THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

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I. POWER TO ENACT

A bill (or charter) of rights and freedoms must be indisputable as a law; the Canadian Charter of Rights and Freedoms[1] is not. The test question is simply whether the Parliament of the United Kingdom had authority to enact the Constitution Act, 1982[2] as a law for Canada; in other words, had that Parliament still the requisite imperial power to grant the request for the enactment of that Act?

The essence of imperialism is supreme legislative authority. In the British Empire, the British Parliament was supreme. As Lord Cranworth said in *Routledge v. Low*,[3] "it is certainly within the power of Parliament to make laws for every part of her [*sic*] Majesty's dominions. . . ."[4] Lord Hobhouse in *Callender, Sykes & Co. v. Colonial Secretary of Lagos*[5] said: "How far the Imperial Parliament should pass laws framed to operate directly in the Colonies is a question of policy, more or less delicate according to circumstances. No doubt has been suggested that if such laws are passed they must be held valid in Colonial Courts of Law."[6]

There is no doubt that the Canada constituted in 1867 was a British colony; hence legislative power granted to Parliament and the provincial legislatures was subordinate to the superior legislative power of the British Parliament. This status is illustrated by the case of *Regina v. College of Physicians and Surgeons of Ontario*.[7] An Ontario statute required an examination as a qualification to practise medicine, but it was held that a medical practitioner, registered in England under the Imperial Medical Act,[8] was entitled to practise in Ontario without examination. That Act declared that every person so registered was entitled to practise medicine and surgery "in any part of Her Majesty's Dominions".[9] In the Act as later amended, the expression "Dominions"

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[1] Constitution Act, 1982, Part I, *enacted by* Canada Act, 1982, U.K. 1982, c. 11.
[2] Canada Act, 1982, U.K. 1982, c. 11, schedule B.
[3] L.R. 3 H.L. 100 (1868).
[4] *Id.* at 113.
[5] [1891] A.C. 460 (P.C.) (Can.).
[6] *Id.* at 466.
[7] 44 U.C.Q.B. (N.S.) 564 (1879).
[8] 21 & 22 Vict., c. 90.
[9] S. 31.

included a colony and the term "colony" was defined to include "all of Her Majesty's possessions abroad in which there shall exist a Legislature . . . ".[10] Hagarty C.J. said:

> But it appears to us that the language of the Imperial Act . . is too clear for dispute. It declares pointedly and most distinctly that a person on its register shall be entitled to registration in any colony on payment of the fee (if any) required for such registration; and the definition of 'colony' clearly includes Canada.[11]

In the course of time, Canada shed its colonial status *de facto*. This change in status was recognized at the Imperial Conference of 1926 in what is known as the Balfour Declaration:

> They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.[12]

Formal legislative recognition of this new status was made by the Statute of Westminster, 1931 (hereafter called the Westminster Act).[13]

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[10] Medical Act, 31 & 32 Vict., c. 29, s. 2.

[11] *Supra* note 7, at 576.

[12] Imperial Conference, 1926, Summary of Proceedings, 12.

[13] 22 & 23 Geo. V, c. 4. The relevant provisions are ss. 2, 3, 4 and 7.

2. (1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

7. (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

By that Act, the Parliament of the United Kingdom (hereafter called the British Parliament) relinquished its imperial power over Canada. Subsection 2(1) wiped out The Colonial Laws Validity Act, 1865[14] with respect to the "Dominions" there defined, which included Canada. Subsection 2(2) abandoned any imperial power that might exist at common law; that subsection then went on to grant to the Dominion power to "repeal or amend" any "existing or future Act of the Parliament of the United Kingdom" or "any order, rule, or regulation made under such Act in so far as the same is part of the law of the Dominion".

