GLOBALIZATION AND THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

ABSTRACT

The phenomenon of globalization impacts on all of our various domains of human interaction, including that of human rights. Looking at globalization in light of the development of the *Canadian Charter of Rights and Freedoms*, we can first examine the influence that globalization and the global rights movement has had on the development of the *Charter*. The impact of the international human rights movement is evident in the adoption and text of the *Charter*, as well as in the way in which the *Charter* has been interpreted. Second, we must also consider the impact the *Charter* itself has had on "global constitutionalism" and the application of international human rights law and jurisprudence.

THE HONOURABLE IRWIN COTLER

The Honourable Irwin Cotler, P.C., O.C., M.P., is the Member of Parliament for Mount Royal and the former Minister of Justice and Attorney General of Canada.

Introduction

We are witnessing – and have been witnessing for some time – the phenomenon of globalization, one which impacts on all domains of human interaction. Indeed, we have experienced what can only be characterized as the globalization of everyday life, involving globalization of the media and markets; of technology and trade; of culture and communications; of ideas and ideology; of politics and policies; of paradigms and pandemics; of rights and writs; and of justice and injustice.

Certainly, the prevalence and pervasiveness of the very term "globalization" is reflected in its appearance in Canadian newspapers more than 30,000 times since 1990.[1] Yet, despite its prevalence and pervasiveness in some 11 enumerated areas of human affairs from psychic globalization to economic globalization to societal globalization to ecological globalization, "'globalization' is a word without a single, precise meaning."[2]

It might be useful, therefore, to examine the phenomenon of globalization in light of its impact on the *Canadian Charter of Rights and Freedoms*. Accordingly, I propose to organize my remarks around two themes: First, I will discuss the impact of globalization and the global rights movement on the *Canadian Charter of Rights and Freedoms*. This is evident in its very construction as well as the way in which the *Charter* jurisprudence has developed. Second, and conversely, I will turn briefly to the impact and contribution of the *Charter* to the global rights movement, be it to global constitutionalism or be it to the development and application of international human rights law and jurisprudence.

Part one: Impact of globalization on the *Charter*

The transformative and revolutionary impact of the *Charter* – underpinned and catalyzed by the global rights movement – can best be understood by appreciating the domestic insularity and limitation of rights protection in the pre-*Charter* era.

Simply put, any narrative of Canadian social history is very much a narrative of exclusion or marginalization of historically oppressed groups – Aboriginal people, women, racial and religious minorities, refugees and immigrants –

coupled with the absence of constitutionally entrenched rights and remedies. This is not to say that there were no rights and remedies.

There were the protections at common law such as those afforded by the Rule of Law principle; article 1053 of the *Civil Code of Quebec*, characterized as a mini-bill of rights; the statutory protections of the *Canadian Bill of Rights*; the implied *Bill of Rights* doctrine; and the dialectics of legal federalism.

But none of these protections involved constitutionally entrenched rights and remedies, while the influence and impact of international human rights law was almost non-existent. Indeed, any inquiry into Canadian constitutional law during the first 115 years of confederation would reveal a preoccupation with the distribution of powers between the federal and provincial governments – sometimes known as the "powers process" or legal federalism – rather than the rights of people, sometimes known as civil liberties or the rights process. And so whenever a civil liberties or rights issue came before the courts, the question was, as former Chief Justice Bora Laskin put it, which of the two levels of government has the power to work the injustice, rather than how the injustice could be prevented. Simply put, legal federalism trumped rights analysis.

What has been the impact of the Charter of Rights on the global human rights movement? There are four distinct contributions that I will briefly note at this point.

The advent of the *Charter*, inspired by and anchored in the global human rights movement, was a veritable human rights movement. Former Chief Justice Lamer has remarked that the advent of the *Charter* was "a revolution on the scale of the introduction of the metric system, the great medical discoveries of Louis Pasteur, and the invention of penicillin and the laser."[3]

It is not surprising, therefore, given the transformative impact of the *Charter*, that we moved from being a parliamentary democracy to a constitutional democracy; from the sovereignty of parliament to the sovereignty of the constitution; from the courts as arbiters of legal federalism to the courts as the guarantors of human rights, because parliament vested in them that power; from individuals and groups as passive objects in inter-jurisdictional disputes to individuals and groups as rights claimants, rights holders; and from the advocacy of rights to the constitutionalization of remedy.

In particular, the global human rights movement – the global human rights revolution and the internationalization of human rights and the humanization of international law – has had an impact on the adoption, text, interpretation and enforcement of the *Charter*.

