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(P) Procedural problems with three articles that cannot be legislated in this type of finance act.

Of the decisions that year, the twelve where the Conseil constitutionnel intervened produced thirty-three "points" where the Conseil interfered with the legislation—again a number that, in abstract, might be thought high, even excessive. But again, examining the details shows a rather different picture. To start with, at least fourteen of the points involve sheer procedural irregularities—parliamentary incompetence of the sort that courts anywhere would automatically pick up. It is in part because of the French tradition of banning courts from querying parliamentary law that such sloppiness is rife, but it also speaks to the essentially weak grasp of the idea of the rule of law in France's political class.

A further seven points involve discrimination or equality arguments, which no one can doubt have been a central concern in French constitutional review (as almost everywhere, and discussed at length in chapter 7). The remaining twelve points are perhaps where we might find the Conseil constitutionnel imposing its values on French society. Yet do we? Six of the points are marked with an "S" to indicate that they were largely defences of structural matters—the role of consultations in external relations, separation-of-powers problems, maintenance of democratic norms in electoral procedures, and so forth. These are all the core business of constitutional courts in any democracy. In some cases reference to the Conseil is mandatory. This leaves only a few points that are problematic. There are three: (A) Loi relative à la réduction négociée du temps de travail, where the Conseil found the legislation amounted in parts to an excessive restriction on freedom of contract as protected by both the Declaration of the Rights of Man of 1789 and the preamble to the Fourth Republic constitution; (F) Loi relative à la chasse, where disproportionate invasion of property rights guaranteed by the Declaration of the Rights of Man was found; (I) Loi relative à la solidarité et au renouvellement urbains, where it was decided that aspects of the legislation amounted to disproportionate interference with property and enterprise rights in Article 4 of the Declaration of the Rights of Man, because they affected contracts already completed. In other words the Conseil constitutionnel insists that France's constitutional heritage includes a strong entrepreneurial and proprietarian element, one about which left-wing governments are prone to be casual. On top of this, the Conseil is involved, as are all such bodies, in preventing unjustified discrimination, has to police boundary problems, and, rather more than most, has to police the state's haphazard approach to procedural regularity. This, all in all, sounds like a fairly normal constitutional review body. Yes private property is more enshrined, or more obviously so, than in some countries. One could sum it up thus: Given the decision on hunting rights, the Conseil constitutionnel would probably have found the law forbidding fox hunting finally passed by the British Labour government in 2005 unconstitutional. And that might be the most one could say in attacking the Conseil as a body undemocratically interfering with the public will.

Canada: Imposing Rights on the Common Law

The Pre-Charter Constitution and the Transformation

Canada is important for this book. Even were it not a subject of interest in its own right, it would have to be covered. This is because Canada is the best example we have of importing a whole new constitutional approach to a working and stable political system. Though the actual text of the Canadian Charter of Rights and Freedoms owes little to any other model, the process of establishing it, working out its details, and applying its rules has been one long exercise of legal transportation. Legal transplantation, though controversial, has been common in the jurisdictions covered here, and is bound to become even more important as the worldwide spread of court power furthers the development of an international constitutional legal approach.¹ This process has been commented on in various parts of the book—Canada is a test bed.² There was constitutional law in Canada before 1982, even a Bill of Rights. But so completely did the new constitution and Charter transform Canadian constitutional thinking some writers hardly acknowledge the fact. This is not to say that everyone welcomed the Charter, or that even now it is universally popular. Critics range from those who think it is far too invasive on democratic politics to those who think it is not only useless but dangerously so. This latter critique, from the Left, complains that the Charter is nothing more than

¹A Watson, *Legal Transplants: An Approach to Comparative Law* (Athens: University of Georgia Press, 1993). For Eastern Europe see G Ajani, "By Chance and Prestige: Legal Transplants in Russia and Eastern Europe," 1995 43 *American Journal of Comparative Law* 1, 93–117.

²See, for example, B Ackerman, "The Rise of World Constitutionalism," 1997 83 *Virginia Law Review* 4, 771–97. Other useful references can be found in Yoo, "Peeking Abroad?"

another weapon of class war, and dangerous because it diverts attention from real class conflict.³ Very specifically it shows the strains in going from the UK style of parliamentary supremacy to a doctrine and reality of constitutional supremacy. The very fact that Canada did have a history of constitutional law, and a Supreme Court with judicial review powers, makes it all the better a test case.

To give a flavour of the sort of cases that now occupy the Supreme Court of Canada under the Charter, one can do no better than to consider a case from 2005, *Chaoulli v Quebec*. The case was decided on a seven-to-two split with a coruscating joint dissent and has already been attacked as an extreme invasion of the legislative domain by a court.⁴ The Supreme Court struck down a Quebec statute that made it illegal either to buy or to offer private health insurance.⁵ This is a bulwark, also present in other Canadian provinces, to ensure the state health system does not lose resources to the private sector. Both the court of first instance and the Quebec Appeal Court had upheld the statute, the former after very lengthy and detailed empirical examination of expert witnesses.⁶ The argument of the claimants was very simple. The Quebec health system was overloaded, and involved lengthy waiting lists for many medical procedures. Patients were therefore dying or suffering prolonged and excessive reduction in their quality of life, some of whom could have had private medical treatment had they been allowed to buy private medical insurance.⁷ The statute therefore abridged the citizen's right under the Charter of Rights and Freedoms. Article 7 of the Charter provides that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."⁸ The leading opinion, by Justice Deschamps, describes how he saw the issue:

when my colleagues ask whether Quebec has the power under the Constitution to discourage the establishment of a parallel health care system, I can only agree with them that it does. But that is not the issue in the appeal. *The appellants do not contend that they have a constitutional right to private insurance. Rather, they contend that the waiting times violate their rights to life and security. It is the measure chosen by the government that is in issue, not Quebecers' need for a public health care system.*⁹

What sort of a right is involved here? The right to life can be a simple negative right against the state—when police get too trigger happy in the street, perhaps. It

³D Herman, "The Good, the Bad, and the Smugly: Perspectives on the Canadian Charter of Rights and Freedoms," 1994 14 *Oxford Journal of Legal Studies* 4, 589–604. The suspicion that elites shelter their power behind apparently liberal constitutional changes is widespread. See R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004).

⁴*Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 (Canadian Supreme Court). For commentary see "Recent Cases—*Chaoulli v Quebec (Attorney General)*," 2005 119 *Harvard Law Review* 2, 677–84.

⁵*Chaoulli v Quebec (Attorney General)*.

⁶*Chaoulli v Quebec (Attorney General)*.

⁷*Chaoulli v Quebec (Attorney General)*.

⁸Canadian Charter of Rights and Freedoms.

⁹*Chaoulli v Quebec (Attorney General)*, par. 14; emphasis added.

can be held to forbid capital punishment, as the Hungarian Constitutional Court hurried to find in 1990 and the South African court found in 1994.¹⁰ It can be used to ban abortion, given certain assumptions about the legal status of the foetus. In *Chaoulli* it is hard to see the right quite in these simple negative turns.¹¹ Quebec is being forbidden to do something—restrict insurance—because this policy, in interaction with another policy—the funding level for the public health service—increases the risk to life beyond some nominal level.¹² Justice Deschamps is clear about this: "the waiting times violate their rights to life and security."¹³ This only makes sense against a measure, however little specified, of a minimal health entitlement, because clearly the right to life cannot be breached by absolutely any wait. As two of the concurring justices put it, "By imposing exclusivity and then failing to provide public health care of a reasonable standard within a reasonable time, the government creates circumstances that trigger the application of [Article] 7 of the Charter."¹⁴ The dissenters in a sense agree:

What, then, are constitutionally required "reasonable health services?" What is treatment "within a reasonable time?" What are the benchmarks? How short a waiting list is short enough? How many MRIs does the Constitution require? The majority does not tell us. The majority lays down no manageable constitutional standard. The public cannot know, nor can judges or governments know, how much health care is "reasonable" enough to satisfy . . . [Charter rights]. . . . It is to be hoped that we will know it when we see it.¹⁵

Chaoulli is not typical of modern Canadian constitutional jurisprudence, but nor is it a "one-off." The Charter has thrown the courts into the policy process in a way that could never have been imagined, or tolerated, by the nineteenth-century politicians who drafted the British North America Act.

Canada as a united political entity came into being when the several different political systems of North America north of the United States voluntarily united into a federation in 1867. This had to be done by UK legislation and with the permission and guidance of the Foreign Office, because none of the existing Canadian political entities had complete freedom and independence, but the initiative was still genuinely Canadian. Indeed, several of what were later to become provinces declined originally to join. The document that served as Canada's new constitution until 1982 was an act of the UK parliament, the British North America Act of 1867. This retained the English Privy Council as the ultimate court of appeal, which role it retained, though later with Canada's consent, until the middle of the twentieth century. The overt intention of the 1867 act was to create a political system as much as possible like that of the United Kingdom, with a doctrine of parliamentary sov-

¹⁰Decision of 31st October 1990 on Capital Punishment, 23/1990 AB (Hungarian Constitutional Court); *S v Makwanyane and Another*, CCT 3/94 (South African Constitutional Court).

¹¹*Chaoulli v Quebec (Attorney General)*.

¹²*Chaoulli v Quebec (Attorney General)*.

¹³*Chaoulli v Quebec (Attorney General)*.

¹⁴*Chaoulli v Quebec (Attorney General)*, par. 105.

¹⁵*Chaoulli v Quebec (Attorney General)*, Binnie and LeBel, par. 163.

ereignty, or indeed supremacy. However, the most important guiding principle in the unification negotiations had been federalism. As federal systems inevitably require something like a constitutional court to police the borders of functional responsibilities, both Canadian courts and the Privy Council were involved in judicial review of legislation from the beginning of the federation. This aspect was more important, and made the courts more powerful, than might otherwise have been the case, because Canada's chosen form of federation was less clear-cut than some, with a good deal of overlapping responsibilities between the central and provincial governments. Much of the doctrine and some of the issues arising from this original plan continue to be vital in modern Canadian constitutional review.

One recent example was the need to have the Supreme Court clarify the constitutional possibility of the federal parliament passing a "same sex" marriage law. The right to legislate on marriage generally was a federal matter, under Section 91(26) of the Constitution Act of 1867, the former British North America Act. But the provinces retained the right to legislate on "civil rights" under Section 92(13) and on "solemnization of marriage" under Section 92(12) of the same act. As several of the provinces were politically more conservative on such issues than the majority in the federal parliament, a political clash on a human rights issue became in part a matter of constitutional law, not under the human rights provisions of the 1982 Charter, but under the still authoritative original constitution.¹⁶ The Reference re Same-Sex marriage was also litigated under the 1982 constitution.

For much of the period before 1982 the only way rights issues could be brought before a court was to challenge legislation not on its substance but on the grounds that whichever legislature was concerned was the wrong one. The Privy Council originally, and the Supreme Court later, were deferential to parliamentary sovereignty as long as it was the right parliament. The famous doctrinal phrase was that "the wisdom as opposed to the vices of an impugned statute was strictly a policy matter for the elected representatives of the people and not for the courts."¹⁷ This did not make either of these courts incapable of political bias, but the biases tended to relate to one issue—a preference for central power versus a Canadian version of the US notion of "states' rights." The framers of the 1867 constitution act had enshrined solutions to the two most powerfully divisive issues of nineteenth-century Canada, language and religion, especially in their educational aspects, as clauses in the constitution itself rather than as in some Bill of Rights appendix. This further diminished any fears of courts being too powerful, because they could more readily be seen as simply applying a black-letter view of the constitution. Though there have been some changes, religion and language rights remain to this day both powerfully divisive, and predominantly covered by the original constitutional settlement, not the 1982 Charter.

This attitude of deference to parliaments was so strongly imbued in the judiciary that an earlier Canadian attempt to provide constitutional backing for civil rights largely failed. This was the 1960 Bill of Rights, which was simply an ordi-

¹⁶ Reference re Same-Sex Marriage, 3 SCR 698 (2004) (Canadian Supreme Court).

