Waiting for Coraf

A Critique of Law and Rights

Allan C. Hutchinson

ALLAN C. HUTCHINSON

Waiting for Coraf: A Critique of Law and Rights

UNIVERSITY OF TORONTO PRESS
Toronto Buffalo London

© University of Toronto Press Incorporated 1995
Toronto Buffalo London
Printed in Canada

ISBN 0-8020-0672-8 (cloth)
ISBN 0-8020-7625-4 (paper)

Printed on acid-free paper

Canadian Cataloguing in Publication Data

Hutchinson, Allan C.
Waiting for Coraf : a critique of law and rights

Includes bibliographical references and index.
ISBN 0-8020-0672-8 (bound) ISBN 0-8020-7625-4 (pbk.)

1. Canada. Canadian Charter of Rights and Freedoms.
2. Civil rights – Canada. 3. Democracy – Canada.
I. Title.

JC599.C2H88 1995 342.71'085 C95-930070-8

University of Toronto Press acknowledges the financial assistance to its publishing program of the Canada Council and the Ontario Arts Council.

Preface

Before I completed the final draft of this book, I was invited to South Africa to talk about constitutional rights and to meet with African lawyers. It was a compelling and memorable trip: South Africa is a country and society that sears a profound mark on the mind. In professional terms, it presented me with the ideal opportunity to put my critical views to the acid test of political extremism. In the face of almost overwhelming support for a constitutionally entrenched and judicially enforced Bill of Rights by black lawyers, progressive academics, and liberal politicians, I felt that my opposition would meet its most sustained and penetrating challenge. Institutional oppression and personal suffering is so endemic in South Africa that people's appeal to the rhetoric of rights seemed almost natural and irresistible in its logic and cogency. However, my exposure, admittedly brief and limited, to the South African experience and the inspiring example of a few like-minded sceptics – Dennis Davis and Justice Poswas, to name but two – convinced me that such constitutional reforms were not the best way to achieve social justice: the short-term fix of liberal reform would not compensate for the long-term debilitation of the democratic cause. Rights-talk has had its day.

The attraction of rights-talk in South Africa and similarly straitened societies is obvious: it promises immediate and real relief from the grotesque abuses that people endure on a daily and continuing basis. The allure of North America and other advanced societies is seen as a shining example of the benefits and protections that constitutional rights can achieve. Yet, as I hope to show in this book, the light that those societies emanate is more diffuse and less ennobling than appears or is suggested. To be blunt, rights-talk flatters to deceive. The achievements

of Canadian society are less uniformly good than is often conceded and they are more often brought about in spite of, not because of, the constitutional commitment to judicial rights-talk. Of course, it is better to be a citizen of Canada than of South Africa. But it is smugly offensive to observe, as former prime minister Brian Mulroney did, that the existence of the Charter of Rights ensures that 'we live in the kind of a democracy for which we are all thankful.' In spite of this country's natural and economic wealth, the anguished lives of many poor, Native, gay, illiterate, unemployed, female, and alienated Canadians stand as stark testimony to the fact that rights-talk dazzles rather than illuminates the critical eye of the liberal reformer. The Charter cannot be an empowering force for the egalitarian good when far too many still live in society's penumbral regions.

While in South Africa, I gave a series of seminars at various universities on the critique of constitutional rights in Canadian law. After one such event, in which I had argued strongly against the constitutional entrenchment of a Bill of Rights, one puzzled academic asked whether this meant that I was in favour of torture, arbitrary detention, surveillance, and the like. At first flabbergasted, I soon became angry at such a ludicrous and malign interpretation of my remarks. The fact is that I am not only appalled by the use of such inhumane instances of official power, but I am convinced that the practice of rights litigation falls well short of its promise to prevent such degradation. For example, despite its claim to be the standard-bearer of rights, the record of the United States on issues of race and violence is less than exemplary; it remains one of the most divisive and troubled countries in the world. Moreover, a constitutional dependence on judicial rights-talk as the exclusive bridle on governmental abuses of power obscures and, therefore, is indifferent to the many systemic ways in which oppression is woven into the social fabric of people's lives. The structured complexity and distribution of power in modern states demands a political response that is equally sophisticated and pervasive in its breadth and depth. Rather than settle for the attenuated discourse of rights-talk, people must aspire to a truly democratic polity that will enable and oblige them to become full and contributing citizens in an expansive civic dialogue over the terms and conditions of social life and personal living. Accordingly, this book is unapologetic in its commitment to championing a style and substance of politics that take seriously the virtues of democratic dialogue over the vices of rights-talk.

