

The Charter Critics : Strangers in a Strange Land

Lorraine E. WEINRIB*

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* Professor, Faculty of Law, University of Toronto.

The Charter has established in Canada a new constitutional state. This new political arrangement presents a mix of borrowed and new elements, of which Charter litigation is but one. While the new role of the judiciary has attracted considerable attention, focus on Charter litigation detached from the other features of the transformed political system precludes a full understanding of the complexity of Canada's constitutional revolution. Despite the large volume of commentary on the judicial role, there are important features of the Charter, as a legal instrument, that have eluded examination. Enough time has passed for the literature to move beyond vindication of favoured positions in the ideological battle that raged at the time of the Charter's adoption. Beyond Canada's borders the Charter has become a respected — and frequently emulated — post-war model of rights protection because of its encapsulation of post-war liberal values in a distinctive institutional arrangement. It deserves consideration along these lines at home.

I. THE NEW CONSTITUTIONAL STATE

In less than twenty years, the Charter has effected a constitutional revolution in Canada. One result has been the facilitation of a new type of politics. The remarkable and unprecedented involvement of ordinary Canadians in the final days of the Charter's formulation, for example, has continued in the form of increased public awareness of and support for substantive and procedural constraints on the exercise of state power. The active participation of public interest groups in law reform and in the litigation of Charter claims also marks the continuity of that phenomenon. Other changes are also evident. Civil servants, government officials and legislators are learning to exercise their authority in conformity to the *Charter of Rights and Freedoms*. Those who fashion public policy know that they must observe the Charter's strictures or risk the possibility of successful Charter challenge in the courts. Accordingly, they extend their consultation process to hitherto undervalued constituencies and consult experts to probe the possible impact of proposed government policy. Courts and legislatures do not merely engage in dialogue, each carrying out their separate functions in reaction to the other. Rather, the legislature, the executive and the courts all shoulder the shared responsibility of conforming to the Charter's strictures.

These developments should not surprise us. The Charter's main purpose was not to produce Charter litigation but to redesign Canada's system of governance. As supreme law, its directives have transformed the roles of legislatures, courts and the executive in order to constrain every exercise of state power to the fundamental values of the post-war world. In the aftermath of the Second World War, the pathologies of majoritarian politics became abundantly evident. Canada, like many other countries, moved to restrain majoritarian politics having in mind both past failures in Canada and its new obligations under international rights-protecting instruments. While in general terms the Charter follows the path marked by the U.S. *Bill of Rights*, its specific models do not lie south of the border. One must look elsewhere, to the idea of equal, individual human dignity, which has become the cornerstone of liberal democracy in the post-war world.

The Charter crystallizes this idea of human dignity by providing an array of rights, some of which invoke universal values and others rooted in the particularities of Canadian nationhood. Following its post-war models and departing from the U.S. *Bill of Rights*, it stipulates not only the rights guarantees but also a more abstracted set of norms. The latter formulation provides the exclusive, narrow and principled formula for limitation on rights. This formula makes clear that limits on rights are not the product of ordinary politics. Limits must not merely be reasonable or prescribed by (positive) law. They must in addition meet the stringent test of demonstrable justification in a free and democratic society, *i.e.*, a society that is both democratic and rights protecting.

In these features, the Charter exemplifies the transformation of political structure effected by adoption of the post-war mode of rights-protection. The Charter thus recapitulates neither the Westminster model of legislative sovereignty nor the U.S. model of the minimal state. The former respects the liberties embodied in the common law. Courts impose constraints on administrative action and apply common law modes of statutory interpretation. Legislatures usually abide by conventions of self-restraint. But the Westminster model ultimately sets statute law above both substantive and procedural norms. The U.S. model, in contrast, affords greater rights-protection because it allows constitutional rights claims to trump statute. But there are other weaknesses. American judicial review stands open to attack because it is largely the creation of the courts, without specific foundation in constitutional text or history.

