THE ENTRENCHMENT OF A BILL OF RIGHTS

DOUGLAS A. SCHMEISER*

One of the most contentious issues involved in the current dialogue over constitutional reform is the value of an entrenched bill of rights. The author presents a brief history of the debate and some of the arguments for each side. Relevant provisions of the proposed Charter of Human Rights, government documents and independent papers give important insight into the issue of entrenchment.

INTRODUCTION

The issue of entrenchment is a recurring controversy in Canadian public law. The question was extensively debated in the late 1950's, prior to the enactment of the Canadian Bill of Rights,[1] but the federal government of the day bowed to political reality and adopted a legislative rather than a constitutional bill. The question resurfaced at various constitutional conferences in the 1960's and 1970's, because of federal proposals to place a Bill of Rights in the Constitution. But the issue was never debated with such vigour until 1980, when the federal government tabled a proposed Resolution in the Senate and House of Commons concerning the Constitution of Canada. The Resolution provides for patriation of the Canadian Constitution,[2] which is supported by all provinces, but also includes a Canadian Charter of Rights and Freedoms. The Charter undoubtedly affects provincial rights, powers and privileges, and is actively opposed by most provinces. The federal government insists that, upon approval by both Houses of the Parliament of Canada of the Resolution requesting amendment of the British North America Act, 1867, and despite provincial opposition, the British Parliament has no choice but to pass the required legislation. This view of federalism is hotly contested by the provinces, and a provincial challenge to it has been litigated in the Courts of Appeal of Manitoba, Newfoundland and Quebec. As a result, the entrenchment debate and federal-provincial relations have been conducted in an unusually rancorous manner. What is proposed in the present paper is to discuss the leading arguments for and against entrenchment, accompanied by some reference to provisions of the proposed Canadian Charter which are particularly relevant to the entrenchment question.

REASONS FOR ENTRENCHMENT

The fundamental argument in favour of entrenchment is that entrenchment is necessary to protect the freedom of the individual from encroachment by capricious majorities. Special reference is usually made to the position of minorities, and to the stresses in time of emergency. A typical expression of this view is the following bald statement found in *Constitutional Reform: Canadian Charter of Rights and Freedoms*, a federal government paper issued under the authority of the Honourable Otto E. Lang in

* Professor of Law, University of Saskatchewan.

1. Assented to on August 19th, 1960; presently found in R.S.C. 1970, Appendix III.
2. The British North America Act, 1867 (U.K.), 30 Vict., c.3.

1978.[3] It states that "Only by placing such a guarantee in the Constitution may individuals and minorities be assured that their rights and freedoms are adequately protected against arbitrary action by others, be those others individuals, majorities, governments or legislators".[4] Similarly, in 1978, the Committee on the Constitution of the Canadian Bar Association recommended entrenchment, stating that: "In the absence of guaranteed rights, a transient majority in Parliament or a legislature can do incalculable harm to a minority or an individual".[5]

Closely allied to the protection argument is the position that human rights are so basic, necessary and everlasting that they must be elevated to an immutable status. The Supreme Court of the United States stated in *West Virgina Board of Education* v. *Barnette:*[6]

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

This passage was quoted in *A Canadian Charter of Human Rights,* another federal government document issued under the authority of the Honourable Pierre Elliott Trudeau in 1968.[7] This document argued that "Language in this form would possess a degree of permanence and would override even unambiguous legislation purporting to violate the protected rights".[8] Similarly, the Lang document stated that the first main justification for enshrining basic rights was "because certain human rights are so basic to our society, they should be given a permanence which can only be assured by placing them beyond the reach of the ordinary legislative process".[9]

Other supporters of entrenchment are more moderate in their assessment of the degree of protection which it affords; their position is that entrenchment operates as a brake on precipitous government action, forcing a sober second thought to changes affecting fundamental rights. The Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 1972, recommended entrenchment on the following more limited basis:[10]

> What democracy requires is that a continuing popular majority must prevail, and it is by no means inconsistent with democracy to erect safeguards to ensure that a majority is a continuing one before it may be allowed to interfere with certain long-established rights. Democracy cannot lose by being forced to have second thoughts on some matters of great moment; in fact this is the rationale of the power which our system of government gives to opposition parties to delay government legislative programs . . . . In reality courts in a democratic society always eventually accept what the majority wants, if only because the political representatives of the majority will ensure that judicial appointees share their philosophy. Moreover, the legislative process of reversal of judicial interpretation through constitutional amendment, though cumbersome, is also assured to the majority.