¹⁷ B Wilson, "Constitutional Advocacy," 1992 24 Ottawa Law Review 265–75, 266.

nary, not entrenched, federal parliamentary statute. It has often been criticised as a powerless document both because of its nonentrenched status and because it contained a "notwithstanding" clause that allowed parliament to legislate contrary to its terms by just saying that the Bill of Rights should not apply. In practise the government made almost no use of this power, nor was its nonentrenched status important. What really restricted it was a timidity on the part of the judges, recognised by the post-1982 Supreme Court, a stance it has always claimed to be anxious not to repeat. As the Bill of Rights applied only to federal legislation, its impact was bound in any case to be limited, and much of the activity of the post-1982 court has involved challenges to provincial legislation. (This is also true of much of the more activist work of the US Supreme Court, which is far more likely to strike down a state statute than a federal statute.) One can easily see this pre-1982 timidity in the fate of those who tried to argue that the original federal constitution did in fact have an "implied" bill of rights, in much the same way that the Australian High Court has "imputed" certain political rights like freedom of speech from the structure of the constitution.¹⁸ As late as 1978 the Supreme Court flatly rejected the idea that fundamental freedoms could be derived from the preamble to the constitution.¹⁹ The idea that inherited judicial timidity made constitutional protection of rights empty before 1982 is borne out by the way arguments very similar to those that failed in the 1960s and 1970s were actually used by the court itself in the 1990s, something we shall come to shortly. Exactly how and why this timidity disappeared is hard to explain. Most probably it was a consequence of a shift in judicial self-definition of the job.

The political history of the changes that brought a new constitution to Canada in 1982 are too complex to relate here, and do not much affect the way it has operated. To a large extent it was the ambition of one man, the prime minister for much of the 1970s and early 1980s, Pierre Trudeau.²⁰ Such a development had to be negotiated with the provinces, and the negotiations, especially with Quebec, which feared an entrenched bill of rights, were not easy. There was no intention to change any part of the existing constitution, though it was strongly felt that it ought at long last actually to be the Canadians' own property and not exist in the limbo of a British parliamentary act. Even this was not uncontroversial, because "patriating" the constitution necessarily involved giving Canadians the right to amend it, and there were those as fearful of possible amendments as of an entrenched bill of rights. Losing patience with endless rounds of negotiations with the provinces, the federal government attempted to go it alone, and simply ask London to patriate the version Ottawa wanted.²¹

¹⁸ See J.L. Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Durham, N.C.: Carolina Academic Press, 2006).

¹⁹ *Canada (A.G.) v City of Montreal*, 2 SCR 770 (1978) (Canadian Supreme Court).

²⁰ An account of repatriation focussing on Trudeau's role is given in G Laforest, *Trudeau and the End of a Canadian Dream* (Montreal: McGill-Queen's Press, 1995).

²¹ Probably the most authoritative account of the politics of repatriation is E McWhinney, *Canada and the Constitution, 1979–82: Patriation and the Charter of Rights* (Toronto: University of Toronto Press, 1982).

At this point the Supreme Court became involved, and demonstrated for the first time that it was likely to develop a rich conception of just what the Canadian constitution was. It is an unusual feature in the common-law world that the Canadian Supreme Court is not limited to hearing actual cases. Both the federal and provincial governments can refer abstract questions to the court in a way not unlike, though much more restricted than, the abstract review processes in some continental European systems. The provinces duly referred to the court the question of whether the Ottawa government could arrange a constitutional change by itself. The court's answer was that there was no "legal" barrier, but that the constitution consisted of more than the British North America Act and constitutional law—it contained also political conventions that could not legitimately be ignored. The result was a further round of negotiations that both changed aspects of the Charter of Rights and Freedoms and modified—in very complicated way—the plans for future constitutional amendments. Finally, to assuage Quebec's fears, the new constitution contained a very powerful "opt out" clause by which a province could prevent the Charter or parts of it from applying within its territory. Any use of this proviso can only last for five years, and becomes invalid unless renewed by the provincial legislature. Quebec took immediate advantage of this, with the result that parts of the new constitution did not take effect in French Canada until the late 1980s. By the end of 1982, however, Canada had patriated a constitution that, with the exception of the Charter of Rights and Freedoms, was largely the one it had lived under since 1867, with all of the complex constitutional law of federalism still in place.

Within a very short time the judges on the Supreme Court, though they had all been on the court before repatriation, threw off the shackles of deference to parliaments. Or did they? The answer to that question seems to depend almost entirely on which side of a split in the Canadian academic community, and to a lesser extent in the Canadian polity, one sides with. There are those deeply disappointed with the court because it has not been "active" enough, and those who see it as regularly and illegitimately usurping the democratic privileges of the legislatures. Not surprisingly people take both sides at different times, because the court is bound to be active in the wrong areas at times for those who want it active, and passive in the wrong areas for those who generally want it passive. What is abundantly clear is that many had exaggerated hopes for what the court could do. Who is right is beyond the remit of this book; the argument is essentially one between the Left and Right in Canadian society. At times, however, it will be necessary to draw on the literature the controversy has evoked. As throughout this book, my preference is to let the cases speak—to study what the court has done, not what it has failed to do. The plan of this book involves crucially important "theme" chapters based on comparison of the different ways issues have been treated by courts in different countries. As a consequence of this structure, there are important areas of Canadian jurisprudence that are treated only with the lightest of touches in this chapter because they are discussed at length later. This is unavoidable because no sense can be made of how the Canadian judges have developed the constitution without some reference to some of these matters at this point.

The Defining Decisions

Defining Its Role

The Supreme Court was from the beginning intensely conscious of the need to carve out a new and much more active role, and correspondingly aware how vital its first few decisions would be. The first court faced three partially related tasks. It had to defend the very legitimacy of constitutional review; it had to develop a methodology for Charter interpretation; it had to teach itself to think afresh about the very nature of judicial interpretation in this new legal-constitutional era. The issues are interrelated for obvious reasons—an inadequate new methodology, or an ill-fitting approach to interpretation, could only feed those hostile to the new judicial powers. Not that the court could hope to overcome entirely this hostility. Courts take sides; they have to because the very logic of judicial pronouncement is dichotomous. An appeal is or is not upheld, and there are always losers. Policy in the hands of politicians may not be zero sum, and compromises that leave everyone feeling happy may be possible, but courts do not, in general, deal in compromise. The expectations riding on this court were so high, and so mutually conflicting, that perhaps everyone would be dissatisfied. Where, as in the United States or Australia, a constitutional court comes on line at the same time as the other constitutional actors, it can hope for a collective legitimacy, such that even those opposed to its decisions accept its role. In South Africa, of course, the court preceded the final constitution, possibly actually granting the other actors legitimacy. But in Canada the Supreme Court faced—still faces—the fact that Canada was, in most ways, doing perfectly well without the Charter, and with a much less salient form of judicial review. In such a situation it was very much harder for other political actors to distinguish between approval of the court's actual decisions and approval of its institutional role.

The other related tasks were crucial and difficult. The Charter does not speak for itself—it has a peculiar structure, one that required considerable fleshing out by the court in developing a methodology for Charter adjudication. Finally, there was what amounted to a personnel problem. The Kelsen courts in Europe were designed in part because of a feeling that the ordinary judiciary would be neither temperamentally nor technically capable of constitutional adjudication. The Kelsen courts in Eastern Europe were designed for the further reason that the existing judiciary was deeply tainted by association with the previous regimes. Those who were already sitting on the Canadian Supreme Court were not tainted, and no one could doubt their eminence as common-law judges. But they were common-law judges, and came from a time of deeply felt judicial deference to the legislature. Could they both summon the courage, and learn the new tricks required, to make the Charter work?

Even if it had wished to dodge the question of its own legitimacy, the court had no option but to develop a strong theory of democracy, which would deal, *inter alia*, with the role of judicial review. This is discussed in the next section. But in fact the court faced the issue squarely and early. In a reference from British Columbia,

the constitutional validity of part of its Motor Vehicle Act had to be decided in the second year of the Charter, there having been only a handful of nontrivial previous Charter cases, all important as initial statements.²² The reference concerned one of the most important but also one of the least clear parts of the Charter, which will concern us throughout this chapter. This is Section 7, which guarantees that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The British Columbia act provided a mandatory prison sentence for anyone driving without a valid license, whether or not the person knew the license was invalid or suspended. It was, in lawyers' language, a "strict liability" offence. The problem for the court was whether such a policy, imprisoning those who may have had no traditional criminal intent, no *mens rea*, deprived them of liberty in a way that did not accord with "the principles of fundamental justice," when these principles were not otherwise defined in the Charter.

Reference re B.C. could almost have been set up as a hurdle by someone wanting to trip the Supreme Court, because what it decided is insignificant compared with how it decided. There was no politically neutral way of dealing with the issue; technical decisions on how to answer the case would inevitably act as branch points channelling future constitutional jurisprudence, a situation political scientists call "path dependency." The fact that the case directly raised the legitimacy of judicial review and its techniques was mentioned at the beginning of the main judgement:

The issue in this case raises fundamental questions of constitutional theory, including the nature and the very legitimacy of constitutional adjudication under the Charter as well as the appropriateness of various techniques of constitutional interpretation.²³ (Lamar J.)

Lamar cites the court below as having asserted that the Constitution Act 1982 had added a new dimension to constitutional review by empowering courts to measure "the content of legislation" against the constitutional requirements of the Charter. Though he tries to suggest not all that much is new, he does this by stressing that content has always been fair game, and tries to suggest the court will still abide by the rules it was used to in pre-Charter days, citing a leading case from 1977, where the now chief justice had argued:

The Courts will not question the wisdom of enactments . . . but it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power.²⁴

The precise problem, which Lamar notes, is that there was a common view that anything but the narrowest interpretation of Charter language would constitute

²² *Re B.C. Motor Vehicle Act*, 2 SCR 486 (1985) (Canadian Supreme Court).

²³ *Re B.C. Motor Vehicle Act*, Lamar writing for six judges, par. 10.

²⁴ *Amax Potash Ltd. v Government of Saskatchewan*, 2 SCR 576 (1977) (Canadian Supreme Court), 590.

the impermissible crossing of the boundary and make the court appear to "question the wisdom of policy." Lamar's own words best describe the quandary and his robust counterargument.

This is an argument which was heard countless times prior to the entrenchment of the Charter but which has in truth, for better or for worse, been settled by the very coming into force of the *Constitution Act, 1982*. It ought not to be forgotten that the historic decision to entrench the Charter in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. *Adjudication under the Charter must be approached free of any lingering doubts as to its legitimacy.*²⁵ (Emphasis in last sentence added).

The last sentence has been quoted time and again by the court to justify its actions. Here, though, the danger is even greater, because a narrow versus rich reading of "principles of fundamental justice" was taken by many to equate to a distinction between merely procedural as opposed to substantive conceptions of justice. And this, deliberately, evoked the huge conflict in American constitutional law over procedural versus substantive due process. Substantive due process had been the intellectual justification for the enforcement of laissez-faire economic theory by the Supreme Court in the late nineteenth and early twentieth centuries.²⁶ This famously culminated in the clash between Roosevelt's New Deal and the Supreme Court in the 1930s. As critics could characterise anything but a narrow and technical reading of Section 7 as tantamount to the most notorious example of judicial policymaking in recent history, the Canadian Supreme Court was forced to make a major choice. It also had to try to deny the implications were anything like that.²⁷

Dealing with this point also forced the court to make a second methodological decision, because supporters of the British Columbia position urged that the proper way to decide what the Charter meant was to look at the very recent proceedings of the parliamentary committee on constitutional reform. In truth the relevant legislative proceedings were rather clearer than most, and would much more have supported a narrow (procedural) reading than a richer one. But reference to constitutional conventions and the like has sometimes tended to be a weapon of judicial conservatives, even if they are not necessarily as extreme as American "original intent" theorists. The court therefore had to insist on two points. First, it argued that the procedural/substantive dichotomy was inapplicable to constitu-

²⁵ *Re B.C. Motor Vehicle Act*, par. 16.

