experiences and thinking behind the philosophies that she employed. To date, her discussions of the task have used the term harmony less commonly than related but better-known terms such as balance, weaving a fabric, *etc*., which, being conventional, arouse less curiosity. Nonetheless, even a cursory glance at well-known aspects of her experience allow us to hazard a few possible hypotheses.

For starters, I would suggest that it may be no coincidence that the approach seeking harmony is perfected by a Canadian. Mirroring the country's international reputation, the Chief Justice has been described as "measured" and a calming influence.[240] With a historically small population, Canada has been shaped by the confluent influences of its Indigenous roots, its English and French political parentage, and its global superpower neighbour. To survive and mature as a nation, it has had to achieve not merely balance, but a harmony among this set of sources and forces. Canada's legal culture is no exception. Add to that the federal nature of the Constitution, plus the bijuralism of the nation's European legal heritage, and the complexity of the challenge is clear. The Chief Justice summarizes: "in short, Canada is one of the most complicated, diverse countries" in the Western world.[241] From that perspective, it is perhaps no surprise that this mode of resolution was conducted with so much sophistication by Beverley McLachlin.

It seems to me likely also no coincidence to see this philosophy blossom by the efforts of a woman. Feminist literature suggests that "men and women approach moral and ethical dilemmas from different vantage points".[242] Women are firstly said to place greater emphasis on respect and empathy — correspondent with the initial stage of the harmony-seeking process, namely, acknowledgment of the legitimate

---

240 Walrus, *supra*, note 117.
241 Symons, *supra*, note 133.
242 Ostberg, *supra*, note 6, at 127.

interests involved. Second, women are described as being "much more interested in trying to strengthen social relationships ... grounded in the assumption that self and others are interdependent".[243] This echoes the latter stage of the harmony-seeking process, wherein the various constituents are orchestrated with a view to the relationships among them and to the whole composed of them. Cynthia Ostberg and Matthew Wetstein conclude that Chief Justice McLachlin's approach "parallels nicely with the themes articulated in feminist literature — that women seek to foster meaningful relationships between individuals and [between] groups, and are more interested than men in promoting community bonds and commitments to others".[244] While claims of that kind are inevitably generalizations, and to that extent oversimplifications, the broad pattern is sufficient at least for feminism to reasonably lay some claim to womanhood as a factor in the Chief Justice's proficiency at these tasks. Moreover, beyond interpersonal and intergroup relationships, the same harmony-seeking feature in her work extends as between the various interests that affect people, as discussed in Part IV.

More particular aspects of Beverley McLachlin's background may also be factors. She was raised in a small town where family was a key institution and the community in some ways an extended family.[245] The highly religious environment was a strong influence on her moral and ethical formation.[246] As discussed in Part I.1, family and religion are normative spheres in which harmony has a high profile. Harmony would also constitute a recurring ideal within her pre-law formation in Philosophy, extending (in the West) from Plato's Ethics to Kant's Aesthetics.[247] Of course, harmony also governs music — noted as being for Chief Justice McLachlin a lifelong passion[248] — "music has always been part of my life": growing up, her family had a band that played the country fairs, while other relatives sang opera or religious hymns, and she herself was in the school choir.[249] Harmony must also have played a role in how she remarkably found a way to preserve an integral sense of self in young adulthood — a "farm girl" suddenly living in the big city,

---

243 *Id*.

244 *Id.*, at 120.

245 Winkler, *supra*, note 234.

246 Canadian Press, "Religious upbringing influences Chief Justice" (May 25, 2000).

247 IEP, *supra*, note 35: "Plato's Ethics: An Overview"; "Immanuel Kant: Aesthetics".

248 Clare Hennig, "Music, novels, justice: Beverley McLachlin lives life after Supreme Court to the full" *CBC* (April 1, 2018), online: <https://www.cbc.ca>.

