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UNAVOIDABLE JUDICIAL POWER AND INEVITABLE CHARTER CONTROVERSY

Bruce Ryder *

Since the middle of the twentieth century, Canada and many other democratic states have expanded judicial power to safeguard fundamental human rights and freedoms. This expansion has rested on two familiar premises. The first is that the conditions of true democracy are not exhausted by majority rule. Democracy also requires that political authorities respect the dignity, worth and basic interests of all individuals by protecting fundamental human rights and freedoms. The second is that an independent judiciary, precisely because it is not politically accountable, is best placed to implement rights-based checks on majoritarian political power. The acceptance of these now commonplace premises fuelled the adoption of the *Canadian Charter of Rights and Freedoms*[1] in 1982, and the passage of judicially enforced entrenched bills of rights in many other countries in the Americas, Europe, Africa and Asia. As a matter of constitutional design, Canadians accepted in 1982, and now take for granted, that judicial power to invoke human rights and freedoms to invalidate the actions of the other levels of government is crucial to our conception of democracy.

While rights-based powers of judicial review are widely accepted as a legitimate, indeed necessary, feature of modern constitutional democracies, the Charter has from the beginning provoked charged debates about its appropriate uses. Because constitutional language is typically open-ended and therefore susceptible to many equally plausible interpretations, normative choice on contested political issues is an inevitable feature of constitutional rights adjudication. And because judges are neither politically representative nor accountable, and their interpretation of constitutional requirements not easily reversed, their forays

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[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

into policy-making on contested terrain will always raise legitimacy concerns. The Constitution places boundaries on judicial power to restrict the policy choices of the other branches of government. If judges exercise this power outside the boundaries set by the Constitution, they are quite properly accused of usurping the powers of the democratically accountable branches of government. The problem is that the boundaries set on judicial power by constitutional documents cannot be clearly demarcated in advance. They are not self-executing. They end up having to be defined largely by the judges themselves. Hence, the question of legitimacy hovers unavoidably over any judicial interpretation of entrenched constitutional documents.

Contemporary conceptions of democracy, then, simultaneously require judicial enforcement of constitutional rights and expose judges to vigorous challenge whenever they do so. Heated debate regarding the manner in which judicial power over constitutional interpretation is exercised goes with the territory in a well-functioning democracy. It follows that Justice Lamer was engaged in wishful thinking when he suggested, in the 1985 *Motor Vehicle Reference*, that "[a]djudication under the Charter must be approached free of any lingering doubts as to its legitimacy."[2] It is true that so long as the Charter remains in force, it must be approached without any doubts about the legitimacy of conferring interpretive power on the judiciary. The document has to be interpreted, and judges, as they have often reminded us, cannot shirk the responsibility conferred upon them. However, doubts about the legitimacy of judicial interpretations at the boundaries of Charter jurisprudence will always hover over the courts' work.

In these circumstances, how should we go about contributing to debates that seek to measure and evaluate the courts' performance in discharging their constitutional responsibilities? What are the features of an appropriate approach to the exercise of judicial power?

The expression "judicial activism" is a frequently used but unhelpful way of formulating the debate about the appropriate uses of judicial power. Often an unspoken set of assumptions animate allegations of judicial activism. The expression carries negative connotations — it suggests an illegitimate usurpation of the powers of the legislative or executive branches. It presupposes a baseline, an appropriate stance regarding judicial power that has been exceeded by a court. But how do we go about defining that baseline and thus determining what kinds of exercise of judicial power are appropriate? Constructive commentary should not label judicial review "active" or "passive" (if those terms are understood as meaning too much and too little judicial power

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[2] *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at 497.

respectively), until we have made clear what our standard or background theory is regarding the appropriate approach to the exercise of judicial power.

