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Legislative Override of Charter Rights

In his paper of February 3, 1981 entitled "Another Way of 'Entrenching' A Charter of Rights in the Canadian Constitution", Professor G.P. Browne of Carleton University (History Department) advocates a Charter of Rights that would have a "priority status" over ordinary legislation rather than being entrenched in the sense that modifications could only be made by the constitutional amending formula.

His reason for this approach stems from his belief that a fully entrenched Charter is incompatible with the basic principle of parliamentary supremacy in that entrenchment would

- (1) transfer ultimate legislative power over social and cultural policies from the legislatures to the courts;
- (2) shift the balance of power in favor of the federal government;
- (3) increase doubts as to the impartiality of the judiciary;
- (4) decrease respect for the rule of law; and
- (5) reduce the role of legislators.

Before dealing with his proposal for a "priority status" Charter, it may be useful to make a few comments on Professor Browne's assertions set out above.

1. Transfer of Ultimate Legislative Power

In empowering the courts to review the compatibility of legislation with entrenched basic rights to determine if there has been an infringement of these rights, there is no transfer of ultimate legislative power to the courts.

In the first place, the courts do not legislate but adjudicate. Consequently, their role would be to examine a provision of a law to determine whether it is in conflict with a constitutionally guaranteed right, eg. does a law which prevents persons from assembling in an orderly and peaceful manner to practice their religious beliefs contravene the Charter guarantees of freedom of religion, association and peaceful assembly. Or, does the holding of a person in detention for three weeks before bringing him before a judge deny the right to habeas corpus. These are even now questions upon which the courts adjudicate under statutes or common law. Section 172 of the Criminal Code makes it an offence to disturb or obstruct an assemblage for religious worship and the common law assures the right to habeas corpus.

In the second place, entrenched rights do not prevent the legislatures from enacting laws on matters covered by these rights. For example, freedom of religion does not mean that Parliament cannot enact laws making what some would claim to be a religious practice a criminal offence (eg. polygamy) or that provincial laws respecting zoning or disturbance of the peace will not apply to religious groups. Or again, the entrenched language rights will not preclude provinces from requiring either English or French as the primary language of business or work or requiring that students graduating from minority language schools possess proficiency in the majority language. Consequently, legislatures will continue to possess the primary responsibility for legislating matters of social, economic and cultural policies. The only restraint by the courts will be where they determine, as a matter of law, that certain legislation impinges unduly on basic rights or freedoms. As the United States Supreme Court and the Supreme Court of Canada have frequently observed: the court's concern is not with the wisdom of policy underlying the legislation, but rather with whether the legislation falls within the limits of the constitutional powers.

In the third place, even if the courts in exercising their constitutional review powers reach conclusions that are considered to be incompatible with needs or good of society, the legislators possess the ultimate power through constitutional amendment to reverse court decisions. Consequently, ultimate parliamentary sovereignty continues to prevail in the same way as it does when courts reach unacceptable decisions on matters involving the division of powers between Parliament and the provincial legislatures.

2. Shift of Power to Federal Government

The Charter does not contemplate or, indeed, authorize any shift of powers from the provinces to the federal level. Nor does it have the centralizing aspect suggested by Professor F.L. Jackson in his paper.

A simple reading of the Charter makes it quite clear that the effect of the Charter is to place restraints on both levels of government to interfere unduly with the basic rights of people. Were this not evident from the provisions themselves, then sections 30 and 31 place it beyond doubt. Section 31 states clearly that the Charter applies to both levels of government and section 30 assures that nothing in the Charter extends the legislative powers of any body.

Some seem to believe that the mobility rights in the Charter (section 6) place restrictions only on provincial laws that discriminate on the basis of residence. This is not the case. "Laws or practices of general application in force in a province" include federal as well as provincial laws and practices.

The idea of the Charter creating a shift of power to the central government may arise from an erroneous attempt to compare the Charter with the U.S. Bill of Rights. In the latter document, certain of the rights guaranteed, such as the 14th amendment "equal protection of the laws" and the 15th amendment "right to vote", explicitly empower Congress to make laws for the enforcement of these rights. There is no comparable provision in the Charter.