249 Letter to author.

working as a journalist, studying philosophy and law, with mostly men for peers in those years, then later raising a child while seamlessly navigating a varied and fast-rising career in the legal profession.[250]

EPILOGUE

Conclusion

Striving to resolve legal problems in a way that gives the legitimate considerations involved harmonious collective expression is one of the hallmarks of Chief Justice McLachlin's resoundingly successful career. Her genius at achieving this took shape in countless examples in her roles as judge, jurist, and civic leader. Each of these provides an invaluable model for others charged in the future with similar functions to look to in tackling their own responsibilities. Greater consciousness of what was characteristic of her vision of the judicious resolution of legal problems, and a clearer conceptual account of the aim as well as the process, may help those interested in pursuing this. To try to assist in that has been this article's aspiration.

Final Thoughts

Might there be wider significance to this distinctive feature of Chief Justice McLachlin's approach, in meeting the challenges emergent in our society now and into the future? Part I.1 observed that harmony's centrality to aspirations of just order in cultures across the world and over history was shared by the Western world's "official" legal systems, yet sharply attenuated in practice by their exclusion of a distinct role for harmony, recognized by and operating within the system as a guiding concept in working out the proper relationship among other elements and the whole, as part of resolving the rules' insufficiencies. Yet, harmony was noted to fulfil this customary role in Western "unofficial legal systems", family and religion.[251] Throughout Western history, it is the latter that have been the dominant cultural forces. It is only in recent decades — the era roughly contemporaneous with Beverley McLachlin's adulthood — that this changed, with the societal breakdown of the family

[250] Kickstart, *supra*, note 237.

[251] I use the phrase "unofficial legal systems" (not uncritically) again from a legal pluralist standpoint: see *supra*, note 39.

and religious exodus in the West. Since then, the official legal system's scope of engagement has expanded, together with expectations that it do more than decide disputes among persons or between persons and the state; there has been a belief that it can and should strive, in the most general sense, for justice in social terms and at a community level — formerly preoccupations of family and religion.[252] In that new reality where Western official law became responsible for pursuing the just order no longer in such a limited sense but in a much more comprehensive sense, the indissociable imperative of harmony had to survive as a distinct guiding principle this same transmigration.

And yet, at the time of the present writing, the West is witness to unprecedented social disintegration, a civil "culture war" over relative preferences among legitimate policy considerations,[253] and historic lows of public trust in organizations and institutions with consequent suffering in society as a whole.[254] While these phenomena have many causes, the common responsibility for their solution belongs to the law, whose duty the preservation of harmony had become.[255] Thus, phenomena like these powerfully evince the overwhelming failure of the law to do so.

In an age where ideas know no borders, Canada is not immune to such trends. But thus far, the country has tried harder to resist them than many places. I submit that this is thanks in part to Chief Justice McLachlin and the McLachlin Court's concern for harmony in Canadian law, and the stewardship that orientation has provided to Canadian society. If this is so, her insight and skill may indeed be of wider significance in navigating the future of Western society.

The Chief Justice proclaims: "Nothing is more important than justice and the just society. It is essential to the flourishing of men, women and children and to maintaining social stability and security".[256] The question

---

[252] The challenge to this view that emerged starting in the 1980s is, regardless of sometimes dramatic rhetoric on both sides, only a challenge as to degree.

[253] James Davison Hunter, *Culture Wars: The Struggle to Define America* (New York: Basic Books, 1992).

[254] R. Bachmann, N. Gillespie & R. Priem, "Repairing Trust in Organizations and Institutions: Toward a Conceptual Framework" (2015) 36:9 *Organization Studies*, 1123, at 1123-26.

[255] I thank Professor Timothy Endicott for his gentle prodding that I confirm here that this duty goes beyond the courts, and that harmony is a value that ought to be secured and respected in a variety of ways by a variety of legal actors, including members of the political branch of government. However, for present purposes (dictated by the nature of this work as a judicial tribute), the argument made is restricted to the sorts of juridical activities I have referred to in discussing harmony's role in the work of Chief Justice McLachlin.

[256] Beverley McLachlin, "The Challenges We Face", Remarks, online: <https://www.scc-csc.ca/>.

is how do we achieve that? Outside the Supreme Court of Canada, stands Lady Justice, who relies on scales of balance, a depiction of our legal tradition's past. For a generation, inside the Supreme Court of Canada, sat Lady Chief Justice McLachlin, pursuing harmony, a model for our legal tradition's future.