Democracy and the Canadian Charter of Rights and Freedoms

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ABSTRACT

In this paper, I argue that the Canadian Charter of Rights and Freedoms, entrenched through the Constitution Act, 1982, enhances democracy. It strengthens Canada's democratic institutions, but also helps to strengthen other democracies abroad. I advance this argument by 1) outlining how the Charter's protection of fundamental rights maintains democracy; this is portrayed through the guarantee of both democratic and minority rights, and how ensuring these rights can prevent populous policies 2) outlining the ways that the judiciary can safeguard these protections; this will be proven through arguing how the dynamic relationship between parliaments and judges helps implement democratic law-making, and how judges also have restraints through the Charter's notwithstanding clause and 3) analyzing how Canada's Charter can be used as a template for other democracies; this will be shown through the South African case example and how fundamental principles of justice can be applied universally throughout the world.

Fortunately, I had the opportunity to interview The Hon. Roy McMurtry who helped negotiate the Charter's entrenchment with the provinces on behalf of Pierre Trudeau. His insight brings an interesting perspective to the paper because he was both an elected Ontario MPP (serving as Ontario's Attorney General) and was also later appointed as the Chief Justice of Ontario. Mr. McMurtry therefore greatly understands the integral dynamic between unelected judges and elected politicians, and how that plays out in the application of the Charter.

INTRODUCTION

The Canadian Charter of Rights and Freedoms, entrenched through the Constitution Act, 1982 protects various fundamental rights and freedoms of Canadians. Do these protections, however, strengthen democracy or undermine it? I will argue that the Charter does in fact enhance democracy. It strengthens Canada's democratic institutions, but also helps to strengthen other democracies abroad. I will advance this argument by 1) outlining how the Charter's protection of rights maintains democracy; this is portrayed through the guarantee of both democratic and minority rights, and how ensuring these rights can prevent populous policies 2) outlining the ways that the judiciary can safeguard these protections; this will be proven through arguing how the dynamic relationship between parliaments and judges helps implement democratic law-making, and how judges also have restraints through the Charter's notwithstanding clause and 3) analyzing how Canada's Charter can be used as a template for other democracies; this will be shown through the South African case example and how fundamental principles of justice can be applied universally throughout the world.

Fortunately, I had the opportunity to interview The Hon. R. Roy McMurtry who helped negotiate the Charter's entrenchment with the provinces on behalf of Pierre Trudeau. His insight brings an interesting perspective to the paper because he was both an elected Ontario MPP (serving as Ontario's Attorney General) and was also later appointed as the Chief Justice of Ontario. Mr. McMurtry therefore greatly understands the integral dynamic between unelected judges and elected politicians, and how that plays out in the application of the Charter. To begin my analysis, I will now outline how fundamental rights serve as pre-conditions for democracy.

THE PROTECTION OF FUNDAMENTAL RIGHTS AS ENABLERS OF DEMOCRACY

The Charter has entrenched democratic rights into our constitution. The right to vote, to periodic elections, and the guarantee of a democratic government under constitutional law were rights that were not ensured in the pre-Charter constitution (Sections 3-5, Canadian Charter of Rights and Freedoms). It
was important to include these provisions in the Charter; why should we take democratic stability for granted? As Weinrib argues, entrenched democratic rights effectively protect democracy. (471). It is arguably dangerous to not include it in the constitution. A core tenet of a constitution is to ensure a written code for the ultimate law of the land (Russell, 317), and since democratic rights are now permanent and guaranteed, this enhances democracy.

Other fundamental rights now protected by the Charter, mainly equality and language rights, act as enablers of democracy as the protection of these rights is integral for its health. As Roy McMurtry stated, “An important general principle is that the rights of minorities must be respected in a democracy, and the Charter in most respects is a Charter for minorities” (2016). Everyone is entitled to the same democratic rights and to be equal under the law, which is what the Charter aims to protect.

One may counter that the mandatory protection of rights is undemocratic if the majority of citizens do not want these protections (Beatty, 486). It simply cannot be 'democratic', however, to infringe on the fundamental rights of a particular group. The principle of 'majority rules' cannot justify a government's compliance with the predatory and racist politics of a majority group. Mendes corroborates this notion stating that it's “essential to protect against the 'nationalizing' tendencies of the dominant population in a multiethnic federation” (71). A parliament dominated by a majority group will not necessarily protect the minority, and thus the Charter fights against this potential 'tyranny of the majority'. For instance, the language rights guaranteed under the Charter for French minorities throughout Canada also helped to give the Quebecois a voice in constitutional affairs which only strengthened our stable, federalist democracy in a time of growing separatist sentiments (Russell, 317). The Charter's protection of both minority rights and French language rights has therefore greatly benefited our democracy.

