

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: THE LESSONS OF COMPARATIVE JURISPRUDENCE

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The Canadian Charter of Rights and Freedoms was constrained, in its drafting and adoption, by special Canadian historical factors: the need, expressed by the Prime Minister and a number of provincial Premiers during the Quebec "sovereignty-association" referendum campaign in the Spring of 1980, to "renew" Canadian federalism if only Quebec would vote against separation, and the constitutional amendment machinery then extant which seemed to require complex inter-governmental bargaining before any federal approach to Great Britain for formal amendment of the British North America Act.

In the result, the new Charter is a governments' and not a peoples' charter, with a strong bureaucratic imprint in its language and styling which will complicate subsequent judicial interpretation. It seems certain that, in the sheer volume and range of the new human rights litigation to be expected under the Charter, a veritable revolution in Canadian constitutional-legal practice and legal thought-ways will occur. The courts will experience extreme pressures to rule on great political causes célèbres, raising the issue of judicial policy-making and the shifting boundaries between law and politics. Traditional concepts of judicial independence, of the relations between the courts and coordinate, executive and legislative arms of government, and even of court jurisdiction and process may need reexamination.

Des facteurs particuliers reliés à l'histoire du Canada ont influencé la rédaction et l'adoption de la Charte canadienne des droits et libertés: la nécessité exprimée par le Premier Ministre et certains premiers ministres provinciaux au printemps 1980, lors de la campagne pré-référendaire au Québec sur la "souveraineté-association"; de "renouveler" le fédéralisme canadien si seulement le Québec votait contre la séparation; le mécanisme alors existant de l'amendement de la Constitution qui semblait exiger des négociations inter-gouvernementales complexes avant toute requête fédérale auprès de la Grande-Bretagne pour faire amender l'Acte de l'Amérique du Nord Britannique de façon formelle.

En fin de compte on se retrouve avec une Charte sanctionnée par les gouvernements et non par le peuple, dont le langage et le style laissent percevoir la forte empreinte de la bureaucratie, ce qui ne manquera pas de compliquer toute interprétation judiciaire ultérieure. Il semble certain que, par suite de l'énorme volume et diversité des litiges portant sur les nouveaux droits de la personne auxquels il faut s'attendre en vertu de ladite Charte, on assistera à une véritable révolution dans la pratique judiciaire et la pensée juridique canadienne ayant trait à la Constitution. Les tribunaux seront soumis à de fortes pressions lorsqu'ils

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auront à prendre des décisions dans des causes politiques célèbres soulevant ainsi la question du "gouvernement des juges" et celle des frontières fluctuantes entre le droit et la politique. La nécessité de ré-examiner les concepts traditionnels de l'indépendance judiciaire, des relations entre les tribunaux et les branches législative et exécutive du gouvernement, et même ceux de la compétence juridictionnelle, pourra se faire sentir.

The Canadian Charter of Rights and Freedoms, like all major constitutional documents reflects the particular circumstances of political timing and choice of drafting personnel and processes, in which it was achieved and enacted. Some of these circumstances were more or less enjoined by the sheer weight of past historical example or precedent; others were relatively casual or accidental, and in no way necessary or inevitable in constitutional terms; still others reflected the conscious political preference and the judgment, good or bad as the case may be, of the main political actors involved in the elaboration and eventual adoption of the Charter.¹

I. *Constitutional Past as Prologue;
the Constitutional
Amendment Route.*

The failure of the British Parliament to include autonomous, self-operating, ("all-Canadian"), constitutional amending machinery in the original British North America Act of 1867²—an error or oversight never again repeated in the "made-in-Britain" constitutional charters for the overseas Empire—bred the conventional constitutional amendment route of legislation by the British, Imperial Parliament enacted at the request, and to the letter of the advice, of the Canadian Government of the day. It was assumed by Prime Minister Trudeau that this existing conventional constitutional law process should be followed in the case of his constitutional proposals of 1980-1981, and alternative processual options were never seriously canvassed or discussed publicly. In fact, very few democratic constitutional charters seem to have emerged and been adopted in strict conformity to the pre-existing rules as to constitutional change, a sufficient legitimation, in constitutional terms, for the exercise in constituent power involved, being considered to be provided by public ratification in referendum vote or some similar exercise in participatory democracy.