In their book *The Charter Revolution and the Court Party*,[3] F.L. Morton and Rainer Knopff put forward a critique of judicial power that essentially uses parliamentary supremacy as a baseline. Counter to the modern trend, their conception of democracy is essentially exhausted by majoritarian legislative processes. This leads them to define judicial activism as any exercise of the power of judicial review to override the policy choices of governments.[4] In other words, whenever a judge upholds a Charter claim in the face of a contrary action based on government policy, activism has occurred. But the Charter requires interference with the policy choices of governments if they amount to unreasonable infringements of human rights and freedoms. Since, in Lorraine Weinrib's words, we have an "activist constitution,"[5] judicial activism on the Morton and Knopff definition can only be avoided if judges irresponsibly abdicate their constitutional responsibilities. Put another way, if judicial activism is a bad thing, then the Morton and Knopff definition suggests that the appropriate level of rights-based judicial review is none. Their definition of activism calls into question the legitimacy of any judicial enforcement of rights and freedoms. Thus their analysis can be seen as a hankering for the pre-Charter days of legislative supremacy largely unbridled by rights concerns.

So, the enactment of the Charter obviously makes no judicial invalidation of governments' policy choices an inappropriate baseline for evaluating judicial power. Similarly, the baseline cannot be the pre-Charter judicial record when parliamentary supremacy was only partially constrained by principles of federalism and a limited set of constitutionally entrenched rights. The courts' record interpreting the *Canadian Bill of Rights*[6] cannot set the baseline for the appropriate exercise of judicial power under the Charter, since the Bill of Rights embodies such a compromised and incomplete commitment to the judicial protection of fundamental rights and freedoms.

Can empirical data provide a useful measure of the exercise of judicial power? Can we say, for example, that a success rate of Charter claimants in the range of 50%, or 30%, or 10%, is evidence that judges are exercising their power appropriately? There are a number of problems in trying to rely on success rates to measure the exercise of judicial power. Any success rate that we might choose as appropriate would be arbitrary. Moreover, it is difficult to define with precision what counts as a Charter victory for a claimant.

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3 Morton and Knopff, eds. *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000).

4 *Id*., at 19.

5 Weinrib, "The Activist Constitution" (April 1999), *Policy Options* 27-30.

6 S.C. 1960, c. 44.

For example, in the *Little Sisters* case,[7] the Supreme Court of Canada failed to deliver any meaningful remedy to address the serious violations of expressive freedoms and equality rights that occurred in the administration of the border censorship scheme by Canada Customs. One provision, relating to burden of proof, was struck down, while the bulk of the legislative scheme was left intact. A tabulation of results might count this case as a victory for Little Sisters. A closer reading reveals the ruling to be an extreme example of deference to Parliament and the executive branch.

Similarly, in *R. v. Sharpe*,[8] the Court upheld the *Criminal Code* offence of simple possession of child pornography.[9] A tabulation based on results might count this as a failed Charter challenge to legislation. In fact, the Court saved the legislation only by engaging in the most extended use of the controversial "reading in" remedy it has employed to date. To limit the law's impact on section 2(*b*) freedoms, the Court had to read in exceptions for the possession solely for private purposes of self-authored creative representations and visual recordings of one's own lawful sexual activity. A significant amount of judicial law-making was necessary to preserve the most important aspects of Parliament's policy choice. The *Sharpe* case is thus an example of judicial activism in the service of judicial restraint, a formulation which may help demonstrate the limited utility of those terms in evaluating the exercise of judicial power.

In any case, it would be a mistake to consider that judicial power is exercised when Charter claims are upheld, and judicial power is not exercised when Charter claims are dismissed. Similarly, it is a mistake to equate activism with the assertion of judicial power and restraint with its avoidance. When judges strike down legislation, they are normally asserting power in support of a Charter constituency aggrieved by a law and contrary to the wishes of a legislative majority. When they uphold legislation, they are normally asserting power in a manner aligned with a legislative majority and contrary to the interests of a Charter constituency aggrieved by the law. Neither assertion of power is neutral or *prima facie* more legitimate than the other in a constitutional design that does not identify democratic dictates with the outcomes of majoritarian politics.

While empirical data on success rates is of limited utility in evaluating judicial power generally, it is useful in revealing which kinds of claims or claimants have more success, which judges are more receptive to Charter claims, and how patterns of decision-making have shifted over time. For example, we know that Charter claims that will have a direct impact on the distribution of material resources, such as claims brought by unions, workers or

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7 *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120.