Some scholars, such as Morton and Knopff, go so far as to argue that the Charter in fact solely serves special interest groups (24-32), although their argument is overstated. McMurtry strongly disagrees with this critique, stating that “'special interest groups' are usually those who are disadvantaged historically” and that “corporations cannot take advantage of the Charter” (2016). Even though some recent Charter challenges, such as Cambie Surgeries Corporation v. British Columbia (2012), may potentially elevate the interests of some wealthy litigants, to say that other groups who were historically discriminated against are 'special interest groups' downplays the importance of their claims for equality and portrays them as businesses rather than disadvantaged groups. The 'Charter Challenge' program also provides funds for minority groups to make Charter challenges that have often been successful (McMurtry, 2016). These so-called “interest groups” do not have the funds to otherwise make such challenges in court, and the Charter therefore provides a more participatory model in policy decisions; this inherently seems more democratic than political-elites' dominance in pre-Charter times. The Charter thus aims to prevent the majority from dominating and to elevate the importance of minorities, whether these groups are sexual minorities, marginalized ethnic groups, and so on.

THE JUDICIAL ‘CHECK’ ON GOVERNMENT

Due to the Charter, judges can also act as a 'check' on parliaments and protect democratic rights from unjust laws. The Charter has effectively transferred a great deal of power from elected lawmakers to appointed judges (Hogg, 77). McMurtry supports this claim stating that we have “transitioned to a constitutional democracy” (2016). As a result, laws that infringe on guaranteed Charter rights can be challenged in court as unconstitutional. This effectively protects Canada from ‘parliamentary dictatorships’ and protects the foundation of Canadian democracy (Hogg, 105).

Furthermore, an interesting interplay has developed between democratic institutions and the courts. Mc Murtry outlined this dynamic, stating that “in reality, being in politics and working as a judge, politicians often duck ... the 'hot potatoes’” (2016), as Parliament will often refer cases to the courts for constitutional interpretation (2016). These sorts of laws are in part 'judge-made laws' that are within the
bounds of the constitution (Hogg, 96). Judges can therefore aid the democratic process through parliament's use of judicial referral. It is not that judges are imposing their will; they are simply fulfilling the role assigned to them, and parliamentarians, according to McMurtry, are happy to have judges be an integral part of the process: “Judges stand in the middle between the Charter and parliament, and they [judges and government] work hand in hand with one another”. We cannot take courts for granted and argue that they conflict with democracy, when governments themselves use courts for their own benefit. (McMurtry, 2016).

Critics such as Morton have argued that politicians' decisions should not be overturned by unelected judges¹, and that this in fact hinders democracy (51). McMurtry, however, countered that assigning judges this role was in any case parliament's decision through a representative democratic process. He pointed out that “an overwhelming amount of parliamentarians were in favour (of the Charter)” and that the “judges did not ask for it” (2016). Parliament wanted to protect our democracy from future governments' actions and they were elected. As Grover states, “The Charter ... integrates human rights, democracy and the rule of law so as to make them inseparable. The 'rule of law' requires that the courts be a check on the legislature and not vice versa.” (479). It is not that judges override parliament; rather, they work together to implement laws within the bounds of the constitution.

An interesting fact which is seldom mentioned (according to McMurtry) is that when Pierre Trudeau drafted the Charter in 1971, this version had the term 'unlawful' in place of the word 'unreasonable'. Parliamentary committees, however, advocated for the change to 'unreasonable'. The government therefore “transferred all of this authority to judges since they interpret what's 'unreasonable' ” whereas the term 'unlawful' would have sustained government's power. (McMurtry, 2016). This shows how through the democratic process the parliamentary committees agreed to create a 'check' on their own actions, and the actions of future politicians.

Notwithstanding Clause

There is also a restraint on judicial power due to section 33 of the Charter: the notwithstanding clause. That way democracy is still protected since parliaments can use this clause to override court decisions (479) which do not adhere to section 2 or sections 7 to 15 (Section 33, Canadian Charter of Rights and Freedoms). The notwithstanding clause cannot be used to override democratic rights in any case, thus maintaining democratic stability.