Since the British Government's rôle in the Canadian constitutional amending process, in modern times and in response to emerging inter-Commonwealth conventions, had become mechanical and non-discretionary, the British connection should not have been oppressive or in any way

¹ Reference may be made to the author's recent constitutional trilogy: *Quebec and the Constitution* (1979); *Canada and the Constitution. Patriation and the Charter of Rights* (1982); and *Constitution-Making. Principles, Process, Practice* (1981), this latter work comparative law in emphasis.

² 30-31 Vict. c. 3, as am. (U.K.) now Constitution Act 1867.

influential in the case of this one, final, "made-in-Britain" amendment to the British North America Act, but it brought in its train other processual elements which were, it may be argued, neither necessary nor inevitable in constitutional terms and which were, in fact, to prove controlling as to many aspects of the planning and drafting of the new Charter—namely the active involvement of the provincial Premiers in the completion of the Canadian phase of the constitutional reform project of 1980-1981, up to the time of its presentation to the British Government for formal enactment by the British Parliament. The direct involvement of the provincial Premiers was related, historically, to the practice over the half century of abortive discussions in Canada, from 1927 on, concerning adoption of a new, "all-Canadian" constitutional amending machinery for the British North America Act, and to much actual practice in regard to the specific amendments that were in fact made to the British North America Act from 1867 on, via the "made-in-Britain" route. It may be suggested that, in strictly conventional constitutional law terms, such practice of involvement of the provincial Premiers, though persuasive, was not legally compelling. In fact Prime Minister Trudeau, after the break-down of the federal-provincial First Ministers' constitutional talks of the summer of 1980, proceeded for almost a year without the provincial Premiers, on the legal advice that it was constitutionally competent to act on the federal government's initiative alone—legal advice which the "legality" majority opinion in the Supreme Court ruling of September, 1981, later confirmed. Our interest, here, is not in the legal merits of making federal-provincial First Ministers' conferences the arena for adoption of the Charter of Rights and Freedoms, but its practical effects upon the philosophy, substantive contents and style of the new Charter. There is a certain obvious logic in negotiating with provincial Premiers as to federal-provincial legislative competences under sections 91 and 92 of the British North America Act, and even as to the reform of federal institutions like the Senate or the Supreme Court. The case for bringing the Premiers in as key actors in the working-out of the Charter is less clear, if it should be as an alternative to or at the expense of other community interest groups,—particularly minority groups—with a more obvious, direct professional or sectarian interest in the whole subject of human rights. The provincial Premiers might argue, of course, that the Charter, in the very fact of establishing or recognizing human rights, would touch upon or even cut down some provincial law-making competences defined in section 92 of the British North America Act. But in strictly scientific-legal terms, that seems a rather limited, limiting vision of a constitutional document whose *raison d'être* is to enlarge people's rights against state authority of whatever nature, federal or provincial or even municipal. We know that the provincial Premiers' opinions operated restrictively in relation to the Charter, not merely *after* publication of its first drafts during actual federal-provincial negotiations; but even before publication, while the federal proposals were still being worked out, by way of a sort of federal government anticipatory self-restraint in regard to

