PARLIAMENT AND THE CHARTER OF RIGHTS: AN UNFINISHED CONSTITUTIONAL REVOLUTION

James B. Kelly

The failure to link parliamentary reform to constitutional reform is the most glaring limitation of the "Charter revolution." Instead of instituting parliamentary scrutiny from a rights perspective, the political response has been to govern with the Charter through central agencies at the disposal of the cabinet. With the enhanced role of the Department of Justice and the absence of parliamentary counterweights to constitutional scrutiny, Charter dialogue is dominated by the cabinet to the exclusion of Parliament. This has led to greater executive dominance and represents the most pressing aspect of the democratic deficit facing Parliament since the introduction of the Charter of Rights.

L'incapacité de lier réforme parlementaire et constitutionnelle : telle est la limite la plus flagrante de la « révolution de la Charte ». Au lieu d'instituer un examen parlementaire dans la perspective des droits, on a entrepris de gouverner avec la Charte par le biais d'organismes centraux à la disposition du Cabinet. Avec le rôle accru du ministère de la Justice et l'absence de contrepoids parlementaire à la surveillance constitutionnelle, le dialogue sur la Charte a été dominé par le Cabinet. Ceci a encore favorisé l'empire du pouvoir exécutif et représente le problème le plus aigu auquel le Parlement fait face en matière de déficit démocratique depuis l'entrée en vigueur de la Charte des droits et libertés.

The debate surrounding the Charter of Rights has focused unduly on the issue of judicial power. The introduction of the Charter has done little to challenge the dominance of the cabinet in the Canadian parliamentary setting. Executive supremacy is the principal outcome because of the cabinet's decision to govern with the Charter from the centre and generally without the participation of Parliament. This may change, however, with a sustained period of minority governments, though the present Conservative government appears committed to governing from the centre — a centre that has clearly narrowed during the last year.

The shift to judicial supremacy has not occurred for a number of reasons. First, there is the myth of judicial supremacy which is based upon the invalidation of statutes. This is an irrelevant indicator, as most were enacted before the Charter's entrenchment or shortly thereafter. In contrast, the Supreme Court has constructed an approach to the Charter that is consistent with the role of the courts in a parliamentary democracy. Much of the critical literature has been derived from the existing debate in the United States. The Charter is not a northern and paler version of the American Bill of Rights but a document embedded with the principles of Westminster democracy.

This has led to problematic understandings of the judiciary and Canadian constitutionalism since 1982. The concern over judicial activism is the most prominent example of this confused constitutionalism.

The legislative response to the Charter contains judicial power, which Peter Hogg and Allison Bushell referred to as Charter dialogue. Their approach to dialogue focuses on the relationship between courts and legislatures. This relationship, however, exists on the most superficial level as the most significant relationship is between the Supreme Court and the cabinet when legislation is subjected to judicial scrutiny.

Charter dialogue occurs in principally two institutional settings before dialogue between the cabinet and the Supreme Court takes place. First, there is pre-introduction or bureaucratic scrutiny by the Department of Justice (DOJ) on behalf of the cabinet. This dimension of Charter dialogue ensures that legislation complies with the Charter. Secondly, post-introduction scrutiny occurs at the parliamentary stage. This aspect of legislative scrutiny

is underdeveloped as Charter dialogue between the cabinet and Parliament is virtually non-existent because of a cabinet-dominated parliamentary setting.

The relationship between the Supreme Court and Parliament has been argued to contribute to Canada's growing democratic deficit. The legislative response to the Charter challenges the democratic deficit as the cabinet generally retains the final word on the constitutionality of legislation, as few statutes are reviewed by the Supreme Court and fewer are invalidated as inconsistent with the Charter. Where the democratic critique has merit is in regard to the distribution of power that has been altered by the legislative response to the Charter. The political response has been to strengthen the policy capacity of the cabinet by instituting bureaucratic review to ensure constitutionality before legislation is introduced into the House of Commons.

The most significant development has been the further marginalization of Parliament by the cabinet. Indeed, the ability of the cabinet to govern from the centre has been considerably increased because the reform of the machinery of government has been the principal response to the Charter. Thus, the "Charter Revolution" remains incomplete because constitutional reform has not been linked to parliamentary reform.

