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THE CANADIAN LEFT AND THE CHARTER OF RIGHTS

by Charles Campbell

1. *Introduction*

This paper about rights in their legal form is addressed to the left in Canada. It is occasioned by the recent adoption of a *Charter of Rights* as "fundamental law". We have been inept, uninspired and uninspiring on the issue. The notion of entrenched rights has been disparaged. This attitude appears to me to be politically incorrect. For all that is wrong with the *Charter*, we must recognise the centrality of the notion of "rights" in industrial and post-industrial society. There is no fully integrated theory of "socialist rights" in these pages, although there are a few ideas and opinions. My objective is not so much to assert that my perception of "socialist rights" is correct, but rather to rally enthusiasm for the important political task of developing theory and practice.

2. *Who Wants A Charter of Rights and Why?*

It is easy to be cynical about the entrenchment of the *Charter of Rights and Freedoms*. Who can take seriously Mr. Trudeau's assertion that we need a *Charter* to protect the rights of individuals when his government, in the crisis of October 1970, abused individual liberties with contempt? The reasons given by the Trudeau government and establishment supporters of entrenchment were thin indeed. In various government papers, the need for an entrenched *Charter* in order to protect minorities and individuals from precipitous government action is proclaimed with little articulated justification[1]. No historical analysis, no jurisprudence, was advanced to explain why, in the year 1982, Canada needed an entrenched *Charter* when we had done without one throughout our history. What major socio-political changes in the mid-twentieth century could have caused us to abandon our traditional belief in the sovereignty of Parliament, and adopt the rhetoric of the American view of government powers limited by a Bill of Rights interpreted by a powerful, independent court? There have been major changes, but we hear little about them and their relationship, if any, to the introduction of a *Charter*.

The real reason the Liberal Party sought to entrench a *Charter of Rights* was language in Québec. Their principal objective was that the language rights of the English minority in Québec should be protected and guaranteed against the French majority by the courts, and not by the federal government. If the federal government was seen as the protector of English language rights, the traditional support of the Liberal Party by French speaking Québecers would be seriously affected. At the same

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time, and for parallel reasons, they sought to entrench the protection of French minority language rights outside Québec. Mr. Trudeau could retire telling francophones in Québec that French language rights were "guaranteed" across Canada, and, therefore, separatism was unnecessary[2]. It is no accident that one of the first cases to employ the terms of the *Charter* was a test case regarding the right to English language education in Québec in which the French language education policies of the Parti Québécois were set aside[3].

While the commitment of the Trudeau Government to individual rights and liberties was suspect, general public support for the entrenchment of the *Charter* was longstanding and firm. Opinion polls supported entrenchment throughout the constitutional crisis, despite the fact that its main advocate, Mr. Trudeau, was widely disliked across the country. The general public outside Québec does not share Mr. Trudeau's concerns for minority language rights; its support for the *Charter* is based on other reasons - on a general concern for human rights and a vague faith in the impartiality of the judiciary. Mr. Diefenbaker's unentrenched *Bill of Rights* was a popular political move, despite the skepticism of lawyers before its passage and subsequent despair over its judicial evisceration. It would be false to conclude that this public support arose from the manipulation of public opinion by professional opinion makers. But it is difficult to find arguments in favour of the entrenchment of the *Charter* that emanate from this more general concern for human rights[4]. There was no shortage of suggestions at the drafting stage, though, for wording that would favour a myriad of special interests, from police chiefs to trees[5]. Socialists and social-democrats in Canada have not supported the idea of entrenching a *Charter*. The half-hearted support of the federal N.D.P. and Mr. Broadbent was won by the government after bargaining about the terms of the *Charter*. Mr. Blakeney, then Premier of Saskatchewan, and many other social democrats opposed entrenchment as a threat to Parliament's supremacy. Mr. Blakeney eventually won a compromise in the form of section 33 which allows the legislatures to override a decision by a court that a particular law violates the provisions of the *Charter*. Skepticism as to how a conservative judiciary will interpret the *Charter* is the overwhelming sentiment on the left.

Indeed, many leftists argue that entrenchment is an illusion of the protection of human rights that can only mislead the working class. Revolutionary socialists denounce "law" and legal institutions, including the *Charter*, as the embodiment of capitalist exploitation and an aspect of "false consciousness" which should be expunged. Social-democrats often argue that entrenchment of the *Charter* is "undemocratic" because it derogates from the sovereignty of the majority. Further, both argue that the "freedoms" expounded in the *Charter* would be irrelevant in a socialist society where freedom must mean something more positive than the limitations on state action set out in the *Charter*. These opinions contain elements of truth. But they deny the central political importance of defining these rights in a socialist perspective.

