

Charter on rights and freedoms essay

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Introduction

The Canadian Charter of Rights and Freedoms was promulgated in 1982 and it brought with it several fundamental developments in the legal system of Canada especially in the Supreme Court. Hon. Justice Frank LaCobucci makes the case that the Charter has led to increased protection of fundamental rights as well as promoting national cohesion. To this end, he examines a few of the cases determined before the enactment of the Charter and after, with a view of demonstrating the developments that the Charter has enabled. Nonetheless, it cannot be said that the Charter has been a magic wand in the improved preservation of rights and freedoms and fostering unity.

Merits

Without doubt, the Charter has brought with it better tidings as far as the protection of the rights are involved. The Charter has led to increased participation of interveners in judicial proceedings so as to ensure that the broader interests of the non-parties in particular, are vouch-safed. This has been brought about by the need to take into account broader policy issues while deciding cases since the rights of non-parties are usually at stake most of the time. The Charter has simply expanded the scope of constitutional adjudication before the courts. The cases of R v Marshall and R v Keegstra decided after the Charter are illustrative of this phenomenon. This has in turn led to improved quality of decisions as flowing from the courts as they benefit from the rich understanding of the interveners thus ensuring the courts are well aware of the social context and circumstances while deciding

cases. More so this makes such decisions even more acceptable by the public in that there is a sense of legitimacy.

In addition, the Charter has led to increased consideration of legislative facts, causes and effects of social phenomena. The evidence of such facts has been adducted by the courts to aid them in understanding the context in which the impugned legislation was enacted. In the case of *R v Butler*, the Crown was able to provide evidence that pornographic materials had led to anti-social behavior by showing the requisite link. These facts aided in supporting the contention that such legislation was inimical to society. With the advent of the Charter and the rights and freedoms enshrined therein, there has been an increased need to consider the political and philosophical theory behind the entrenchment of such rights. The jurisprudence of the Supreme Court especially on the freedom of expression as illustrated in the *Keegstra* case shows that courts are now willing to consider the theoretical basis of individual rights. This analysis is only possible through the work of legal and philosophical theorists. This analysis is to be found in academic commentaries by the theorists and have proved to be a reliable resource for the courts in ensuring that they develop robust jurisprudence which is agitated for by the Charter.

With the rise in constitutionalism the world over, there has arisen the need for comparative analysis of constitutional jurisprudence. Indeed, the rights and values embedded in a number of Constitutions of modern democracies borrow heavily from the Charter. This is the case with the Constitutions of South Africa, India, Israel, and New Zealand, among others. Similarly, since the enactment of the Charter, international jurisprudence has been

considered by the Canadian courts. This comparative analysis is even more valuable where there lacks a jurisprudence or a textual guidance to an issue thus ensuring the decision arrived at by the courts is rich.

The Charter has also led to increased tendencies by the courts to consider a case despite its mootness. The reluctance by courts to hear such cases is buttressed by the arguments that there is a risk that such cases will not be well argued, the need to preserve judicial resources and the possible encroachment on the work of the legislature. Lacobucci makes the argument that the presence of interveners as espoused herein owing to the fact that rights anchored in the Charter involve broader policy issues and ensures that the cases are well argued despite their mootness. Further, since such cases are of great public interest and involve individual rights as agitated by the Charter, the issue of judicial economy is eliminated. This is well demonstrated by the Borowski case as stated by Justice Sopinka who held that the courts would not concern themselves with whether it was contested by parties and allowed the case to be argued, its mootness notwithstanding. The rule concerning standing prior to the enactment of the Charter was that an individual was supposed to show that their private rights were affected by an impugned legislation. However, in the Borowski case, it was held that an applicant need show that they are directly affected by a legislation or are genuine and interested citizen in challenging the validity of legislation. These barriers as to standing have even been eliminated with the enactment of the Charter since the rights enshrined therein increase the chances that enacted legislation will affect the legal rights of an individual thus subjecting it to legal challenge as to its validity. Moreso, these rights are central to

democracy thus justifying the genuine interest of the applicants as well as the need for expedition. It can, therefore, be said that this has enabled justiciable issues to be canvassed without applying the restrictive rules as to standing.

Matters that were hitherto within the province of the legislature are now within the reach of the courts owing to the competing interests of the rights in the Charter which has called for a balance between individual rights and interference by the State. The courts now do not shy away from deciding politically charged issues so long as there are legal issues to be canvassed. This has had the effect of expanding the number of issues that were formerly non-justiciable, to justiciable issues that are now properly before the courts. When legislation is impugned in the courts through judicial review, the courts do not usurp the legislative power of parliament. It usually is a dialogue between the two arms of government. As such, a dissenting opinion by a judge in a judicial review where an enactment is struck down can be of valuable use in subsequent legislation. In *R v O'Connor*, the dissenting judgement was put to use by the legislature in redrafting legislation that was subsequently upheld by the courts in *R v Mills*.

