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The Canadian Charter of Rights and International Law

L. C. GREEN*

IT IS NOT THE PURPOSE of this article to examine how the Canadian Bill of Rights[1] has been interpreted in practice. Nor is it its purpose to examine the manner in which the Canadian courts have approached the Charter of Rights[2] in the new Constitution.[3] Rather, its aim is to examine the extent to which some of the major provisions of the Charter conform to or differ from international law in so far as human rights are concerned.

The first thing to note is that, despite the activities of the European Court of Human Rights, there is as yet no way in which national legislation incompatible with international obligations respecting human rights can be abrogated or disregarded, even though damages may be awarded[4] against a state for its failure to comply with the provisions of the European Convention on Human Rights.[5] In the case of the Canadian Charter, however, the situation is different. By Section 52(2) of the Constitution Act, 1982, the Constitution of Canada includes the Canada Act (U.K.), Part I of which is the Canadian Charter of Rights and Freedoms. By Section 52(1) of the Constitution Act, "the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." It would appear, therefore, that any legislation incom-

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1 R.S.C. 1970, App. III.

2 Constitution Act 1982, Part I.

3 Canada Act 1982, c. 11 (U.K.); Constitution Acts 1867-1982.

4 *Young, James and Webster (Closed Shop)* case (1981) 62 I.L.R. 359.

5 (1950), 213 U.N.T.S. 222.

patible with the Charter will, to that extent, be null and void. However, as is clear from the practice of the European Court of Human Rights in its approach to the Convention, and of the Supreme Court of the United States when construing the American Bill of Rights, it is one thing to postulate a law or a principle, but it is an entirely different matter to construe it. It is, as yet, far too early to estimate what the attitude of the Canadian courts is going to be and whether the Charter and its overriding character will be interpreted widely or narrowly. So far there is some evidence to suggest, as was made clear by Chief Justice Laskin in the case dealing with the validity of Calgary's municipal legislation against prostitution, that counsel are tending to look to the Charter as a general catch-all to be fallen back upon,[5a] if not in every case, whenever another ground for argument may be difficult to find. Should that practice become general, it may well result in the Supreme Court adopting a rigid and formalistic approach with the scope of the Charter being narrowly confined. On the other hand, it must be borne in mind that the Charter does provide the possibility for major development. By section 24 "anyone whose rights and freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." While this would imply that this right to apply for a remedy only relates to breaches of the rights and freedoms guaranteed by section 26 of the Charter, it does open the way for the courts to provide a true remedy, perhaps even including damages, to one whose rights have been so infringed.

An immediate problem arises as to who would have sufficient legal interest to attempt to secure the condemnation of a statute as being contrary to the Charter. Does this have to be a person who is directly affected and injured by the legislation or would it suffice for any citizen or taxpayer of Canada to contend that he, in that capacity, is affected by all the laws of Canada? In *Minister of Justice (Canada)* v. *Borowski*,[6] the majority of the Supreme Court was of opinion that "to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable effective

[5a] See also *R.* v. *Altseimer*, (1982) (Ont. C.A. unreported).

[6] (1981) 130 D.L.R. (3d) 588, 606.

manner in which the issue may be brought before the court." In this, the Supreme Court appears to be adopting a somewhat similar line to that of the International Court of Justice in the *South West Africa* cases[7] when it held that Ethiopia and Liberia as former members of the League of Nations were therefore possessed of sufficient "legal interest" in observance of the Mandate for South West Africa to be able to institute proceedings against the Mandatory, "for the manifest scope and purport of the provisions of [Article 7 of the Mandate] indicate that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members."[8] It was expressed even more directly by Judge Jessup in his Separate Opinion:[9]

> International law has long recognized that States may have legal interests in matters which do not affect their financial, economic, or other "material," or, say, "physical" or "tangible" interests. One type of illustration of this principle of international law is to be found in the right of a State to concern itself, on general humanitarian grounds, with atrocities affecting human beings in another country. In some instances States have asserted such legal interests on the basis of some treaty.... In other cases, the assertion of the legal interest has been based upon general principles of international law.... States have also asserted *a legal interest in the general observance of the rules of international law*.... [T]he general interest in the operation of the mandates was a legal interest.