Could the notwithstanding clause, however, be used to permit the 'tyranny of the majority'? For instance, Quebec passed a statute that automatically included the clause in all of its bills from 1982-85 in a protest against the Charter's entrenchment (Hogg, 83). Outside of Quebec though, the use of the notwithstanding clause is politically unpopular (Hogg, 83). McMurtry corroborates this notion, citing the backlash in Alberta towards then-premier Ralph Kline's declaration when he considered using the notwithstanding clause to overturn a judicial decision (2016). Even within Quebec, the government only used Section 33 once to override a judicial ruling in order to protect the French language (Hogg, 83). Furthermore, in 5 years any use of the notwithstanding clause expires or has to be renewed (Section 33, Canadian Charter of Rights and Freedoms). Therefore, the aforementioned Quebec bills that automatically included the clause eventually expired, and in any case the government had halted that retroactive practice; an election is also guaranteed to occur within that 5 year span, and the new Quebec government did not renew them (Hogg, 83). Perhaps the 'tyranny of the majority' principle still applies to Quebec in any case, if the notwithstanding clause is used in the future. Democracy, however, always

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¹ According to Roy McMurtry, former PM Stephen Harper was very critical of him while McMurtry presided over the landmark same-sex marriage case as the Chief Justice of the Ontario Court of appeal, which effectively created the first jurisdiction on the planet that allowed same-sex marriage. Harper and McMurtry's relationship serves as a prime example of this judicial-parliamentary tension. (McMurtry, 2016).
carries the risk of having a 'tyranny of the majority'. It's a constant battle and a balancing act, yet the Charter significantly helps to balance these fundamental freedoms and democratic rights. Section 33 thus helps to maintain some governmental power, while it still provides substantial checks on that power through the various conditions and political implications of the notwithstanding clause.

A CHARTER OF GLOBAL PROPORTIONS – FOSTERING DEMOCRACY ABROAD

The Canadian Charter serves as an international model and has the potential to help strengthen democracy elsewhere. Countries look to the Canadian system, where democracy has been extremely stable for a long time, and strive to institute a similar Charter. For instance, McMurtry was consulted by the Nelson Mandela government about Canada's Charter in order to institute a similar South African Charter (2016). McMurtry does not believe, however, that a Charter will absolutely guarantee a stable democracy, but that it's a “formal guarantee as long as a country has a court system which is respected and the rule of law is adhered to”. In this regard, the Soviet Union had a “very high-sounding Charter of rights” yet in reality had little respect for them (McMurtry, 2016). If people do not respect democratic principles, the opportunity for an authoritarian takeover is always present. Furthermore, judicial interpretation of the Canadian Charter has created specific parameters to deal with any secession attempts (Mendes, 71). The Charter can thus not only strengthen well-established democracies, but can also help to stabilize democracies that may be threatened by ethnic divides.

Is the Charter perhaps 'euro-centric' though, in that it may work for Canada but not for other non-Western countries (Turpel, 151)? The Charter is designed, however, to foster an equal society irrespective of ethnicity, race, religion, or other social differences. Universal human rights should apply in any country (Cotler, 60) and hence a Charter should be able to protect these rights. Even if a country needs slight variations in their specific Charter given their own respective political culture and history, the same principles can be compatible with an independent court system, and Canada's Charter acts as a prime example.

CONCLUSION AND FURTHER IMPLICATIONS FOR RESEARCH

In the words of Roy McMurtry, the Charter is “not perfect and changes may be needed to further enhance its usefulness” (2016). Perhaps no future amendments should be made without direct citizen input. For example, should a referendum be necessary for any constitutional amendment? If so, should that principle be codified in our Charter? Constitutional changes can have tremendous implications for future generations, who may not be content with the changes that the preceding generations have made.

The Charter as it is now, however, greatly enhances democracy on the whole. Its guaranteed protection of fundamental democratic and minority rights stabilizes democracy. Allowing various social groups to challenge the law through the Charter further enhances democratic participation. The judicial branch protects citizens from parliaments who want to systematically infringe upon those rights and freedoms; and moreover, the Charter's notwithstanding clause can in turn restrain unelected judges. Other countries can also look to Canada as an example of how democratic stability can be strengthened with a Charter, and as Canadians we have good reason to be proud of our own Charter of Rights and Freedoms.

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