3. *Infantile Anti-Legalism*

The first argument of leftists against a serious consideration of rights stems from a deep hostility towards the very idea of law and legal institutions. Many revolutionary leftists perceive law and legal institutions as the embodiment of capitalist exploitation. The scripture tells us:

> The sphere of circulation is a very Eden of the innate rights of man, there alone rule freedom, equality, property and Bentham ...,[6]

> The recognition of the rights of man by the modern state means nothing more than did the recognition of slavery by the state of old[7].

The fundamental role of law and legal institutions in the capitalist mechanism for the extraction of surplus value from the working class is not in dispute. The charade of equal rights in contracts for labour services is more than an article of faith for Marxists. The "freedoms" of the capitalist marketplace are a mechanism to protect those with capital. But law and legal institutions are more than the enforceable rules of the marketplace. To follow Pashukanis in arguing that law is simply the verbal form of commodity fetishism is to believe that law is nothing but the rules of exchange relations of isolated individuals and that the " law will wither away with the demise of capitalist social relations"[8]. This is too narrow a view of the province and function of law. There were "laws", being the rules and orders which organise society, before capitalism; and there will be laws thereafter.

This is the romantic attitude which is typified by Michael Tigar in his attack on the idea of "positivist law". The formal rules of positivist law are seen as essentially anti-democratic. He compares the Soviet Union, the People's Republic of China, and post-revolutionary Cuba. In the first there is a formal set of rules supposedly protecting a citizen's rights, and in China and in Cuba there are few formal rules. (China has revised its legal structure since Tigar's essay was written). He describes the ineffectiveness of the Court system in the Soviet Union in protecting the rights of citizens. Of the Chinese system, he writes:

> However, it seems likely that in terms of Chinese tradition, a system of social organization that relies upon constant and active debate about social goals and priorities has a great chance of developing a broad consensus about minimal human rights and securing respect for them[10].

Tigar goes on to praise the apparent enthusiasm for and popular participation in the people's tribunals in Cuba:

> There appears to be an effort in Cuba to rely very little upon rigid structures and forms, a constant effort to renew institutional norms with revolutionary experience. There is a marked fear of creating a class of persons ... who do not work but merely live from the labor of others. Evidence of this same effort appears in China,

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What can be the lesson of this historical sketch for the Movement in this country? We have, all of us, been schooled to believe that protection of basic rights requires a quasi-independent class of lawgivers expounding a detailed set of rules which contain, as monuments to social struggle, some concessions to fairness and justice ranging from formal guarantees of political freedom to wage-and-hour legislation.

In the courts and in political forums we have sought to create progressive legal rules to protect and extend the rights of people's movements. But we have not sought to hear the people's authentic voice on the courts and halls of justice, only to keep that voice from being stilled by the application of legal rules which are at bottom designed to protect privilege. It has been the principle that we have sought to defend, not the institution which administers it[12].

This is not an adequate theory of law and legal institutions in Canadian society today. It romanticises the functioning of People's Courts and Block Councils. It ignores the dictates of "equality" which cannot be achieved among a thousand informal tribunals without fixed laws which are interpreted in a uniform fashion. Some matters, such as matrimonial disputes, minor assaults and vandalism can be dealt with effectively by neighbourhood tribunals. We can learn from the Chinese model, but we must remind ourselves that the majority of difficult social conflicts are not amenable to resolution through such informal proceedings. Richard Kinsey's words are appropriate:

The problem of socialization of production thus becomes much more than the mere reallocation of property and property rights as suggested by Renner. The whole edifice of rights and duties must be reworked and re-examined. This remains a task for the future, but a signal note of warning should be sounded. Too often radical analysis has slipped back to the eighteenth century and to the insidious anarchism of Godwin, satisfied with the rejection of legality lock, stock and barrel. Half an acre and a cow is simply not sufficient. No socialist society will be "free" from organization any more than it will be free from the need to produce. But then, no more than the capitalist labour process is free from contradiction, is the form of bourgeois law free from its internal contradiction and the possibility of its transformation[13].

