THE *CHARTER*: FOUR CRITICISMS

ABSTRACT

Four criticisms of the *Charter* are advanced: (i) that the decision to express its values in terms of rights saps those values' ability to motivate people to uphold them; (ii) that rights talk encourages adversarial responses to conflict, making genuinely reconciliatory approaches to conflict resolution difficult if not impossible; (iii) that the *Charter* contributes to the fragmentation of the country; and (iv) that the *Charter's* failure to recognize the Québécois nation alienates that nation's members from Canada.

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I should begin by declaring that I have no quarrel with the values contained in the *Canadian Charter of Rights and Freedoms* (1982). On the contrary, the *Charter*'s affirmation of the respect for the individual, along with its expressed concern for the special status of our aboriginal peoples, for our multicultural heritage, for the equality of the sexes, and so on – all these strike me as eminently laudable. Evidently, my objection lies elsewhere: it is with the decision to express these values in the language of rights. For I believe that the *Charter*, by encouraging rights talk both within and without the courtroom, has done great damage to Canadian politics. This is because such talk not only, ironically enough, undermines the very values it would affirm but it also makes it harder to meet the challenge of diversity, the challenge of making sometimes very different people feel at home in the same country.

I begin with a puzzle. In having ratified the UN *Universal Declaration of Human Rights*, Canada asserts, among other things, that everyone has a right to an adequate standard of living.[1] This is a right, however, that is notably absent from our *Charter*. Yet despite this, the Canadian state redistributes *over ten times* more wealth to the Canadian poor then it does to impoverished foreigners.[2] How could that be? The highest law in the land does not recognize the right of Canadians to an adequate standard of living; such a right is recognized when it comes to all of the world's poor; and yet the former are provided with more aid than the latter.

This suggests that what motivates Canadian public policy vis-à-vis our poor is something other than their ability, simply by virtue of being human, to make certain rights-claims. I believe that what that thing is something much less abstract than rights, namely, the sense that we Canadians are members of a particular political community. I care about the Vancouverites who I have never and shall never meet, that is, not because they bear certain rights, but because I see them as fellow citizens, and this in an Aristotelian sense, namely, that we share a kind of friendship.[3]

This conception of citizenship must be distinguished from one based on the idea that we Canadians affirm a theory of justice, as with the vision of a Just Society that inspired former Prime Minister Pierre Elliot Trudeau to put the *Charter* in our Constitution.[4] Because theories, unlike friendships, are abstract rather than particular. Indeed, that is one reason why it should come as no surprise that the rights contained in the *Charter* are comparable to those found in the constitutions of many other countries, not to mention the UN *Declaration*. One even wonders whether the *Charter* ought to be identified with a specific country at all as opposed

to being seen as a fundamentally cosmopolitan document; for after all, it itself declares that its rights are the possession of not only Canadian citizens, but of "everyone," "any person," "anyone," "every individual" and "any member of the public."

By contrast, the common good at the heart of the Canadian political community is something wholly particular, wholly practical and historical. Aristotle famously stipulated that no *polis* could be so large that citizens could not hear a clarion's call inviting them to participate in the discussions of the *agora*. My claim is that, thanks to advances in media and telecommunications, we Canadians have been hearing that call for some time.

It is precisely because we have done so that our political community has had a certain power to motivate us to feel obligated to each other. Let me explain. An abstraction is something separate from context, isolated from all of the things that exist together within a context. As John Locke once put it: "Words become general by being made the signs of general ideas: and ideas become general, by separating from them the circumstances of time and place, and any other ideas that may determine them to this or that particular existence."[5] Yet the more abstract something is, the less we – or at least those of us who are not natural scientists – tend to find it of interest or concern. Think of the question "How's things?" It expresses our interest in someone because it refers to the things that are of concern to them in the context of their lives.[6] Indeed those things are parts of the more or less integrated whole that constitutes their identity, the story of who they are.[7] When we ask "How's things?" then, we are essentially asking to hear a story; and a story, given that it presents things together in a context, is the opposite of an abstraction. This is significant for ethics and politics because, when those things are *values* and they are articulated abstractly, then this makes them less of a concern, undermining their very ability to motivate us to uphold them. We are all familiar with the military's use of abstract euphemisms as a way of distancing us from the horrors of war: 'collateral damage' for the deaths of civilians; 'incontinent ordnances' for wayward bombs; 'traumatic amputation' for the blowing off of arms and legs. These are effective because abstraction desensitizes, which is but another way of saying that it disempowers the values involved. I haven't the space to argue this point further here, however, so I'll have to make do with pointing out that ancient rhetoricians used to refer to vivid, detailed description as *enargeia*, and this is precisely the kind of thing I mean to invoke when I write of the *power* of a value to motivate us.