As regards Canada, that power was by section 2 granted only to the Parliament of Canada, but it is bifurcated by subsection 7(2) and limited by subsection 7(3). Subsection 7(2) provides that the provisions of section 2 shall extend to laws made by any of the provinces of Canada and to the powers of the legislatures of the provinces. Subsection 7(3) restricts the powers granted to Parliament and to the legislatures "to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively"; that restriction excludes legislative powers, since they are not matters within the competence of Parliament or the legislatures of the provinces.

The surrender of imperial power made by the Westminster Act, however, was not complete. Subsection 7(1) states that nothing in that Act "shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder". That provision, of course, does not abrogate power to amend the British North America Acts under any authority apart from the Westminster Act. For example, the legislatures continue to have power to amend the "Constitution of the Province" under head 1 of section 92 of the British North America Act, 1867, and Parliament continues to have power to amend the "Constitution of Canada" under the authority of the British North America (No. 2) Act, 1949.

The result is that British imperial power is reserved only with respect to those provisions of the British North America Acts that are not now subject to repeal, amendment or alteration by any legislative authority or authorities in Canada.

There is section 4 of the Westminster Act, which provides that no Act of the British Parliament passed after the commencement of the Westminster Act "shall extend or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to the enactment thereof". Although that section was repealed by the Constitution Act, 1982, in so far as it was law in Canada, it was in full force when that Act was enacted.

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[14] 28 & 29 Vict., c. 63.

There is the question whether section 4 of the Westminster Act authorizes the enactment of a law only for a Dominion. It speaks of the *extension* to a Dominion of an Act of the British Parliament, which rather implies that there must be an independent law *for* the United Kingdom before it can be *extended*. Be that as it may, it is clear that section 4 cannot be construed as reserving full imperial power, for that would destroy section 2. It would not make sense to say that subsection 2(2) grants power to amend any British statute and then to say that that power is taken away by section 4 if the statute is requested and consented to by Canada. Obviously, any Act that is so *extended* would be subject to the repeal, amendment or alteration provisions of the Westminster Act itself. If, for example, the enactment by the British Parliament of a new law of wills had been "requested" and "consented to", a province could repeal or override it.[15]

The position of Canada is clear. If an Act of the British Parliament is a repeal, amendment or alteration of the British North America Acts, 1867 to 1930, it is a valid imperial law and, without more, untouchable by any legislative authority in Canada; if the Act does not fall within subsection 7(1), and purports to be a law for Canada alone, then, at worst it is not law in Canada, and, at best, it is subject to repeal, amendment or alteration by Parliament or the legislature of a province according as it is in relation to a matter within the competence of the Parliament of Canada or the legislatures of the provinces under the present distribution of powers.

The Constitution Act, 1982, consists of seven Parts. Part V prescribes the procedure for amending the British North America Acts (to be known henceforth as the Constitution of Canada) exclusively by legislative authorities in Canada. This Part falls within subsection 7(1) of the Westminster Act; it is an amendment of the British North America Acts within the meaning of that subsection, for it vests in legislative authorities in Canada a jurisdiction over those Acts that heretofore resided exclusively in the Parliament of the United Kingdom. Legislative power is not a matter within the competence of Parliament or the legislatures. Part VI of the Canada Act, 1982 also falls within subsection 7(1) of the Westminster Act; it is a textual amendment of the British North America Act, 1867 with respect to legislative power. Part VII is general and consequential.

Part IV of the Constitution Act, 1982 imposes on the Prime Minister of Canada a duty to convene a conference between himself and the first ministers of the provinces, requires that there be included in the agenda an item respecting the aboriginal peoples of Canada, and prescribes that elected representatives of the Yukon Territory and the Northwest Territories shall be invited to participate in the discussions on any item in the agenda that directly affects the Territories. This Part does not fall

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[15] Subs. 92(13) of the B.N.A. Act gives the provinces jurisdiction over "Property and Civil Rights in the Province", which includes wills.

within subsection 7(1) of the Westminster Act; it is not a repeal, amendment or alteration of the British North America Acts, 1867 to 1930. What authority has the British Parliament to command such a conference and to prescribe the agenda? The only possible argument to support the validity of Part IV is that it is authorized by section 4 of the Westminster Act. As indicated, it is doubtful whether this is an Act of the British Parliament that can be said to be *extended* to Canada within the meaning of section 4, but, if it is, it is not an imperial law and hence could be repealed, amended or altered by Parliament and the legislatures of the provinces.