expected provincial objections. Indian rights, which were included in the very first federal draft, were subsequently deleted altogether out of fear of an adverse provincial reaction, and only subsequently restored to the federal constitutional plan, as a result of countervailing pro-Indian pressures, a scant few hours before Prime Minister Trudeau unveiled the federal constitutional package in his nation-wide television address on October 2nd, 1980. In sum, the Charter is the product of an essentially oligarchic, inter-governmental process that was broken out of only when its main lines had been established, and that replaced the governmental oligarchy by an internal, bureaucratic operation conducted in private. I do not think that the federal parliamentary committee "crash" hearings, crammed into the winter months of 1980-1981 (with the Christmas period excepted, of course) after the break-down of the inter-governmental forum, can be regarded as a sufficient and adequate corrective for the lack of prior public consultation. (The eleventh-hour pressure group activity applied by women's groups, and to a lesser extent Indian groups, after the federal-provincial political deal of November 5th, 1981, which seemed to have secured a final constitutional compromise at the expense, in part, of women's rights and native rights in the new constitutional charter, demonstrated just how vibrant and effective participatory democracy could be as an instrument of constitutional change, if only given a chance). The limited federal parliamentary gesture towards participatory democracy in the winter of 1980-1981 occurred only *after* the publication of the federal government's unilateral constitutional proposals, in what turned out to be very close to the final form enacted on April 17th, 1982. There are some second thoughts as to the representativeness, in regional and also sectarian terms, of the sample interest group spokesmen who were in fact convoked by the parliamentary committee: it is recognized that rank-and-file members, particularly from Opposition parties, do not have the back-up, resource facilities to examine, and if need be to challenge, the expert status and scientific detachment of those technical witnesses who are chosen to parade before them.³ Some much more substantial and systematic canvassing of regional opinion, and some more exacting preliminary examination of witnesses, on the *voir dire*, as to their representative or expert quality as the case may be, and their general claims to credibility, would have been helpful. But that would have needed much more time than was, in fact, made available; and because it would have interrupted or delayed the momentum of the whole constitutional patriation process, that extra time was not conceded. For this special combination of reasons, principally historical, the new Canadian Charter of Rights is, in its origins, a govern-

³ See, generally, House of Commons, Special Committee on Standing Orders and Procedure. Third Report to the House (First Sess. of the Thirty-second Parliament, 1980-81-82), Issue No. 7, Nov. 4th, 1982; Issue No. 8, Nov. 9th, 1982; Issue No. 12, Dec. 7th, 1982.

ments' charter and not a peoples' charter. That fact shows up in its language and styling and, ultimately, in its substantive contents too.

II. *Timing of Constitutional Change: the Political "ripeness" of Constitution-making.*

There are times, as the great nineteenth century legal historian and philosopher, von Savigny, noted, that are ripe for legal codification, and other times—perhaps the majority of times, that clearly are not.⁴ Von Savigny linked his thesis to the somewhat mystical, romantic notion of the *Volksgeist*, the element of popular consciousness in law. We would render the same proposition in more contemporary constitutional-legal terms by saying that it is extremely difficult, if not indeed impossible, to undertake constitution-making of a fundamental, far-reaching character unless there is a substantial degree of popular consensus in support of the aims and objectives of the constitutional project. Such a popular consensus sufficient to build a successful venture in constitution-making will normally exist only in periods of public euphoria following on some cataclysmic social event, such as a revolution, a great military victory (or even a great military defeat); but that consensus is difficult to find and even more difficult to maintain in more normal times. The attempts at constitutional novation in other democratic polities than our own in the last decade and a half—Switzerland and Germany, for example—have tended to confirm von Savigny's basic thesis afresh, amply demonstrated as it had already been in Continental European legal experience over the more than a century and a half since its first formulation.

Prime Minister Trudeau, presumably also the four provincial Premiers who ventured with him into the Quebec referendum campaign in the Spring of 1980, and who joined him in promising Quebec voters a "new" or "renewed" federalism in Canada if only they would vote against "sovereignty-association", were no doubt justified in attempting to profit from the mood of public enthusiasm in English-speaking Canada immediately after the referendum vote, to launch the idea of constitutional reform. But such public enthusiasm was bound to be fleeting, and impossible to maintain over the eighteen months of protracted debate and argument that in fact ensued; and it proved difficult to concentrate it in support of specific constitutional reform projects going beyond the more specifically "Quebec" (French language; French language rights outside Quebec) issues which the NO! vote in the Quebec referendum had presumably mandated. These other, non-Quebec issues, of course, were those touching federal-provincial legislative competences, federal institutions and the like. The historical lessons as to the timing of projects of constitutional

⁴ F.K. von Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (1814); and see also On the Vocation of our Age for Lawmaking: Constitutional and International Codification in an Era of Transition and Rapid Change, in A.R. Blackshield (ed.), *Legal Change, Essays in Honour of Julius Stone* (1983).

change all pointed to acting only while a popular consensus for change existed, and to tailoring one's reform proposals to accord with that consensus or at least moving affirmatively to educate the public in support of new and additional projects. At all events, one had to act quickly; and probably in the nature of things with the inordinate delays and difficulties inherent in federal-provincial inter-governmental bargaining, it meant going it alone, (with or without any extra political-psychological lift coming from popular, plebiscite consultation). The conclusion must be that the times were not especially favorable in Canada at the opening of the 1980s for any really comprehensive, innovatory exercises in constitution-making; and some of the more obvious shortcomings and disappointments in the Charter as finally adopted must be assessed in this light.