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3. Canadian Unity Information Office, 1978.
4. *Id.* at 1.
5. *Towards A New Canada,* 1978, 15.
6. (1943) 319 U.S. 624, *per* Jackson J. at 638.
7. Queen's Printer, 1968, at 11.
8. *Id.* at 14.
9. *supra* n. 3 at 2.
10. Information Canada, 1972, 18.

The Canadian Bar Association report took a similarly restrained approach:[11]

> This is not, as some would argue, a denial of the democratic principle that the majority rules. Sustained majority opinion must and will prevail. Courts will eventually accept the consistent views of the majority as expressed in the legislature. What a Bill of Rights ensures is that fundamental freedoms will not be set aside by a transient majority. As the Joint Committee of the Senate and House of Commons on the Constitution noted, it ensures second thought by society through the courts of legislative and executive action that infringes individual freedoms.

An entrenched bill of rights undoubtedly has educational and inspirational value for a nation. It stimulates interest in rights, fosters their acceptance, and leads to a greater public awareness of human rights problems. In some circumstances it serves as a statement of national goals, and in other circumstances it serves as an authoritative standard by which to judge governmental action.

Other arguments supporting entrenchment are now being raised in a distinctively Canadian context. One contention, at odds with Canada's federal structure, is that entrenchment is required to achieve a greater uniformity of rights throughout Canada. The 1968 Trudeau paper, after acknowledging divided legislative competence over fundamental rights, stated that: "Only by a single constitutional enactment will the fundamental rights of all Canadians be guaranteed equal protection".[12] The 1978 Lang paper gave as its second main justification for entrenchment that "these human rights should be common to all Canadians whatever may be their place of residence within Canada . . . . The rights enjoyed should not be dependent upon the particular place where an individual chooses to reside."[13]

The claim is also made that an entrenched bill of rights will contribute to Canadian unity. The Task Force on Canadian Unity,[14] co-chaired by Jean-Luc Pepin and John P. Robarts, concluded, "on balance", that some key individual and collective rights should be entrenched, since "entrenchment would perform an educational and inspirational function by making Canadians more aware and more proud of the wide range of freedoms they do have. Above all, a sense of individual and collective confidence in the security of their rights would contribute to a positive attitude to Canadian unity."[15] The Canadian Bar Association report also suggested that "A clear statement in the Constitution of the fundamental values all Canadians share would, we think, have an important unifying effect".[16]

Another Canadian argument has arisen out of the frustration experienced by civil libertarians with the Canadian Bill of Rights. The decision of the Supreme Court of Canada in *R.* v. *Drybones,*[17] holding that the Bill rendered inoperative any law of Canada inconsistent with it, was a monumental decision, since it was by no means clear what effect the Bill was intended to have. However, the high hopes generated by *Drybones* were shattered by the subsequent decision in *A. G. Canada* v. *Lavell, Isaac* v. *Bedard,*[18] upholding

11. *supra* n. 5 at 15-16.
12. *supra* n. 7 at 14.
13. *supra* n. 3 at 2.
14. Canadian Government Publishing Centre, 1979.
15. *Id.* at 108.
16. *supra* n. 5 at 15.
17. (1970) S.C.R. 282, (1970) 3 C.C.C. 355, 10 C.R.N.S. 334, 71 W.W.R. 161, 9 D.L.R. (3d) 473.
18. (1973) 38 D.L.R. (3d) 481, 23 C.R.N.S. 197, (1974) S.C.R. 1349 (S.C.C.)

s.12(1)(b) of the Indian Act.[19] Civil libertarians now express the hope that the Supreme Court of Canada will take a new and sympathetic approach to the protection of fundamental rights under an entrenched bill, and would reject the sterile interpretation given to the present bill.