Part III would impose a commitment on Parliament, the provincial legislatures and the federal and provincial governments to promote equal opportunities for the well-being of Canadians, to further economic development to reduce disparity in opportunities and to provide essential public services. These things are legislative and governmental policies. What power has the British Parliament to prescribe policies for Parliament, the legislatures and federal and provincial governments? And what happens if those bodies fail to implement the policies? Part III is clearly not an amendment, repeal or alteration of the British North America Acts, 1867 to 1930; therefore, either it is not law in Canada, or, if it is law by virtue of section 4 of the Westminster Act, then it also is subject to be repealed, amended or altered by Parliament and the provincial legislatures.

Part II, headed *Rights of the Aboriginal Peoples of Canada*, is in the same position as Parts III and IV. Part II provides, in section 35, that the "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Recognized and affirmed by whom? The "speaker" here is the British Parliament! Aside from that mystery, this Part, even if it is aimed at our Parliament, is not within the powers reserved to the British Parliament by the Westminster Act, for it does not purport to touch any of the provisions of the British North America Acts. Moreover, it is meaningless. What form is this recognition and affirmation to take? It would be just as meaningful to say that "existing high interest rates, unemployment and inflation are hereby recognized and affirmed."

There is also a minor drafting flaw in section 35. The section refers to "existing" rights, and no doubt it was thought that this meant rights existing when the provision was enacted. However, since the law is always speaking, "existing" in a statute means existing when the statute is read. A new right, arising, say, five years hence, would at that time be an *existing* right within the meaning of the provision.

Part I is headed *Canadian Charter of Rights and Freedoms*, and runs from section 1 to section 34. Continuing our journey from the end to the beginning, the first "rights" provision encountered is section 23, entitled "Minority Language Educational Rights"; it purports to grant to certain linguistic minorities "the right to have their children receive primary and secondary school education" in their minority language. This section is not and does not even purport to be an amendment of the

British North America Acts: it is a direction to provincial legislatures to exercise their legislative powers as regards education (which remain unchanged)[16] so as to achieve a prescribed result. Effect can be given to this "right" only by provincial legislation amending Education Acts and appropriating money out of provincial consolidated revenue funds. The British Parliament has no jurisdiction to demand that the provinces exercise their legislative powers to achieve a prescribed objective, or to spend provincial money. The power of the British Parliament is only to amend the education provisions in the British North America Acts; it does not have power to make other laws respecting education.

The next new "right" is found in section 20, which purports to grant the right to communicate with and to receive services in English or French from the government of Canada or the government of New Brunswick. This is not an amendment of any provisions of the British North America Acts. Section 133 of the British North America Act does deal with language, but only as respects the legislative bodies and courts of Quebec and federal Canada. A new provision granting new rights, or a new provision with respect to another province, is not an amendment of section 133. An "amendment" of an Act must mean a change in a provision that is there; if a new law of wills, intestate succession, highway traffic or steam boilers, for example, had been enacted, then, even if it were called an "amendment" of the British North America Act, 1867, such a law would not be an "amendment" within the meaning of the Westminster Act. The new laws proposed for Canada and New Brunswick leave the present provisions of the British North America Acts respecting language untouched.

Section 15, "Equality Rights", provides that every individual is equal before and under the law and has the right to equal protection and benefit of the law. What provisions of the British North America Acts does this amend?

Sections 7 to 14 come under the heading "Legal Rights". These rights are of two kinds: first, "abstract" rights; positive ones, for example section 7, "everyone has the right to life, liberty and security of the person"; and negative ones, for example section 9, "everyone has the right not to be arbitrarily detained or imprisoned." Secondly, there are specific rules: procedure in criminal matters (section 11) and evidence (sections 13 and 14).