8 [2001] 1 S.C.R. 45.

9 R.S.C. 1985, c. C-46, s. 163.1.

social assistance recipients, have had a low rate of success. Empirical data on success rates can also be useful in countering the wilder claims of Charter critics. For example, consider the assertion that the Court is unreceptive to equality claims, or conversely, that the Court's policy agenda is driven by equality-seeking groups. The record does not support a dramatic version of either claim. In fact, the success rate of section 15 claimants is modest. The Supreme Court has found unjustifiable violations of equality rights in slightly less than 30% of the section 15 cases it has decided.[10] This includes a low rate of success for claims alleging discrimination on some enumerated grounds, such as sex, age and disability. This is not the record of a Court hostile to, or captured by, the claims of equality-seeking groups.

One useful criterion for evaluating the exercise of judicial power in controversial constitutional cases, as Cass Sunstein has suggested,[11] is to ask whether a court ruling has supported and enhanced democratic deliberation about the appropriate balance between the protection of fundamental human rights and freedoms and other legitimate state objectives. On this view, which has much in common with Peter Hogg and Allison Bushell's conception of Charter dialogue,[12] judges and legislatures are engaged in an interpretive partnership in relation to the Charter — they have joint responsibility for giving meaning to its open-textured language. Hogg and Bushell's study demonstrated that legislatures normally respond in some way to Charter rulings that invalidate legislation. It has become even clearer in recent years that the choices open to legislatures include complying with, revising, or even seeking to reverse the results of judicial rulings.

The model of interpretive partnership, or constitutional dialogue, was enhanced significantly by the Supreme Court's 1999 ruling in the *R. v. Mills*[13] case. This was the first time that the Court had considered a Charter challenge to a legislative sequel that departed from an earlier Charter ruling by the Court. Following the Court's ruling in *R. v. O'Connor*,[14] Parliament had engaged in a careful consideration of the competing interests at stake when defence lawyers seek access to complainants' therapeutic records in sexual assault trials. This led to the passage

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[10] Faria, *Judicial Activism?: An Evaluation of Supreme Court of Canada Decision-Making in Section 15 Equality Cases* (LL.M. Thesis, Osgoode Hall Law School, 2001) [on file with author].

[11] Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, Mass.: Harvard University Press, 1999).

[12] Hogg and Bushell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997), 35 Osgoode Hall L.J. 75; Hogg and Thornton, "Reply to 'Six Degrees of Dialogue' " (1999), 37 Osgoode Hall L.J. 529.

[13] [1999] 3 S.C.R. 668.

[14] [1995] 4 S.C.R. 411.

of Bill C-46,[15] a legislative regime that has much more in common with Justice L'Heureux-Dubé's dissent than it does with the majority ruling in *O'Connor*.[16] Nevertheless, in *Mills*, the Court did not insist that Parliament slavishly adhere to the Court's previous interpretation of Charter requirements. Instead, it noted that Parliament had given close consideration to the Charter interests at stake, and had taken advantage of its ability to assess information and hear views not available to the Court. In upholding the legislation, the Court indicated that the courts "do not hold a monopoly" on the interpretation, protection and promotion of rights and freedoms. "Parliament also plays a role in this regard and is often able to act as a significant ally for vulnerable groups."[17]

Like the saga regarding therapeutic records that unfolded in the sequence of *O'Connor*, Bill C-46 and *Mills*, constitutional debates regarding limits on the use of evidence of complainants' sexual history in sexual assault trials is another example of a context where an exchange between courts and legislatures produced heightened democratic deliberation and careful consideration of the competing Charter claims in designing legislative solutions. Parliament's response (Bill C-49)[18] to the *R. v. Seaboyer*[19] ruling was upheld by the Court in *R. v. Darrach*.[20] In contrast to the legislation at issue in *Mills*, the "rape shield" legislative sequel upheld in *Darrach* closely modelled the court's ruling in *Seaboyer*. Still, it is evident in the judgment in *Darrach* that the Court will not require that carefully considered legislative sequels adhere precisely to previous court rulings.