²⁶ Though of course there are those who argue powerfully that *Lochner* was never like that at all. See JM Balkin, "Wrong the Day It Was Decided: *Lochner* and Constitutional Historicism," 2005 85 *Boston University Law Review* 677-726.

²⁷ For an excellent account of how fear of a *Lochner*-like situation had bedevilled the negotiations leading up to the Charter, see S Choudhry, "The *Lochner* Era and Comparative Constitutionalism," 2004 2 *International Journal of Constitutional Law* 1, 1-55. In his broad comparative study, Koopmans comments interestingly on these early decisions. T Koopmans, *Courts and Political Institutions: A Comparative View* (Cambridge: Cambridge University Press, 2003).

tional law, and was an unnecessary and dangerous importation from American law useful there only because of major structural differences in the two constitutions. Second, it insisted that the legislative record should never be given much importance when interpreting the Charter, both because it is difficult to interpret and because it would "freeze" the meaning of what should be a document capable of development and growth. Fundamental justice is then defined by Lamar and the other five justices he writes for as involving a reference to core principles of Canadian legal thought, against which it could never be justified to imprison someone for a strict liability offence. This is done by a careful examination of the way Section 7 and other sections interrelate. All this effort to avoid the appearance of making policy choices was somewhat damaged by the seventh justice, Bertha Wilson, later to be chief justice and with little doubt the most radical person to have yet sat on the court. She certainly agreed with the majority on the result, but got there by a much more direct route that rather too clearly demonstrated how much was a matter of judicial ideology. She considered theories of punishment, decided what the rules for selecting punishments should be, and finished with characteristically strong language. The constitutionality of the legislation depended on

whether attaching a mandatory term of imprisonment to an absolute liability offence such as this violates the principles of fundamental justice. I believe that it does. I think the conscience of the court would be shocked and the administration of justice brought into disrepute by such an unreasonable and extravagant penalty. It is totally disproportionate to the offence and quite incompatible with the objective of a penal system referred to in [the criminological research she has cited].²⁸

Whatever the impact of the different positions, this early case established clearly that the court had no doubt about its own legitimacy, and that it was intent on avoiding reliance on any technique that might restrict its freedom to innovate.

Interpreting a Constitution

Shortly before the *B.C.* reference the Supreme Court had begun the task of developing an appropriate approach to interpreting the Charter in *Hunter v Southam*, which along with *B.C.* and two other cases form the cornerstone of its method to this day.²⁹ *Hunter* involved a challenge to a warrantless search by government officers of a newspaper office, apparently justified under a piece of federal legislation. This was alleged to breach Section 8 of the Charter, which, echoing a similar provision in the US Bill of Rights, lays down simply that "Everyone has the right to be secure against unreasonable search or seizure." Here a single word required interpreting, "unreasonable," and the Charter says no more about it. The question for the court was what standard, or indeed what sort of standards, it should reach for. The court was very clear about one thing: interpreting a constitution is not the

²⁸ *Re B.C. Motor Vehicle Act*, par. 128.

²⁹ *Hunter v Southam Inc.*, 2 SCR145 (1984) (Canadian Supreme Court).

same as the normal common-law judge's duty of interpreting statutes, or indeed any other normal legal document, because it approvingly cited a major US legal thinker who insisted to US courts that they should not "read the provisions of the Constitution like a last will and testament lest it become one." This comparison with a will has become an important part of the court's justification of its methods. The court fell back on a much older ruling on Canadian constitutional adjudication, from the days when the English Privy Council was the final Canadian court, citing Viscount Sankey from the 1930s to the effect that a constitution was like "a living tree." "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. . . . Their Lordships do not conceive it to be the duty of this Board . . . to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation."³⁰ The "living tree" analogy is cited endlessly in modern cases to justify a nonliteral interpretation. It would have worked perfectly to disallow the recourse to the Parliamentary record attempted in *B.C.* The judges also cited, and it is an interesting reflection on the extent to which the common law internationally agrees about constitutional jurisprudence, a rare reference from a modern English case. The Privy Council until recently remained the court of last resort for various Caribbean commonwealth states. This presented a few UK judges, long before the 1998 Human Rights Act, with the job of interpreting written constitutions, which they undertook quite conscious that such work was different from their normal role. Thus Lord Wilberforce's famous dictum, already quoted in chapter 1, on the matter also appears in *Hunter v Southam*, where he notes that a constitution, unlike other legal documents, is

sui generis, calling for principles of interpretation of its own, suitable to its character, [and requires] . . . a generous interpretation avoiding what has been called "the austerity of tabulated legalism," suitable to give individuals the full measure of the fundamental rights and freedoms referred to.³¹

All this is important, but largely negative—it tells a judge very little about how to approach the problem, but *Hunter* does give some aid. In particular the case stresses the "purposive" nature of constitutional interpretation, and the fact that it must produce answers that will serve in the uncertain future rather than merely being a solution to the case in front of the court. Much stress is placed on the expected longevity and difficulty of amending a constitution compared with the ease of repealing a particular legislative act. The single judgement in this case was written by Dickson, who shortly thereafter became chief justice, and ranges widely over both English and American common-law cases on search powers. The main stress, though, is that it is crucial to decide what "reasonable" must be taken to mean to validate the important right of being free from unreasonable searches—the interpretative duty is to ensure the right, not to limit it. Especially, Dickson

³⁰ Both quotations from *Hunter v Southam Inc.*, 156.

³¹ *Minister of Home Affairs v Fisher*, AC 319 [1980] (Privy Council).

says, the court must not "consider simply [the act's] rationality in furthering some valid government objective."

In this way the court drew a sharp distinction with much Anglo-Canadian administrative law—constitutions really are different from statutes. The final blow against seeing constitutions as just big acts of parliament was contained at the end. The government council urged the court, if it was not to uphold the statute intact, also not to hold it invalid. Instead, it urged, the court should "read in" terms that would make it legitimate. *Hunter v Southam* was the first time a federal statute was to be struck down by the court under the Charter, and a reading down would avoid this result. To do so, however, would have been to blunt the force of Charter overview, to give the impression that the Supreme Court would in general help the government out. Dickson ended by saying:

While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional. Without appropriate safeguards legislation authorizing search and seizure is inconsistent with s. 8 of the Charter. As I have said, any law inconsistent with the provisions of the Constitution is . . . of no force or effect. I would hold subss. 10(1) and 10(3) of the *Combines Investigation Act* to be inconsistent with the Charter and of no force and effect.³²

In the comparative focus of this book the last argument marks quite clearly how different common-law constitutional adjudication is from the spirit within which continental European Kelsen courts work. Nothing more alien to the spirit of French *réserve d'interprétation* or German equivalent techniques can easily be imagined.

The third of the setting-up cases is discussed later in the book, when issues of religion and constitutionalism are dealt with, and can be covered quickly here for present purposes. *R v Big M Drug Mart Ltd* was perhaps the most important and even surprising of the early cases in terms of its substance. It struck down a long-established act, the Lord's Day Act, that, amongst other things, largely prohibited trading on a Sunday.³³ It followed shortly after *Hunter v Southam* and largely reflects the ideas about interpretation contained there. In fact the statement in *Big M* is probably clearer than in the preceding case, and worth quoting at length. It is again by Dickson, who was to write many of the most important Supreme Court rulings over the next few years, especially when he became chief justice.

[*Hunter v Southam* decided that] that the proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view

³² *Hunter v Southam Inc.*, 169.

³³ *R v Big M Drug Mart Ltd*, 1 SCR 295 (1985) (Canadian Supreme Court).

this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection.³⁴

What *Big M* added was crucial—to clear away any attempt to argue that previous interpretations and meanings must be imported into Charter jurisprudence. The Lord's Day Act had been litigated before, specifically under the Charter's predecessor, the nonentrenched 1960 Bill of Rights.³⁵ The definitions of religious freedom then given had been restrictive, indeed conservative, and had the court accepted them it would have severely limited the Section 2 guarantee of "freedom of conscience and religion." Yet it was not obvious that all past decisions on an act, especially ones under a form of a bill of rights, had ceased to be binding once the Charter was in place. If not binding, they might at least be persuasive—and the Supreme Court has always been happy to ransack legal history for help. Why not take their own rulings from the past? In the court below it had been argued very powerfully that the Charter refers, when it talks of rights and freedoms, to those existing in Canada at the time of its coming into force. In particular

It is to be noted at the outset that the *Canadian Bill of Rights* is not concerned with "human rights and fundamental freedoms" in an abstract sense, but rather with such "rights and freedoms" as they existed in Canada immediately before the statute was enacted. . . . It is therefore the "religious freedom" then existing in this country that is safe-guarded by the provisions of s. 2.³⁶

This whole approach is flatly denounced: "the Charter is intended to set a standard upon which present as well as future legislation is to be tested." Dickson goes on to say:

It is not necessary to reopen the issue of the meaning of freedom of religion under the *Canadian Bill of Rights*, because whatever the situation under that document, it is certain that the *Canadian Charter of Rights and Freedoms* does not simply "recognize and declare" existing rights as they were circumscribed by legislation current at the time of the Charter's entrenchment. The language of the Charter is imperative. It avoids any reference to existing or continuing rights but rather proclaims in the ringing terms of s. 2 that: "Ev-

³⁴ *R v Big M Drug Mart Ltd*, 344.

³⁵ A useful analysis of this earlier human rights initiative is given in EA Driedger, "The Meaning and Effect of the Canadian Bill of Rights: A Draftsman's Viewpoint," 1977 9 *Ottawa Law Review* 303–20.

³⁶ Quoted in *R v Big M Drug Mart Ltd*, 343.

everyone has the following fundamental freedoms: (a) Freedom of conscience and religion.³⁷

With these cases, then, a new era was consciously created. The Charter was supreme; rights came first and were not to be overcome when the government had a rational and valid aim. The Charter was to be interpreted with a special set of future-oriented, "purposive" techniques, and it was never to be interpreted in a way that would "freeze it." These principles were certainly admirable, necessary, but also tremendously vague. The real problem for Canadian constitutional jurisprudence is that they have not become a great deal more specific in the twenty-plus years since they were first evoked. Nor has the commitment not to be "literalist," for example, invariably been obeyed.

Limits to Rights: *Oakes*

The final two setting-up cases were much more specific. One dealt with a novel structural question without a solution, on which constitutional litigation could have made no progress. The other saw the court quite intentionally restricting its own powers in a way that has been deeply criticised but that clearly demonstrates the consequence of giving constitutional review to a common-law court.

Probably the most important single case in the history of the Charter, because of its structural aspect, is *R v Oakes*.³⁸ Though it was not decided until the third year of Charter applicability, the timing was just happenstance. All the earlier cases might have raised the question *Oakes* dealt with, and there have been very few rights cases since that have not relied on it. (A detailed and critical treatment of *Oakes* is found in chapter 8, on the limitation of rights.) The *Oakes* test means that the court first decides whether the plaintiff has made out a case that legislation breaches the constitution. If it is seen to be *prima facie* unconstitutional, the second stage of the test applies the Charter's exception, set out in Section 1.

Oakes is important here because it is a prime demonstration of the inevitability of judicial power flowing from the very fact of having a written constitution. The Canadian constitution, like the South African constitution it influenced, faces up more openly than some to the brute fact that no political system can treat any right as an absolute, and cannot avoid potential conflicts between separate rights. Because of this the Charter starts with a guarantee, but a limited one:

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.

Some of the individual rights also contain their own limitation clauses, as with Section 7's guarantee of "life, liberty and security of the person" that can be taken away, but only "in accordance with the principles of fundamental justice." But even these rights are subject to the Section 1 limitation as well. (Judicial glosses on Sec-

³⁷ *R v Big M Drug Mart Ltd*, 344.