The follows the post-war model most clearly in its first section, which establishes a specific type of judicial review. Section 1 provides the guarantees of the rights and freedoms, set out in other provisions, and, in addition, stipulates the exclusive basis for limitation on rights. The rights and freedoms act as constraints on every exercise of state power while the limitation clause permits encroachment on these guarantees when justified. This means that the state must, however, do more than merely give assurance that its preferred policy has majoritarian imprimatur or has satisfied the demands of the ordinary political calculus. That would amount to legislative sovereignty through the back door. The state must demonstrate, by argument and supporting material in a court of law, that it has satisfied certain criteria. It must prove, on a heightened civil standard of proof, that the policy it defends, despite its encroachment on a guarantee, forwards a pressing and substantial objective consistent with the Charter's values, rationally forwards that objective with minimal impairment on the right, and creates more beneficial than deleterious effects. The language of the limitation formula, as well as the complex set of doctrinal inquiries that the Supreme Court has provided for its application, come directly from the post-war model. This model was expressly invoked when the limitation clause was drafted in public, televised, parliamentary committee hearings.

Within this framework of guarantee and justified limitation, the Charter protects the usual array of democratic rights, fundamental freedoms and legal rights. While there is no protection of property, now a standard feature in bills of rights, there is also no protection of social and economic rights. In contrast, the equality provision remains noteworthy for its expansiveness. It includes four separate formulations of equality — before and under the law, equal protection and equal benefit of the law without discrimination — as well as an open list of prohibited grounds of discrimination. Adverse impact is recognized as a breach of equality and affirmative action is expressly permitted. In addition, two general interpretive clauses require respect for gender equality as well as preservation and promotion of the multicultural heritage of Canadians. Existing aboriginal rights are also protected. The unifying idea is not the atomistic, disembodied classical liberal individual who flourishes under minimal government. It is equal human dignity, the core value of rights-protecting instruments in the post-war world. This concept recognizes that the modern welfare state provides the framework of modern life. It also promotes individual flourishing in given and chosen community, as an embodied being entitled to equal treatment, without invidious distinction, by the state both in the design and impact of policy preferences.

In taking up the post-war model's democratic, egalitarian and multicultural commitments, the Charter supersedes both the controversies that plague the U.S. *Bill of Rights* and the limitations of the Westminster model. In the legislative override provision, however, the Westminster model is preserved with modifications. This provision, set out in s. 33 of the Charter, empowers legislatures to enact laws that suppress selected Charter rights temporarily if they follow a particular formula. The statute must expressly invoke the power to override specific guarantees. The override instrument has an automatic sunset provision that takes effect after five years, although a legislature may prescribe a shorter period or extend the override by re-enactment satisfying the prescribed conditions.

The override does not simply recapitulate the legislative supremacy of the Westminster model. First, reliance on the override differs from legislative supremacy in that it does not create a law that stands until repealed. The sunset provision deprives the legislature of the security that usually accompanies enactment. In the normal course, legislatures pass statutes and consider their job done. Without the sunset provision, those who object in principle to the use of the override, or to the policy embodied in the statute, face the difficult political task of battling for repeal or for a change in government. The sunset provision alters the political balance by rendering both retention and re-enactment of the override instrument a live political question, especially at election time. Premier Bourassa experienced this phenomenon when he used the override to protect Quebec's restrictions on the use of languages other than French.

Second, the declaration and specificity requirements carry forward the best feature of the Westminster model, the conventional restraints on legislatures in favour of rights. Most rights-protecting systems create final powers of judicial review and thus attract the complaint that the representative and accountable arm of government must bend to the elite, unaccountable judiciary. The cry goes out that jurocracy has supplanted democracy. The final compromise that put the override into the Charter should blunt the force of this critique. Legislatures are free to depart from a number of the Charter's strictures, but not surreptitiously. They must pay the political price on the floor of the assembly and in the court of public opinion. This political price may be exceedingly high if the legislator acts in cavalier disregard for valued rights, even of a small and powerless minority, or after a highly persuasive judgment by the Supreme Court of Canada.

The models for the override were Canadian statutory instruments, at the federal and provincial levels. The rare reliance on the Charter's override to date conforms to its models. The idea was to provide a safety valve in exceptional circumstances, not an easily accessible trap door out of the Charter's strictures. The strong and growing convention against using the override is thus faithful to its original purposes. What is new, perhaps, is the fact that considerations lying beyond the immediate political constituency would have a strong inhibiting effect. Premier Klein, for example, did not use the override after the tumultuous response to the Supreme Court decision that inserted same sex equality rights into Alberta's human rights legislation. His concerns, apparently, were that the support for this action within Alberta reflected social policy positions that were clearly discriminatory, that the majority of Albertans did not support such action, and that the political ramifications across Canada would be undesirable. He preached tolerance and respect for the dignity of fellow citizens. Premier Bouchard has refrained from using the override as well. Mindful of the importance of international support for the project of Quebec independence, he has refused demands to use the override to support language or election laws declared by the courts to be inconsistent with the Charter. Quebec's future may ultimately depend on international recognition based on a successful referendum. He cannot afford to create the impression outside Canada that Quebec is not attentive to the fundamental rights of minorities or the fairness of the democratic process.

