THE *CHARTER* AS A GOVERNANCE STORY

ABSTRACT

The *Canadian Charter of Rights and Freedoms* was a chance event that derailed the drift from Big G (government) to small g (governance). The positive opinion of Canadians about the *Charter* is an uninformed opinion. In fact, the *Charter* underpinned a new fundamentalism of rights talk, and a trumping of politics by adjudication. Until judges go back to their duty of jus dicere, instead of indulging in *jus dare*, and until citizens recapture control of their polity, the malefits of the *Charter* will continue to prevail.

> "As the morality of rights displaces the morality of consent,
> the politics of coercion replaces the politics of persuasion".
>
> F.L. Morton & Rainer Knopff

The context

The last twenty-five years have witnessed major changes both in the nature and valence of the state, and in the configuration of government. Pressures generated by globalization, accelerated technological change, greater socio-ethnic diversity, heightened citizens' expectations, crises in public finances, and so forth, have generated considerable turbulence, and a requirement for the institutional order to adjust faster to ever more complex and always evolving circumstances. These pressures have eaten away at many basic assumptions upon which traditional forms of governing were built.

To simplify, one might say that the Welfare State is in the process of being replaced around the world by the Strategic State: governing has been drifting from a pattern dominated by Big G (government) towards a pattern dominated by small g (governance). This latter pattern of governance is less state-centric, more decentralized, and more polycentric and network-based than the previous regime.

The dominant features of the Big G world were a presumption that the state is more effective than other mechanisms in the pursuit of the public good, and that redistribution should proceed as a matter of right toward an objective of egalitarianism – that can be achieved only through a centralized governance that brings the loot to the center to begin with.

As for the small g world, its dominant features are a belief that the state cannot be presumed to be more effective than market or solidarity mechanisms in all circumstances, and that redistribution should proceed on the basis of needs, and be guided by a philosophy of subsidiarity that operates bottom-up, and in a decentralized fashion – allowing intervention at the higher and more distant level only if the work cannot be done at a lower and more proximate level.

The *Charter* revolution

My hypothesis is that the 1982 *Charter* has produced changes of considerable magnitude in the Canadian psycho-socio-political environment, and has considerably slowed down the drift from Big G to small g.

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It has done so by dramatically changing both the Canadian mindset and the rules of the democratic game in Canada. These impacts have not been well understood.

First, the positive opinion of Canadians about the *Charter* is not an informed opinion. It is an impressionistic and emotional attachment to a contraption that has been effectively marketed by Trudeau-style politicians as an empowerment of the citizens. As soon as the citizens are informed that two thirds of the *Charter* decisions by the Supreme Court involve the rights of those accused of crimes or of special interest groups, Canadian citizens are often astonished and much less enthralled.

This ignorance explains why more than half of polled Canadians in 2007 continue to think that the *Charter* has had a positive effect on Canada in the past, and is moving Canadian society in the right direction for the future.

In parallel, the fuzziness of the public mind on *Charter* matters has allowed interest groups to take advantage of the new instrument to advance their causes by defining their wants or their preferences as rights. Rights as a bundle of rules are claimed without any concern as to whether such claims relate to basic needs or rather to luxury privileges, without any concern for the consequences, and without asking if the population agrees to it and is ready to take on the associated burdens.

Second, such claims have been routinely supported by the courts, often for specious reasons, and have acquired thereby a sacred character and a degree of permanency that they would never have acquired through parliament. The courts have gained the upper hand in their dialogue with the legislatures and parliament.

While it has been argued that the legislatures can always use the 'notwithstanding clause' to neutralize the actions of the courts, the extraordinary degree of political correctness of the population, and their undue deference to the courts, have led to a chill both in the political class and the citizenry, even in the face of the most Kafkaesque decisions of the courts.

The political correctness that has generated such deference to the judiciary has become a new despotism.

Consequently, democratic governance has been eroded by the new fundamentalism of rights talk, and by the fact that, through the *Charter*, judicial adjudication has come to trump the democratic conversation.