Outside the operation of the courts and the consequence of the Charter on their work, the Charter has also had an impact on persons as well as institutions. There has been tremendous interest by the public in the courts primarily because of the rights underpinned in the Charter since they affect the public. Issues that have come for constitutional adjudication before the courts based on the Charter involve gay issues, abortion, euthanasia-which are of great interest to the public and have the likelihood of impacting upon

the everyday lives of individuals. Closely intertwined to this, is the fact that there is increased media coverage of such cases since they are of interest to the public. This has had the benefit of enabling the public appreciate the operation of the courts and reasons for their decisions, in turn facilitating public acceptance. This public interest has not been restricted to the streets and the media, in that it has also roused academic interest in both law schools and among academics. The Charter by extolling constitutional supremacy has fundamentally altered the engagement of the judiciary and the legislature and the ensuing developments in terms of engagement, has been of interest to academics. Also the very fact that the Charter ascribes rights so fundamental to democracy as a concept, has made it of interest to academics on how such decisions are made. This is the same at Law schools where students are required to familiarize themselves with the Charter. Owing to the number and nature of rights embedded in the Charter as earlier mentioned, individual rights are mostly at stake. This has necessitated public participation in cases and work of courts. Increased participation of the public without doubt eliminates the chances that an otherwise invalid legislation will remain in force without being challenged. The Charter has empowered the judiciary and this has increased the clamor for approval of appointment of judges by Parliament. Further, the Charter has led to increased accountability on the part of government in that they know that refusal to take into consideration the rights and interests of individuals may be challenged in the courts. Since the government would not like the fact of being publicly condemned by the courts for acting arbitrarily, they facilitate dialogue with the individuals. This bolsters the very tenets of democracy

thus facilitating good governance.

In *R v Oakes*, the court developed the Oakes test and outlined the core values in contemporary liberal democracy as those relating to inherent dignity of a person, social justice and equality as well as accommodation of beliefs of persons. Section 15 of the Charter develops on these very values by recognizing the equal human worth and dignity of all individuals. This has been upheld by the Supreme Court in the *Vriend* case where the court affirmed that gays and lesbians had equal protection under the Charter as any other disadvantaged group.

The Charter has also had an impact on criminal law by ensuring that the legislature does not engage in overzealous legislation that impinges on rights of the accused in the process of prosecution. Section 11(d) has put the prosecutors and the court under scrutiny in ensuring that criminal cases are disposed in a timely manner thus avoiding prejudice of the rights of individuals. The same provision has also enabled the adduction of evidence that was hitherto inadmissible that has gone a long way in safeguarding the rights of the accused as illustrated in the case of *R v Seaboyer*. Section 9 that guards against arbitrary detention alongside section 8 of the Charter has ensured the balance of private rights of individuals against society's interest of law enforcement.

In the *Charkaoui* case on immigration, the court struck down the provisions of section 78(g) of the IRPA that allowed for use of evidence that had not been disclosed to the named person without any warning as to the dangers it could cause. This was held to be inconsistent with the Charter and as such, inoperative. Similarly, in the *Charkaoui* case, section 84 (2) which provided

for differential treatment to foreign nationals was found to be inconsistent with the Charter on prompt hearing of a trial.

Demerits

The progressive developments brought about by the Charter notwithstanding, it cannot be said that the Charter has been without limits. Section 1 of the Charter places a limitation on the rights if the legislature is able to show a pressing and substantial objective it seeks to pursue with such limitation. Vital as this provision may be in ensuring that the law is pragmatic on the ground, it can in turn be a source of infringement of the same rights under the veneer of limitation.

In the case of *Rodriguez v British Columbia (Government)*, the courts interpreted section 7 of the Charter on right to life, liberty and security to mean that a person had the right to make choices on his own body and exclusive control over one's physical and psychological integrity. In this context, it found the legislation prohibiting suicide not to be in conflict with the Charter. In this vein, the Charter could not be said to have furthered the objective of the provision of promoting life.

More so, the comparative analysis of international jurisprudence as envisaged by the Charter may have an adverse effect on the law in the event a parallel is drawn where none exist. This could be the case where different circumstances, context or period in history informed the enactment of a certain legislation. It would in effect mean importation of laws that are inconsistent with a nation, and thus calls for the courts to warn themselves of such dangers.

Conclusion

As illustrated in this paper, the Charter on Rights and Freedoms of Canada of 1982 brought with it a realization of a number of values that are extolled as tenets of contemporary liberal democracy. Nonetheless, just like any legislation, it has not been without hiccups. In view of the foregoing, I find the view taken by Justice Frank LaCobucci that the Charter is meritorious and progressive, as well founded and solid.

Works Cited

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