The ideal of a society without coercive rules should be understood as belonging in a utopia without want. The dream is that scarcity will give way to abundance and acquisitive competitive behaviour to sharing and co-operation. Thus "law", as a means of regulating the exchange of commodities, including labour, will no longer be necessary. But that eventuality is remote. And even in a planned economy (striving to reduce or eliminate scarcity) the law of value will operate through the inevitability of commodity exchange and wage differentials. Legal institutions of some variety are necessary to regulate that exchange[14]. If, for reasons of faith or tactics, we choose to call the socialist (pre-communist) stage "transitional" in the hope or expectation that a later truly communist stage will arrive, we should recognise at least that it is likely to be a long transition. Even in that transitional stage, there will be a profound demand for court-like, law-like, social institutions - the independent adjudication of disputes in accordance with consistent rules, applied equally. This requires the determination of rights as against the government of the day, determined in accordance with those principles of fairness and equality which are more fundamental than the political passions of the moment. The polity will demand it, and no government that denies it will survive its first generation.

4. *Sophisticated Anti-Legalism*

The theories of Antonio Gramsci have been of seminal importance, especially to left-wing legal theorists in the 1970s[15]. Gramsci explained the apparent acquiescence of the working class in the rule of the capitalist class in terms of "hegemony".

> By hegemony Gramsci meant the permeation throughout civil society - including a whole range of structures and activities like trade unions, schools, the churches, and the family - of an entire system of values, attitudes, beliefs, morality, etc., that is in one way or another supportive of the established order and the class interests that dominate it ... To the extent that this prevailing consciousness is internalized by the broad masses, it becomes part of "common sense"; ... it encourage[s] a sense of fatalism and passivity towards political action; and it justifie[s] every type of system-serving sacrifice and deprivation. In short, hegemony worked in many ways to induce the oppressed to accept or "consent" to their own exploitation and daily misery[16].

Law and legal institutions are seen by contemporary legal scholars on the left as part of this system of hegemony. One of the obvious conclusions flowing from Gramsci's works is the insufficiency of a simple insurrectionary strategy to seize state power. Merely taking over state power will not be enough. The entire apparatus and belief system of capitalist hegemony must be smashed in order to reconstitute society.

One is inevitably and properly impressed by the monumental nature of the value system that supports capitalism and the key part played by the legal apparatus. But the radical Gramscians give us no sense of how a

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socialist society, or any other society better governed, would rule itself. Theirs is not just an attack on laws of oppression and exploitation, but an attack which challenges the idea of the Rule of Law itself. In his introduction to ***The Politics of Law***, David Kairys challenges every aspect of the conventional illusion of the Rule of Law, including the notion of precise, understandable, legal reasoning and expertise, and the possibilities of impartial fact finding[17]. Elizabeth Mensch[18], in her essay in the same book, goes further. She appears to deny that modern American jurisprudence has *any* principles, fixed rules or firm rights, other than political preferences. A similar perspective can be found in the savage critiques by radical American constitutional theorists of conventional constitutional theory. They point to the failure of conventional theory to posit reasons, other than value-laden reasons, in support of the interpretations reached in constitutional cases. Political assumptions and presumptions govern at every turn[19].

But these authors lead us into a no-man's land. They suggest no alternatives. We have no idea or hope that any system of government by law can ever exist. In order to free us from the hegemony of legal values and the myths of legal objectivity, rationality, consistency and fairness, they have denied the possibility of these elements being institutionalised in any system of government. If socialist judges could not perform any better, we are left with no hope for socialist jurisprudence.

This perspective is dominant amongst leftist lawyers. Their debates are preoccupied with the fear that the *Charter* will give the "system" legitimacy. It is deemed profane to speak positively of the opportunities in *Charter* litigation. Of course, the *Charter* is an attempt to give the "system" legitimacy. But it is also an implicit recognition of, and an opportunity to demonstrate, its illegitimacy.

5. *Politics*

The attitude of revolutionary leftists towards the *Charter* and legal rights is primarily determined by their political strategy for change. Such issues cannot be resolved in this paper, but I do not accept the inevitablity of the collapse of capitalism[20]. Confrontation between classes, and perhaps revolution, must be anticipated, although an emphasis on insurrection *per se* is an incorrect strategy. The confrontation the left is most likely to win will occur when it is defending its duly elected government against a right-wing insurrection. The transformation of capitalism into socialism will be gradual. Even after a cataclysmic revolution, the building blocks of a new society will be social institutions similar to the familiar ones known today. The transition will be long.