The focus of the Supreme Court's Charter jurisprudence has not created the relationship suggested by the media or academic critics: an activist Court routinely challenging the legislative will of Parliament. Since 1982, nearly two-thirds of Charter decisions by the Supreme Court have involved legal rights and 52 percent have involved police officers. This is the principal Charter relationship and it questions whether judicial activism involving the police can lead to a paradigm shift to judicial supremacy.

Invalidated statutes demonstrate the myth of judicial supremacy. Between 1982 and 2003, a total of 64 statutes were invalidated by the Supreme Court. A little over two statutes have been invalidated a year — not a particularly significant basis to claim a judge-led constitutional revolution. This leads to a more fundamental point — rates of judicial activism involving statutes are an irrelevant indicator of judicial power. This measure is based upon yearly rates of activism: what matters is not the year in which a statute is invalidated, but the year in which an invalidated statute was passed into law.

Judicial legislation remains secondary legislation because the cabinet retains the discretion to respond to the Charter in two instances: first, when the cabinet drafts legislation and attempts to reconcile policy objectives with Charter commitments, and second, when the Supreme Court invalidates a statute and the cabinet decides on the legislative response to re-establish constitutionality.

Of the 64 statutes invalidated, 20, or 31 percent, were enacted into law before the Charter's introduction. Of the remaining 44 statutes, 21 were enacted in 1985. This leaves 23 statutes invalidated in a 21-year period as the basis of judicial supremacy. Few statutes enacted since 1990 have been invalidated (12 in total). Thus, the Supreme Court is occasionally activist but against the policy choices of the distant past. This is a significant characteristic of judicial activism that has been downplayed.

A.V. Dicey argued that Parliament remained supreme because common law rules created by the courts were secondary legislation that could be reversed by an act of Parliament. Judicial legislation remains secondary legislation because the cabinet retains the discretion to respond to the Charter in two instances: first, when the cabinet drafts legislation and attempts to reconcile policy objectives with Charter commitments, and second, when the Supreme Court invalidates a statute and the cabinet decides on the legislative response to re-establish constitutionality. The freedom to respond depends on the nature of a judicial decision but the cabinet retains the discretion on how to respond.

A highly institutionalized vetting process exists in Canada under the direction of the DOJ before legislation is introduced into the House of Commons. This dimension of Charter dialogue is dominated by the DOJ, as all legal personnel within the bureaucracy, with the exception of the Department of Foreign Affairs, are DOJ lawyers. Government lawyers outside of the DOJ are referred to as Legal Service Units (LSUs), and provide legal advice to their client department in consultation with the DOJ.

Since 1990, Charter vetting has been mandatory as cabinet guidelines require all departments to consult their LSUs from the beginning of a policy. A department cannot submit a memorandum to cabinet unless the DOJ has assessed the risk of judicial invalidation and must certify its constitutionality. This questions the use of invalidation to demonstrate judicial power. Specifically, statutes enacted in a Charter-based policy context are largely found to be constitutional and judicial activism involves statutes enacted in a policy context where legislation was not vetted through the prism of rights and reasonable limits.

A final element has implications for the continued dominance of the cabinet in the post-Charter era. Under section 4.1.1 of the *DOJ Act*, the minister of justice is required to certify that all bills introduced into Parliament are Charter

compliant. This is *the* parliamentary statement on rights and made by the cabinet to Parliament. What does it mean to be certified as Charter compliant and what does the minister of justice provide to demonstrate that, in their opinion, legislation is consistent with the Charter?

Constitutionality under the Charter is complex and can mean one of three things. First, a bill is considered by the DOJ and the cabinet, on the advice of the minister of justice, to be consistent with rights. Second, a bill is an infringement on a protected right but considered by the cabinet and the DOJ to be a reasonable limit. Finally, a bill is an infringement on a right, determined by the DOJ to be an unreasonable limit but considered by the cabinet to be reasonable and therefore constitutional.

The answer is quite simple — by introducing legislation, the sponsoring minister is indicating that it has been certified by the minister of justice to be constitutional. In effect, there is no written assessment of a bill's constitutionality presented during first reading or at the committee stage. Constitutionality, therefore, is implied by its introduction into the House of Commons.