Charter theorists tend to ignore the full complexity of the Charter's transformation of the Canadian legal and political system. They prefer to rehearse the ideological debates that raged when the Charter was a matter of federal-provincial negotiation. They ignore the fact that the Charter's substantive and institutional features did not materialize in a political vacuum but were responsive to the controversies that raged around it. Ideologically inspired critiques of the Charter are not without interest, but they do tend to feed on themselves. The primary theoretical critiques of the Charter, both on the left and on the right, have not progressed beyond their initial opposition to the Charter. They thus miss the most important factor in the Charter's formulation. While the left and right expended their energies attacking the Charter project, the people of Canada marched up and secured a Charter that reflected a different set of ideas.

II. THE CHARTER CRITIQUE FROM THE RIGHT

The most vociferous critics of the Charter base their attacks on conservative, social ideology. They utilize the same weapons that failed to prevent the adoption of the Charter in 1980-1. That battle had two goals. The primary goal was to stop the Charter's entrenchment. The secondary goal was to ensure that the Charter text under negotiation would, as the Canadian *Bill of Rights* before it, reaffirm the *status quo*. That position met almost total defeat. Nonetheless, the rejectionists soldier on, fighting for a traditional society protected against progressive ideas by legislative supremacy. They continue to insist upon their conservative understanding of human nature, the family, and the relationship between the individual and the state. No longer in a position to reject the Charter's adoption or weaken its text, they now denounce "judicial activism" — the power of judges to strike down or modify the product of the democratic process due to non-conformity with Charter guarantees. Their specific target is what they describe as an illegitimately liberal interpretation and application of the Charter.

The audacity of the rejectionists' current claim is remarkable. In the name of democratic legitimacy, they seek to eradicate their utter defeat in the political battle against entrenchment. In effect, they insist that judges today interpret the Charter as if it embodied the text that was rejected in 1980-81. That text, championed by the premiers who opposed the Charter project as well as the Conservative Opposition in Parliament, recapitulated the traditional social values contained in the utterly discredited Canadian *Bill of Rights* and directed judges to defer to their political masters. Although in form a bill of rights, in content that draft would have guaranteed nothing and retained the institutional status quo. The premiers who opposed the Charter abandoned this text in exchange for the legislative override when the Prime Minister dared them to defend their position in a national referendum. The premiers declined the invitation to take their rejectionist position to their voters.

The people of Canada have consistently repudiated the traditional values championed by these critics. Opinion polls at that time indicated that the vast majority of Canadians across the country supported rights guarantees against the ordinary operation of the political process. The parliamentary hearings that produced the final draft of the Charter also revealed widespread support for effective rights protection. The objective was to preclude future disregard for liberty, equality and human dignity by the state. In a remarkable moment in Canadian political history, ordinary Canadians made clear that they preferred no Charter at all to the one that would offer no more protection than the system that had failed them in the past. Their position found concrete affirmation in the

substantive values unambiguously delineated in the revised text and the new institutional roles created to protect those values.

Nonetheless, the rejectionist stance persists. It has morphed into a claim for deferential judicial interpretation of Charter rights, expansive interpretation of permissible limits on those rights and unrestrained reliance on the override. Those who decry “judicial activism” express outrage when judges carry out the role that the Charter vests in them. They launch vituperative attacks on judgments that dislodge long-standing social policy as illegitimate usurpation of the legislative role in a democratic society. They denounce judges who interpret and apply the Charter as a rights-protecting instrument having constitutional status. They reject the substantive commitments of the modern rights-protecting systems that were the express models for the Charter. They urge legislatures to use the override as if it entailed an exercise of routine political power.