Even the most optimistic revolutionist must accept that the possibility of revolution is remote[21]. Thus, even the revolutionists should join the social democrats in upholding the fundamental legitimacy of majority rule under law. Support for the form, majority rule by law, does not imply support for the content of the law. And within the limits of this political struggle, the concept of rights is and will be central.

The ideology of law, as espoused by socialists, is important because it assures those citizens whom we seek to recruit to our cause that civil rights and equality will not be put at risk in a socialist transformation of society. Thus, it is important that socialists endorse the principle of civil liberties protected by an entrenched *Charter* as a cornerstone of a socialist society. This is not merely a "bourgeois leftover", but a necessary institutional feature of any large complex government structure that seeks to be democratic. The fundamental point is that equality, which is the ethical, rhetorical, and political basis of contemporary socialism, is probably impossible and certainly unsaleable, unless there is something recognisable as a legal system to enforce it. The central task of socialist lawyers must be to demonstrate the reliability, efficiency and fairness of substantive equality amongst citizens as an organising principle.

6. *Social Democrats and Judicial Intervention In Democratic Government*

Social democrats and constitutional socalists evince a profound fear of judicial power. They see the *Charter* as the basis for judicial interference with the will of the people as expressed by elected governments. Roosevelt's problems with the U.S. Supreme Court, which at first struck down much of the New Deal legislation, are often cited.

An entrenched *Charter* does represent an infringement of the sovereignty of Parliament. The argument is that some infringement is necessary and proper, even in a socialist society (it does not seem necessary to discuss the obvious benefit of an entrenched *Charter* as a defence, if only as a means of creating delay, against outright fascist tyranny).

The Canadian *Charter* is different in two important respects from the American *Bill of Rights*. First, it contains no general clause entrenching "freedom of property" (yet). Second, it contains an "overriding" provision, whereby the legislature can enact laws which violate the entrenched rights and freedoms of the *Charter*. Such legislation may be valid for five years. These were changes insisted upon by Mr. Blakeney and others in the process of negotiation which preceded the *Charter*.

Regardless of the effect of these two provisions, an entrenched *Charter* is a proper and necessary aspect of a socialist constitution. It is no less necessary in a socialist state than in any other to be suspicious of the concentration of power in the hands of a ruling élite. The occasional election of a parliament is an insufficient guarantee against tyrannical abuse of individual and minority rights. The logic of "checks and balances", expounded by Montesquieu and in the ***Federalist Papers***[22], is as compelling today as it has been for two centuries. There is no persuasive reason to be certain that a socialist government which, one would hope, would respect the rights of minorities and individuals today, will always do so. The abuse of power, and the perception of the abuse of power, by the best intentioned and respected politicians is something we must expect in every government. An independent judiciary with authority based upon an entrenched *Charter* is a partial remedy to these problems. General public suspicion of "big government" must be respected by socialists. Indeed, it is likely that those who ignore it will never be entrusted with political authority.

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A second reason to support the entrenched power of an independent judiciary, is to establish a "procedural policeman" to act as referee in a democracy. John Hart Ely has made this point in his book on American constitutional theory, ***Democracy and Distrust: A Theory of Judicial Review***[23]. He advocates an activist approach to the interpretation of those open-ended provisions of the U.S. *Constitution* which reinforce representation in the democratic process. He eschews judicial activism with respect to the substantive merits of actual legislation. The recent American experience has not been satisfying to Ely. The Burger court has struck down several legislative efforts to curb the ability of the rich to control the electoral process by means of big spending[24]. But the Warren courts did take major steps in enforcing the redistribution of electoral districts[25].

Moving down the hierarchy, there is another way in which an independent judiciary can promote the "democratic" governance of modern industrial society. It is now recogised that a "democratic" government must not only be well administered, but that decision-making must be open and incorporate public participation. Participation is the order of the day. The function of parliament is to make policy at the highest level. But many more decisions must be made in our complex society than those which are entrusted to that small body of men and women. And at every level, as we descend the bureaucratic ladder, the appropriate rights and privileges of individuals and groups to be represented and participate in that decision-making have to be acknowledged. The increased importance of bureaucratic decisions arises from a fundamental re-ordering of society. Andrew Fraser has put this in historical perspective:

> Property provided the foundation upon which rested the bourgeois individual's hopes of becoming a self-mastering, self-controling self-correcting individual. The development of social capital inverted the meaning of property and individual economy. Once domination becomes an organized team effort, no member of the dominant class can ever again see the protection of his or her own personal liberty in the economy as being the essential purpose of the legal order. It is no longer possible to analyse legal relationships of governments, corporations and unions in terms of traditional private law concepts drawn in contract, property and tort law.
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> Status, the set of rights and duties attendant upon either the membership of a particular group or performance of a particular institutional role, rather than contracts, have become the paradigmatic legal relationship of the corporate state[26].