³⁸ *R v Oakes*, 1 SCR 103 (1986) (Canadian Supreme Court).

tion 7 continue to be confusing, showing how little resolution the Charter has achieved in over twenty years. As far as Section 7 goes, the judges are not even agreed as to how many rights it protects.) The early decisions on how to use this combination of specifically protected rights and Section 1, which culminated in the rule announced in *Oakes*, were crucial, but none of them inescapably obvious. Take one question—is the identification of a right, the decision as to whether it has been breached, and the decision as to whether the breach is authorised by Section 1 all one intellectual process? Is it in fact part of the true definition of a right, let us say the right to freedom of religion, that an exercise of that right which could legitimately be curtailed as not compatible with "a free and democratic society" is not a right at all? There is no obviously correct answer to that question. On the one hand there is something odd about saying that part of the definition of any right is whether it could legitimately be curtailed—that might leave very few rights indeed. On the other hand no one can really be thought to have a right seriously to impede the public welfare. The argument is not at all an abstract word game, as will become apparent shortly. But it is most definitely a problem that had to be answered by the court if the Charter was to work. No other institution in Canadian society could have answered this unavoidable question. It is a fine example of the claim made in this book—constitutional courts are both necessary and not really "courts." As it turns out, a major criticism by some of the court, including some justices against other justices, is that the rule in *Oakes* is far from being always adhered to.

The rule in *Oakes* is, at least on the surface, clear-cut and intellectually elegant. As a first move the court insisted, in answer to the sort of question posed above, that the Charter requires a two-stage process. First the action or behaviour the citizen wishes to privilege must be shown to be an example of one of the specific rights, and it must be shown that it has in fact been curtailed. As an example, in a recent freedom-of-speech case, *Little Sisters Book and Art Emporium v Canada*, it had to be shown that freedom of speech includes the right to import pornographic material from the United States, and that the way the Customs Service was operating its policies did prevent some such imports.³⁹ Only after this stage does the question arise whether the right, now acknowledged to exist and to have been denied, was legitimately denied under Section 1. In *Little Sisters* the need to protect Canada from being deluged with gay pornography was found to be enough to satisfy Section 1.⁴⁰

The *Oakes* test goes on to spell out how a court is to decide whether in the case in point the right can be legitimately curtailed because the limitation is reasonable, prescribed by law, and "can be demonstrably justified in a free and democratic society." *Oakes* was about whether someone convicted of possessing drugs could be automatically convicted of intending to traffic in them unless he was able to

³⁹ *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2 SCR 1120 (2000) (Canadian Supreme Court).

⁴⁰ The more general ruling supporting the constitutionality of obscenity laws is *R v Butler*, 1 SCR 452 (1992) (Canadian Supreme Court), later rejected by the South African Court and discussed in chapter 6.

prove otherwise, thus reversing the normal burden of proof in criminal law, which requires the prosecution to prove all elements in the definition of the crime. This right to be presumed innocent is specifically guaranteed under Charter Section 11(d): "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." There had been a similar right in the Canadian Bill of Rights, under which the jurisprudence had been very pro-prosecution on the issue, again requiring the court to dismiss its own past rulings. Once that was done, there was little difficulty in showing that the accused really did have a right, and convicting him without the prosecution having to prove intent to traffic really was a breach of this right. But could the government get away under Section 1? It was, as the court saw it, a pure example of the "purposive" approach it had advocated in the cases already discussed. The purpose here was to ensure that Canada be a democratic society, requiring the court essentially to create some political theory, to flesh out the single adjective "democratic." The Canadian Supreme Court has often had to do this, and has developed a rich conception of democracy. At this point it is enough to quote Dickson, by now chief justice, in this case:

Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.⁴¹

The Section 1 analysis is always presented in two parts—is the aim of the impugned legislation the solution of a problem sufficiently serious that a society like the one just described would accept a limitation on a listed right? "It is necessary, at a minimum, that an objective relate to concerns that are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important." On the whole this part of the test has proven to be largely rhetorical, because the government does not frequently act so far from democratic legitimacy as to fail it. The working parts of the test came next, where the court operationalized the phrase "reasonable and demonstrably justified." Dickson described this as a "form of proportionality test," but the label is misleading because proportionality in any usual sense is only one part of the three-pronged "subtest" here: (1) the legislation must be carefully designed, not arbitrary or unfair—it must be "rationally connected to the objective" (this is largely borrowed from US constitutional jurisprudence); (2) the legislation must have the minimum impact possible on the rights in question (often called the "minimum impairment" test); and (3) (finally we do get to proportionality) the effects of the legislation must not be so great as to outweigh any possible social value that is being sought. As Dickson put it:

⁴¹ *R v Oakes*, 138.

Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. *The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.*⁴² (Emphasis added)

As the italicised part of the quotation shows, these various tests or subtests or prongs do interact. Nonetheless, the whole test is a logical and detailed scheme to operationalize a well-intentioned constitutional goal both to have rights and to limit them where really necessary. Of course it depends entirely on the judges on the court at any one time just how difficult a job the government of the day will have. There is a very practical consequence of the *Oakes* test, again not in any way required by the Charter itself. *Oakes* was about burdens of proof in two different ways: substantively it dealt with a burden-of-proof rule in criminal law, but as a generalised test for constitutional legitimacy it had itself to impose a burden-of-proof rule. During the first part of the analysis, when the court is trying to decide whether or not a specific right covers the citizen's actions, it is up to the citizen to convince the court. The person claiming a right has the burden of proof that the Charter does protect him or her in the way alleged. But if he or she does manage to persuade the court of this protection, and a Section 1 analysis is carried out, this burden shifts. If the court is satisfied that a right is breached, the actor, normally the government, who wishes to breach the right has to prove that the legislation passed all the elements of the Section 1 analysis. Though an alternative scheme can be imagined, the two versions of burden of proof are more or less necessary. If a citizen only had to claim a right without having to justify it, cries of "It's my right" might well paralyze government policy, especially because proving the negative, that a right does not exist, would usually be extraordinarily difficult. But once a court is satisfied that a right has been trampled on, the citizen would be in an impossible situation demonstrating that there was no need for this curtailment. His problem would not only be logical, but largely evidential. The government can in principle be expected to be able to show that there was no less impeding solution, or that proportionality was followed, but a private citizen could hardly have the information with which to do so. This is why the tendency at times for judges to conflate both parts of the overall analysis and import Section 1 considerations into an analysis of whether a right exists is so severely criticised—it is a way of supporting the government against the citizen. It may well say something about the lack of complete acceptance of Charter values amongst the Canadian higher judiciary that it does sometimes commit this sin. South Africa has an almost identical limitations analysis, yet it is very rare for a judge to be criticised for conflating the two elements.⁴³

⁴² *R v Oakes*, 140.

⁴³ A powerful attack on the court for this conflating of its own test, as well as an excellent analysis of the test, is given in D Beatty, "The Canadian Charter of Rights: Lessons and Laments," 1997 60 *Modern Law Review* 4, 481–98.

Limits to Rights: *Dolphin Deliveries*

In one way or another all of the rules, aims, and tests in the four cases so far covered would have been necessary if the Charter was to work at all. The last important "setting up" case is very different, because it not only could have been decided in a radically different way, but the Charter would have been more, not less, powerful a tool had that been done. At this point, it must simply be noted as an example of how early decisions determine the future course of a new court's work. At several points in the book, and notably when talking about Germany, a key question has been whether a constitution solely regulates the relations between the state and the individual, or whether it has an effect on the legal relations between individuals. It was the German constitutional court's early decision in *Lüth* to give the constitution a form of horizontal effect that has helped make the constitution so formative of German life.⁴⁴ But the German court is the prime example of a Kelsen court, quite deliberately not staffed by career judges. In the same year that the Canadian court laid down its powerful rule in *Oakes*, and during this initial phase when it was generally concerned to shore up and legitimize an active role as exponent of the Charter, it made a directly opposite decision to the German court that firmly ruled out any Charter effect between citizens.

The case, always known as *Dolphin Delivery*, involved industrial relations in which an employer managed to get a court injunction preventing a trade union from engaging in secondary picketing of a third-party firm, under the ordinary industrial relations laws in force at the time.⁴⁵ The union in question was involved in a dispute with a firm called Purolator, which had locked out the union members. *Dolphin Deliveries* was an ally of Purolator that the union wished to target by secondary picketing. For technical reasons the actual statutes covering such activity did not apply and common law ruled the case. *Dolphin Deliveries* managed to get a court to grant it an injunction under common law forbidding the picketing. The union appealed on the constitutional grounds that such a ban breached its right to freedom of expression under the Charter. Whether or not picketing should be seen as a form of protected expression may be arguable, and whether secondary picketing may ever have constitutional protection equally so. Indeed the courts are still not clear on those questions. But answers, even anti-union answers, to those questions would not have brought the court under so much criticism as what they did do.⁴⁶ Simply put, the court refused to recognize that the Charter had any effect at all on relations between individuals, and restricted itself to a classical liberal argument that constitutions were there only to rein in the state. There is very little argument in *Dolphin*, certainly not the subtle political theory of which the court has often shown itself capable. Instead the court just asserts that any move

⁴⁴*Lüth*, 7 BVerfGE 198 (1958) (German Federal Constitutional Court).

⁴⁵*Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd*, 2 SCR 573 (1986) (Canadian Supreme Court).

⁴⁶David Beatty claims *Dolphin* to have been the most criticised case in the first ten years of the court's history. D Beatty, "A Conservative's Court: The Politicization of Law," 1991 41 *University of Toronto Law Journal* 147-67.

to allow one private individual to sue another for breach of a Charter right would open up the whole civil law to invasion by the constitution. It might very well do so, but some argument has to be made why this would be a bad thing, and the court simply makes no such argument. It was for the Canadian Supreme Court, entirely populated by people who had made their name as attorneys in private law practise before the Charter, just axiomatic that the constitution should be kept out of private individual relationships, even when the individuals in question were as powerful as major commercial actors. There was some acceptance that the Canadian courts should have an eye on the Charter when developing the common law, but the Supreme Court was adamant that the Charter penetrated no further than that. Only if government is involved or has passed a law in statute or other form can the Charter be invoked.

I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the *Charter* is far from irrelevant to private litigants whose disputes fall to be decided at common law. But this is different from the proposition that one private party owes a constitutional duty to another, which proposition underlies the purported assertion of *Charter* causes of action or *Charter* defences between individuals.⁴⁷

The problem with this ruling is that the government may well be forbidden to pass a law that has the same effect as an existing, or newly developed, common-law rule, but that rule would be immune. The apparent acceptance of the Charter being used to develop the common law may be fatally flawed. A court may do that, but a court that refused to develop a common-law rule in light of the Charter, or created a new one contrary to Charter values, could not be appealed against on that point—for the Supreme Court to entertain such an appeal would be a breach of the *Dolphin* rule itself. It is true that in some circles the Canadian court does not have an enviable reputation on industrial relations law, but the motivation for the decision in *Dolphin* seems to be very different. It was a failure of judges from a certain background fully to engage in the possibilities of constitutionalism in society.⁴⁸

The comparison with South Africa is fairly clear. The South African court also initially shied away from developing the horizontal effect of its new constitution, citing *Dolphin* in the leading opinion.⁴⁹ In both cases it seems likely that the professional "formation" of judges used to a common-law approach had an impact missing in Germany where a different type of judge sat on the constitutional court. But while the South Africans have tempered this stance somewhat, *Dolphin* re-

⁴⁷*Dolphin Delivery*, 603.

⁴⁸D Pothier, "Twenty Years of Labour Law and the Charter," 2002 40 *Osgood Hall Law Journal* 370-400.

⁴⁹The South African case is *Du Plessis and Others v De Klerk and Another*, CCT 8/95 (South African Constitutional Court).

mains more or less unmodified. For better or worse, these cases demonstrate the steps that any court would have to make when presiding over the insertion of an entrenched rights document into a parliamentary sovereignty political system. Very probably any such court would also have to do what we now come to—the writing of a theory of democracy compatible with judicial review.