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While the DOJ is providing an authoritative statement, it is simply an opinion that the minister of justice receives from the DOJ. The determination of constitutionality is highly discretionary and is ultimately the decision of the cabinet and not the DOJ. A government with a very different approach to reasonable limits will result in legislation with a very different constitutional architecture than a government with a deferential approach to the advice provided by the DOJ.

The limitations of the present certification process are evident in Bill C-27 — *An Act to Amend the Criminal Code* (dangerous offender status). This bill was recently introduced into the House of Commons and changes the process for determining who is designated as a dangerous offender. First, the Bill provides that the Crown must seek dangerous offender status for an individual who has previously been convicted of two serious personal injury offences. Secondly, the Bill removes the judiciary's discretion to refuse to order such an assessment of the proposed designation. Finally, the Bill creates a reverse-onus provision on the accused to demonstrate that a lesser designation is warranted.

By its introduction, Bill C-27 is considered by the Conservative government to be constitutional. It is debatable whether this bill is in fact constitutional because it will be decided by section 1 of the Charter: it limits judicial discretion and is a violation of section 11.d (judicial independence), it infringes the right to be presumed innocent and it brings in a reverse-onus provision which the Supreme Court has been reluctant to accept as consistent with the Charter's legal rights guarantees. This bill can be viewed as constitutional only because the government considers it a reasonable limitation on protected rights. If this is the case, it should be required to provide a comprehensive assessment for concluding that an extensive number of infringements are considered reasonable in a free and democratic society.

Opposition to requiring the cabinet to provide its justification for constitutionality is generally the following: it would violate the lawyer-client privilege that exists between the DOJ and its client departments, and secondly, if a government concedes that legislation is constitutional because it is considered a reasonable limitation, this would facilitate litigation. There is no empirical evidence to suggest that executive disclosure would facilitate litigation or violate lawyer-client privilege.

The point is this — Charter dialogue will occur in our system. It is at the cabinet's discretion where this dialogue occurs and what form it takes — exclusively between the Supreme Court and cabinet when legislation is challenged before the courts, or alternatively at the parliamentary committee stage through a substantive approach to section 4.1.1 of the *DOJ Act*. Executive disclosure would not facilitate litigation. It can circumvent it by allowing those likely to challenge legislation before the courts to resolve Charter disagreements at a more constructive stage of the policy process.

This parliamentary dialogue is prevented by the reality of Parliament as an institution. Despite the importance of the Charter as a policy framework, there is no standing committee with a mandate to scrutinize legislation from this perspective. When this occurs, it is performed by committee members who are interested in Charter issues. Thus, Charter issues are treated as a generalist and passing concern of specialized standing committees.

The second deficiency is the limited resources parliamentarians draw upon to engage in Charter scrutiny. The Parliamentary Counsel's Office has a legal staff of seven lawyers who provide support to all 48 standing committees of Parliament. In comparison to the resources that support the cabinet in the development of legislation, this is a serious imbalance that limits the effectiveness of Charter scrutiny by ordinary parliamentarians.

The principle of responsible government reduces the effectiveness of

parliamentary committees as government backbenchers are reluctant to delay the passage of their government's program. This is a political reality and Charter scrutiny must be advanced by opposition members. In the Canadian context, the highly partisan nature of the House of Commons reduces the effectiveness of opposition scrutiny at the committee stage. In other parliamentary systems, this constraint is overcome by locating rights-based scrutiny committees in upper houses, which are more collegial than lower houses. Alternatively, joint committees are established, as in the case of the United Kingdom, where an equal number of members of the Lords and Commons sit on the Joint Committee on Human Rights which is chaired by a Commons member.

The present composition of the Canadian Senate and the public perception of this institution effectively block either scenario as a counterbalance to cabinet-dominated Charter dialogue. This is unfortunate, as Canada lacks an institutionalized class of backbench members without ministerial ambitions committed to parliamentary scrutiny of the cabinet's legislative agenda, as in the United Kingdom. Parliamentary scrutiny, as it relates to the Charter, is a duty neglected by the reality of the House of Commons and its partisan nature.