Their banner is democratic legitimacy. But they disregard the terms of the Charter that the people of Canada secured from the federal government after weeks of nationally televised parliamentary hearings in 1980-81. They discredit that success, at their expense, as the victory of a cabal of excessively liberal public interest groups. They do not respect the terms of the compromise agreement that the elected governments of Canada, except Quebec, reached in November of 1981 after unprecedented public debate and participation. They want to release the override from the constraints imposed by that bargain, but would renege on the companion concession to strong rights and a narrow, principled limitation clause. This position does not reflect current public opinion polls, which reveal strong support for the Charter and the Supreme Court of Canada’s Charter judgments. Nor does it reflect the same political preferences registered in election after election.

These critics want to forget, and want us all to forget, that they lost their opportunity to resist redesign of the basic political structure Canada in 1981. They hope to achieve a retroactive victory over the Charter 17 years after the fact despite its entrenchment by constitutional amendment as supreme law and warm public acceptance.

The critics on the right make extravagant ideological demands that judges read the Charter in ways that are wholly divorced from the established canons of constitutional interpretation. They want judges to cast aside the obvious guides to interpreting the Charter text, including political history, text, remedial purposes and chosen models.

Interpretation of a legal text cannot effect its transformation or repeal, which is what these critics would require to reach their ideological objectives. To be sure, there are rarely single, definitive “right answers” to the difficult interpretive questions that reach our appellate courts. But constitutional interpretation is more constrained than these critics would allow. They want judges to ignore the supreme status of the Charter over legislative and executive law-making. Moreover, they call on judges to betray the normative values embodied in the Charter’s guarantees, re-write the principled and narrow formulation of the Charter’s limitation clause, and refuse to exercise the expansive remedial role that the Charter mandates. In other words, they want our judges to deny that the Charter is a post-war rights-protecting instrument whose purpose is to re-create the relationship between the individual, the group, and the state based on the core value of equal human dignity.

The commentators who take up the increasingly strident cry of illegitimate “judicial activism” have imported a slogan that makes no sense in application to the Canadian constitution. The charge connotes a judicial role that is illegitimate because it usurps the policy-making role that rightfully belongs to elected and accountable democratic institutions. But the Charter was designed to transform the Canadian political structure and requires that judges fulfil their mandate as guardians of the constitution. The claim of illegitimacy is ultimately empty. In fact, when the self-styled critics of “judicial activism” decry rulings driven by the personal whims of the judges or judicial usurpation of the democratic function, they usually target rather orthodox, purposive interpretation. The cry of impermissible activism in the U.S. calls on judges to return to the constitutional text and its historical meanings. In Canada, the constitutional text and historical meaning demand an active judiciary, vigilant in its protection of the Charter’s guarantees. Activist judges are not a problem under an activist constitution.

What these critics advocate as proper judicial interpretation of the Charter would go far beyond the bounds of legitimate judicial authority to interpret constitutional text. Their claim is that judges should, in the guise of interpretation, reject the Charter as a bill of rights with the status of supreme law in Canada and, in effect, stage a counter-revolution that re-instates legislative sovereignty. Moreover, they insist that legislators resist any overtures to depart from traditional social values. The accusation of “judicial activism” would be a wholly inadequate description of such behaviour. It amounts to a renunciation of the rule of law. That is why, in his remarkable reasons for judgment in the *Vriend* case at the Alberta Court of Appeal, Mr. Justice McClung announced that he would not march to the Charter drum. This statement reveals clearly that the issue is not interpretation at all. It is the institutional structure of the state.

III. THE CHARTER CRITIQUE FROM THE LEFT

One might presume, from the strong rejection of the Charter on the right, that the left would have something good to say. Not so. These theorists reject the Charter as failing to address the real problems in Canadian society. The charge is that the Charter does not dismantle the true source of inequality — private wealth and power. The Charter is a liberal lie, recapitulating the myth that restraint upon the state, through the form of enforceable constitutional guarantees, will realize increased liberty, economic equality and social justice. The Charter will have the opposite effect, they argue, because the restrained liberal state will no longer be able to perform its most admirable function, redistributing wealth and providing for the disadvantaged and oppressed. Advocates of this view cite Charter judgments that recognize corporate interests as guaranteed rights, that privilege the atomistic economic actor over the collective, public good or that limit the reach of social welfare programs.