Finally, it might be noted that, in relation to fundamental freedoms at least, the Charter probably imposes greater restraints on Parliament than it does on provincial legislatures. This, because the Supreme Court has in a number of earlier civil rights cases struck down provincial laws dealing with freedom of religion, speech and the press on grounds that such laws could only be enacted by Parliament.

3. Impartiality of Judiciary

While, rightly or wrongly, some provinces have alleged that the Supreme Court has shown a federal bias in deciding constitutional cases involving the distribution of legislative powers, it is difficult to imagine how any similar suspicions could be generated in cases involving infringement of Charter rights.

What the courts will be determining in these cases is not a "contest" between competing claims to legislative power by two levels of government, but rather claims by individuals or groups that a law, be it federal or provincial, is violative of Charter rights. Surely, this type of case cannot give rise to doubts as to the impartiality of the judiciary. Judges for many years have been adjudicating disputes between individuals and governments.

4. Decreased Respect for Rule of Law

This suggestion must be totally without merit. Surely the very basis of the rule of law is the role which the courts play in assuring that the law is applied to and observed by all, so that we live not by the rule of men but the rule of law. This was the very point made by the Supreme Court in the landmark case of Roncarelli v. Duplessis (1959) in which it was held that even the Premier and Attorney General of Quebec was subject to the ordinary laws in the ordinary courts.

Far from decreasing respect for the rule of law, an entrenched Charter interpreted by the courts would enhance respect for the rule of law by ensuring that legislators and bureaucrats cannot arbitrarily deprive individuals of their basic rights.

5. Reduce the Role of Legislators

As has already been indicated above, an entrenched Charter will not deprive the legislators of role in determining social issues. Nor will it diminish their role in protecting rights. Indeed the Charter will no doubt heighten their awareness of their role in this regard, encouraging them to scrutinize laws and delegated powers much more closely to ensure that Charter rights are not infringed.

A Charter with "Priority Status"

Professor Browne's thesis, which he admits is not new, would be to have a Charter of Rights where the courts would initially determine if a particular law was in violation of any specified rights. If the court made such a determination and the affected legislature determined that it did not approve of the decision, it could then re-enact the law, either after a certain delay period or with a special majority vote with a free vote among members. He feels that such an arrangement would create a proper balance between "judicial supremacy" and "parliamentary supremacy".

Such a "legislative override" provision now exists in the Canadian Bill of Rights whereby Parliament may declare (as it has done with the War Measures Act) that a law is to operate notwithstanding the Bill of Rights. No special majority is required for such an enactment.

Approaches along these lines were considered by the Continuing Committee of Ministers on the Constitution during the past three years, but it was the conclusion of most provinces and the federal government that such a form of "entrenchment" was undesirable for a number of reasons.

First, experience with the Canadian Bill of Rights (a "priority status" enactment) has demonstrated that where parliamentary supremacy is maintained in the enactment, the courts are extremely reluctant to invoke the Bill of Rights to strike down offending legislation. Given the existence of parliamentary supremacy, the courts remain fully deferential to the will of the legislators, and conclude that where they have enacted a law which appears contrary to the Bill of Rights, they must have had the intention to do this. Consequently, simply as a matter of psychology, a "priority status" Charter would likely remain an ineffective device in the hands of the courts.

Second, a "legislative override" mechanism lays open to abuse the very integrity of basic rights that an entrenched Charter is designed to ensure. Rights, by their nature, are designed to protect the individual or the minority. If the majority in a legislature has determined in the first place to violate these rights, then it is doubtful that the individual or minority is going to prevent this from happening a second time. (Would the Manitoba or Quebec legislatures hesitate to reverse the decisions in Blaikie or Forest if they possessed the constitutional power to do so?) While requiring a special majority vote and/or a free vote might make the override of a court decision more difficult, it would not prevent the outcome.

Finally, the "legislative override" approach is simply a first step toward opting out of Charter rights by various jurisdictions and consequently creating a "checkerboard" Charter with rights varying from jurisdiction to jurisdiction. This would defeat one of the principal purposes of entrenching Charter rights in the first place -- to ensure that Canadians enjoy the same basic rights wherever they reside or travel to in Canada.

For all these reasons, a partially entrenched Charter would appear to be a rather unsatisfactory means of enshrining basic rights in the constitution.