This is not news. The central legal problem in contemporary society is already the question of the status of the individual within the myriad organisations of which he is a part and wherein lie virtually all his rights and privileges. The "right" of individuals to participate in decisions by government and non-government bureaucracies that affect them has been the subject of enormous jurisprudence. Here again, the record of the

courts is spotty at best. The Supreme Court of Canada has moved cautiously in the past decade to require bureaucratic decision-makers to listen to the people affected by their decisions[27]. But it has also bolstered the unreviewable discretion of the bureaucrat in interpreting his or her statutory instructions[28]. Such trends reflect the ebb and flow of trust and distrust of the bureaucracy as the instrument of democratic will. It is unlikely that the courts will soon recognise a constitutional basis for the right to participate in administrative decisions. But eventually this area of law will be viewed from Ely's perspective - what is necessary to reinforce democracy?

The regulation of the democratic process requires an independent court. This is an essential and expanding role today and in any future social democratic or socialist polity. If we are unhappy with some of the decisions by the courts in this area, we must be careful not to deny them the power to make these decisions. The *Charter* creates a means of criticising the failure of our democratic institutions. It gives legitimacy to complaints about them. We cannot predict whether reforms will be achieved through the judiciary or by "the people in the streets". It is important, however, that some social institution (inevitably the courts) should have the status, integrity and power to police democratic institutions in order that reformers need not be driven to revolution. That should be the boast of a stable socialist society.

7. *Socialist "Rights"*

If the foregoing has demonstrated that the elaboration of "socialist rights" is necessary for successful socialist politics in this epoch, it has not answered the question: what are they? What follows can only be described as preliminary. The elaboration of a concept of socialist rights is a principal political task, particularly for left legal workers.

Most of the provisions in the *Charter of Rights* are derived from the bourgeois "freedoms" upon which the classical liberal theories of Hobbes and Locke were based. The fundamental freedoms, mobility rights and legal rights, as set out in the *Charter*, are freedoms from government interference with individual activity. They reflect classical liberal notions of the role of law and the fundamental nature of the human condition. The latter is seen as the ceaseless struggle for survival through the accumulation of property. We are "possessive individuals" - contentious and competitive. It is, therefore, the natural function of law to protect each person's accumulated property and to regulate the perpetual struggle of each against all. This supposedly "natural" behaviour of people implies, according to the argument, the right to freedom from government interference in the process of private accumulation.

C.B. Macpherson points out that this notion of rights is at odds with the general sentiment of the twentieth century, which perceives rights differently. The notion of rights now generally conveys the idea of "equality"; if not an equal division of the social pie, at least "equal access to the means of 'convenient' living"[29]. An alternative notion of rights, now prevalent, derives from Rousseau and Marx. Their "rights" are perceived

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nental nature of the human con-
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essive individuals" - contentious
ıtural function of law to protect
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y "natural" behaviour of people
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ıtion of rights is at odds with the
ry which perceives rights differ-
y conveys the idea of "equality";
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ılternative notion of rights, now
ırx. Their "rights" are perceived

as the freedom to be fully human in a way not presently possible. Rights are not rules regulating this world, but a description of the next.

> The Marxian and Rousseauian theories find little difficulty with the social and economic rights, but do not find it so easy to accommodate the earlier trilogy of natural rights of life, liberty, and property, which they have tended to mistrust on the ground that these are essentially bourgeois rights[30].
>
> . . .
>
> Only those theorists who rejected the morality of bourgeois society, and rejected the adequacy of the bourgeois model of man, could entertain the postulate of potential harmony of interests. The outstanding theorists who did this were Rousseau (who rejected the bourgeois morality and the bourgeois model of man in favour of petty-bourgeois ones) and Marx (who rejected both bourgeois and petty-bourgeois moralities and models in favour of a vision of classless society).
>
> In the context of our inquiry, the significant thing is that Rousseau and Marx, and those who have followed in the Rousseauian and Marxian traditions, were not natural rights men. They did not build on natural rights of the individual. For them, the main thing was the social transformation which would restore, or create for the first time, a freedom that would be truly human.
>
> . . .
>
> For no one would say that the conditions for the truly human freedom envisaged by either Marx or Rousseau have yet been fully achieved anywhere in the world. And only if they were fully and irreversibly achieved, would there be theoretically no need for a doctrine of human rights of the individual[31].