A substantial benefit will accrue to the legal profession if entrenchment comes about. What entrenchment really offers is a right to litigate, and it does not require much imagination to find a seemingly plausible ground to challenge any kind of socially significant legislation. In addition to increased legal activity there may also be an increase in professional status, for the lawyer may pose as the champion of liberty and the defender of the Constitution, even when he is defending selfish interests.

Support for entrenchment has also been predicated on the assertion that entrenchment is in compliance with Canada's international obligations. Reference is usually made to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The preamble to the Universal Declaration recites that member states of the United Nations have pledged themselves to achieve "the promotion of universal respect for and observance of human rights and fundamental freedoms". Article 2, Section 1 of the International Covenant stipulates that "each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."

Finally, the ancillary argument is raised that any limitations on the principle of parliamentary sovereignty caused by entrenchment are justified by democratic concerns. The Special Joint Committee Report gave the following rationalization:[20]

> We admit that an entrenched Bill of Rights would limit legislative sovereignty, but then parliamentary sovereignty is no more sacrosanct a principle than is the respect for human liberty which is reflected in a Bill of Rights. Legislative sovereignty is already limited legally by the distribution of powers under a federal system and, some would say, by natural law or by a common-law Bill of Rights. The kind of additional limit on it which would be imposed by a constitutional Bill of Rights is not an absolute one, for a Bill of Rights constitutes rather a healthy tension point between two principles of fundamental value, establishing the kind of equilibrium among the competing interests of majority rule and minority rights which is in our view of the essence of democracy.

The Canadian Bar Association report goes further, suggesting that there is no conflict between entrenchment and parliamentary supremacy,[21] but its argument can hardly be described as convincing. The rationale given is that "It is a prerequisite to the proper operation of the principle of the supremacy of Parliament that the courts apply principles of natural or fundamental justice".[22]

REASONS AGAINST ENTRENCHMENT

While many arguments have been advanced against entrenchment, most of them stem from the proposition that words describing fundamental rights are general words of varying and uncertain content, and that decisions as to

19. R.S.C. 1970, c. I-6.
20. *supra* n. 10 at 18-19.
21. *supra* n. 5 at 16.
22. *Id.*

their meaning primarily involve matters of social policy, better left to the legislative process than to the courts. No right can be interpreted in an absolute fashion; it must be subject to the dictates of national security, public order, health and morality. The freedom of one is necessarily subject to the freedom of others, and freedom can only exist under the law. Indeed, rights on occasion conflict with each other. Policy choices must be made in the recognition of fundamental rights, and these choices are best made by legislatures because of their representative character, their accessibility, and their superior abilities with respect to fact-finding, awareness of public needs, formulation of national goals, compromise, timing and economic resources. The adversary system of judicial proceedings, restricted to the facts of a particular case and limited by rules of evidence and procedure, is ill-equipped to create universal solutions to complex social problems.

At the outset it should be noted that it is difficult to avoid some degree of generalization in a discussion of entrenchment. Courts are often influenced by public policy considerations, especially in their roles as arbiters of federal-provincial conflicts. They have, on occasion, effectively protected fundamental rights by rejecting the legislative authority of the body that was attempting to deal with them. In some situations they clearly create law. It is also incorrect to suggest that there are no entrenched rights in the Canadian constitution. Democratic rights are clearly guaranteed by Part IV of the British North America Act, denominational education rights by section 93, and the use of English and French by section 133. Various judges have also suggested the existence of an implied bill of rights in our constitution, at least until the recent rejection of that doctrine by the Supreme Court of Canada in *Attorney-General of Canada* v. *Dupond.*[23] Accordingly, the issue in dispute is not the presence or absence of the power of judicial review, but the extent of its operation. What must be determined in the entrenchment debate is whether our courts should be invested with power to openly invalidate the political decisions of Parliament or of the provincial legislatures, acting within their jurisdictional competence. With respect to some entrenched rights, such as educational and linguistic rights, the courts may be required to move beyond constitutional invalidation to judicial legislation and to direct administrative supervision.