III. *The Transient and the Permanent in Constitution-making.*

There was a further problem as to timing that the Canadian Charter of Rights, no doubt because in the end it is fairly cautious and conservative as to its actual, substantive contents, managed fortunately, to avoid. That is the jelling, as timeless absolutes of constitutional law, of temporary public fads or preferences, usually of a moral character, that happen to be current at the particular moment of constitutional drafting. Von Savigny had also warned of this danger, in counselling against a "premature" legal codification that might act as a brake upon a society still in full evolution as to its basic social, economic, and industrial organization and the community values going with that. Canada is, manifestly, a community in transition at the present time, and part of a larger world community itself undergoing transition and fundamental change. It is one of those happy accidents of history, resulting from the interplay of rival forces during the federal parliamentary phase of the constituent process over the Charter of Rights, that both religion and property disappeared from the substantive parts of the Charter. Each of these has proved a Pandora's Box of problems for other countries: the politically wise and magnanimous Prime Minister of Ireland, Garret FitzGerald, whose country, more than most others, could justify incorporating a particularist religious ethic into its constitution and in fact did so, has suggested that the time may now be ripe, politically, to delete the religious sections in the interest of a larger, unified Ireland. Public attitudes change perhaps more in this area of constitutional concern than any other, and it is open to sectarian political strife and pitiless litigation in support thereof, as the constitutional experience of other countries amply indicates. As for property, every modern constitution-maker has taken note of the unhappy American constitutional experience with property rights through the substantive due process ("liberty of contract") notions that were built upon the Fourteenth Amendment by an ultra-conservative judicial majority on the United States Supreme Court, as a means of striking down popularly-enacted social legislation—minimum wage laws, maximum hours of labour laws, and the like. Without exception, the pre-

Roosevelt American experience has been viewed by constitution-makers of the post-war era as a negative lesson of the dangers of enshrining any one generation's passing views on property as timeless absolutes in the constitutional Charter.

IV. *Vagaries in Constitutional Drafting: Lapidarian Text or Detailed Blueprint?*

The Canadian Charter of Rights was determined, in its basic organization, language and styling, as much by the objective factors of its process of adoption and legal enactment, as by the conscious preferences of its actual drafters. In fact, deference to the process and to the main political actors expected to be involved in it controlled the choice of the persons and qualifications (political or professional) of the drafters themselves. For the Charter was, from the outset, as we have said, a governments' and not a peoples' project. Never being intended to be submitted to popular approval, whether by way of legally binding referendum or facultative plebiscite, the Charter did not have to be designed in such a way as to persuade people and win votes: in other words, it did not have to be rendered (in Jeremy Bentham's words) "cognoscible", except insofar as that might be viewed as an intrinsic drafting value in itself. Further, since the constitutional exercise had started as one involving governments and might again return to an inter-governmental arena (as it, in fact, eventually did), and would in any case have to end up before a foreign (albeit friendly) government, Great Britain, whose acquiescence, though pre-ordained, should not nevertheless be strained unnecessarily, there seems to have been a desire on the part of the Prime Minister's political advisers to depersonalize the whole project by minimizing, in public, the rôle that he would himself play in it and by ensuring, in private, that he was never directly involved. This was one of the fateful political judgments made in the whole constitutional project, for it meant eschewing all the legal virtues and concomitant political advantages of a clear, firm, and succinct text, freed from unnecessary equivocations or contrived diplomatic ambiguities, such as only a very strong political leader, or a small group of like-minded political allies, could have produced. In the result, we have neither the American Bill of Rights nor the French Declaration of the Rights of Man and the Citizen, both of which, nearly two centuries after their original drafting, are still legally extant and part of their current national constitutional charters, and the two standard drafting models because of the quality of their language and styling and the apparent universality of their postulated ideals. No one better than Prime Minister Trudeau, with his easy elegance in both official languages, could have undertaken to draft a short, lapidarian, American or French-style charter. But he was apparently dissuaded by his staff from trying to play Thomas Jefferson.

