

Book Review: Charter Conflicts. What is Parliament's Role?, by Janet L. Hiebert

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Book Review

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CHARTER CONFLICTS: WHAT IS PARLIAMENT'S ROLE? BY JANET L. HIEBERT (MONTREAL: MCGILL-QUEEN'S, 2002) 285 pages.¹

BY LORNE SOSSIN²

I. INTRODUCTION

Typically, books by political scientists about the *Charter* tend to elaborate and then lament the usurpation of legislative powers by the courts.³ Janet Hiebert's *Charter Conflicts: What is Parliament's Role?*, attempts to stake out different terrain. Her novel and lively contribution to this debate is to focus on the parliamentary side of the equation of judicial activism. She is critical of Parliament's passivity in the face of judicial intervention on matters of public policy by means of the articulation and adjudication of *Charter* rights. She argues that constitutional interpretation is a "shared responsibility" between courts and Parliament. In particular, she advances the premise that Parliament has a distinctive role to play in the delineation of section 1 justifications for the limitation of *Charter* rights, and more explicitly in the decision to invoke the "notwithstanding" override under section 33 of the *Constitution Act, 1982*.

She advocates a "relational approach" to *Charter* determinations, incorporating legislative and judicial perspectives in a collaborative rather than hierarchical format. In so doing, she self-consciously situates herself somewhere in the middle of the judicial activist spectrum, refreshingly distant from both the acidity of *Charter* critics and the naïveté of *Charter* cheerleaders. However, far from resolving the tensions surrounding judicial power in the *Charter* era, her approach raises essential questions—how should this judicial-legislative collaboration take place, and who should have the last word? To her credit, Hiebert does not sidestep such thorny questions. She believes Parliament's role in disseminating *Charter* values should be transparent and direct, and sees this role integrated with the

¹ [*Charter Conflicts*].

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³ See e.g. Frederick Lee Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Toronto: Broadview, 2000); Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Toronto: McClelland & Stewart, 1993). For a discussion of these and other contributors, see Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 69-95.

parliamentary committee structure.⁴ One of the strengths of her analysis is that it is rooted in the realities of parliamentary governance.

There is much to agree with in Hiebert's view that the *Charter* gives rise to obligations for Parliament as well as for judges. My broader concern with Hiebert's framework of shared responsibility between Parliament and the courts for the elaboration of *Charter* values, however, is that it glosses over the important obligations of the executive branch in the development and implementation of those values. Whether one views the judicial-legislative relationship as one of "dialogue" or, as Hiebert prefers, "conversation,"⁵ neither party would have much to say but for the role played by the executive in advising on the legislative options available to government, in defending legislation (or declining to do so) before the courts, and in interpreting the effects and implications of judicial orders following litigation.⁶ Both literally and figuratively, when Parliament and the courts speak to one another, it is through executive action.

Not only is the executive role significant, it is also salutary. The independence of the civil service (and of government lawyers in particular) and the obligation of public officials to act in the public interest, permit and may in some circumstances require the executive branch of government to act as an important check against both the majoritarian excesses of the legislature and the countermajoritarianism of the judiciary. It is not for nothing that then-Chief Justice Lamer referred to Canada's separation of powers as the "backbone of our constitutional system."⁷ While it is unfair to criticize Hiebert for devoting too little attention to the role of the executive (her study, after all, is about Parliament's role under the *Charter*), the focus on Parliament's obligations overlooks important dynamics regarding the formation of *Charter* values and their implications for democratic legitimacy. As a result, Hiebert assigns to Parliament a potential role that it may lack both the capacity and the authority to play.

⁴ Hiebert contemplates a report that would be made to Parliament during the second-reading debate of a bill, which would, in her words, not be "overly technical" or "lawyerly." See *Charter Conflicts supra* note 1 at 66.

⁵ *Ibid.* at 50.

⁶ On the role of the executive in the judicial-legislative dialogue, see Matthew A. Hennigar, "Players and the Process: Charter Litigation and the Federal Government." Windsor Y.B. Access Just. [forthcoming in fall 2003]; Lorne Sossin, "The Politics of Soft Law: How Judicial Review Influences Bureaucratic Decision-Making in Canada" in Simon Halliday & Marc Hertogh, eds., *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press) [forthcoming 2004].