When asked whether he spoke Spanish, one of P.G. Wodehouse's

此为试读,需要完整PDF请访问: www.ertongbook.com

characters answered, 'I don't know: I've never tried.' Canadians would do well to cultivate a similar open-mindedness and confidence in themselves when it comes to democratic conversation. The continued accumulation of elite power in the name of popular democracy is to be deplored. My proposal to abandon rights-talk and give democratic dialogue a real chance will only ring hollow and naïve to those latter-day aristocrats who crave the privilege to decide what is best for others. In working toward the social and material conditions for such conversations, much will have to be confronted and altered that is inimical to a truly just and egalitarian society. In so doing, people will learn that conversation and debate are not only some of the great pleasures of the good life, but that they are also its necessities. For too long, Canada's constitutional talk has been uttered by its political and judicial elites in an institutional accent and idiom that make it next to impossible for ordinary Canadians to participate: democracy has become more of a stylized exchange in which the powerful speak as often as they want and the powerless listen as best they can. This is the perversion of democracy, not its perfection.

Nevertheless, while I am an unapologetic advocate of unmodified democracy, I do recognize that I am not writing in a sociopolitical vacuum and that Canada has already made a constitutional commitment to an entrenched bill of rights. Unlike in the United Kingdom and South Africa, the political debate in Canada is not about whether to introduce constitutional change by way of rights-talk, but how to put an institutional discourse of rights-talk to progressive ends and effect. Consequently, while this book is devoted to demonstrating how the theory and practice of rights-talk betrays the cause of democracy, I concede that it might not be possible to ignore entirely constitutional litigation in a society that is already pervaded by rights-talk. Mindful that there is no 'outside' from which to work, there may be occasional strategic advantage in making 'inside' resort to the courts in the struggle to advance the project of progressive justice. However, it is a very dangerous two-edged sword that must be wielded with extreme caution and self-conscious scepticism.

Acknowledgments

While it almost goes without saying that this book would not have been completed without the assistance of many people, it would be inexcusable not to thank and mention some of them by name. Some of the work on which I have drawn in this book began life as joint projects with friends. I am particularly grateful to Pam Carpenter, Lisa Fishbayn, Robert Maisey, Patrick Monahan, and Andrew Petter for their generosity, insight, forbearance, and friendship: they prevented me from making even more gaffes than I otherwise would have done and made the whole business of scholarship much more fun. I have been most fortunate in working with talented, imaginative, humorous, and dedicated students who have made an invaluable contribution to the finished product; these include Jonathon Anschell, Adam Bernstein, Richard Epstein, Sue Hodgson, Blair Holder, Tom Lacerte, Moonlake Lee, Maureen Lennon, Evan Siddal, Anne Werker, and Laura Young. In the same way, I have had the definite pleasure of working with Carole Trussler, Rose Della Rocca, and, especially, Wendy Rambo, who have endured my eccentric work habits and taxing demands with an enviable professionalism and friendly equanimity. Also, I want to thank my colleagues and friends at Osgoode for contributing to an academic community that generates all the intellectual diversity, political tension, and institutional support that allows someone like me to thrive. Finally, I owe special debts of appreciation to Robert Maisey, who went above and beyond the call of friendship by reading the whole of the completed manuscript in his own rigorous and insightful way, and, in particular, to Andrew Petter, whose intellectual influence and personal example remain strong throughout.