Adoption of the *Charter*

Justice Minister Pierre Elliot Trudeau, when tabling a white paper in parliament in 1968 entitled "A *Canadian Charter of Rights and Freedoms,*" noted the confluence between International Human Rights year as proclaimed by the United Nations in 1968, and a Charter reflecting that inspiration.[4]

Successive drafts of the *Charter*, in which I participated in as a special advisor to then Justice Minister John Turner, drew upon the corpus of international rights law, specifically the *Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights*, and the *European Convention on Human Rights.*

This international inspiration has been noted in Canadian jurisprudence. For instance, as Former Chief Justice Dickson stated in Re: *Public Service Employee Relations Act (Alta.):* "The *Charter* conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights." [5]

The text of the *Charter*

If the adoption and successive drafts were inspired by the international human rights movement, it should not be surprising then that the actual text of the *Charter* – the language of the Sections themselves – was derived from international human rights law. Indeed, as Professors Maxwell Cohen and Ann Bayefsky put it shortly after the *Charter* came into effect, the *Charter* was

"a bridge between municipal law and international law to a degree, and with an intensity, not heretofore known in any of the multitude of links between Canadian and international legal orders."[6]

The evidence of the international influence on the text of the *Charter* found expression in several specific sections.

To begin, the very existence of the limitations clause in s.1 of the *Charter* reflects the influence of international human rights instruments, especially the *International Covenant on Civil and Political Rights and the European Convention on Human Rights.* Indeed, it was the more refined invocation of international human rights language by human rights groups that appeared before the joint House and Senate Committees that transformed the original draft of s.1 into one that was more reflective and representative of the higher bar set by international human rights law.

The section on Fundamental Freedoms, s.2, was derived not from American law – which expressed these fundamental freedoms in absolutist terms – but again from international human rights law. These freedoms were also present, like s.1, at the 1971 Constitutional Conference and what is known as the resulting *Victoria Charter*.

Section 6, the section guaranteeing mobility rights, was influenced by the international freedom of emigration movement then underway behind the Iron Curtain, which found expression then in the *Helsinki Final Act*, in whose adoption Canada played a central role.

The legal rights section, ss.7-14, were also very much influenced by international human rights law. For example, s.11(g) of the *Charter* is derived directly from international criminal law and the Nuremberg principles, and contains the only direct and express textual reference to international human rights law in the *Charter*.

As well, s.10(5) of the *Charter* confers upon an arrested person the "right to retain and instruct counsel without delay" though it does not make it clear whether counsel is to be paid for by the government or the accused person. The International Covenant of Civil and Political Rights, under article 14(3)(d), however, confirms upon an accused person the right to "legal assistance," and goes on to stipulate that the legal assistance is to be provided "without payment by him… if he does not have sufficient means to pay for it." International law, therefore, imposes upon Canada an obligation to supply legal aid to an indigent accused, and Canadian courts could interpret s.10(b) of the *Charter* as having "constitutionalized" this international obligation.

S.15, the Equality Rights provision, reflects not only the equal rights language of international human rights law,[7] but also the influence of equality seeking social movements, and their impact on the drafting of the *Charter*. Suffice it to say that s.15 would not read the way it does without the concerted human rights advocacy of the international human rights movement in general, and that of the women's movement in particular, who – wary of the language used in, and the jurisprudence resulting from, the *Canadian Bill of Rights* – secured the equality rights provision as it now reads in s.15.[8] Not unmindful of the fate of the Equal Rights Amendment in the United States[9] advocates also secured the only sweeping unconditional "notwithstanding clause" in the *Charter* with s.28.[10]

Interpretation of the *Charter*

If the adoption of the *Charter* and its subsequent text were influenced by both international human rights law and the international human rights movement, the interpretation of the *Charter* by the courts through recourse to international law is yet another expression of the impact of globalization of law – and the globalization of rights – on the interpretation and application of the *Charter*.

As Justice Dickson said in *Re: Public Service Employee Relations Act:* "The various sources of international human rights law – declarations, covenants, conventions, judicial and quasi judicial decisions of international tribunals, customary norms – must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter's* provisions."[11] In the 20 years that have passed since this statement – moreover, in the 25 years since the *Charter* came into being – Canadian courts have cited international human rights instruments and jurisprudence in literally hundreds of cases.

For example, in the second edition of his book *International Human Rights Law and the Canadian Charter,* William Schabas published a list of some 400 cases in which international human rights law was cited by the Canadian courts.[12] In the third edition, the dramatic number of cases cited had grown such that it became impossible to cite them individually.