The Definition of Democracy

There are three levels at which the Canadian Supreme Court has had to tackle the meaning of democracy. Most frequently the need arises when considering one of the specified rights under the Charter. A Section 1 analysis, as we have seen, requires the court to apply the idea of something being demonstrably justified “in a free and democratic society.” Other parts of the Charter have called for similar interpretation. Above all, Section 15, which guarantees equality before the law and nondiscrimination, has caused much sophisticated social theorising, through which discrimination has been held to be an affront to dignity, and dignity to be implied by democracy.⁵⁰ The second level of analysis has occurred in cases dealing very directly with one component of democracy, the right to vote. Finally there have been powerful explications of democracy where the court has had to deal, as a result of references, with major structural analyses of the Canadian political system. The first type of analysis is discussed mainly in a later chapter that gives a general comparative study of the nature of limitations on rights. We can move directly to the second type of cases, directly on voting rights. Though there are several such cases, two will suffice to bring out the problems the court has faced.

Fairly early in the post-Charter history, in 1991, the Saskatchewan Court of Appeal was asked on a reference whether the new electoral boundaries imposed by an electoral commission, itself bound by statutory restrictions, deprived citizens of an equal vote in ways that breached Section 3 of the Charter. Section 3 simply states that “Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.” The provincial court held that the right to vote was breached, and the province appealed to the Supreme Court, which by a five-to-three margin upheld the appeal, deeming the boundaries to be perfectly compatible with the Section 3 right.

The problem arose because the provincial legislature had passed an act that restricted the freedom of the Boundary Commission, forcing it to produce a boundary map in 1989 significantly less “fair” than the one it had produced as early as 1981. Fairness here refers to the size of the constituencies—the aim was to provide constituencies that did not vary by more than 15 percent from a target derived by dividing the electorate by the number of constituencies. In 1981 no constituency exceeded this 15 percent margin, but under the restrictions imposed in 1989 several urban seats were above this margin, leading to urban underrepresentation. The restrictions in 1989 were that a specific quota of urban and rural seats was

⁵⁰ *R v Oakes*.

insisted on, and all urban seats had to be drawn respecting existing municipal boundaries. That this was a political matter in Saskatchewan is obvious—rural overrepresentation has been clung to by conservative politicians worldwide since suffrage began, and the Canadian court is by no means the first to have to deal with the issue. But could it be dealt with in a nonpolitical way? The majority would claim to have done so, largely by finding good reasons to defer to the provincial legislature, while the minority tried to evade the charge of political bias by trying to make equality of representation part of the very definition of voting. Neither position is very convincing, and the majority opinion itself spells out the theoretical gulf between them:

The question for resolution on this appeal can be summed up in one sentence: to what extent, if at all, does the right to vote enshrined in the Charter permit deviation from the “one person—one vote” rule? The answer to this question turns on what one sees as the purpose of s. 3. Those who start from the premise that the purpose of the section is to guarantee equality of voting power support the view that only minimal deviation from that ideal is possible. Those who start from the premise that the purpose of s. 3 is to guarantee effective representation see the right to vote as comprising many factors, of which equality is but one.⁵¹

This distinction between a justification based on “one person, one vote” and another based on the idea of “effective representation” allowed the majority to ransack Canadian electoral history to demonstrate that numerical equality has never been seen as the only, or even a deciding, factor. This relied on a distinctly nineteenth-century view expressed by the prime minister of 1872, saying that “other considerations were also held to have weight; so that different interests, classes and localities should be fairly represented.”⁵² Once it can be established that Canadian history is one where numerical equality is not the only factor, the argument then proceeds by relying on the court’s duty to give the Charter a purposive interpretation. The purpose was, in the eyes of the majority, simply to enshrine the existing electoral theory, an argument buttressed by the absence of any suggestion in the parliamentary proceedings on the Charter that Canadian tradition was to be changed. As the actual results of the 1989 redistricting did not produce what the court saw as serious breaches in numerical equality, the Section 3 right had not been breached.

The minority approach, however, does not have to deny that other factors may be legitimate, if these other factors are taken not to be part of the definition of the right, but to be good reasons for *restricting* the right. In other words a pure equal-vote definition of the right to vote in Section 3 still allows consideration of other matters, because any right can be curtailed subject to Section 1. By taking this route the minority produced an answer that might be thought to trump any refined “democracy as effective representation” justification. What happens in the minority argument is that the fact of serious numerical disparity is subject to the

⁵¹ Reference re Provincial Electoral Boundaries (Sask.), 2 SCR 158 (1991) (Canadian Supreme Court), 182.

⁵² Quoted in *Provincial Electoral Boundaries (Sask.)*, 184.

twin tests of Section 1—is the aim of the restriction legitimate, and is the method proportional? Here the fact that a much more proportional system had been in effect, and presumably also generated “effective representation,” and could have continued were the legislature not to have shackled the boundary commission, becomes decisive:

The province has failed to justify the need to shackle the Commission with the mandatory rural-urban allocation and the confinement of urban boundaries to municipal limits. The effect of these mandatory conditions was to force the Commission to recommend a distribution which departs from the higher degree of equality achieved in 1981. In the absence of a reasonable explanation as to why this was necessary, the distribution in question is suspect and there is no basis upon which to conclude that the legislature's objective in imposing the mandatory conditions was pressing and substantial.⁵³

The case is most useful in demonstrating two aspects of Canadian judicial methodology. The first, briefly touched on earlier, is the tendency of some on the court, while paying lip service to the test defined in *Oakes*, to drop it when it suits them. The majority and minority differences here largely depend on whether one reads justifications in at the first stage and shows that no right has been breached, or leaves them to the second stage, accepting that a breach has occurred and then testing it. Almost invariably the former, anti-*Oakes* strategy will serve the interests of the government better than the latter. Justifications have to be tested against the proportionality limb of the *Oakes* test if used as they ought to be used, in a second-stage test. But the same arguments in justification need not be subject to any test when used to define what the right is in the first place. The second point is the way that pre-Charter history, and not only legal history, is wielded to define theoretical terms and limit political arguments. This we shall see much more of. The majority opinion hinges in the end on a question that is completely unavoidable if a new aspect is to be grafted on to an existing constitution—how much must it be interpreted as continuing the pre-existing institutions? The court early on refused to accept a broad theory that the Charter only protected rights as they were understood before it came into force. How far does this rejection run? Must the Charter only overcome the past when there is no other way of making sense of it? Or can one take the Charter as an intentional rupture? Given the natural instinct of common-law judges, honed on precedent, to make only minimal necessary alterations to commonly understood legal rules, the instinct to minimise the Charter's impact, especially where so doing accords with deference to elected bodies, must be very strong. The whole question of a “rupture” with the past is implicit if a major constitutional change occurs in all these jurisdictions, as has been shown in several chapters. (A further discussion can be found in chapter 7.) In fact the clash between relying on long-established custom versus a court's duty to modernise is an age-old problem in the common law. A version underlay the conflict over homosexual rights in *Lawrence*, the very first case cited in the book.

⁵³ *Provincial Electoral Boundaries (Sask.)*, 173.

The other voting rights case in which the nature of democracy had to be reviewed was unusual in several respects. It was a challenge to the federal law that denied prison inmates the right to vote. Such a disqualification is very common internationally, and the victory for the plaintiff shows Canada at the forefront of liberal rights and bears considerable importance in a comparative respect. The case we are concerned with comes from 2002, but the second unusual feature is that it was actually the second time the same plaintiff had brought the complaint to the courts, having already won the issue in 1993.⁵⁴ In this first case there was, very unusually, no discussion on the Supreme Court. A unanimous court dismissed the government's appeal four times. The government had admitted that Section 51(e) of the Canada Elections Act, 1985, which contained the ban, was a breach of the Charter Section 3 right to vote. Though the government tried to justify it under Section 1, the Supreme Court stated baldly that the clause failed the proportionality test under the Charter and was too broadly drafted. The law contained a more moderate clause that was not tested in 1993, by which only convicts with sentences over two years were disqualified from voting. In 2002 *Sauvé* went back to court protesting against even this more restricted ban, and won again, though this time only by a majority of five to four.⁵⁵ Only four of the judges in the second case had also heard *Sauvé*'s first challenge to the legislation, and these two split fifty-fifty the second time. Another member of the 2002 court, Arbour, had been in favour of *Sauvé* when she heard his original case as a member of the lower court whose decision was overturned in his favour by the Supreme Court.

It is a pity that the Supreme Court in 1993 did not publish a full reasoned opinion, because it would help us to know more about why two judges who believed the first ban unacceptable were persuaded by the second. There is somewhat of a giveaway on one aspect that reiterates the issue of whether to define rights restrictively or define them widely and test them under Section 1. Gonthier, who wrote the minority opinion in *Sauvé II*, had been on the unanimous court for *Sauvé I*. In both cases the Crown had conceded that the electoral law was a breach of the Charter voting right, and argued merely that it could be saved as reasonable under Section 1. Gonthier went out of his way to say that he did not regard the new legislation as a breach, and he wished the Crown had not conceded this. Given that he apparently had not objected to the Crown's submission in *Sauvé I*, he must have believed that the very definition of the right depends on the justifications for curtailing it, again a breach of the *Oakes* rule. The minority opinion in fact challenges the entire approach fundamentally, in ways that go far beyond the issue in the case itself, and which demonstrate a very decided degree of deference to legislative power. Gonthier argued that the conflict over the legitimacy of disenfranchisement for convicts was a matter of “social and political philosophy.” As such it was so different from the usual constitutional law arguments over policy that it could not be tested in the usual way. Consequently the courts should defer to parliamentary choice in matters like this, and not subject them to any part of the Section 1

⁵⁴ *Sauvé v Canada (Attorney General)*, 2 SCR 438 (1993) (Canadian Supreme Court).

⁵⁵ *Sauvé v Canada (Chief Electoral Officer)*, 3 SCR 519 (2002) (Canadian Supreme Court).

test. That meant, effectively, that the disenfranchising act was not even a breach of Section 3, hence his unhappiness at the Crown's acceptance of the point. For Gonthier, if the court upheld *Sauvé* it would be doing nothing but choosing one over another social philosophy, something it is clearly not entitled to do—at least if one accepts a very traditional view of constitutional adjudication. The majority rejected this as a false antithesis:

The right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination. This is not a matter of substituting the Court's philosophical preference for that of the legislature, but of ensuring that the legislature's proffered justification is supported by logic and common sense.⁵⁶

Furthermore the approach Gonthier suggests, "Insulating a rights restriction from scrutiny by labeling it a matter of social philosophy," effectively reverses the *Oakes* test in its burden of proof. "It removes the infringement from our radar screen, instead of enabling us to zero in on it to decide whether it is demonstrably justified as required by the *Charter*." The majority is forced into a very strong statement of the role of a court in a constitutional democracy in order to avoid the almost populist force of Gonthier's reasoning, insisting that deference to the legislature is not appropriate where fundamental rights are concerned.

This case is not merely a competition between competing social philosophies. It represents a conflict between the right of citizens to vote—one of the most fundamental rights guaranteed by the *Charter*—and Parliament's denial of that right. Public debate on an issue does not transform it into a matter of "social philosophy," shielding it from full judicial scrutiny. It is for the courts, unaffected by the shifting winds of public opinion and electoral interests, to safeguard the right to vote guaranteed by s. 3 of the *Charter*.⁵⁷

The majority does, rather grudgingly, agree that some sort of argument can be made for the aim of the legislation. Making a symbolic stand on criminality and citizenship can qualify as an acceptable goal, but the majority opinion nonetheless opposes it as neither sufficiently narrowly conceived nor rationally connected to an acceptable goal. Again, no other institution in Canadian society could have answered this unavoidable question. In so doing the court produces a very powerful view of the relationship between the court and the fundamentals of democracy, all of it read into a *Charter* that is actually silent on the question. "The *Charter* charges courts with upholding and maintaining an inclusive, participatory democratic framework within which citizens can explore and pursue different conceptions of the good." Holding up the court as the real champion of democracy the opinion goes on to say that "it is precisely when legislative choices threaten to undermine the foundations of the participatory democracy guaranteed by the *Charter* that

⁵⁶ *Sauvé v Canada (Chief Electoral Officer)*, par. 10.