If most human rights disputes in a democratic society involve policy choices, then judges exercising a power of judicial review necessarily will be imposing their personal values and biases on the legislatures, often frustrating the popular will. Consider the following examples, all borrowed from American law. Should courts have power to determine that a convicted criminal must be released because his trial was delayed too long; that illegally obtained evidence is inadmissible; that capital punishment constitutes cruel and unusual punishment; that women must be conscripted with men for military service; that a woman has a constitutional right to an abortion, possibly paid for by the state; that school attendance laws violate religious freedom; that school children have a constitutional right to wear black arm bands as a form of political protest; that school boards must bus pupils to desegregate a school system, even specifying the number of buses which a system must purchase; or how electoral boundaries shall be drawn,

23. (1978) 2 S.C.R. 770, 84 D.L.R. (3d) 420, 19 N.R. 478.

how voting shall be conducted, and whether the right to vote requires a ward system? From a Canadian perspective, most people would prefer a political rather than a judicial determination of these issues.

Two Canadian examples may highlight the difficulties arising under entrenchment. The proposed federal Charter guarantees equality before the law without discrimination because of age. In Canada we are becoming more conscious of the position of the elderly, and we are concerned whether mandatory retirement constitutes age discrimination. This issue has great implications for such matters as employment opportunities and advancement, employer-employee relations, union negotiations, health care, safety standards, pension plans, and the like. Under entrenchment a court might be constrained, in a dispute involving only two persons, to hold that all mandatory retirement is unconstitutional. Critics of entrenchment would suggest instead that the legislatures, as the representatives of the people, should pass final judgment on this issue.

Another example concerns the position of the disabled. The Senate-House of Commons Committee studying the federal proposals has recommended adding physical and mental handicap to the prohibited categories of discrimination. News reports discussing this recommendation stated that blind persons would no longer be barred from serving on juries. It is not immediately apparent why barring the blind, or the deaf for that matter, from serving on juries is an improper form of discrimination. One also wonders what will happen to the right to a fair trial.

If it is correct that policy matters are better decided by the legislatures, then judicial decisions invalidating legislation will be wrong more often than right. Critics of entrenchment point to the American experiences as supporting this allegation, since many Supreme Court decisions originally nullified welfare legislation, but were eventually reversed by the Court itself. In the process, needed social reform was unnecessarily delayed. In Canada, courts have usually been more conservative in outlook than the legislatures, and a similar tendency could be anticipated, perhaps not immediately but in the long-term future.

Having judges decide basically political questions tends to have a deleterious effect on the judiciary itself. When courts become involved in political controversies, they are rightly subject to political criticism, and lose their image of impartiality and fairness. Even among judges themselves, there will be a substantial amount of lobbying and enmity. The recent bestseller, *The Brethren, Inside the Supreme Court,*[24] is an amazing chronicle of injudicious conduct by American Supreme Court judges, torn by differing political views. The end result may be a loss of prestige and independence.

Another argument raised against entrenchment is that it is essentially undemocratic and elitist. Under entrenchment final responsibility for major social issues is taken from the people, acting through their elected representatives, and given in the final analysis to five members of the Supreme Court. The rationale is that legislatures cannot be trusted to make proper decisions about fundamental rights, and that the people must be protected from themselves. The response given by opponents of entrenchment is that there is no

24. Bob Woodward and Scott Armstrong, 1979.

historical or democratic warrant for judges to act as super-legislators or philosopher kings, and that legislative majorities acting under a parliamentary system have not been a threat to the fostering of human rights. Rather, they have been the champions of liberty. As well, the practice of Canadian federal governments of appointing judges primarily on the basis of political allegiance does not foster confidence in the judicial settlement of political issues.

The contention based on democratic concerns may be expanded to suggest that entrenchment results in an erosion of democratic responsibility because the people can no longer assume final responsibility for social changes. It is admitted that democratic majorities will on occasion make mistakes, but they will be able to correct their own mistakes, and learn from the process. On the other hand, there is no easy way for the courts to correct their mistakes, short of judicial reversal or constitutional amendment. Citizens may also identify constitutionality with wisdom, falsely assuming that what is constitutional is acceptable.

Another criticism of entrenchment is that it unduly fosters litigation, much of which is frivolous as well as expensive. The ordinary remedy to enforce or protect an entrenched right is a lawsuit, and it is debatable whether litigation is the best way to solve human disputes. It may also be the case under entrenchment that privileged people are better able to protect their essential interests than the poor and underprivileged. While the rich or the zealots are challenging the validity of legislation, social reform will be unduly delayed. Certainly American society has become preoccupied with litigation, which is regarded as a respectable, and in some instances the only available, instrument of political reform. It is suggested, however, that a legal system works best when it is invoked least, and that increased litigation is not a desirable social activity.