The Bill of Rights in the Constitution of the United States of America also has these two kinds of provisions: direct limitations of sovereign power, such as "Congress shall make no law abridging the freedom of speech",[17] and specific laws that operate as a limitation of sovereign power, such as "[n]o person . . . shall be compelled in any

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[16] *See* B.N.A. Act, s. 93.

[17] U.S. CONST. amend. I.

criminal case to be a witness against himself. . . ."[18] Both of these kinds of provisions limit sovereign power.

Despite the superficial similarity, however, the provisions of the Canadian Charter prescribing specific rules do not operate in the same way as do similar provisions in the Constitution of the United States. Section 11 of the Charter is pure criminal law, a subject-matter within the jurisdiction of Parliament,[19] and hence it falls squarely within subsections 2(2) and 7(3) of the Westminster Act, which are left untouched by the Canada Act, 1982;[20] therefore Parliament alone has power to repeal, amend or override them.

Sections 13 and 14 of the Charter are pure evidence laws. Parliament has jurisdiction over evidence in criminal matters[21] and the legislatures of the provinces have jurisdiction in civil matters.[22] These sections, therefore, also fall within subsections 2(2) and 7(3) of the Westminster Act.

The "abstract" rights and freedoms provisions, such as sections 2, 7 and 9, when coupled with section 52, would operate as a restriction on legislative power, in the same way as do the prohibitions in the Constitution of the United States. Section 52 provides that any law that is inconsistent with the provisions of the Charter is, to the extent of the inconsistency, of no force or effect. The difficulty, however, is that these provisions (sections 2, 7 to 10 and 12) are not directed solely to Parliament and the legislatures. They are universal and are directed to individuals as well. They are therefore ordinary criminal and civil laws designed to regulate the conduct of individuals among themselves, and as such are not amendments to the British North America Acts; they are therefore beyond the jurisdiction of the British Parliament to enact as laws for Canada.

Section 6 purports to confer mobility rights. The British Parliament clearly does not have the right or power to direct where Canadians can move or work in Canada. That provision has nothing to do with the British North America Acts.

Section 3 purports to confer on every citizen of Canada the right to vote. This is an election law within the legislative competence of Parliament and the legislatures. It is not an amendment of the British North America Acts. Hence it is not law in Canada, or, if it is, then it is subject to repeal or amendment by Parliament and the legislatures.

There is subsection 52(3), which provides that an amendment of the Charter of Rights and Freedoms may be made only in accordance with the new amending formula, but if any of the provisions of the Charter fall within subsections 2(2) and 7(2) of the Westminster Act, then subsection

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[18] U.S. CONST. amend. V.
[19] B.N.A. Act, subs. 91(27).
[20] U.K. 1982, c. 11.
[21] B.N.A. Act, subs. 91(27).
[22] B.N.A. Act, subs. 92(14).

52(3) also falls within those subsections in regard to such provisions. Also, if that provision is operative, there would in effect be added to subsection 2(2) of the Westminster Act the words "unless such future Act otherwise provides", thus destroying it as of the time of its enactment. In any case, subsection 2(2) of the Westminster Act is an abdication of imperial power, and the British Parliament cannot now take it back and impose restrictions or conditions on the exercise of the jurisdiction it relinquished in 1931.[23]

Section 28 is a queer provision. It provides that the rights and freedoms referred to in the Charter "are guaranteed equally to male and female persons". Whatever the word "guarantee" may mean, it is obvious that the provisions of the Charter are directed equally to male and female persons. The expressions "everyone", "every citizen", "any person", "every individual", and "any member of the public" as a mere matter of language include male and female persons. This section means and accomplishes nothing. No doubt its origin and the euphoria with which its re-insertion in the Charter was greeted are due to the constant distortion and misrepresentation of the Privy Council's decision in *Edwards v. Attorney General of Canada*,[24] sometimes known as the "Persons" case.