The new fundamentalism of rights talk

Fundamentally, rights are social; they are a man-made system of rules granting some privileges to persons with a particular status. They define expectations when they become morally endorsed and/or embedded in law. The *Charter* has generated considerable pressure to establish and formalize rights, to give judicial status to certain rules, and to make the related rights inalienable and inextinguishable.

Like all charters of rights, the *Canadian Charter* was purported to ensure *negative freedom* (i.e., to protect citizens from their governments). But, through various means – of which judicial activism is only one – the *Canadian Charter* has morphed into a machine that produces an inflation of entitlements, with the courts using it to force government to accept new responsibilities in the name of *positive freedom* (i.e., the obligation to provide citizens with the security and support necessary to help them "develop" to their fullest extent), all in the name of shared values and egalitarianism.

The shift from a focus on negative freedom to one on positive freedom is a change of kind.

While the pursuit of negative freedom entails a reduction of oppressive rules, the focus on positive freedom leads to an increase in the *number of rules* as: (1) there seems to be no limit on the "capacities" that may presumed to be necessary for the optimal development of the individual, and (2) therefore no limit to the entitlements required to ensure that one's "capacities" are going to be allowed to be fully developed. It has also been argued that the degree of formality and permanency of the arrangements, necessary for positive freedom to be assured, is such that only legal arrangements will do.

This inflation of new rights to symbolic and real resources has re-enforced the centrality of the state, and in so doing, slowed down the drift from Big G to small g in Canada.

Although the new fundamentalism that emerged from the rights talk of the *Charter* has been denounced from the very moment when the project of a charter was discussed, to the present – from Smiley (1969) to Ignatieff (2001) – and even though it was clear that the vague Rorschachian language of charters was likely to be 'interpreted' by activist judges as legitimizing limitless entitlements, it has proved impossible to counter the ideological support for this philosophy of entitlement.

The notion of needs might have helped in establishing limits on those entitlements. David Braybrooke (1987) has shown that, to the extent that one is able to tame the notion of needs (through lists of matters of need, definition of minimal standard, the principle of precedence of needs over preferences, and a revisionary process to modify either list or standards as circumstances evolve) this notion may serve to anchor discussions about entitlements, and help to keep them within bounds. For, contrary to the notion of rights that is a conversation stopper, the notion of needs is an invitation to conversation and deliberation.

Charter as adjudication trumping politics

In the post-*Charter* years, the drifts from the rule of law to the idolatry of rights, and toward a political correctness of deference to the infallibility of the judges and commissars charged to interpret them, have not been innocent. It would appear that the quest for certainty and clarity knows no bound; the political process has been found too unreliable to be counted on in matters of governance. Better a clear bad rule than a good fuzzy one.

An elite of superbureaucrats has been called upon to interpret the laws, to define what is acceptable or not, to make decisions for the citizens, because the citizens have been declared incapable (as were their elected representatives) of doing that.

This drift toward legal formalism and administrative adjudication has grown exponentially. It is such that one can hardly go through a week in the life of the country without one commissar or another making an adjudication report that is meant to force a representative government to do something it would prefer not to do.

Such development has also tended to slow down the drift from Big G to small g, and it has often been done with the complicity of parliamentarians whose lack of courage has, at times, led them to: (1) delegate to judges and commissars some of the wicked problems they were faced with, and (2) never to challenge their diktats even when they were absurd and destructive.

This state of affair reached a bizarre climax in 2004 when the then federal Minister of Justice developed a new doctrine, in the *Ottawa Citizen*, in the midst of the electoral campaign (Cotler 2004). This new gospel stated openly what until then had remained closeted in political circles: representative democracy does not work; and the courts and commissars must be the bulwarks to protect Canadian governance.

The key matter under discussion at the time was the decision of appellate courts in British Columbia, Ontario and Quebec to strike down the legislation limiting marriage to a man and a woman.

Irwin Cotler took the view that appellate court judges were infallible, even though the majority in the House of Commons would appear not to agree with them, and had said so very clearly in open debates in recent times.