Macpherson concludes hopefully that, given the apparent abundance of the modern world, we might have relief from the bourgeois notion of the human condition, of humans as naturally contentious and combative. As a consequence, the alternative notion of rights might achieve pre-eminence[32].

I do not believe that one of these perspectives on "rights" is correct and the other not. Both represent valid points of view, though between them there is confusion, tension and political dialogue. In the legal sphere, "rights" define the fundamental parameters of social relations, and the limits of government powers. In the political sphere, "rights" define the aspirations of all citizens to equal opportunities and perhaps equal shares of social wealth. "Economic rights" are familiar and can be the basis for useful political rhetoric[33].

The central issue is defining the proper function of the court in the socialist polity. Should the courts be the principal, or even an important, instrument of redistribution? In my view, they should not. When

all is said and done, the redistribution that is ordered under the *Charter*'s equality provisions should be limited to that necessary to reinforce the healthy functioning of the political process[34]. This may be wider than conservative politicians would appreciate, but it will certainly fall short of socialist goals. And it is proper that wider redistribution should be mandated by the elected politicians and carried out by civil service, not the courts. Which is not to say that the courts might not be useful in implementing certain stages of that redistribution.

I believe the authority of our court system, any court system, is derived from its effectiveness in dispute resolution, which is, after all, its principal task. This in turn depends upon the perception by the public of neutrality, fairness, consistency and rationality. The courts will lose their constituency if they become political decision-makers on issues where there is significant public disagreement. This general dispute resolution function is needed as much in socialist polity as in our own. Socialists must not make demands of jurisprudence in the capitalist context which they could not tolerate in a socialist one.

No doubt we expect a socialist society, even in its transitional stage, to be less contentious. As people give up their bad old selfish ways, disputes between individuals will give way to co-operation, harmony and compromise. To a degree this will be true. But a willingness to trust the community and abandon individualism must surely reflect the fundamental guarantees of equal treatment for all citizens. And independent courts enforcing those equality rights, no matter what the polititians of the hour may say, are indispensible for that public acceptance of socialism. It may be that we will adopt some forms of dispute resolution different from those afforded by our existing court structure, but the ultimate value, equality, demands a hierarchy of appellate tribunals to assure citizens that people across the land will be dealt with equally. The courts must play this role in such a way as not to overstep the limits of that consensus. It is a role that relies on distinguishing the procedures of democracy from the substantive decision of social organisation and distribution.

Ely defers totally, in principle, to majority opinion if duly expressed through the democratic process. For example, he would not overrule laws against abortion on the basis of some notion of a fundamental right to privacy, autonomy or selfhood. These are not matters of fundamental importance to the effective working of democracy.

Ronald Dworkin expresses a different view. He argues that a commitment to equality implies not just economic redistribution, but also certain principles of tolerance regarding morality. The state, he argues, should treat citizens with equal respect. No law based on the belief that citizens would be "better" people if they did, or refrained from, certain actions is acceptable unless the citizens so regulated would so admit. To force one set of moral principles on a minority is not equal treatment[35]. The problem with the argument lies in defining laws that are purely moral, and laws that are justified on the grounds of some actual harm to society. That is an inevitable problem in constitutional law. We have to draw a boundary between purely private conduct and conduct which

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affects other citizens. If minority and individual "rights" mean anything, they must imply that the drawing of that boundary is to be done by people at least one step removed from the day-to-day passions of the majority. In a phrase - an independent judiciary - I believe Dworkin points the way to the second important element of a socialist theory of rights.

I have boldly, perhaps foolishly, taken these positions on some of the substantive issues of defining "socialist rights". I have done so to a large degree in order to get the discussion started. While constitutional principles and theories will never, given the inevitable element of compromise, be perfectly clear and consistent, the left has to do better than it has in defining its position. The values relied upon here seem generally acceptable in our society and ought to provide the basis for elaborating constitutional principles without embarrassment that they are indeed "values".