Another meaningless provision is section 27, which provides that the Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

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[23] *See* Driedger, *Statute of Westminster and Constitutional Amendments*, 11 CAN. B.J. 348 (1968), for a discussion of the problems involved in making constitutional amendments in the face of the Statute of Westminster, 1931.

[24] [1930] A.C. 124. It is constantly represented that before this decision women were not persons under the law, and only since this decision did they become so. This is false. This case decided only that women were persons qualified to be summoned to the Senate. Prior to the decision, and since time immemorial, women were "persons". They could own and dispose of property; they could enter into contracts; they could sue and be sued for any cause of action. Married women did have some legal disabilities but those were removed in Canada long before the *Edwards* case by Married Women's Property Acts. At common law women were disqualified from holding public office, but at the time of the *Edwards* case that disqualification no longer applied in Canada, if ever it did. The British North America Act, 1867, however, was a British statute and the question in the *Edwards* case was simply whether that common law rule applied to that Act. The Privy Council held that it did not. But that is a far cry from the bald assertion that the decision for the first time declared women to be legal persons for any purpose. Following that "logic" it would be equally sound to say that judges are not persons, because they are not qualified to vote; that lawyers are not persons, because they are not qualified to act as jurors; that non-lawyers are not persons because they are not qualified to be appointed to the bench; in short, no person is a person.

II. THE EFFECT

Now that the Canada Act, 1982[25] has become "law" in Canada, the question arises: what is its effect?

The fundamental purpose of a bill of rights is to impose restrictions on sovereign power. That was the purpose of the instrument originally called the Bill of Rights in England in 1688.[26] Such is the purpose and effect of the Bill of Rights embodied in the Constitution of the United States of America. The Bill of Rights there is designed to protect the individual against the power of the state; it is not designed to protect individuals against other individuals. Thus, it provides that Congress should make no law abridging freedom of speech;[27] any statute that purports to do so would be declared *ultra vires* by the courts. Limitation of the power of Congress takes another form; no person shall be subject in any criminal case to be a witness against himself.[28] That is an immutable law and any statute that purports to change it would again be declared *ultra vires*. These provisions in the Constitution of the United States are directly enforceable by the courts and require no intervening legislation to make them effective.

The rights and freedoms enumerated in the Canadian Charter of Rights and Freedoms bear a superficial resemblance to the form of the United States Bill of Rights, but there is a vast difference in theory. As has been mentioned, these rights and freedoms are expressed as being universal and as being applicable not only to legislative bodies but to individuals as well.

The provisions of the Charter may be divided into six categories:

1. Freedoms (*e.g.*, paragraph 2(*c*), everyone has the freedom of peaceful assembly);
2. Rights, both "positive" (*e.g.*, section 8, [e]veryone has the right to be secure against unreasonable search or seizure), and "negative" (*e.g.*, section 9, [e]veryone has the right not to be arbitrarily detained or imprisoned);
3. Legal rules (*e.g.*, paragraph 11(*d*), any person charged with an offence has the right to be presumed innocent until proven guilty);
4. Policy objectives (*e.g.*, section 23, the right to minority language education); and
5. Meaningless provisions (*e.g.*, sections 27 and 28).

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[25] U.K. 1982, c. 11.
[26] 1 Wm. & M., sess. 2, c. 2.
[27] U.S. CONST. amend. I.
[28] U.S. CONST. amend. V.

1. *Freedoms*

The fundamental freedoms have simply been copied from the International Covenant on Civil and Political Rights[29] or the draft Universal Declaration of Human Rights.[30] As there expressed, they are intended as objectives, as standards of achievement; they are not intended to operate as laws in themselves. These objectives are not achieved simply by re-stating them; it is contemplated that the signatory states will take such steps as may be necessary, by legislating or refraining from legislating, to achieve these objectives. In Canada our laws now are in harmony with the objectives. In the United States, Congress is prohibited from abridging freedom of association;[31] that provision grants the freedom, and no further laws are required to give it. Although the statement in the Charter that "everyone has freedom of peaceful assembly and freedom of association", when coupled with section 52, would give freedom from governmental action, it does not effectively give individuals these freedoms against other individuals; a mass of criminal and civil laws on subjects such as assault, false imprisonment, false arrest, conspiracy, trespass, *etc.*, would be required to do that.