⁷ *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 at 867, Lamer C.J.C., concurring.

This review is organized into two parts. In the first part, I examine Hiebert's argument and explore in more detail her application in the context of gay and lesbian rights. I examine her thesis in light of recent legal and political developments relating to same-sex marriage. In the second part, I explore her conclusions regarding the judicial-legislative relationship in the elaboration of *Charter* rights, and suggest reasons why more attention should be paid to the executive branch and its role as an intermediary between judicial and legislative authority, and as a conduit for judicial and legislative communication.

II. A RELATIONAL APPROACH TO *CHARTER* POLITICS

The centrepiece of Hiebert's contribution to the literature on *Charter* politics is what she terms a "relational approach" to the interaction between courts and Parliament. Hiebert explains this approach in the following terms:

A relational approach assumes that both Parliament and courts have valid insights into how legislative objectives should reflect and respect the Charter's normative values. Yet their judgments may be different. The benefits of conceiving Charter judgment in relational terms arise from the responsibility each body incurs to respect Charter values, from the exposure to judgments made by those differently situated, and from the opportunity to reflect upon the merits of contrary opinion. The normative goal ... is that each body satisfy itself that its judgment respects Charter values, particularly when faced with the other's contrary judgment.⁸

Hiebert builds the case for her relational approach by reviewing the relationship between courts and legislatures in a number of high-profile *Charter* settings: tobacco advertising, sexual assault trials, the collection and use of DNA, rules and exemptions for search warrants, and equality claims of lesbians and gays. These chapters are mostly descriptive accounts of the leading judicial decisions and the legislative (and political) responses they provoked in each setting. Hiebert's writing is clear and accessible and manages to capture the complexity of political and judicial decision making. While there is not enough space for a detailed assessment of each case study, I will consider her analysis of the equality claims of gays and lesbians in more depth, and examine its implications in light of recent developments in the field of same-sex marriage rights.

Hiebert charts the story of same-sex rights under the *Charter* from a number of vantages.⁹ She traces the evolution of the Supreme Court's

⁸ *Charter Conflicts supra* note 1 at 52.

⁹ *Ibid.* at 162-99.

thinking on equality rights through the 1990s, from the tentative steps taken in *Canada (A.G.) v. Mossop*¹⁰ to the dramatic leaps of *Vriend v. Alberta*¹¹ and *M. v. H.*¹² She identifies in these cases a perceptible shift in the Supreme Court (both intellectually and in terms of its composition) from a view of equality as equal benefits and equal burdens towards a view of equality rights as guaranteeing equal respect and dignity from the state as well. Hiebert avoids one-dimensional narratives when examining *Charter* cases. She canvasses lawyers' arguments and legislative responses across multiple provincial and federal jurisdictions, and does so in an engaged and dispassionate style. Importantly, she also discusses the significance of these cases to the gay and lesbian community, emphasizing the ambivalence with which even the court victories were greeted.

Hiebert asserts that judicial power has played a pivotal role in the context of gay and lesbian rights because governments have reneged on their "responsibility to evaluate and make prudential and principled decisions about how to reassess the complex policy networks of social benefits and obligations."¹³ She maintains that the legislature is better suited than the courts to "consult, engage in dialogue and conduct research" regarding social policy reforms such as marriage rights. Presaging future events, Hiebert cautions, "Yet, if legislatures are too slow in changing social policy, courts will likely become impatient with legislative indecision and more active in proffering remedies."¹⁴

Of course, this is precisely what transpired. While two provincial appeal courts were content to order the elimination of discrimination on grounds of sexual orientation in the common law definition of marriage (thus defining marriage as a union between "two people" rather than a "man and a woman") but to suspend the effect of this order to permit the legislature time to respond, in the summer of 2003, the Ontario Court of Appeal held that a suspended order was inappropriate and that the effect of the changed common law definition would be immediate.¹⁵ The Ontario Court of Appeal's decision ended a meandering, squabbling parliamentary committee that was holding national hearings on the same-sex question.¹⁶

¹⁰ [1993] 1 S.C.R. 554.