8. *Conclusion*

Professors Glasbeek and Mandel[36] point to an important trend which they call the "judicialisation of politics". Briefly put, they suggest that the overburdened and overdemocratic institutions of government can no longer satisfy the expectations of the increasingly articulate and demanding populace. Government has passed on the task of distribution of benefits and burdens to the alleged experts in the bureaucracy. They are commanded to divide the available resources, and to be perceived as being fair and equitable in so doing. The courts are given the task of protecting bureaucratic discretion and certifying where necessary that the bureaucratic procedures are fair. The whole task is impossible under capitalism. But the presumed expertise of the bureaucracy and the traditional reputation of the courts for fairness and independence serve to disguise this impossibility. The *Charter* is the icing on the cake, the ultimate guarantee of fairness. The impossible political problem has been transferred to the bureaucracy and the courts where demands for "more" must be submitted to the expertise and independent wisdom of the bureaucracy and the courts. Glasbeek and Mandel call this the "judicialisation of politics". It is patently an illustration of what the Gramscians warned us about - the prestige of the legal system at the service of capitalist hegemony.

Glasbeek and Mandel are largely correct in their analysis, but their negative view of politics in the legal sphere is inappropriate. These new burdens cast upon the legal process do not signal the end of political struggle, but its transfer to the judicial forum. Rather than fatalistic resignation to the impossibility of political struggle and the inevitability of defeat in courts, we should look forward to a politicisation of the legal process. Our strategy should be to expose this transfer of political functions and make demands for the reforms in the legal system that are appropriate to its new powers (*e.g.* election of judges, public criticism of judicial performance, etc.). Our response should be an equal and opposite one - the judicialisation of politics requires the politicisation of the judicial process.

My conclusions, then, are these:

1. There is a place in a socialist society for an independent Court acting as political referee.

2. There is a limited role for the Courts in a socialist society in administering economic redistribution, though this is not generally a proper area of legal initiative.

3. In order to win public support for socialist reforms it is necessary to demonstrate a full commitment to civil liberties protected by an independent judiciary.

4. Socialist legal workers should strive to articulate a coherent theory of legal rights consistent with the economic redistribution which is a consequence of their philosophy.

5. Our courts have had thrust upon them new and visible political functions in the form of rights adjudication.

6. Leftists in the legal arena should firmly seize the opportunity and face the necessity of politicising the legal process.

FOOTNOTES

1. The federal government's position papers have little substantive argument in favour of entrenchment. For summary and comment see Schmeiser, "The Entrenchment of a Bill of Rights" (1981) 19 *Alta. L. Rev.* 375.

2. For an account of the origins of the urge to entrench see: R. Sheppard, and M. Valpy, ***The National Deal*** (1982) ch. 1-4.

3. *Québec Association of Protestant School Boards* v. *A.-G. Qué.* (No. 1) (1982) 140 D.L.R. (3d) 19 (Qué. S.C.).

4. There are some notable professional exceptions to this general observation. See W.E. Conklin, ***In Defence of Fundamental Rights*** (1979); and Berger, "The Constitution, the Charter and 'Fragile Freedoms'" (June/July 1982) 62 ***Can. Forum*** 8. To remind ourselves of the poverty of our thinking in the area we should read, even learn from, the American literature. See John Hart Ely and his critics: J.H. Ely, ***Democracy and Distrust: A Theory of Judicial Review*** (1980); Parker, "The Past Constitutional Theory - And Its Future" (1981) 42 ***Ohio St. L.J.*** 223.

5. See Sheppard and Valpy, note 2.

6. K. Marx, ***Capital*** (1962) New World Paperback edition, Vol. 1 at 176.

7. K. Marx, "The Holy Family" in ***Collected Works*** (1975) Vol. 4 at 5.

8. E.B. Pashukanis,

9. M.E. Tigar, "Soci court (ed.), ***Law A***

10. *Ibid.* at 342.

11. *Ibid.* at 344-345.

12. *Ibid.* at 345.

13. R. Kinsey, "Desp Conference, ***Capi*** 63-64.

14. Many polemicist assumption of ab Transition to Soci

15. A. Gramsci, Q. H ***from the Prison N***

16. C. Boggs, ***Grams*** Greer, "Antonio Kairys, (ed.), ***The***

17. Kairys, note 16 at

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8. E.B. Pashukanis, ***Law and Marxism*** (1978).

9. M.E. Tigar, "Socialist Law and Legal Institutions" in R. Lefcourt (ed.), *Law Against the People* (1971) at 327.

10. *Ibid.* at 342.

11. ***Ibid.*** at 344-345.