Instead, the task seems to have been entrusted to a committee of intermediate-level, federal civil servants. Within the limits of their man-

date and their professional expertise and training, they performed, it is clear, very, very well; and they displayed an excellent political prudence and self-restraint in regard to the larger issues of political choice surrounding adoption of the Charter, which were clearly beyond their mandate as civil servants. But it is a civil servants' text that has emerged from them, more suited to ordinary legislation in implementation of the guarantees in a constitutional charter than to a constitutional charter itself. It is very, very long for a constitutional charter, deliberately uninspired in choice of language, and it proceeds, where possible, by denotation and by listing *in extenso*, rather than by postulation of "standards"-type legal provisions which would lend themselves to progressive, generic extension in the future in accord with what, in United Nations' parlance, is described as the "evolving juridical conscience of mankind". By virtue of its very specificity and detail and length, it may be suggested that the Charter is far less likely to meet the testing challenge of time, in the future, than the very much older, but much more high level and general-principled American Bill of Rights and the French Declaration. In being specific and low-level, the Canadian Charter carries its own in-built legal fetters to future growth and future creative interpretation, in a way those other Charters never did. This might not matter very much if the Canadian Charter could be easily amended and up-dated to meet new societal conditions and demands. But, on the face of it, the new, autonomous, "all-Canadian" constitution amending machinery adopted as part of the whole constitutional "patriation" package in 1982, is likely to prove as resistant to change, and as rigid in practice, as the American and most other federal constitutions have been. There are likely, then, to be strong political pressures in Canada in the future to use informal agencies of constitutional change particularly judicial legislation; though the Charter, in comparison to the American Bill of Rights upon which conscious judicial policy-making was built up into a science, does not lend itself too easily to this particular solution to constitutional impasse.

On one point, however, the anonymous federal civil servants who actually worked out the text of the Charter deserve freedom from criticism or censure. What the American legal realist leader and Federal Appeals Court judge, Judge Jerome Frank, used to call "weasel-words", abound in the Charter by way of express limitation or exception to rights given in the same breath. These are not the responsibility of the civil service drafters. They entered the Charter in response to, or in anticipation of, objections advanced by reluctant provincial Premiers who did not like the idea of a constitutional Charter of Rights anyway. Their inclusion in the Charter represents a clever decision at the federal political—not the technical, civil service level—to attempt to reconcile the politically irreconcilable according to Preuss' celebrated strategy in the drafting of the Constitution of the Weimar Republic: when faced in a constituent assembly or similar body with two mutually opposing philosophical or ideological principles, put

them both in together in your constitutional text and leave it to history to try to resolve the antithesis.

V. Comparative Law: Its Use and Misuse.

It has been said, as a mark of high praise, that the Canadian Charter makes extensive and profitable borrowings from comparative law; and the two main examples cited in support of this claimed recourse to foreign law are the United Nations' Universal Declaration of Human Rights of 1948, and the Council of Europe's European Convention on Human Rights that was signed in 1950. On empirical examination, however, the purported use of foreign law turns out to be a purely mechanical exercise in legal eclecticism. Someone using scissors and paste has cut out phrases, here and there, from both documents and inserted them into the Canadian Charter, without however evidencing comprehension of the basic institutional-processual legal framework in which the Universal Declaration and the European Convention must each operate, and without study of the underlying societal facts in the World Community and in the Council of Europe which necessarily limit and condition the operation of both acts, as purported law-in-action for their own special legal communities. To paraphrase Austen Chamberlain in another context, comparative law, if not properly used, can become a "trap for the innocent and a sign-post for the guilty". Unlike the Canadian Charter, the United Nations-based Universal Declaration of Human Rights of 1948 was never designed or intended as a judge-based charter, to be interpreted and applied, and if need be extended, by courts; and it has not been so used. The International Court of Justice, in those of its judgments and advisory opinions turning on human rights issues has preferred to base itself directly on the Charter principles, particularly as interpreted and applied in General Assembly Resolutions and other United Nations decisions. The Universal Declaration remains, as it was historically intended, as a code of conduct addressed to legislators and administrators on classical, Continental European, civil law, constitutional lines. To say this is in no way to denigrate its legal utility as an operational restraint on state conduct, but simply to question its full relevance as a textual, drafting model for what will be, after all, a court-based jurisprudence in terms of the new Canadian Charter. The Council of Europe's European Convention—which should not be confused with the European Community's Treaty of Rome Charter-style rights—should also be studied in the special institutional-processual context of its own special (Council of Europe) legal community and its special legal system of rules, which is peripheral both to the highly-developed national systems of jurisprudence of the main Continental European countries and also to the tightly-knit court-based system of rules developed by the supra-national European Community through its own enormously active, supra-national, Court of Justice. The Council of Europe, with its own two tier, administrative Commission and Court, control system, is not without interest, in spite of