Pre-*Charter* references to international human rights law had been all but non-existent.

Drummond Wren[13] – which made reference to international conceptions of non-discrimination – was later effectively repudiated by *Nobel v. Alley.*[14] In post-*Charter* interpretation – however numerous the cases in which international law was cited – the courts have not yet developed a coherent theory, as such, of binding or non-binding international human rights law. Nonetheless, the reference to international human rights law as a "relevant and persuasive source" in the interpretation of the *Charter*, analogous to the reference to comparative law, has offered the courts greater flexibility, adaptability, "dynamism", scope and ultimately greater impact. The absence of a concrete, theoretical approach to the application of international law has left Canadian courts appear free to use a variety of sources, regardless of factors such as ratification, to inform their decisions. [15]

A case study of where international human rights law and jurisprudence has served as such, a relevant and persuasive authority has been in the upholding of the constitutionality of anti-hate legislation, notably in *Keegstra*[16] *, R v. Andrews*[17] and *Canada (Human Rights Comm.) v. Taylor.*[18] The law at the heart of these cases was formed with international human rights considerations at its core: many international conventions to which Canada is a signatory, such as the *International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Prevention and Punishment of the Crime of Genocide,* bound Canada to certain general human rights norms as well as more specific obligations, such as the duty to punish hate propaganda and the promotion of genocide. When Canada's legislation was challenged, the court used reference to international objectives and human rights norms to buttress their preservation of the provisions.[19]

Of course, hate speech is not the only category in which international human rights law has had an impact. For instance, the proportionality inquiry under the s.1 *Oakes Test* – an integral part of Charter deliberation – has been informed by international human rights norms. In *Slaight Communications Inc.*[20], the Supreme Court of Canada expressly stated that Canada's international obligations with respect to human rights should inform the interpretation of the content of *Charter* rights, as well as of what qualifies as a "pressing and substantial objective" in s.1 analysis.

Furthermore, by L'Heureux-Dubé J's strong concurring opinion in *R. v. Ewanchuk*[21] referenced international principles and norms, such as those in *The Convention for the Elimination of All Forms of Discrimination against Women*, to support the finding that the defendant could not use the defence of implied consent in Canada.[22] Finally, in the landmark *Reference re Secession of Quebec*[23] the Supreme Court of Canada evaluated Quebec's theoretical claim to unilateral secession in the international context, with specific regard to the principle of self determination.

Part two: The impact of the *Charter* on the global rights movement

What has been the impact of the *Charter of Rights* on the global human rights movement? There are four distinct contributions that I will briefly note at this point.

First, the *Charter* has contributed to the development of global constitutionalism – and global rights protection – through its aggregate contributions to rights in such diverse countries as South Africa, New Zealand, Israel, India, the United Kingdom and the like. Indeed, some provisions in the South African constitution or the Israeli Basic Laws on Human Rights are direct embodiments of provisions from the *Charter*. As Adam Dodek has written, its accessible structure made the *Charter* a useful model for the drafters of the South African *Bill of Rights*, an appeal enhanced by the *Charter's* status as a "modern" rights document. The influence of the limitations clause and the s.15 is especially evident.[24] Likewise, the *Charter* provided a model for the drafters of the Israeli Basic Laws, particularly with regard to the limitations clause and the override clause.[25]

Second, post-*Charter* jurisprudence, inspired by international law and comparative law sources in the protection of human rights and described by William Schabas as "bold and innovative", has also become influential in the courtrooms of the world.[26] For example, Israel's Supreme Court has cited *Canadian Charter* jurisprudence more than any other court and the proportionality test that evolved from *R v. Oakes*[27] case has become a staple of Israeli jurisprudence. The Constitutional Court of South Africa has also drawn extensively on Canadian *Charter* jurisprudence, referring to twelve Canadian cases in an influential decision on extradition to the death penalty,[28] a decision the Supreme Court of Canada itself later relied upon.[29]

Third, *Charter* jurisprudence is important not only in the development of global constitutiona-

lism, but also because it has contributed to the international development of human rights law and jurisprudence, including the case law of the European Court of Human Rights. In particular, Canadian *Charter* decisions were utilized often by the European Commission of Human Rights before its dismantling in 1998.[30] Finally, the Canadian judiciary and Charter jurisprudence has been at the forefront of what Anne Slaughter has called trans-judicial pluralism, transnational legal processes – in the words of Harold Hongju Koh – or, simply put, judicial globalization of an ongoing transnational judicial dialogue.