⁵⁷ *Sauvé v Canada (Chief Electoral Officer)*, par. 13.

courts must be vigilant in fulfilling their constitutional duty to protect the integrity of this system."⁵⁸ This is indeed a powerful argument against those who regard judicial interference with policy as inherently undemocratic, and is echoed further in the final category of cases to be discussed in this section.

There is one other important part of Gonthier's claim for deference that needs to be mentioned, if only because it is a rather rare example of the Canadian court taking notice of academic debate on the whole question of its legitimacy. Supporters of the court have developed an approach to justify it against arguments that judicial review is undemocratic—a theory of court/legislative dialogue. It is best set out in the Canadian context by Peter Hogg, one of the leading pro-court academic commentators, in an article from 1997.⁵⁹ The argument is that in practice the Supreme Court's decisions very seldom result in the complete overturn of legislation. At most the court will strike down some aspect of a law, giving rather precise reasons. The federal or provincial parliament then usually rewrites the legislation to get around these criticisms, and the court accepts this second version. This obviously has similarities to the French parliament's reaction to rulings of the Conseil constitutionnel, and probably to German constitutional politics. Indeed one analyst has suggested it is more widely typical of East European jurisdiction, especially in Hungary.⁶⁰

Whether it is descriptively accurate or not in the Canadian context, and whether it is an adequate defence against the charge that judicial review is unconstitutional, it was surely not meant as an actual prescription for how the court should view its activity. Yet this was precisely what Gonthier, who acknowledged Hogg's essay, advocated. The very fact that in *Sauvé I* the court had struck down the broad disqualification clause meant it should show extra deference to the second, more narrowly drawn version litigated in *Sauvé II*. As the majority opinion said, "The healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of 'if at first you don't succeed, try, try again.'" Gonthier himself clearly recognizes that there is something odd about dialogue as an account of the court's role, because his final definition of it is indistinguishable from the majority view of what it is doing:

Importantly, the dialogue metaphor *does not signal a lowering of the s. 1 justification standard*. It simply suggests that when, after a full and rigorous s. 1 analysis, Parliament has satisfied the court that it has established a reasonable limit to a right that is demonstrably justified in a free and democratic society, the dialogue ends; the court lets Parliament have the last word and does not substitute Parliament's reasonable choices with its own.⁶¹

⁵⁸ *Sauvé v Canada (Chief Electoral Officer)*, par. 15.

⁵⁹ P Hogg and AA Bushell, "The Charter Dialogue between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)," 1997 35 *Osgood Hall Law Journal* 75. A powerful critique is given in LB Tremblay, "The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures," 2005 3 *International Journal of Constitutional Law* 4, 617–48.

⁶⁰ See Schepple, "Constitutional Negotiations."

⁶¹ *Sauvé v Canada (Chief Electoral Officer)*, par. 104.

Gonthier is nonetheless fundamentally right about the case involving a clash of rival philosophies that cannot be tested in any normal way. Perhaps this is best demonstrated by the disagreement between the majority and the minority on one specific part of the argument. In keeping with the tendency to equate democracy in part with a respect for human dignity, the majority objects to disenfranchisement as an insult to this dignity. Gonthier does not regard the dignity argument as irrelevant—to him, removing the prisoner's vote is in accordance with dignity, because it accepts that prisoners are free actors who deserve the punishment. Dignity is the most difficult of constitutional-legal concepts, and a constitutional review body that is forced to rely on the idea is by that very fact demonstrating the special nature of the function it performs in the polity.⁶²

These two decisions were given by a split court. The Canadian Supreme Court has a very high rate of divided opinions. When it has had to deal with its most abstract, but also most politically contentious, issues, it has naturally tried for a consensus, and the result at times, for example in a famous reference decision on whether Quebec has the right to secede, has been seen by some as a form of high-minded evasion. These opinions inevitably are as important for the court as for those who refer the questions, because the court's own legitimacy is dependent on its answer. There is another important difference of relevance to us. So much of the modern writing on the Canadian court is focused on the Charter that one can be forgiven for thinking that it embraces the whole of Canadian constitutional law. Yet the big structural questions hardly touch on Charter jurisprudence because they are not really about individual rights. It may well be that the post-Charter court is bolder about judicial review, but it is not usually dealing with issues, or using material, that could not have happened before 1982. In trying to understand the nature of judicial review in Canada we need to deal with the whole range of constitutional politics. That the court may be more consensual because more at home dealing with the material the pre-Charter courts handled is hardly surprising, but is germane to the enquiry in this chapter. Some of these structural questions have, naturally, incidentally involved the Charter. One such case involved the question whether it was a breach of the separation of powers, and of the rule of law, for provincial governments directly to cut judicial salaries.⁶³ Even though this was one of the grand constitutional questions, the court did not manage complete unanimity, one judge still urging deference to the legislature. The division of opinion, though, came about because the argument was in part based on the Charter right of litigants to an unbiased bench as part of a fair trial. Hopeful criminal defendants seized on the theoretical argument that a bench whose salaries were directly determined by the provincial government could not be seen as unbiased. Had the whole case been set in abstract, noncharter, terms of separation of powers, the dissenting judge might well not have dissented. There seems for some to be a wide gap be-

⁶²One powerful criticism of the use of dignity in public law is D Feldman, "Human Dignity as a Legal Value—Part I," 1999 *Public Law* 682–702. But see also O Schachter, "Human Dignity as a Normative Concept," 1983 77 *American Journal of International Law* 4, 848–54.

⁶³*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 3 SCR 3 (1997) (Canadian Supreme Court).

tween agreeing to theoretical statements, and actually opposing the government in its dealing with individuals, especially where the criminal law applies.

The Quebec reference is the court's keynote statement on democracy and the shape of the Canadian polity.⁶⁴ Known as the *Reference re Secession of Quebec*, it was an attempt to answer two politically loaded questions addressed to it by the governor in council. The main question was "Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?" The constitution never mentions secession; the court first had to translate the question into one it believed it was entitled to handle, and then derive a fundamental theory of Canadian constitutional legitimacy.

The translation was needed because several arguments addressed to the court challenged its very right to hear the case, on the grounds that it was not "justiciable," or that it amounted to what the US Supreme Court calls a "political question," beyond the bounds of judicial review. The court's defence was that the questions did not "ask the Court to usurp any democratic decision that the people of Quebec may be called upon to make." The questions, said the court, were "strictly limited to aspects of the legal framework in which that democratic decision is to be taken." The more strictly the court limited this, of course, the less useful, but the safer for the court, were the answers. The way the arguments for Quebec were cast was that if the citizens of a province, by a clear majority, wished secession, than the democratic nature of the Canadian state must recognize the right to secede. The court had to find a definition of Canadian politics that both recognized democracy but did not lead to this conclusion. It achieved this aim, in the court's own eyes anyway, by both construing democracy away from mere majoritarian preferences, and making democracy only one of four equal standing principles of legitimacy. In the court's earlier response to the reference on patriating the constitution, it had insisted that the actual texts were only part of a broader constitution, and fundamental principles existed that were at most only marginally referenced in the documents. There are four such architectonic principles: federalism, democracy, constitutionalism and the rule of law, and respect for minorities. These are derived not only from 130 years of written constitutional history but, rather grandly, from "an historical lineage stretching back through the ages." As part of judicial technique, the court saw the underlying principles as incorporated by the preamble to the 1867 constitution, and quoted an earlier judgement discussed above. "In the *Provincial Judges Reference* . . . we determined that the preamble "invites the courts to turn those principles into the premises of a constitutional argument that cul-

⁶⁴A very interesting analysis of this case, which shows how different was the style of the opinion from most, is given in P Horowitz, "Law's Expression: The Promise and Perils of Judicial Opinion Writing in Canadian Constitutional Law," 2000 38 *Osgoode Hall Law Journal* 1, 101–42, especially 138–40. A full analysis of the constitutional law is given in P Bienvenu, "Secession by Constitutional Means: Decision of the Supreme Court of Canada in the Quebec Secession Reference," 1999 21 *Hamline Journal of Public Law and Policy* 1–65. A more developed discussion of the politics involved is given very well in an article written before the case came to the court: PJ Monahan, "The Law and Politics of Quebec Secession," 1995 33 *Osgoode Hall Law Journal* 1, 33–67.

minates in the filling of gaps in the express terms of the constitutional text.⁶⁵ One cannot but be struck by the similarity of this logic to much of the argument used by the Conseil constitutionnel to justify the derivation of the *bloc de constitutionnalité*. One crucial point is that "These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other."⁶⁶ The court has also always refused to rank charter rights. Its entire approach to constitutional interpretation can best be described as holistic—in this opinion indeed the court refers to the constitution's "internal architecture."

So how do these principles answer the question of the legality of unilateral secession? Or to put it in more realistic terms, how does the court get round the apparent will of Quebec's sovereign people? What was inevitable was that democracy should not be defined just as majority rule; otherwise it would be hard to maintain that democracy was not at odds with the other aspects of constitutionalism identified by the court. The court canvassed various meanings of democracy, and insisted on its vital role in the Canadian constitution, but warned strongly that "It would be a grave mistake to equate legitimacy with the 'sovereign will' or majority rule alone, to the exclusion of other constitutional values."⁶⁷ To summarize a lengthy and somewhat repetitive judgement: democracy actually requires the rule of law; federalism requires equality of esteem between majorities at different levels; democracy embraces (from the statement in *Oakes*) respect for minorities, and thus a unilateral secession must be illegal, and not merely politically or morally wrong. The court, however, went further, unwilling to leave Quebec with no gain at all from the reference. Rather, as it found the original patriation claim by the federal government acting alone to be legally acceptable but in breach of conventions, the court finds obligations for both sides here. The obligation, stemming from the intersection of all four unwritten principles, is to good-faith negotiations on both sides. It must be understood that the court is not just giving good political advice here—it claims that there is a *legal* obligation on the political authorities outside Quebec to respect the Quebec popular will by entering into such negotiations, to attempt to respond to Quebec's concerns. At the same time there is a *legal* obligation on Quebec not to commit to secession before good-faith negotiations. The Constitution Act of 1982 confers a right

to initiate constitutional change on each participant in Confederation. In our view, the existence of this right imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces. This duty is inherent in the democratic principle which is a fundamental predicate of our system of governance.⁶⁸

⁶⁵ *Reference re Secession of Quebec*, 2 SCR 217 (1998) (Canadian Supreme Court), par. 53. The opinion referred to is *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*.

⁶⁶ *Secession of Quebec*, par. 49.

⁶⁷ *Secession of Quebec*, par. 67.

⁶⁸ *Secession of Quebec*, par. 69.

The court was fully aware of the problem in democratic theory it was setting here. The reconciliation of rights and obligations would be a problem for

the representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be. There can be no suggestion that either of these majorities "trumps" the other. A political majority that does not act in accordance with the underlying constitutional principles we have identified puts at risk the legitimacy of the exercise of its rights.⁶⁹

Nor is the court unaware of how little it will do in the future if the politics proceeds to these negotiations. The judges several times refer to their necessary limitations, seeing their role as "limited to the identification of the relevant aspects of the Constitution in their broadest sense." They entirely accept that they have "no supervisory role over the political aspects of constitutional negotiations." But the core statement of legality is clear:

The non-justiciability of political issues that lack a legal component does not deprive the surrounding constitutional framework of its binding status, nor does this mean that constitutional obligations could be breached without incurring serious legal repercussions. Where there are legal rights there are remedies, but . . . the appropriate recourse in some circumstances lies through the workings of the political process rather than the courts.⁷⁰

This must be one of the strongest statements of the importance of a constitutional system and of the idea of constitutional legality. But it has to be admitted that it actually is unclear in what sense a binding status continues when the issues are nonjusticiable. The whole opinion is rich with insights into democracy as a constitutional status, and is likely to be mined for references in future opinions, just as the court of 1998 did itself cite almost every major opinion it had previously issued on the topic. It remains a highly creative judgement, one that manages to use the cloak of legality to cover sage advice to both sides, and of course therefore to limit them. The court actually went so far as to point out how badly it would play on the international scene if either side ignored the obligation to good-faith negotiations. Above all it is a judgement that serves to legitimize the court itself further, and to ensure its role in Canadian political life.