Although there is much that is new in this book, it is the accumulated result of more than seven or eight years of research and publication. My

ideas have gone through many twists and turns in that time; no doubt, they will continue to develop and change after the publication of this book. This way of proceeding has meant that as well as rewriting and re-editing older arguments and ideas, I have written a considerable amount of new material. As such, I hope that this book represents a more original and less patchwork effort than might be expected. In completing the final version of the book, I have drawn freely on ideas and material that was previously published in the *Harvard Law Review*, *University of Toronto Law Journal*, *Texas Law Review*, *Stanford Law Review*, *Law and Society Review*, *University of British Columbia Law Journal*, *Ottawa Law Review*, *McGill Law Journal*, *Canadian Business Law Journal*, *Yale Law Journal*, *British Journal of Law and Society*, *Michigan Law Review*, *Southern California Interdisciplinary Law Journal*, *Literary Review of Canada*, *Canadian Lawyer*, the *Globe and Mail*, and the *Toronto Star*. Many thanks to all editors and staff for their support.

Of course, life is much more than work. And work is much less than life. I am lucky to be part of a family that gives a broader meaning and value to both my work and life: my mum and dad, Marie and Charlie Hutchinson, have always shown me what it means to work hard and love unconditionally; my daughters, Katie, Emily, and Rachel, love me enough to put up with a father who is often more distracted than he might be; Katie, Chris, and Daniel Carpenter have increased my family in affection as well as size; and Pam Marshall endured me in ways that only she could – 'You showed me what it's all about.' Thanks and love to all.

Allan C. Hutchinson
31 December 1994

Power of some sort or other will go on
In games, in riddles, seemingly at random;
But superstition, like belief, must die,
And what remains when disbelief has gone?

– Philip Larkin

Contents

此为试读,需要完整PDF请访问: www.ertongbook.com

WAITING FOR CORAF: A CRITIQUE OF LAW AND RIGHTS

1

Waiting for Coraf: Liberalism and the Charter

What are we doing here, *that* is the question. And we are blessed in this, that we happen to know the answer. Yes, in this immense confusion one thing alone is clear. We are waiting for Godot to come ... Or for night to fall ... We have kept our appointment, and that's an end to that. We are not saints, but we have kept our appointment. How many people can boast as much?

– Samuel Beckett[1]

Samuel Beckett was always a man ahead of his time. He would have understood well the disconcerting dilemma of Canadian lawyers and constitutional scholars. His tragicomedy of existential despair, *Waiting For Godot*, is a threnody of hope postponed and abused, but never abandoned or extinguished. The wretched Vladimir and Estragon are waiting on a road, beside a blasted tree too frail for a gallows, for the inscrutable Mr. Godot to come. Through a series of desolate encounters in which Nothing happens, the Chaplinesque tramps continue in their daily round of abiding anguish and unrequited anticipation. The bewilderment and frustration of waiting seems to become life's reluctant ambition and dubious achievement – 'I wait, therefore I am (perhaps).' In this minimalist drama, Beckett suggests the predicament of human living in which the responsibility of ennobling opportunity and the burden of enervating risk combine in the god(ot)-less search for meaning in an abject and alienating world. As such, it captures neatly the perennial predicament within which Canadian lawyers and academics are squarely caught.

WAITING FOR CORAF

In 1982, the new Charter of Rights and Freedoms became part of

Canada's Constitution. Although some worried that 'Canada was in danger of becoming a rights-ridden country,'[2] most heralded the Charter as a symbolic distillation of all that is estimable and esteemed in Canadian political life; it was to be the legal jewel in the constitutional crown. As part of the patriation of the Canadian Constitution, it promised to make good on Canada's traditional commitment to being a just and ordered democracy. In particular, the Charter proposed a framework of rights within which the relations between individuals and the state could be monitored and structured. Of course, while the Charter crystallized the debate around rights and placed it at the constitutional heart of democratic affairs, it was not Canada's first encounter with the political and legal ramifications of rights-talk. Throughout the common law and in public law generally, lawyers and judges have attempted to identify and refine a style and substance of rights-talk that can bring the existential search for legal truth and social justice to a successful and satisfying conclusion. Nevertheless, the entrenchment of a judicially administered Charter that took constitutional precedence over the legislative enactments of a democratically elected Parliament was a seminal and sustaining event in Canadian political and legal life.