the relative paucity of empirical, case-based examples; but one wonders if the federal forces, if they were seriously endeavouring to benefit from comparative jurisprudence, might not have done better to study also the richly vibrant and numerically substantial jurisprudence in human rights matters of the West German *Bundesverfassungsgericht*, the French *Cour de Cassation*, *Conseil d'Etat*, and (marginally) the *Conseil constitutionnel*; and finally (and with particular reference to mobility rights⁵) the Court of Justice of the European Communities.

Recourse to comparative law, in any case, in order to be scientifically meaningful and legally relevant to Canadian courts operating under the new Charter, must proceed from, and be based upon, comparative sociology of law-comparative sociological jurisprudence. For these purposes, it is not enough to demonstrate a purely verbal similarity or even textual identity as between the new Canadian Charter and another, foreign charter. One must indicate, in addition, the particular societal conditions—cultural, social, economic—under which the particular foreign legal principle or rule developed in its own country, then demonstrate a basic identity with, or parallelism to distinctive Canadian societal conditions today, in order to justify making the legal transfer or “reception” from the foreign country concerned to contemporary Canada. This is a fairly rigorous scientific-legal test to pass, but it will avoid the hazards of those purely mechanical “receptions” of foreign law in which odd snippets are casually or carelessly snatched from constitutional charters or case law decisions, here and there around the world, and then rearranged, like dead butterflies in cases, in one’s own national jurisprudence. Comparative law must be, in Ehrlich’s phrase, comparative “living law”; not simply textual exegesis, on a trans-national basis, of the abstract “law-in-books” of constitutional texts.

VI. *The Charter Law-makers: Judicial Independence, Judicial Policy-making.*

If, as we have suggested, the Canadian Charter, unlike the United Nations and international acts already referred to and some major European charters, is designed well-nigh exclusively for court-based application, it behooves us to consider the effects of its adoption upon the *rôle* of the judiciary as traditionally conceived and exercised in Canada.⁶ It is curious

⁵ See, as to mobility rights in the new Canadian Charter, the federal government-commissioned study, J.A. Hayes, *Economic Mobility in Canada. A Comparative Study* (1982).

⁶ Based, in part, on the unpublished text of an address on The Independence of the Judiciary Today, delivered to the Judges’ Day, Annual Meeting, Canadian Bar Association, Sept. 1st, 1981. See, generally the author’s *Judicial Review* (4th ed., 1969); W.R. Lederman, *The Independence of the Judiciary*, in *Continuing Canadian Constitutional Dilemmas* (1981); P.H. Russell, *The Effect of a Charter of Rights on the Policy-making Rôle of Canadian Courts* (1982), 25 *Can. Pub. Admin.* 1.

that this question received so little public attention and debate, at any of the successive stages in adoption of the constitutional patriation package, for it is evident that, simply in terms of the sheer quality and range of new cases that could reasonably be predicted as a result of adoption of the new Charter, a veritable revolution in Canadian law could be expected to result. The question urgently called out for some pre-enactment study of the consequences of the flood of new cases for existing judicial institutions and processes, and also the complementary enquiry of what new institutions and processes might sensibly be created to ensure that the Charter should become fully operational as law-in-action and that no impossible burdens of time and work-load be thrust upon the present court system.