Conclusion

In the year in which we mark the 25th anniversary of the *Canadian Charter of Rights and Freedoms*, it is important to include international considerations in our celebration of this document which has transformed both our laws and our lives. The influence and application of the *Charter* will continue to evolve, and, as it does, we should pay attention both here in Canada as well as abroad. For the phenomenon of globalization – the globalization of everyday life – continues, with remarkable and intriguing effects on the field of both domestic and international human rights.

Notes

[1] *Crossing Borders: Law in a Globalized World,* The Law Commission of Canada, March 2006 Discussion Paper, Her Majesty the Queen in Right of Canada, page 4.

[2] *Crossing Borders: Law in a Globalized World,* Law Commission of Canada, March 2006 Discussion Paper, Her Majesty the Queen in Right of Canada, page 4-5.

[3] F. L. Morton, and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, ON: Broadview Press, 2000) at 13.

[4] Trudeau, Pierre Elliott. *Canadian Charter of Human Rights,* Tabled February 1st, 1968 Sessional Paper no. 95C.

[5] *Re: Public Service Employee Relations Act (Alta.)* [1987] 1 S.C.R. 313.

[6] Maxwell Cohen and Anne F. Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law" (1983) 61 *Canadian Bar Review* 265 at 268.

[7] For example, the *Convention for the Elimination of All Forms of Discrimination against Women*.

[8] See for instance *Murdoch v. Murdoch* [1975] 1. S.C.R. 423; *Bliss v. A.-G. Canada* [1979] 1 SCR 183; A.G. *Canada v. Lavell* [1974] SCR 1349.

[9] The *Equal Rights Amendment* has again been put before both the House of Representatives and the Senate in the current 110th Congress.

[10] Section 28 of the *Charter* reads: "Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

[11] [1987] 1 S.C.R. 313.

[12] William Schabas, International Human Rights Law and the Canadian Charter, 2nd Ed. (Toronto: Thompson Canada Limited, 1996) at 255.

[13] *Drummond Wren* [1945] O.R. 778.

[14] *Noble v. Alley* [1951] S.C.R. 64.

[15] William Schabas, *International Human Rights Law and the Canadian Charter,* 2nd Ed. (Toronto: Thompson Canada Limited, 1996) at 52 and 436.

[16] *R. v. Keegstra,* [1990] 3 S.C.R. 697.

[17] *R v. Andrews* [1990] 3 S.C.R. 870.

[18] *Canada (Human Rights Comm.) v. Taylor* (1990), 13 C.H.R.R. D/435 (S.C.C.).

[19] For instance, in *Keegstra*, the majority Supreme Court ruling found that there was a powerful legislative objective at the basis of the challenged law, an opinion the Court illustrated by pointing to Canada's international commitment to "eradicate hate propaganda".

[20] *Slaight Communications Inc. v. Davidson* [1989] 1 S.C.R. 1038.

[21] *R v. Ewanchuck* [1999] 1 S.C.R. 300.

[22] For the international influence on the conception of the rights of children, see for example *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817.

[23] *Reference re Secession of Quebec* [1998] 2 S.C.R. 217.

[24] Adam Dodek, "*Canada as Constitutional Exporter: The Rise of "the Canadian Model" of Constitutionalism*", Paper Delivered at A Living Tree: The Legacy of 1982 in Canada's Political Evolution, Saskatchewan Institute of Public Policy, Regina, Saskatchewan, May 24, 2007. Publication forthcoming in the Supreme Court Law Review as well as in a book by LexisNexis.

[25] The Charter… in the Holy Land? (1996) 8:1 Constitutional Forum Constitutionnel 5.

[26] William Schabas and Stéphane Beaulac, *International Human Rights and Canadian Law: Legal Commitment, Iplementation and the Charter,* 3rd Ed. (Toronto: Thompson Canada Limited, 2007) at 46.

[27] *R v. Oakes* (1983), 145 D.L.R. (3d) 123.

[28] S. v. *Makwanyane*, 1995 (3) SA 391.

[29] William Schabas and Stéphane Beaulac, *International Human Rights and Canadian Law: Legal Commitment, Iplementation and the Charter,* 3rd Ed. (Toronto: Thompson Canada Limited, 2007) at 46-7.

[30] William Schabas and Stéphane Beaulac, *International Human Rights and Canadian Law: Legal Commitment, Implementation and the Charter,* 3rd Ed. (Toronto: Thompson Canada Limited, 2007) at 214-5.