Now what are rights if not abstract principles, isolable concepts capable of being presented in bulleted schedules or lists? Of course the *Charter* is just such a list, one that fails to integrate its values, to make for some kind of narrative of the whole. Indeed the rights it affirms are not even prioritized; we are not told, for example, that the democratic rights adumbrated in Articles 3-5 are meant to carry more weight then the mobility right of Article 6. The most notable guidance offered as regards to how the *Charter's* rights are to be applied as a whole is, ironically enough, Article 1's declaration that they may be compromised ("subject to reasonable limits"), as long as this is justifiable in the name of that equally abstract formulation "a free and democratic society." Lacking any sort of Canada Clause, the *Charter* thus presents its values in an inherently uninteresting, disempowering way.[8]

Not that we are ever uninterested in asserting our own rights, of course, or those behind the causes to which we subscribe. These we advance, and often strenuously so, within *adversarial* contexts, in which we hope to have our favoured rights imposed upon those unwilling to respect them in the way we would like. The problem with taking an adversarial stance, however, is that it does violence to the common good. So where my first critique of the *Charter* above is based upon the disempowering effects of the abstract language of rights, this one has to do with that language's inherently adversarial nature.

In the United States, as the legal philosopher Mary Ann Glendon has complained, rights tend to be invoked in a way that encourages disputing parties to advance absolute, all-or-nothing positions, rendering their advocates incapable of compromise.[9] And when people are locked in a battle of this sort, of course, there is little room for the notion of a common good. In Canada, our rights talk is still adversarial, although somewhat less so. For we *negotiate* our rights, balancing them against each other in a way that recognises that hard choices have to be made.[10] We do so because we are aware that when rights clash none can be, a priori, awarded an overriding status. So while the parties here are still adversaries – for one gains only when, and as much as, the other loses – at least they do not aim for total victory. Instead, each hopes to put enough pressure on the other to

encourage them to make certain concessions, the goal being to reach a reasonable accommodation.

Yet, negotiation, we must recognize, is distinct from *conversation*. Those who respond to a conflict with conversation still oppose each other, but not in an adversarial way.[11] For their goal is not accommodation but the achievement of a shared understanding. This is a much more ambitious ideal, since where an accommodation is, as the word suggests, but a temporary domicile, understandings are things we can truly feel at home with. But understandings cannot come from balancing demands against each other. On the contrary, each party must try to convince the other of the best way to *integrate* or *reconcile* the values involved. This means that each must hear the other out with the intent of learning something.

If this is to happen, however, they must avoid articulating their positions in terms of rights. Instead, they need to go into the richest possible detail about how their interpretations of the matter constitute the best way of fulfilling the common good. Conflicting over the justice of abortion? Those who would converse will invoke neither the right of a woman to control her body nor the right to life of a foetus, for they know that such talk constitutes but an aggressive way of asserting their independence, their separation from each other and hence from the common good. ("Why should I be allowed to have an abortion? Because it's *my* right!" "Why should you not be allowed to have an abortion? Because the foetus, an *independent* being, has a right to life!" And so on.) The hostility associated with invoking such rights also ensures that neither will be able to feel secure enough to listen to the other with an open mind, which is precisely what conversation requires. Instead of asserting rights, then, those disagreeing need, for example, to open up a Bible and begin exploring it together, alongside the best feminist texts. Of course as these examples show, conversation, while markedly less aggressive than negotiation, is also far more difficult, not to mention fragile. But at least the potential payoff is directly proportional to the difficulty: the realising, rather than compromising, of the common good.[12]

Such realising can produce laws that are far more durable than any arising from some struggle over rights. The many rights being trampled in the United States today, causalities of the so-called war on terror, come as no surprise. For those of us who have taken the lesson of Weimar to heart know that neither constitutional documents (and the U.S. Bill of Rights, we recall, does not even have a notwithstanding clause!), nor institutional checks and balances can preserve our values in trying times. Other than heroism, only our political culture, as powered by the hearts of our fellow citizens, can do that.