Issues of institutions and processes in law are never, as Maitland recognized, entirely neutral in themselves, since they are rooted in a nation's own distinctive legal history and development. But the influence of casual, transient issues of political ideology is normally very much less than with substantive law issues; and so the recourse to comparative law, and particularly to other legal systems' experience, long-continuing or even recent, as to special jurisdictional, institutional, or procedural arrangements for human rights cases becomes more relevant and persuasive. There is far less danger of that naive, hit-or-miss form of legal eclecticism, already referred to, of ripping one particular legal rule or principle from another foreign system without accompanying study of underlying societal facts in which the rule emerged and was developed. This particular comparative law area reveals a range of alternative institutional-procedural options that have been chosen often for functional reasons—how best to make a dramatically expanded human rights jurisprudence function efficiently. The foreign experience lends itself easily to classification and study in institutional-procedural antinomies. Should there be court-based, or executive-administrative, application of a charter of rights, (or even a prudent combination of both)? If it is to be a court-based exercise, then should it be left to ordinary courts or, rather, entrusted to courts specialized by subject matter—that is, special human rights tribunals or special chambers or senates within existing, ordinary courts of general jurisdiction? Should the determinations be made at the final appellate (Supreme Court) level only, or should they be open to rulings, on the merits, by any level of courts? If the determinations are to be reserved for the final appellate level only, does one need specially streamlined processes for taking such matters up in original jurisdiction or,—when they arise interstitially to other cases in courts at various levels—for escalating them for decision at the final appellate level? If one is to establish the final appellate (Supreme Court) level as the preferred jurisdiction, then should one confer drastic judicial discretionary powers to screen cases according to their conceived importance, and to refuse to hear individual cases that do not raise new issues or that are simply repetitive of others already before the court? These are all institutional-procedural questions faced by other legal

systems than our own in recent years. Save for section 24(1) of the new Canadian Charter—and the treatment there is at a very high level of abstraction and generality, only—the problem does not seem to have been addressed so far, and there is no indication of any pending implementing legislation for section 24(1).

It seems always to have been assumed that the main thrust of implementation of the new Canadian Charter would be court application, flowing from direct constitutional litigation before the ordinary tribunals. In the light of foreign law experience, this is neither necessary nor inevitable, and it is not even a consequence of our “received” British common law experience or, *a fortiori*, of our French civil law experience. But if one traces the substantial influence and practical “reception” of American constitutional law ideas and practice from the 1930s onwards, it has its own logic and common-sense; though that might point, then, to “reception” also of some of the special American institutional-procedural devices, developed over that same time period, for facilitating decision-making by the Supreme Court and for by-passing or limiting determinations at other levels or in other jurisdictions. The American court system is not congruent with our own of course, but the fact that, with far greater obligations to respect autonomous and separate state jurisdictions than we have under our own constitutional system, they have gone so far, suggests we need not be too reticent in profiting from their example here. The one thing that comparative national—as distinct from international—experience with constitutional charters of rights indicates most clearly is that, once the charter is accepted as being “judicialized” in its practical application, the flood-gates can be expected to be opened to new human rights litigation, and that all the canons of judicial self-restraint will hardly suffice to protect the courts from being asked to rule on great political *causes célèbres* which, in other, calmer times, might have been thought to have been better left to executive-legislative authority or to the people. What does that do to traditional concepts of the independence of the judiciary, and the relations of the courts to other, coordinate, executive and legislative, arms of government?

Judicial appointments in Canada are, of course, made by the executive on its own proper discretion, in contrast, for example, to the United States where there is also a major legislative *rôle* (Senate confirmation) as an institutional check-and-balance to unbridled executive authority; and to West Germany where the constitutional judges are elected by the federal legislature and elected for a term of years, achieving the advantages of political balance through a system of proportionality in the elections. Both national systems, American and West German, have, with the passage of time, achieved their own distinctive customs and conventions and, in the process, a fairly large degree of professional legal and public acceptance and support; and they are, of course, radically different from our inherited Canadian system of judicial appointments. While neither the American nor