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The Charter revolution will remain incomplete, writes James Kelly, so long as decisions on how to interpret rulings by the courts remain with cabinet rather than Parliament as a whole.

Without a new approach to constitutional certification by the minister of justice, Charter dialogue will remain the domain of the cabinet. The present approach to section 4.1.1 of the *DOJ Act* is a powerful disciplining instrument on a government backbench that limits the effectiveness of rights-based scrutiny by standing committees. A common assertion by the minister of justice against amendment of legislation by standing committees is the following: amendments may undo the delicate balance between legislative objectives and Charter consistency constructed by the sponsoring department and its legal advisers and may result in unconstitutional legislation being passed. This will become the argument made by the Conservative government (or any government) to achieve its legislative agenda despite its minority status — amend legislation at the peril of the Charter. Without the ability to challenge this implied constitutionality, parliamen-

tarians are unable to evaluate the merits of this certification by the justice minister or to challenge this assertion.

Non-constitutional reforms can retain the cabinet-centred nature of our policy process and complement it with parliamentary scrutiny. Such reforms would change the nature of Charter dialogue and include Parliament in a meaningful way. The Department of Justice's monopoly on Charter vetting must be addressed by following New Zealand, where a separate Ministry of Justice and a Crown Law Office exist. Each department has a member of cabinet, with a minister of justice and an attorney general, who heads the Crown Law Office. In Canada, the Department of Justice also contains the attorney general's department but has a single cabinet minister.

The two parts of the DOJ must be separated and have individual ministers: a minister ofjustice and an attorney general. There are a number of important reasons to justify this change. First, no government department should monopolize the provision of a particular form of advice. Secondly, the policy functions of Justice must be separate from the prosecutorial and law functions of the attorney general. This would create countervailing sources of Charter advice within government. As in New Zealand, Justice would provide Charter vets for all non-Justice bills and the attorney general's department would provide Charter assessments of all bills that originate from the DOJ.

The *Department of Justice Act* must be amended to require Charter compatibility statements to be submitted when bills are introduced into the House of Commons. The compatibility statement would require the justice minister to provide the constitutional basis of legislation — whether the bill is consistent with rights and freedoms or constitutional because the government considers limitations reasonable under section 1 of the Charter. When legislation infringes a Charter protection, the compatibility statement must provide a discussion of the government's position that the infringement is considered a reasonable limitation. In effect, an approach to compatibility statements that are required under the *Human Rights Act 1998* in the United Kingdom must be adopted in Canada.

A Charter Scrutiny Committee must be established in Parliament. It would be a specialized standing committee that engages in parliamentary scrutiny from a rights perspective. Until Canada engages in Senate reform, it would be a joint committee of the two houses and eventually a standing committee of a reformed upper house. Not every piece of legislation would be scrutinized by this committee. In the present Parliament, 31 bills were introduced in 2006 and 18 clearly had implications for the Charter.

Broader reforms of the apparatus supporting parliamentarians are required, such as the Parliamentary Counsel's Office (OPO), which must be upgraded from a 19th century institution and provided with 21st century resources to properly service standing committees. This office requires a legal secretariat similar in size to Legal Service Units that presently support line departments. In a period in which the principal response to parliamentary reform has been to strengthen the officers of Parliament — the auditor general, the human rights commissioner and the chief electoral officer — empowerment must involve the internal agents of Parliament, such as the Office of Parliamentary Counsel.

These reforms are all within the discretion of the cabinet. While the focus of reform has involved the selection of judges, judicial interpretation of the Charter is not the cause of an incomplete constitutional revolution in Canada. Judicial activism is the result of Parliament's inability to properly scrutinize the cabinet's legislative agenda and represents the only effective constraint on political power.

The conclusion is very simple — the Charter is a success for the cabinet and a failure for Parliament. It is a success because of changes in the machinery of government that scrutinize legislation from a Charter perspective. The failure is the further marginalization of Parliament because of the cabinet's decision to govern with the Charter exclusively from the centre.

The first 25 years of the Charter have focused on the judicial implications of this document. The next years must be devoted to understanding the parliamentary implications of Charter dialogue. Otherwise, the Charter as a political project will remain incomplete, to the detriment of Parliament and to the continued empowerment of the cabinet in our parliamentary system.

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