Not that we are ever uninterested in asserting our own rights, of course, or those behind the causes to which we subscribe.

My third criticism of the *Charter* follows from the second. It is that, in encouraging Canadians to defend their positions as adversaries rather than merely opponents, the *Charter* contributes to the fragmentation of the country.[13] This happens in two ways. The first is 'pluralist multicultural': by affirming the rights of women and minorities such as the aboriginals, the disabled, and ethnic communities, the *Charter* encourages division, rather than integration, between them. The problem, to be clear, is not with their constitutional recognition *per se*; it is with the choice to do so in the language of rights. The second path to fragmentation is 'individualist multicultural', the version of multiculturalism that Trudeau endorsed: it promotes an even finer fragmentation in that articulating the respect for individuals in terms of rights encourages their separation from each other, making it more difficult for them to share goods in common and hence be members of communities.

As an alternative, I offer a 'patriotic multiculturalism'. It calls on citizens to put their common good first, and this means responding to conflict with conversation before turning to negotiation. While I accept that negotiation, and the rights talk that facilitates it, does have its place, the question is whether, thanks to the *Charter*, it has taken up too much. My answer is that it has.

I want to close by mentioning one final criticism of the *Charter*: its failure to recognize the

presence within Canada of the nation of francophone Quebecers. The recent Harper motion to this effect has certainly constituted a step in the right direction, but this is a journey that we can never hope to complete until the *Québécois* are recognized within the Constitution. In failing to do that, the *Charter* has thus served to alienate them from the country. Yet we English Canadians continue to be bewildered, as well as to pose that utterly misguided question "What does Quebec want?" For it is not the political community of Quebec that needs recognition, the community of all Quebec citizens, but, again, the national community of the *Québécois*. Perhaps one day, when we manage to wean ourselves off of our addiction to rights talk, we shall become able to listen to them with an open mind and learn how they, and indeed the many other Canadians like them, can be made to feel truly at home in the country. But for that, of course, we will first need to get rid of the *Charter*.

NOTES

[1] Article 25 of the *Declaration* states that "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

[2] In 2004, for example, it spent $1,241 million on foreign aid and $13,413 million on domestic social assistance. See Statistics Canada at http://www.statcan.ca.

[3] See Aristotle. (1985). *Nichomachean ethics.* (T. Irwin, Trans.). Indianapolis: Hackett.

[4] See, for example, Trudeau. (1992). The values of a just society. (P. Claxton, Trans.). In T. S. Axworthy and Trudeau (Eds.), *Towards a just society: The Trudeau years.* Markham, ON: Penguin.

[5] Locke. (1979). *An essay concerning human understanding* (P. H. Nidditch, Ed.). Oxford: Oxford University Press, 1979), bk. 3, ch. 3, sect. 6.

[6] For more on this notion of "things," see Heidegger, "The Thing," in *Poetry, Language*, *Thought*, trans. Albert Hofstadter (New York: Harper & Row, 1971).

[7] On the connection between narrative and identity, see, for example, Alisdair MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame: University of Notre Dame Press, 1984, 2nd edn.), ch. 15; Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, MA: Harvard University Press, 1989), pp. 47-52; and Paul Ricoeur, *Oneself as Another,* trans. Kathleen Blamey (Chicago: University of Chicago Press, 1994), chs. 5-6.

[8] For more on the disempowering effects of rights talk, see my "The Ironic Tragedy of Human Rights," in *Patriotic Elaborations: Essays in Practical Philosophy* (forthcoming), sect. I.

[9] See Glendon, Rights Talk: *The Impoverishment of Political Discourse* (New York: Macmillan, 1991).

[10] See, for example, Paul Sniderman, Joseph F. Fletcher, Peter Russell, and Philip E. Tetlock, *The Clash of Rights: Liberty, Equality, and Legitimacy in Pluralist Democracy* (New Haven: Yale University Press, 1996).

[11] On this distinction, see my "Opponents vs. Adversaries in Plato's Phaedo," *History of Philosophy Quarterly* 22, no. 2 (April 2005): 109-27.

[12] For more on this critique of rights talk, see my *From Pluralist to Patriotic Politics: Putting Practice First* (Oxford and New York: Oxford University Press, 2000), ch. 7.

[13] I first advanced this particular criticism in my *Shall We Dance? A Patriotic Politics for Canada* (Montreal and Kingston: McGill-Queen's University Press, 2003), pp. 86-91.