The *Mills* and *Darrach* judgments demonstrate that the Charter dialogue between courts and legislatures is not a monologue, as some have suggested.[21] The courts can and should give effect to a genuine interpretive partnership between courts and legislatures. The appropriate apportionment of interpretive responsibility must take into account the respective institutional strengths and weaknesses of courts and legislatures. When the basic rights of vulnerable minorities are at stake, especially when there is evidence that their interests were not treated with concern and respect in the legislative process, judges must insist on the primacy of their interpretive role and show little deference to legislative policy choices. When, on

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15 *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*, S.C. 1997, c. 30.

16 A review of the legislative process leading to the enactment of Bill C-46 can be found in Hiebert, *Wrestling with Rights: Judges, Parliament and the Making of Social Policy* (Montreal: Institute for Research on Public Policy, 1999).

17 *R. v. Mills*, *supra*, note 12, at para. 58.

18 *An Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38.

19 [1991] 2 S.C.R. 577.

20 [2000] 2 S.C.R. 443.

21 Morton and Knopff, *supra*, note 3, at 166; Manfredi and Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999), 37 Osgoode Hall L.J. 513.

the other hand, the legislature has engaged in a concerted and sincere attempt to consider and balance competing Charter interests with other legitimate state objectives, their policy choices should not lightly be overruled by the courts.

The *O'Connor*/*Mills* and *Seaboyer*/*Darrach* stories are examples of the positive exercise of judicial power because they had the effect of stimulating and supporting democratic deliberation and resulted in laws that balanced competing rights and freedoms in an intelligent and sensitive manner. On the other hand, the exercise of judicial power is problematic if courts uphold government policy choices that were not formulated in a manner that gave appropriate consideration and regard to the Charter interests at stake. The *Little Sisters* and *Sharpe* cases were both examples of situations where the Supreme Court excused Parliament from undertaking any serious democratic deliberation about Charter rights and freedoms in designing legislative policies.

In *Little Sisters*, the legislative regime of border censorship was found to have violated the expressive freedoms and equality rights of a cultural institution representing vulnerable sexual minorities. The Court ought to be on high alert when its anti-majoritarian role is so obviously called into play. Despite the fact that the legislation treated expressive material no differently than other imported goods, and despite the fact that Parliament had not undertaken any steps to assess the legislation's impact or to review alternatives, the Court said it would be too onerous to require legislators to do these things. Instead, it left the onus on Little Sisters to pursue further litigation if problems persisted.

In *Sharpe*, even though an offence of simply possessing expressive material was added to our criminal law for the first time, even though it was drafted by Parliament with no public debate about its impact on section 2(*b*) freedoms, and even though the Court found the law to be unjustifiably broad, the Court again let Parliament off the hook by correcting the most egregious flaws in the legislation itself. In both cases, the Court's rulings encourage Parliament to be cavalier about its constitutional duties, and they discourage future democratic deliberation about the appropriate scope of Charter rights and freedoms in the context of border censorship or possession offences, even though none occurred in the first place. In these areas, the interpretive partnership that ought to animate the Charter has been stalled at the outset.

In summary, I have suggested that the debate about the appropriate uses of judicial power would be advanced if we dropped the misleading labels of "activism" and "restraint," and instead recognized that the exercise of judicial power is an unavoidable aspect of Charter adjudication. Rights-based judicial review is essential to our conception of democracy, and yet, paradoxically, judges are inescapably embroiled in controversy about the democratic legitimacy of their interpretation of the Charter. Empirical evidence of the success rate of Charter claims is of limited assistance in assessing whether judicial power is being

exercised in an appropriate manner. Instead, I have suggested that one useful way of evaluating the exercise of judicial power is to ask whether it fosters greater democratic deliberation about the appropriate scope of rights and freedoms and an interpretive partnership between courts and legislatures that is attentive to their respective institutional strengths and weaknesses.