Another common problem with entrenched bills of rights is that as society changes some of the specified rights become outdated, others assume undue importance, and new and equally valid claims of rights are ignored. The American "right of the people to keep and bear arms" has not had a salutary effect on American society, and the right of trial by jury in suits exceeding $20 would block procedural reforms even if the Founding Fathers had been prescient enough to add an inflation factor. There are many rights ignored 50 years ago which would be included in a current bill of rights, and one can safely predict that new rights will be in vogue 50 years from now. These newly competing rights are never given as much credence as the entrenched ones, and social reform is retarded.

In direct contrast to the position that all Canadians should enjoy the same fundamental rights is the contention that entrenchment will be destructive of Canada's federal system. The genius of federalism is to combine the individuality and the variety of the different parts of the country with the strength of the whole. In a country as large and as diverse as Canada it is important that people in the various regions have a right to differ, and to seek new ideas and solutions, particularly in the sensitive areas found in section 92 of the British North America Act. Federalism serves as a social crucible, in which provinces can experiment and profit from the experience of other provinces. Entrenchment acts as a brake on this process because a final court tends to express a uniform social philosophy, tends to disallow imaginative solutions to social ills, and tends to prefer consistency over provincial diversity. Canada's multicultural nature requires flexibility in its

governmental organization but the experience of entrenchment in other federal states indicates that a supreme court reacts more harshly against novel solutions by provincial legislatures.

Another possible argument against entrenchment is that it lulls people into a false belief that their rights are finally secure, and that this attitude is destructive of the vigilance required to maintain a free society. The Canadian Bill of Rights certainly was not a positive factor in protecting human rights, and unsympathetic interpretation of an entrenched bill could produce a similar result. Emphasis on entrenchment could distract attention from utilizing human rights commissions and Ombudsmen to solve individual problems, and from utilizing the political system to solve major social problems.

A final argument against entrenchment is that when protection from oppressive majority action is really required, judicial review will be ineffectual. The two Canadian incidents which have been frequently cited as justifying an entrenched bill of rights are the treatment of Japanese-Canadians during the Second World War and the invocation of the War Measures Act during the October crisis of 1970. It is difficult to see how an entrenched bill would have prevented either action. The opinion of the Special Joint Committee of the Senate and the House of Commons on the Constitution, and of the Canadian Bar Association, that a sustained majority opinion will always prevail, has already been quoted. However, the most eloquent rebuttal of the protection argument is found in the writings of Judge Learned Hand:[25]

> [T]his much I think I do know — that a society so riven that the spirit of moderation is gone, no Court can save; that a society where that spirit flourishes no Court need save; that in a society which evades its responsibility by thrusting upon the Courts the nurture of that spirit, that spirit in the end will perish.

The first section of the proposed Canadian Charter illustrates the conceptual difficulties posed by entrenchment. That section originally provided:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.

The section may have resulted from an attempt by the federal government to strike a balance between the theories of parliamentary supremacy and judicial review, or to gain the consent of the opposing provinces. In any event, the section has pleased no one. It was vigorously attacked by civil libertarians, who viewed it as a negation of the purpose of entrenchment, and it failed to reduce provincial opposition to entrenchment. The joint parliamentary committee studying the federal proposals has recommended that the section be amended to read as follows:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The former version probably was a more accurate description of the result under entrenchment, and it is doubtful that the latter version will effect a significant change.

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25. *The Spirit of Liberty, Papers and Addresses of Learned Hand,* (Irving Dilliard, 1952) 181.

CONCLUSION

In assessing the relative merits of entrenchment in Canada, the question is not whether we should have a bill of rights, but whether we should have an entrenched bill. The operating principle of Canadian government has traditionally been that of parliamentary democracy, i.e., that our elected and accountable representatives have the ultimate authority to define our basic social values as a nation. Under entrenchment, that ultimate authority would be transferred to the courts. It is difficult to conclude that a satisfactory case for such a change has been made.