Nevertheless, as even its most enthusiastic supporters might concede, the impact of the Charter has been more than a little problematic and the performance of its judicial interpreters has been less than exemplary. The Charter's vaunted claim of being the authoritative voice on the potential and parameters of responsible government in a constitutional democracy has not been made out. With over a decade of judicial experience and jurisprudential reflection behind it, the whole of the Charter enterprise remains in serious need of political justification and jurisprudential support. However, as the flawed nature of the Charter's character becomes more apparent, its many supporters content themselves with reassuring each other that its real potential has not yet been fully actualized. Like Beckett's vaudevillian vagrants, Canadian constitutional scholars exist in that precarious purgatory between the unfulfilled hope of formalist salvation and the compulsive fear of nihilistic damnation. They live and wait in that demi-world of exquisite perdition in which it is uncertain whether the real Charter of Rights and Freedoms (CORAF, hereafter called Coraf) will or will not come. It is as if only the will to believe in Coraf and its imminent arrival is all that keeps society from an anomic abyss: 'In the meantime let us try and converse calmly, since we are incapable of keeping silent.'[3]

Within the context and confines of this self-imposed purgatory, it is crucial to its judicial and juristic inhabitants that a viable and legitimate mode of rights-talk be attainable. Without the possibility of effecting a legitimate practice of Charter adjudication – determinate in scope, objective in operation, and progressive in outcome – the struggle to establish a constitutional order that is worthy of a democratic polity is lost. It is feared that, without such an order, Canadian society would be cast adrift on a sea of ideological wrangling with only scholarly impostors to map the charts, judicial tyrants to plot the course, and lawyerly swabs to crew the voyage. More pertinently, the increasingly desperate nature of the legal community's yearnings for theoretical and practical relief from this dystopian vision ensures that its members will regularly be beguiled by the barest hint of Coraf's impending sighting. Without some sign of its likely arrival, mainstream lawyers, judges, and scholars will succumb to the insidious fear of self-doubt and begin to question their own authority: 'We always find something, eh Didi, to give us the impression that we exist.' Consequently, in the long night of rights-talk, constitutional law and scholarship sleep-walk a thin line between a dream of deliverance and a nightmare of inconsequence. It is a tired and tiring prospect: 'Don't let's do anything. It's safer.'[4]

This jurisprudential desire for a good night's constitutional sleep has deep cultural roots. More than most continents, North America is a land of dreams. It exists as much in the ideological geography of the imagination as in any political gazetteer. One particular dream (or nightmare) that has withstood the reality of waking history is about 'a government of laws, not men.' Although this constitutional vision is predominantly American, it has retained a firm grip on the Canadian popular and legal psyche; it has been a major source of governmental authority and legitimacy. There is a long-standing belief in the United States and Canada, especially in these post-Charter years, that Law is more than the sum total of extant laws: it is felt to be the expression and repository of a political wisdom that transcends the bounds of its own temporary articulation.[5] Democratic law-making cannot be left entirely to its own promptings, but must be judged by its willingness to conform to the dictates of a higher law. Whereas Reason and Natural Right used to hold considerable sway, recent invocations of these transcendent authorities are of a more specific and prosaic nature. Recognizing that, whatever else it might be, law is a human activity, contemporary legal theorists strive to explain and justify the delicate and elusive relation between law's immanence (the idea of law as the rational embodiment

此为试读,需要完整PDF请访问: www.ertongbook.com