It is by now notorious that the decision to recognize a legal interest to institute proceedings is not the same as recognizing that the owner of that interest has any right to a remedy. As the International Court held, by the casting vote of its President, in the *South West Africa* cases (Second Phase),[10]

> the question which has to be decided is whether ... any legal right or interest ... was vested in the Members of the League of Nations ... individually and each in its own separate right to call for the carrying out of the mandates as regards their "conduct" clauses.... [T]he question is whether the various mandatories had any direct obligation towards the other members of the League individually, as regards the

[7] [1962] I.C.J. 319.

[8] At 343.

[9] *Ibid.*, 387 at 425, 433 (italics added).

[10] [1966] I.C.J. 6, 22, 32.

carrying out of the "conduct" provisions of the mandates.... [Legal] rights or interests, in order to exist, must be vested in those who claim them, by some text or instrument, or rule of law ... none were ever vested in individual members of the League under any of the relevant instruments, or as a constituent part of the mandates systems as a whole....

Perhaps even more relevant to the sort of question that may arise in relation to the Charter is the reaction of the 1966 Court to the suggestion that,

directly or indirectly, humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within its own discipline. Otherwise, it is not a legal service that would be rendered. Humanitarian considerations may constitute the inspirational basis for rules of law.... Such considerations do not, however, in themselves amount to rules of law. All States are interested — have an interest — in such matters. But the existence of an "interest" does not of itself entail that this interest is specifically juridical in character.... [Turning now to] the contention by which it is sought to derive a legal right or interest in the conduct of the mandate from the simple existence, or principle, of the "sacred trust" [which the Mandate was said to constitute]. The sacred trust, it is said, is a "sacred trust of civilization." Hence all civilized nations have an interest in seeing that it is carried out. An interest, no doubt; — but in order that this interest may take on a specifically legal character, the sacred trust itself must be or become something more than a moral or humanitarian ideal. In order to generate legal rights and obligations, it must be given juridical expression and be clothed in legal form.... [I]t is necessary not to confuse the moral ideal with the legal rules intended to give it effect.[11]

It takes no major effort to transfer these arguments to the contention that the public at large has no "legal interest" in ensuring that Canadian legislation does not conflict with the guarantees embodied in the Charter, whatever may be the rights of any individual who may have suffered as a consequence of such legislation. Some of the comments as to the idealistic or humanitarian character of "the sacred trust of civilization" are, if we revert to the *Borowski* case, probably equally relevant in considering whether the right to life and the concept of "fundamental justice" which may infringe there-

[11] At 34-35.

on are sufficiently "specifically juridical in character" to protect the unborn against abortion, and to confer a legal right on any person, including a male who could never be "directly" involved in this process or who is not the father of any particular foetus, to seek to have the relevant sections of the Criminal Code declared unconstitutional.

Having looked at the problem of who might be eligible to seek a declaration that particular legislation may be contrary to the Charter, it is time to turn attention to the substantive clauses of the Charter itself. A significant issue in any discussion of fundamental rights is identification of those to whom the rights are granted, and it is important therefore to examine the nomenclature. The Universal Declaration of Human Rights[12] opens with the assertion that "all human beings are born free and equal in dignity and rights," and goes on to provide that "everyone is entitled to all the rights and freedoms set forth . . . without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." When stipulating what the rights are it employs the term "everyone," and when forbidding particular actions it provides that "no one" shall be subjected to whatever it may be. Equally, the International Covenant on Economic, Social and Cultural Rights,[13] having stipulated that the rights in question are to be exercised without discrimination of any kind, proceeds to confer the rights upon everyone. The International Covenant on Civil and Political Rights[14] reverts to the language of the Universal Declaration. The only departure from this generality of terms, sometimes expressed as "all persons," appears in Article 3, which obligates the parties "to ensure the equal rights of men and women to the enjoyment of all the political and civil rights set forth. . . ." The only other near departure from generality is to be found in the provisions concerning freedom of religion or belief, which is to be enjoyed "either individually or in community with others and in public or private,"[15] while "in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own

[12] 1948, G.A. Res. 217 (III) A, Arts. 1, 2.