It is difficult to understand why the Minister of Justice did not even feel the need to obtain the Supreme Court's view about whether the traditional definition of marriage was indeed in violation of the *Charter* – an opinion that the Supreme Court has refused to give.

Whatever the Supreme Court's final decision might have been, what is most surprising is to see a federal Minister of Justice so obsessed with limiting the damages that the tyranny of the majority might inflict on minorities (in his own personal view), that he was willing to (1) fall into an idolatry of court-interpreted rights (as if they were sacred), (2) to pronounce the ultimate authority of the courts over parliament in a representative democracy, and (3) to suggest that Parliament should not dare to use the notwithstanding clause, and that the judiciary should be allowed complete license.

As Michael Ignatieff has rightly underlined, "we need to stop thinking of human rights as trumps and begin thinking of them as a language that creates a basis for deliberation". Rights are not a set of trump cards to bring political disputes to closure. Parliament is the place of last resort for deliberation about all governance issues in a democracy.

This ignorance explains why more than half of polled Canadians in 2007 continue to think that the Charter has had a positive effect on Canada in the past, and is moving Canadian society in the right direction for the future.

The idea that Parliament is not to be trusted, and that judges, as super-bureaucrats, are like shamans who cannot be contested is anti-democratic.

The *Charter* is a creature of Parliament

Rights have been defined by Parliament, as Michael Ignatieff reminds us. They are a "tool kit against oppression" and one should not automatically "define anything desirable as a right", because that would erode the legitimacy of core rights.

The courts are not infallible in interpreting the *Charter* either. And there is nothing sinister, in a free and democratic society, in Parliament's using the notwithstanding clause to suspend for a short period the application of a decision by the courts that does not pertain to oppression, and with which the majority of freely elected parliamentarians does not agree.

To allow minority groups to obtain everything they would prefer to have as a matter of rights, to make rights into a secular religion, and the courts into its only authorized clergy, is taking Canada back into dangerous territory. And when a minister of the Canadian government trivializes Parliament as the ultimate authority in a representative democracy, one has cause for concern.

One might be tempted to take Cotler's views as extreme and marginal, and to discount them accordingly. That would be a mistake.

The activism of the courts and the willingness of judges and commissars to indulge in intellectual acrobatics in interpreting Article 15 of the *Charter* – the equality clause – (for instance), and in philosophizing about what may touch or leave untouched "dignity, feelings and self-respect" of a person can only leave one somewhat uncomfortable.

The thrusting of the language of rights into democratic conversations, and the further displacement of Parliament by judges and commissars, have imposed onto discussions about more or less (that characterize most of the democratic discourse) a sort of either-or yoke. Practical issues that ought to be discussed taking into account context and circumstances are adjudicated in the absolute and in the abstract, within an adversarial venue. This is not what we thought democracy was.

Hopes and fears

At first, many were enthusiastically favourable to the idea of the *Charter*, on the ground that the Supreme Court would exercise the same restraint in interpreting the *Charter* that it had exercised in interpreting the *Bill of Rights* of 1960.

This has proved not to be the case. The dual forces of the fundamentalism of rights and judicial activism have unleashed a major attack on representative democracy.

The saga of this successful attack has been eloquently told by Rory Leishman (2006).

In a short paper, one cannot do more than point to circumstantial evidence, but this is a cautionary tale.

Our institutional order has been transformed while the citizens slept. It has now been established that the courts have a right (when they wish) to review and strike down policies supported by the citizens' elected representatives, and to define their own rules for doing so (e.g., the Oakes' test) – in complete ignorance or blatant contradiction of earlier jurisprudence when they wish to do so – as Leishman clearly shows.

Whether this is an irreversible trend is the key question.

Let us just say that, for an observer from the mezzanine, it is difficult to see how this dérapage will be stopped (1) until judges go back to their duty of *jus dicere* instead of indulging in *jus dare*; and this will not happen until there is a change of the guard; and (2) until parliamentary democracy has been strengthened; and this will not happen until there is a change in citizen activism.

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