¹¹ [1998] 1 S.C.R. 493.

¹² [1999] 2 S.C.R. 3.

¹³ *Ibid.* at 199.

¹⁴ *Ibid.*

¹⁵ *Halpern v. Canada (A.G.)* (2003), 65 O.R. (3d) 161 (C.A.).

¹⁶ See Tonda MacCharles, "PM won't appeal Ontario court ruling Ottawa joins the Netherlands, Belgium" *Toronto Star* (18 June 2003) A1.

This committee represented much of what Hiebert's approach appears to aspire to: consultation, engagement, and the evaluation of social preferences. The result, however, was a divided, partisan and ponderous process.

Whereas judicial review is supposed to be a reactive and sluggish mechanism for social intervention in the face of responsive and proactive government initiative, the example of gay and lesbian rights has turned this assumption on its head. Governments have found themselves more often than not reacting, often sluggishly, to the proactive initiative of courts. The tension between the majoritarian and partisan impulses of legislative action and the independent and rights-driven impulses of courts is mostly a healthy one, as long as the executive branch of government is present to mediate the judicial-legislative relationship.

III. CHARTER POLITICS AS A THREE-LEGGED STOOL

Parliament deserves a more meaningful role in determining the balance between political needs and *Charter* protections. Hiebert's call for parliamentarians to take section 33 more seriously, for example, is persuasive. This was clearly intended by the design of the *Constitution* to be the legislative focus of the *Charter* debate. It seems to me less tenable, however, to insert Parliament in the context of adjudicating the reasonableness of Parliament's limits on rights and freedoms through section 1 of the *Charter*.

Section 33 captures a process of legislative deliberation. In this context, Parliament speaks through its legislation. Under section 1, by contrast, the onus rests with government to justify the reasonableness of *Charter* infringements. This means it is up to the executive branch of government to defend legislation.

While Hiebert notes the current federal practice for a report from the Attorney General to accompany proposed legislation that sets out the degree of risk of *Charter* litigation attached to the legislation, she does not explore the implications of the fact that it is also the Attorney General who advances the Crown's position in *Charter* litigation, circumscribes what kinds of laws may come before the legislature, and interprets the significance of judicial decision making, overseeing and advising what legislative or administrative responses are justified and appropriate.¹⁷

¹⁷ Another important aspect of the executive involvement in elaborating *Charter* values that merits more attention in Hiebert's analysis is the decision to launch a constitutional reference, as in the same-sex marriage case.

With this added complexity of the executive role in the legislative-judicial relationship in mind, I return to Hiebert's notion of a parliamentary committee with the mandate to offer reports (during second-reading of a Bill) on the justifications for laws which might be seen to infringe *Charter* rights.¹⁸ She emphasizes that the purpose of parliamentary *Charter* scrutiny is neither to establish a rival or parallel procedure for undertaking risk assessments nor to use rights language in a partisan manner to delay or block government initiatives, but is rather to ensure that Parliament is aware of the consequences of legislation for protected values, and may make careful judgments about whether legislation is reasonable and justified. What role should such a report play in the court's *Charter* deliberations? Should parliamentary reports elaborating *Charter* values be considered more or less significant than the Hansard record of parliamentary debate and ministerial statements that already form part of the record of most *Charter* cases?¹⁹ While legislative history may shed light on legislative intent and reflect the depth of legislative deliberations, it may just as often capture the emotions, distortions and distractions of political and partisan struggles.

Hiebert's support for a more robust parliamentary role in elaborating *Charter* values is based, in part, on her healthy skepticism regarding the court's capacity for policy analysis. She is surprisingly less critical, however, when it comes to the capacities of Parliament. While she acknowledges that Parliament has become a "weak" institution, she nonetheless envisions a parliamentary process able to undertake extensive consultations, engage in research and stimulate thoughtful debate. Hiebert also appears strangely untroubled by the risk that such a parliamentary process would lack independence and be vulnerable to partisan interests and influences. As Roland Penner has noted, Hiebert appears to underestimate the potential for such a parliamentary committee to become hostage to political lobbying or the vicissitudes of public opinion polls.²⁰

To suggest that it is important to delve more deeply into the complexity of parliamentary, bureaucratic and legislative processes under the *Charter* does not detract from the view that Parliament has a key role in the elaboration of *Charter* values. It does cast doubt, however, on

¹⁸ *Charter Conflicts supra* note 1 at 66.