[13] 1966, G.A. Res. 2200 (XXI) A, to which Canada became a party in 1976.

[14] *Ibid.*

[15] Art. 18.

culture, to profess and practice their own religion, or to use their own language."[16] The European Convention on Human Rights[17] is equally general, referring in the positive form to "everyone" and in the negative to "no one," with the sole specification[18] that "men and women of marriageable age have the right to marry and to found a family, according to the national law governing the exercise of this right." The American Convention on Human Rights[19] is in much the same form, referring to "all persons," "every person," and "no one." The Convention does specifically mention the right of both men and women to marry, and makes provision for the protection of minor children. It also confirms the right to "profess or disseminate one's religion or beliefs either individually or together with others." As with the other international instruments, there is no recognition of any special rights for any particular group.

The Canadian Charter, on the other hand, on occasion refers to the rights of "everyone," while other rights are only extended to Canadian citizens, and others to "every individual . . . without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Despite this generality, the Charter, on two occasions,[20] recognizes and affirms the rights of aboriginal peoples, and expressly states[21] that "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons" — a principle that one might have thought followed from the express condemnation of any form of discrimination based on sex. This affirmation of the equal rights of women was introduced to satisfy the demands of the feminists, who felt that they required such specific mention. It is difficult to appreciate, however, why it should be considered that the specific reference to the equal rights of men and women should be any more worthwhile and real than the general ban on sexual discrimination, or the undertaking that the rights shall be enjoyed by "everyone."

Perhaps more important than the reference to the rights of aboriginal peoples or of women is that which flows from the fact that English and French are the official languages of Canada. As a

[16] Art. 27.

[17] *Loc. cit.*, *supra* note 5.

[18] Art. 12.

[19] (1969), 9 I.L.M. 99.

[20] Ss. 25, 35.

[21] S. 28.

result thereof it became necessary to make provision for minority language educational rights.[22]

> Citizens of Canada whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province. [Moreover,] citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

In addition, where the numbers of a linguistic minority warrant, the children are entitled to be educated in their own language or to have schools provided for them, if "the number of those children so warrants." This right only relates to education in English or French and only attaches to Canadian citizens, so that a non-Canadian, even though he be a landed immigrant, cannot opt for either language at his choice, and may be required to be educated in the language of the province in which he resides. This problem has become of pressing significance due to the educational linguistic restrictions embodied in Quebec's language charter, Bill 101.[22a]

It should be noted, however, that a similar problem exists in Belgium, where, although the Constitution provides that education shall be unrestricted and that the use of the languages — Flemish and French — is optional, the Flemish areas issued regulations concerning education in French. Basically,

> the language of education was in principle that of the region, while study of a second language (whether national or not) was compulsory only in secondary classes. This rule was, however, mitigated ... [by the provision] that children whose maternal or usual language was not of the region were entitled to receive their primary education in their own language. But the competent authorities remained the judges of the "reality of this need" and the "expediency of meeting it" by setting up "transmutation" classes [where] pupils ... were obliged to learn the language of the region from the second grade of primary schooling....[23]

[22] S. 23.

[22a] S.Q. 1977, c. 94.

[23] *Belgian Linguistics* case (Merits) (1968) 45 I.L.R. 114, 145. The decision of Deschenes C.J.Q. in *Quebec Association of Protestant School Boards* v. *A.G. Quebec*, (1982) (unreported), does not affect the argument herein.