The claim carries into the courtroom as well. Because litigation is expensive, only the wealthy and powerful will be able to litigate. Their rights will prevail. When the powerless or disadvantaged invest in litigation, they divert limited resources from the political forum, which is their best hope for protection. Judges, drawn from the class of society that holds wealth and power, will, in any event, perpetuate inequality by favouring their own elite and privileged class. Social justice cannot prevail in an institution committed to the preservation of capitalism.

This assault on the Charter lacks the force that its promulgators assert. The Charter does not embody classical liberal ideas of the individual pitted against the state, seeking negative liberty in his atomistic, disembodied isolation. On the contrary, the Charter gives priority to equal human dignity, which embraces community, identity and personal characteristics. It serves the disempowered and disadvantaged more than acknowledged, although it neither promises nor delivers free standing economic rights, such as a right to employment, shelter or an education. Nonetheless, the rights that the Charter does guarantee have improved the situation of the politically powerless, opening up the political process to those who are not wealthy and dislodging long-standing, discriminatory social policy. Moreover, the judiciary has in important cases subordinated Charter claims to the public good, in which it factors the interests of minorities, the politically powerless and the economically disadvantaged.

Access to the courts has proved easier than anticipated. Dedicated public interest groups have been able to use the Charter to forward the interests of the disadvantaged and vulnerable. Such public advocacy, justice on a shoestring, as well as *pro bono* work by lawyers in private practice at both the criminal and civil bar, have made the courts more accessible to those who would ordinarily have neither an effective political voice nor Charter rights claims to press. The courts have also enlarged entitlement to legal aid when available. Even the victories of corporations or privileged individuals have a silver lining, because they establish rules of fairness for all, including the disadvantaged and those caught up in the criminal process.

The real effect of the Charter is to be found in the ripple effect of Charter litigation, not the tabulation of the results in individual cases. There has been a discernible transformation of our public values. Legislators now develop social policy with a greater concern for the implications on those who hold Charter rights. The Charter has delivered a much more participatory democratic process.

The left critique raises the charge that the Charter offers an unsavoury combination of liberal guarantees delivered by conservative judges. The claim, like the claim from the right, is against the Charter as drafted as well as its interpretation. All would agree that the Charter is not, and does not purport to be, a socialist manifesto. But the allegation that the judges have across the board interpreted the Charter to sustain a conservative social agenda is excessive. It is both counter-intuitive and counter-factual to take the position that those who have used the Charter to effect change that was unavailable by ordinary politics — such as women, religious and ethnic minorities, Aboriginals, gays and lesbians, the criminal accused or the disabled — would have fared better without the Charter.

CONCLUSION

One might be inclined to dismiss the inconsistent critiques on the right and the left, the former demanding that the judges make the Charter disappear and the latter dismissing the Charter as misconceived and harmful. This would be a mistake. The critique on the left, advocated by law professors, seeks the greatest possible social justice and equality under the Charter and respects the rule of law. It is an excessively critical position but one that nonetheless illuminates its subject matter. The attacks on the right, in contrast, largely the work of political scientists, seek in interpretation a victory that political history has denied. These critics want to return to Westminster style legislative sovereignty, in which, they understand, legislatures made social policy, and

judges merely interpreted or applied that legislation in the course of resolving disputes. Whether that description is valid or not as ascribed to the past is debatable. Without doubt, it is no longer accurate. Enmeshed in the universe of social policy, which these critics would relegate to the exclusive auspices of the legislature, lie rights guarantees that the supreme law of the land now protects through the judiciary.

Canada's constitutional revolution continues. The Charter is respected and emulated elsewhere as a sophisticated response to the crisis of liberal democracy in the post war period. At home, theorists continue to fight ideological battles that appear increasingly detached from the text and context of our constitutional structure. To understand our constitutional transformation, and the role of the judiciary that it dictates, we must develop modes of Charter analysis that relate more directly to its history and text, to its exemplification of the post war model of liberal democracy, and to its innovative institutional arrangements for the protection of equal human dignity. Outrage at liberal rulings is an unsatisfactory foundation for academic or popular understanding of our political system. Charges of activism and pleas for restraint tell us nothing if they are so distorted by ideology that they do not relate to their subject matter. That subject matter must take in more than the courtroom. It must embrace the remarkably complex and inter-connected roles of courts, legislatures and the executive in our new constitutional state.