¹⁹ In light of Hiebert's argument that the courts should take more seriously the deliberative process of Parliament, I would have thought that the court's jurisprudence on the treatment of parliamentary debates and reports in *Charter* cases would be more extensively discussed. See e.g. Peter W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997) at 57.1(a)

²⁰ Roland Penner, Book Review of *Charter Conflicts: What is Parliament's Role?* by Janet L. Hiebert (2003), 28 *Queen's L.J.* 731.

Hiebert's conclusion that parliamentary hearings and reports should be the vehicle to give expression to that role. Most legislation begins with a section designed to specify the purpose for enacting the statute—or the mischief it is intended to address. This, typically, is the point of departure for a court's analysis of section 1. These sections should represent the embodiment of the parliamentary deliberation and debate over *Charter* values. A second best approach is to locate parliamentary guidance on the purpose of legislation in preambles, which have become elaborative of legislative intent.²¹ Whether Parliament consulted widely or narrowly, whether it conducted extensive research or none at all, or whether it balanced competing claims or advanced the interest of one group over another, however, does not necessarily shed light on whether the infringement of a *Charter* right is justified. For Hiebert's ideal of "relational" *Charter* values to be achieved, the court itself would have to stake out a position on the "quality of the process" pursued by Parliament.²² On what basis is the court to distinguish a good process from a bad one? Judicial sensitivity respecting whether Parliament has or has not "consciously reflected on *Charter* values" seems an implausible mandate for the court to undertake.²³

In the final analysis, Hiebert's relational approach, like Peter Hogg and Allison Thornton's dialogue approach, assumes a partnership where there arguably is none and where none was ever intended.²⁴ Legislatures are majoritarian institutions. Courts, by contrast, most often play a countermajoritarian role in the defence of individual rights and vulnerable groups. This tension between majoritarian and countermajoritarian interests is healthy and necessary for a sophisticated democracy to function.²⁵ It is this tension, I would suggest, that makes the role of the executive branch so crucial. Just as a two-legged stool cannot stand on its own, so the role of the executive is crucial to the stability of Canada's Constitutional system, providing balance and ballast for the judicial-legislative relationship.

²¹ For a recent survey of preambles, see Kent Roach, "The Uses and Abuses of Preambles in Legislation" (2001) 47 McGill L.J. 129.

²² *Charter Conflicts supra* note 1 at 70.

²³ What the Court has said on the subject is simply that the government has no obligation to consult affected groups before legislative action is taken. See e.g. *NWAC v. Canada*, [1994] 3 S.C.R. 627 and *Bell v. Canadian Telephone Employees Assn.*, [2003] 1 S.C.R. 884.

²⁴ See Lorraine Weinrib, "Canada's Constitutional Revolution: From Legislative to Constitutional State" (1999) 33 *Isr. L. R.* 13.

²⁵ For discussion, see A. Wayne MacKay, "The Legislature, the Executive and the Courts: The Delicate Balance of Power or Who is Running this Country Anyway?" (2001) 24 *Dal. L.J.* 37.

IV. CONCLUSION

While I disagree with some of Hiebert's conclusions and recommendations, I found her analysis lucid, engaging and thought-provoking. This book constitutes a significant contribution to the study of *Charter* and judicial activism. Hiebert has highlighted the disturbing tendency of Parliament to play a passive and reactive role in the articulation of *Charter* values. Where I differ from Hiebert is with respect to how Parliament ought to express its views on those values. In my view, her "relational approach" neglects the complex and fundamental roles played by the executive branch. Ultimately, it is the three-legged stool of Canada's constitutional system and the dynamic relationship between the legislative, executive and judicial branches of government that provides the surest safeguards for the preservation of the rule of law and democratic legitimacy in the *Charter* era.