12. *Ibid.* at 345.

13. R. Kinsey, "Despotism and Legality" in National Deviancy Conference, ***Capitalism and the Rule of Law*** (1979) 46 at 63-64.

14. Many polemicists do not recognise the importance of the assumption of abundance. For example, P.M. Sweezy, "The Transition to Socialism" (1971) 23 ***Monthly Review*** 1.

15. A. Gramsci, Q. Hoare, and G. Nowell-Smith (eds.), ***Selections from the Prison Notebooks of Antonio Gramsci*** (1971).

16. C. Boggs, ***Gramsci's Marxism*** (1976) at 39-40. See also: E. Greer, "Antonio Gramsci and 'Legal Hegemony'" in D. Kairys, (ed.), *The Politics of Law* (1982) 304 at 305.

17. Kairys, note 16 at 1.

18. E. Mensch, "The History of Mainstream Legal Thought" in Kairys, note 16 at 18.

19. See, for example, Parker, note 3; Franz, "Is the First Amendment Law?" (1963) 41 ***Calif. L. Rev.*** 729; Brest, "The Fundamental Rights Controversy" (1981) 90 ***Yale L.J.*** 1063.

20. S. Amin, G. Arrighi, A.G. Frank & I. Wallerstein, ***Dynamics of Global Crisis*** (1982); Union for Radical Political Economics, ***U.S. Capitalism in Crisis*** (1978); see especially D. Gordon, "Up and Down the Long Roller Coaster" at 22, and R. Alcaly, "An Introduction to Marxian Crisis Theory" at 15; Marramo, "Theory of the Crisis and the Problem of the Constitution" (1975-76) 26 ***Telos*** 141.

21. Perhaps it is not persuasive to the most fervent, but it does seem at least relevant that all the major communist parties in Europe have rejected the revolutionary "path". See: R.A. Medvedev, ***Leninism and Western Socialism*** (1981).

22. ***The Federalist Papers*** (1961). See: No. 47 & 51. But it should be noted that Madison did not see the *Bill of Rights* as an essential aspect of checks and balances. See No. 84.

23. Ely, note 3.

24. See *Buckley* v. *Valeo*, 424 U.S. 1 (1976); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978); *Citizens Against Rent Control* v. *Berkeley*, 454 U.S. 290 (1981).

25. *Baker* v. *Carr*, 369 U.S. 186 (1962).

26. Fraser, "The Legal Theory We Need Now", ***Socialist Review*** No. 40-41.

27. *Nicholson* v. *Haldimand-Norfolk Regional Board of Commissioners of Police* (1979) 1 S.C.R. 311.

28. *CUPE Local 963* v. *New Brunswick Liquor Corporation*, (1979) 2 S.C.R. 227.

29. C.B. Macpherson, "Essay XIII: Natural Rights in Hobbes and Locke" in his ***Democratic Theory*** (1973) 224 at 233.

30. *Ibid.* at 224-5.

31. *Ibid.* at 235.

32. *Ibid.* at 236.

33. T. Campbell, ***The Left and Rights*** (1983) esp. ch. 7 and 9.

34. I am deeply indebted to Professor Richard Parker, Harvard Law School, for his brilliant illumination of this subject, even though I disagree with his eventual conclusion. See Parker, note 4; Brest, note 19; Franz, note 19.

35. Dworkin "Is There A Right to Pornography?" (1981) ***Oxford J. of Legal Studies*** 177.

36. H.J. Glasbeek and M. Mandel "The Legalisation of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms" in this volume.

Socialist Studies/ Etudes Soci

THE SUPREME COURT GUARANTEE IN THE CH

by Lynn McDonald

1. *Introduction*

From the time an entrenched decided possibility, there hav ful it would be to disadvan always sceptical. To me, th were, and still are, persuasive like a new-fangled American gressive interventionism of increased judicial power wi judiciary. The record of the as shall be shown in this pap ject to recall, has been more by the courts, including the fied by provincial legislatu *Charter*, disadvantaged grou Supreme Court of Canada d lengthy and cumbersome p approval for a constitutional

The organised women's mo the United States, *never* pre activities were directed at s equal value, equal division ces, day care and so forth. N would get an entrenched *Ch* movement organised. This except to note that it was *Charter*, which would have changed.

Section 15(1) initially had th the *Canadian Bill of Right* interpreted narrowly and st provision meant only that ordinary courts; inequaliti offence, were legitimate if wr