The Court's Record (and the Critics' Reaction)

It was never going to be easy to graft fully fledged judicial review onto a parliamentary sovereignty system, but one can hardly avoid sympathizing with the court, so grudging has been its press in legal academic circles. The main criticism, though, is one the court may have invited by its own uncertainty. Some were bound to

⁶⁹ *Secession of Quebec*, par. 93.

⁷⁰ *Secession of Quebec*, par. 102.

be disappointed. The left-wing critics, centred round David Beatty, seem to have had an expectation of the Canadian court even more improbable than the French Left's view of how the Conseil constitutionnel should work. Despite saying in an important article that he did "not intend the descriptive part of the essay to be controversial in any way," Beatty asserts forcefully,

Legally, we find ourselves ruled by a Court controlled by people who have favoured a set of doctrines and modes of analysis that are in conflict with the most basic principles and values underlying the Charter, and that provide much less protection for our rights and freedoms than the Charter is able to guarantee.⁷¹

But would many agree with his judgement that accepting an electoral finance law cast in more or less standard international terms systematically "discriminates against minor and embryonic political movements"? How many would see a law controlling prostitutes' soliciting as "restricting the freedom of poor and disadvantaged women"? More to the point, Beatty's explanation for why the court swung so rapidly to the right (as he sees it) has been convincingly discredited. Beatty focuses on a major replacement of personnel on the court that happened in its early years. Because the five new justices were all appointed by a Conservative prime minister, and replaced judges appointed by a Liberal, there was for him no mystery. However, statistical analysis a few years later showed that the voting profile of these new judges was in no way different from others appointed by Liberals.⁷² Certainly there have been cases that gave the Charter a weaker impact than some might have liked. *Dolphin*, where the court refused horizontal effect, is one such, but it is a decision more plausibly explained in terms of common-law judicial socialization than conservatism. Many of the failures of the court to live up to radical hopes probably stem from much the same aspect as the one that cost them the decision they would have preferred in *Dolphin*. This is the simple fact that Canada has for a long time had a Europe-like body of welfare state style legislation, often in complex codes. Judges have been unwilling to recognize a full constitutional right to strike largely because they have not wanted to disturb a fairly effective and long-established but complicated labour relations code, as in their decision not to overturn a part of the code that excepted rural workers, often criticized by the Left.⁷³ Even in *Dolphin* a part of the court's justification for refusing horizontal effect was the fear of disturbing well-established and effective human rights codes in the several provinces. Had there been less state support in these areas, the court might well have been bolder.

There is a clue to the real problem the court has had in another attack that Beatty mentions, though he does not pretend that it is as uncontroversial as his assessment of the court's record. Beatty's prime concern in the article referred to here

⁷¹Beatty, "A Conservative's Court," 151.

⁷²JB Kelly, "The Charter of Rights and Freedoms and the Rebalancing of Liberal Constitutionalism in Canada, 1982-1997," 1999 37 *Osgoode Hall Law Journal* 625-79.

⁷³*Dunmore v Ontario (Attorney General)*, 3 SCR 1016 (2001) (Canadian Supreme Court).

is that Canadian judges are appointed in an undemocratic manner. This matters for him because, for example,

Even though the vote of each of Mulroney's appointees would be crucial to how the Court might rule on a future abortion law, for example, the public had no input in determining whether any of these appointments should be given to someone who would take the liberal or the conservative approach.

This is a left-wing version of a more commonly conservative complaint—the impropriety of unelected judges making policy.⁷⁴ Beatty ignores the fact that the court actually did strike down the restrictions on abortion in the criminal code, just as public opinion wished.⁷⁵ (Of the two dissenters, only one was a Conservative appointee.) Whereas the Left thinks it undemocratic that judges are not selected by the people, most object to the court on the grounds that it does not defer to elected politicians—an indirect version of the same claim for how a judicial review court ought to behave. The proponents of this more predictable complaint have sometimes been called the "Canadian interpretivists."⁷⁶ This, an evocation of the most conservative style in American constitutional jurisprudence, is to indicate a preference for narrow readings of the Charter, where the court may do no more than update the application of terms set by the original intent of the drafters. Where the "core meaning" of a right is extended, the court goes too far. "When the judiciary refuses to be guided by original intent in its interpretation of the constitution, it exercises an extra-constitutional and arbitrary form of power."⁷⁷ What is interesting is not that there should be such an attack—there cannot be a single country where a court is empowered to strike down legislation where the claim is not echoed. Courts everywhere are attacked by those whose values are infrequently the winners in constitutional litigation, and Canada is inevitably a special case simply because it did manage to function for so long without the Charter. So there are powerful and broad arguments made to the effect that Canadian political culture is in danger from developing a US-style "rights mentality." Such an attack is made by Bogart in *Courts and Country*, bemoaning the potential challenge to the author's sense of Canadian identity that may come about from strong judicial rights activism.⁷⁸ Unusually for a distinguished lawyer, part of Bogart's concern is that too much is expected from law, though it is clear that he would be even less happy were the Supreme Court's rulings to become more effective.

⁷⁴Beatty, "A Conservative's Court," 151.

⁷⁵In *R. v Morgentaler*, 1 SCR 30 (1988) (Canadian Supreme Court).

⁷⁶The phrase seems to have been used for the first time in JB Kelly and M Murphy, "Confronting Judicial Supremacy: A Defence of Judicial Activism and the Supreme Court of Canada's Legal Rights Jurisprudence," 2001 16 *Canadian Journal of Law and Society* 3-28. They provide a useful list of the main proponents of this position. The article is a useful balance to the general "counter-majoritarian" argument on judicial review.

⁷⁷This is the description of the interpretivists' position used in Kelly and Murphy, "Confronting Judicial Supremacy," 4.

⁷⁸WA Bogart, *Courts and Country: The Limits of Litigation and Social and Political Life of Canada* (Toronto: Oxford University Press, 1994).

While criticism, either of the limited, almost technical interpretivist critique or in the broader style of Bogart or Beatty, is to be expected, it is the missing opposition to them that is problematic. Few actually believe the court to be activist, and they approve of this. Those who do criticize the attacks on the court do not do so because they accept the need, even the desirability, of a constitutional court striking down legislation. Instead they try to claim it does not actually do so very often. For example, Kelly, both in the article cited above and in earlier work, stresses that any initial appearance of willingness to strike down has been replaced with due deference to the legislature.⁷⁹ Others give the game away in the very titles of their works, most notably Hogg and Bushell, whose article on the dialogue theory is subtitled "Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All." That article tries to insist that the court very seldom actually prevents the legislature from doing what it wants. Why anyone ever thought that a fully armed judicial review court would not, perhaps frequently, strike down legislation is a mystery. But the fact that the court's supporters try to defend it by playing down this part of its role is indicative of how little committed some Canadian circles are to the very fact of replacing parliamentary sovereignty with constitutional sovereignty. Even Beatty, though he objects to some of what the court has *not* done, shows no faith in a generalized activism.

Blocs and Dissent in the Court

There seems, amongst many commentators, to be a general concern about the mere fact that judges make value decisions, and are not always in agreement on these values, as though Canadians had really believed in a formalist, slot machine jurisprudence until 1982. So there is great concern about the lack of unanimity in constitutional cases. An early article, for example, sees it as striking that there were two dissents in the abortion case, and that the court was split four to two on whether the right to strike was implied by the Charter's freedom of association right. The author of this article summarizes his concern thus:

Perhaps we need to reflect on the implications of the fact that Canada's top jurists can hear the same arguments and read much the same material relating to a particular Charter claim and yet come to opposite conclusions about that claim. One might pause to wonder what this means for the supposed "inalienability" of the rights enshrined in the Charter.⁸⁰

Others also worry about what they see as a high dissent rate, causing one of the Supreme Court justices even to defend the right of dissent, something no one would worry about in most countries.⁸¹

⁷⁹ Kelly, "Charter of Rights and Freedoms."

⁸⁰ AD Heard, "The Charter in the Supreme Court of Canada: The Importance of Which Judges Hear an Appeal," 1991 24 *Canadian Journal of Political Science / Revue canadienne de science politique* 2, 289-307, at 294.

⁸¹ C L'Heureux-Dubé, "The Dissenting Opinion: Voice of the Future?" 2000 38 *Osgoode Hall Law Journal* 495-518.

It is commonly asserted that the court started unanimously but rapidly came to be full of disagreement, and that its dissent rate in constitutional cases, roughly 30 percent over this period, shows a good deal of ideological conflict. Much effort has gone into finding the relevant ideological blocs and spelling out the underlying dimensions of judicial conflict. Individual judicial votes have been carefully canvassed to elucidate this pattern, and in particular the rate by which they vote against the government. In the end, however, very little has been found. A clue to this result might be something virtually never mentioned—the 30 percent dissent rate in constitutional cases is almost exactly the same as the dissent rate in *non*-constitutional cases. This identity of decision behaviour between constitutional and ordinary law is a repeated finding. In 2000 for example there was a 31 percent dissent rate in both areas; in 2001 the court was much more unanimous, with a dissent rate of only 21 percent—indistinguishable between constitutional and other law. There really are no patterns, just what political scientists call "trendless fluctuation," except that constitutional law is no different from any other area of the court's activity.⁸²

The truth is simply that the Canadian Supreme Court does not have a strong and coherent judicial ideology, on any issues. The rate of dissent is high, compared with the German or even the South African court, but is nothing like that of the US Supreme Court. But the Canadian Supreme Court differs from its more southerly neighbor in one major way—it does not have two opposing and long-term ideological blocs based on the politics of the appointing president, and highly predictable in the long run of decisions. Efforts to find such blocs have failed—judges vary, of course, but the variance, for example on preparedness to vote against the government, is tiny. Only a few percentage points separate the justices most and least likely to do so, just as the tendency to dissent, with one or two clear exceptions, varies hardly at all.⁸³ What happens is that judges equally likely to oppose the government just do so on different cases, in no way that is easily attributed to general ideological leaning.

Almost inevitably the early cases were more consensual because they were, in all but name, methodological cases where the court struggled to work out how, in general, to go about its business. The court in its early days can be criticized for the way it went about this process, in particular because of the elaborate legal tests it set up, notably in *Oakes* but in several other early cases, tests that have proved cumbersome. This alone may have produced later dissensus because of the need to force facts and values into such tests to extract what the judges think is a just result. Such an argument has been forcibly made by Paul Horowitz, who interestingly compares the much less technical style of opinion in the Quebec referendum reference to that normally used.⁸⁴ And the *Oakes* test, because it is so complex, has

⁸² The statistics are my own calculations from the court records.

⁸³ The best account is given in Kelly, "Charter of Rights and Freedoms." The article also summarises earlier research, and is partially brought further up to date in Kelly and Murphy, "Confronting Judicial Supremacy." See also P McCormick, "Blocs, Swarms, and Outliers: Conceptualizing Disagreement on the Modern Supreme Court of Canada," 2004 42 *Osgoode Hall Law Journal* 100-138.

⁸⁴ Horowitz, "Law's Expression."

often been used rather casually, opening the court to further attacks for apparently playing fast and loose with its own methodology. The very structure of the Charter itself may lead to dissensus, because in many cases there are two points at which judges can disagree—has a right been infringed, and if so, is the infringement justifiable? It was, of course, this structure that made the court produce the tests in cases like *Oakes*, and later we consider at length how courts in different countries have handled their limitation clauses. The Canadian court may have made life harder for itself, but there is not even a consistent “bloc” analysis to be drawn on judges who are more or less faithful to *Oakes*.