the West German system has been able, or has been intended, to keep political *causes célèbres* away from the court-house door, the more complex, several-stage system of appointment (preceded by legislative ratification or election) does seem to endow the final courts concerned with an extra degree of constitutional legitimacy, beyond that attaching to them in their capacity as Supreme Court judges, when they venture upon high policy choices in law in respect to which the language of the Charter is not particularly compelling, one way or another, and perceived to be such by the legal profession and by the general public. Ever since the Legal Realists' teachings of the between-the-two-World-Wars era, we have accepted that all judicial interpretation inevitably involves an element of free discretion, and that it cannot be reduced to legal logic alone. But the distinction of degree between the Canadian Supreme Court and the American Supreme Court, for example, has been profound, with our own court generally managing to apply self-restraint and to eschew the conscious and avowed policy-making *rôle* assumed by the United States Court since the "Court Revolution" of 1937. Perhaps, the September, 1981, Supreme Court decision on the "legality" and also the "conventionality" of the constitutional patriation package, will turn out to have been a watershed event in the Canadian Supreme Court's jurisprudence. It is difficult to envisage either the American or West German courts, with their far greater acknowledgement of judicial activism than our own court has ever displayed, moving in where angels might normally choose not to tread, so as to rule on the practice, as distinct from law, of other, co-ordinate arms of government. The shifting boundaries between law and politics—it was always a false dichotomy—are likely to be strained, as never before, with adoption of the new Canadian Charter. Should the judicial *rôle* be given some greater degree of constitutional legitimacy, for the future, by some more sophisticated, plural-step or plural-institutional approach to appointment of judges? We do not yet have a reformed, elected Senate to which a ratification *rôle* analogous to that of the United States Senate, might be entrusted. The purely informal, non-binding, and in any case non-public, pre-appointment enquiry and screening that some recent federal Attorneys General have applied to Supreme Court appointment hardly meet the challenge in contemporary constitutional terms. Are there merits, perhaps, in having a reformed House of Commons justice committee at least have the power to conduct public hearings and examination, though without any legal right of rejection of nominees? It is the public aspect of the hearings that, in recent years, seems to have had a salutary effect on executive nominations to the judiciary in the United States in recent years, without the need to escalate to the ultimate legal sanction of outright rejection of a nomination. The change, if adopted in Canada, would be an incremental one, building on the existing system without the need for a formal constitutional amendment. It has been suggested by some whose views deserve respect because of rich understanding and experience with the judicial system—that even the holding of parliamentary committee hearings might

discourage some outstanding potential nominees from allowing their names to go forward; though the foreign experience seems to demonstrate that, even with a far more formidable public appointment process, this has not been the result.

Conclusions

In spite of its more obvious, often avoidable, errors or imperfections, the new Charter of Rights is on its way to transforming Canadian constitutional-legal practice and legal thought-ways through the sheer volume and range of the political, social, and economic issues that can now be expected to come before the courts. The most patent gaps in the Charter concern Indian rights and group rights generally—matters which common law constitutional doctrine has normally had great difficulty in encompassing; and also the newer economic rights, on which political consensus clearly had not formed at the time of drafting. Each of these areas seems reachable only with extreme difficulty, and episodically, by judicial legislation; and some form of exercise of constituent power would be requisite. As for the Charter as a whole, we are likely to have a difficult period of transition in which the various levels of courts in Canada will have to sort out, anew, their own hierarchical relationships in what now concerns judicial legislation upon the Charter in amplification or extension of its terms. If inter-court confusion and a generalized ‘carnival of unconstitutionality’ under the Charter is to be avoided, the Supreme Court may need to lay down some guidelines to intermediate and lower courts as to their proper area of discretion in breaking new legal ground in Charter interpretation—what Kelsen identified, in terms, as the *Stufentheorie* of unfolding and concretization of legal norms. While foreign legal experience, properly proven as to its relevance and applicability to Canada in doctrinal but also sociological terms, may be of great interest and help to us, there is every reason to believe that we can develop our own distinctive, national jurisprudence on an empirical, case-by-case basis. This will mean a much more overtly policy-making rôle for the Supreme Court and, in consequence, much greater public visibility for the court and its judges and much greater exposure to public study and criticism of court decisions, and a somewhat more nuanced relationship than heretofore to co-ordinate, executive and legislative arms of government.