The defenders of the court tend to argue that even if it was earlier very deferential to the state, it has become much more so. They claim that the court has deliberately changed its docket so that it is more likely to hear cases against executive action, and not cases that involve the constitutionality of legislation—to act more as an administrative law court than a constitutional review body. There is absolutely no evidence available about why the court grants leave to appeal in some rather than other cases. An equally plausible explanation is that the federal and provincial governments of Canada are in fact constitution-respecting entities who have themselves learned how to craft legislation that is constitutionally compliant. There is at least some evidence to support this, if only because we know that government at all levels has changed its policymaking processes to incorporate constitution checking at an early stage. Civil servants at both the federal level and some of the provinces certainly claimed as early as 1992 to be imbued with Charter values, and to have guided this process.⁸⁵ An even more plausible explanation is simply that it is early yet, and less than twenty-five years does not allow real trends to appear.

The rate of dissent and the rate of antigovernment decisions has not declined in the last few years, but much of the more obvious targets may have been dealt with early. There is a particular reason why this might be so. A large part of the early litigation was about the equality guarantee in Section 15. This promises that

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (Emphasis added)

The italicized part of the section had to be dealt with by the court immediately, which it did by asserting that any “analogous” group, for example homosexuals, might be entitled to protection from discrimination. The details of this analysis are covered later in the book. Having set up such an interpretation, the court indulged in some years of putting claimants into “analogous” groups, as well as in spelling out exactly what constitutes discrimination, as opposed to legitimately differential treatment. A typical case, known to have had a major impact in the thinking of policymakers, was *Schachter v Canada* in 1992.⁸⁶ Here a father of a newborn

⁸⁵ PJ Monahan and M Finkelstein, “The Charter of Rights and Public Policy in Canada,” 1992 30 *Osgood Hall Law Journal* 501–46.

⁸⁶ *Schachter v Canada*, 2 SCR 679 (1992) (Canadian Supreme Court).

child claimed welfare payment for staying home during its first few weeks of life, because a statute specifically granted such an entitlement to a couple who adopted a newborn. New parents are not covered in the first part of Section 15, but the government itself agreed that the policy was discriminatory, and did not even offer a Section 1 justification. *Schachter* is difficult for those who would claim the court was overnegative towards legislative discretion. The opinions in the case actually lambaste the government for giving in too easily, thereby depriving the Supreme Court of argument through which it could decide for itself whether or not discrimination had occurred. Reading the opinions with any care strongly suggests that the court would either have refused to treat the two categories of parents as comparable, or accepted a Section 1 justification for differentiating between them. By the time the case came before the court, the government had amended the law, giving both categories of parents aid, but for a shorter time than the adopters had enjoyed under the previous version. The only reason the case came up for decision was to rule on the legitimacy of the particular technique of resolving such cases. Should the offending part of the statute be struck down? Should all of it be struck down? Should it be made compatible with the constitution by judicially adding words—that is, by adding in “natural parents”? Should part or all of the statute be ruled null and void, but with this ruling postponed to give parliament time to amend the law? The main opinion on the case is an enormously elaborate working out of what sort of remedy would be applicable under what conditions, with the interests of governmental policymaking and the interests of current and potential beneficiaries to this sort of legislation all carefully balanced. It is not possible to describe *Schachter* as either full of, or deficient in, deference to the legislature.

As cases like this multiplied, and a host of possible discriminations were analyzed, there were inevitably many occasions when details of legislation were struck down. They nearly all referred to legislative schemes that predated the Charter, and were not necessarily fought hard by the government. What seems to have been the case is that Canada has, in many ways, adjusted to the Charter, inevitably reducing the conflict between government and court, if indeed there ever was much heat in that conflict. This does not mean that a new generation on the court may not decide to renew a push to extend Charter values, and there are some suggestions that this may happen in the area of positive rights, though the cases in this area (discussed in a later chapter) send conflicting signals at this stage.

The importance of the equality jurisprudence may explain, in a rather different way, the sense of ideological conflict on the court.⁸⁷ There may be, or have been, one bloc on the court—some of those in the “interpretivist” movement seems to think so, and on this point, those opposed to them rather agree. Much has been made of the idea that there now exists in Canada something called the “court party,” a label invented by one of the conservative critics of the court. A sense of his position can be gained by the quotation he chose to begin the article in which he launched the

⁸⁷ A recent monograph on the court by a leading exponent of American-style political science analysis of courts is DA Songer, *The Transformation of The Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press, 2008). The book casts some light on the ideological conflict in the court since 1982, in a highly nuanced way.

idea.⁸⁸ "If you had told the people what the *Charter* was going to mean in 1982—with respect to things like abortion and the Lord's Prayer—you never would have gotten it." This was from an elected conservative politician and former premier of Ontario, David Peterson. To Morton and many who have followed his analysis, the court party is an alliance of interest groups, mainly of the sort political scientists call "new social movements" intent on getting Charter-based recognition for the rights of those others have described as "marginalized" in Canadian history. A leader of one of these groups is quoted by Morton, though not with sympathy:

The *Charter's* appeal to our non-territorial identities—shared characteristics such as gender, ethnicity and disability—is finding concrete expression in an emerging new power structure in society. . . . This power structure involves new networks and coalitions among women, the disabled, aboriginal groups, social reform activists, church groups, environmentalists, ethno-cultural organizations, just to name a few. All these new groups have mobilized a broad range of interests that draw their inspiration from the *Charter* and the *Constitution*.

Several analysts have operationalized the concept of the court party by coding cases that refer to the values this broad movement supports, and measuring the tendency of Supreme Court justices to vote in support of the movement. It turns out that justices who tend regularly to vote for Charter-based claims on this "court party" index do not necessarily support putative Charter rights in other cases. Because the Supreme Court has in fact not granted a high proportion of court party claims, Morton notwithstanding, such justices also dissent more than others. (The court only found for an equality claimant in 20 percent of such cases, compared with over 30 percent for "legal" rights.) The "bloc," if there is or was one, is simply identified. They are the female justices: Bertha Wilson (1982–92), Beverley McLachlin, appointed in 1989, later chief justice, Claire L'Heureux-Dubé, appointed in 1987, and Louise Arbour appointed in 1999. It is improbable that these justices do see themselves as a bloc, if only because their voting is much less similar in other Charter areas, but it cannot be an accident that they are all women and all leaders in pro-Charter jurisprudence on this specific dimension. But then it says something about Canadian politics and law that the Supreme Court has had so many distinguished women on it. The best summary is that the court, like any court, has judges with particular drives and interests, but no structured patterning.

Echoes of the Common Law

This is probably true of the whole set of issues that have so concerned the court's critics—it has neither been particularly deferential nor conflicted, especially with governments. It has been finding its way slowly from a common-law background.

⁸⁸FL Morton, "The Charter Revolution and the Court Party," 1992 30 *Osgood Hall Law Journal* 628–52.

and with all that entails. As L'Heureux-Dubé says of common-law judges, when justifying dissents:

From the first days of their legal education, common-law lawyers are instilled with a narrative and an adversarial culture in which the justification of one's reasoning is given pride of place. For this reason, common-law lawyers tend to view the drafting of opinions which seek to justify the choice of one of several competing solutions as indispensable to the legal system. . . . Theirs is a vision of the law and of the role of judicial decisions that readily admits of the possibility of a number of divergent opinions on any given issue.⁸⁹

The vital importance of common law in the working out of the Charter cannot be too strongly emphasized; it also means that the coding of cases as pro or anti legislative authority may be largely meaningless. Consider the following case, *R v Pan*, from 2001.⁹⁰ It involved a claim by Pan that his fundamental freedoms had been abridged contrary to Section 7 of the Charter. Section 649 of the criminal code was said to abrogate his fundamental freedoms. The court dismissed his appeal. What he wanted was for the age-old rule on jury secrecy enshrined in Section 649, to be declared unconstitutional. He wanted to adduce in his trial evidence about jury discussions in his earlier trial that had been declared a mistrial. It would be hard at the best of times to see an attack on jury secrecy as a development of human rights, but the obvious external coding of the case would indeed be that a Charter claim was overturned to defend a parliamentary statute. Unfortunately even such a reading would not complete the misdescription. The main reason the court upheld Section 649 was precisely that it did legislate the old common-law rule—the court is far more likely to refer to the common law to interpret the Charter than to change a common-law rule because it breaches a Charter right. The decision of the united court was given, incidentally, by the most recent female appointee, Louise Arbour, whose reputation for radical pro-Charter thinking is already well established.

A final aspect of the common-law inheritance may be important. Common lawyers do not like overturning precedent, but they are adept at "distinguishing" precedents. Inevitably the court has taken some wrong turnings in its decades, but they are all too recent for a court willingly to overturn. The twisting and turning involved in escaping from these wrong turnings without acknowledging that they were mistakes increases the image of a court much torn and very uncertain. This behaviour has been evident with the *Oakes* test for some time. There are regular further examples occurring as the court moves on. A prime example is on a humanitarian issue that has concerned several European countries. As long as the United States retains the death penalty, long an unthinkable punishment in the rest of liberal democracy, countries like Canada and those of Western Europe that have extradition treaties with the United States have a problem. The practice has grown up, and is indeed now required in Europe by the European Court of Human

⁸⁹L'Heureux-Dubé, "The Dissenting Opinion," 502.

⁹⁰*R v Pan*, 2 SCR 344 (2001) (Canadian Supreme Court).

Rights, of extraditing on capital offences only when guaranteed the death sentence will not be carried out. Yet when the Canadian minister of justice in 1991 ordered the extradition of someone facing the death penalty in California and refused to ask for this guarantee, the Supreme Court, by four to three, upheld his decision, ruling that it was not in breach of any Charter rights.⁹¹ (Justice L'Heureux-Dubé of "court party" fame was in the majority.) The decision was denounced and has long been seen as one of the court's less worthy actions. The issue never completely went away, and in 2001 the court heard a similar appeal in *United States v Burns*.⁹² This time the decision was a united one, and it was to hold that the extradition would be unconstitutional. But the two previous Supreme Court cases both decided in 1991, *Ng* and *Kindler*, were not overruled.⁹³ They were, in the language of the head note to *Burns*, "explained." That is, reasons were found to decide the new case directly opposite to the earlier ones, and still maintain the 1991 cases were good law. The early cases had insisted that the minister must "balance" a set of concerns to ensure fundamental justice, but that the default position would be for extradition, with the guarantee only being demanded in exceptional cases. Now the presumption is the other way around—only exceptional cases could dispense with the guarantee. The court's own conclusion serves best to state this shift:

The outcome of this appeal turns on an appreciation of the principles of fundamental justice, which in turn are derived from the basic tenets of our legal system. These basic tenets have not changed since 1991 when *Kindler* and *Ng* were decided, but their application in particular cases (the "balancing process") must take note of factual developments in Canada and in relevant foreign jurisdictions. When principles of fundamental justice as established and understood in Canada are applied to these factual developments, many of which are of far-reaching importance in death penalty cases, a balance which tilted in favour of extradition without assurances in *Kindler* and *Ng* now tilts against the constitutionality of such an outcome.⁹⁴

Burns was heard by a Supreme Court panel of eight justices and was unanimous, even though three of them had been in the majority in the 1991 cases. None of the arguments were really new in 2001, none of the facts of death penalties or of international public opinion had actually changed. This is the common-law mind at work—incremental development and the presentation of an apparently seamless web of precedents. Whether it is the best way to transform a parliamentary supremacy system into a constitutional system is perhaps not obvious. But there will be more occasions when early decisions, some of them really bedrock like *Dolphin Deliveries*, will come up for reconsideration, and Canadian constitutional law is likely to get even less predictable and even more tangled as long as common-law precedential thinking dominates.

⁹¹ *Reference re Ng Extradition (Can.)*, 2 SCR 858 (1991) (Canadian Supreme Court).

⁹² *United States v Burns*, 1 SCR 283 (2001) (Canadian Supreme Court).

⁹³ *Kindler v Canada (Minister of Justice)*, 2 SCR 779 (1991) (Canadian Supreme Court).

⁹⁴ *United States v Burns*, par. 144.

What Canada has already done for everyone's understanding of constitutional review is clear. It has begun to sketch a justification for constitutional review in liberal democracy. The arguments in the major reference cases, for example, and elsewhere, have been powerful statements that democracy is a multifaceted concept, some parts of which require something very much like a court, and an approach very much like a legal one. This argument will be picked up again in the final chapter.