There is section 24, which would give to anyone whose rights or freedoms have been infringed or denied the right to apply to a court for a remedy. But that provision is not an adequate or suitable substitute for all the laws that are necessary to protect these freedoms of individuals against infringement by other individuals. There is, for example, no authority to impose penalties, since none are expressly authorized. These freedoms now exist in federal and provincial laws and anyone whose freedoms have been infringed would probably seek his remedy under those laws rather than the Charter. Also, giving a remedy in the Charter raises the question whether *expressio unius est exclusio alterius*; does the new remedy in section 24 abrogate the remedies that now exist in provincial and federal laws to protect freedoms?

The Canadian Bill of Rights[32] is effective without the intervention of further legislation. It provides, for example, that no law of Canada shall be construed or applied so as to authorize or effect the arbitrary detention, imprisonment or exile of any person.[33] Nothing more is required to protect individuals against state power, and it does not purport to protect individuals against other individuals. It is totally different to say that everyone has the right not to be arbitrarily detained

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[29] Adopted and opened for signature, ratification and accession by United Nations' General Assembly resolution 2200 A (XXI) of 16 Dec. 1966. Entry into force, 23 Mar. 1976, in accordance with art. 49.

[30] Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 Dec 1948.

[31] U.S. CONST. amend. I.

[32] R.S.C. 1970, App. III.

[33] Para. 2(*a*).

or imprisoned. That applies between individuals, and further laws are needed to give effect to that right; and if those laws are not forthcoming, there is no remedy — and "no remedy no right".

2. *Rights*

Section 3 of the Charter purports to confer on "every citizen of Canada" the right to vote in an election of members of the House of Commons or of a legislative assembly. That statement would be good enough in an international agreement to indicate an objective, but it will not do as a law. Have infants the right to vote? Have the residents of one province the right to vote in a provincial election in another province? Can a citizen of Canada vote anywhere in Canada? An elaborate Elections Act is required to give effect to this "right". Since judges now do not have the right to vote, is the Canada Elections Act[34] in violation of the Charter?

Legislation would be required to give effect to positive rights. Thus, effect cannot be given to the right to life, liberty and security of person, or the right to security against unreasonable search or seizure, except by elaborate civil and criminal laws. If these laws do not exist, there is no way that Parliament or the legislatures of the provinces can be compelled to enact them; and, as indicated, section 24 is not suitable or adequate to give effect to these rights.

Legislation would also be required to give effect to negative rights, such as the right not to be arbitrarily detained or imprisoned. In the case of positive rights, a violation by a legislative body would be nullified by section 52, but in the case of negative rights a "violation" could be a failure to legislate; there would in that case be nothing to nullify, and the courts cannot legislate to give effect to these rights or compel Parliament and the legislatures of the provinces to do so.

3. *Legal Rules*

Section 11 sets out rules of the criminal law, many of which are now contained in the Criminal Code.[35] This form is adequate in the United States to restrict the power of Congress, but there is there no Act, such as the Westminster Act, that authorizes Congress to "repeal or amend" a rule of law in the Constitution.

4. *Policy Objectives*

Section 23, "Minority Language Educational Rights", expresses a policy objective that requires legislation for its implementation. This

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[34] R.S.C. 1970 (1st Supp.), c. 14, para. 14(4)(*d*).
[35] R.S.C. 1970, c. C-34.

section cannot be given effect unless a province amends its Education Act and appropriates money. Here there is no remedy under section 24, for a court cannot legislate or order a legislature to legislate or appropriate money. If a province neglects or refuses to carry out section 23 by appropriate legislation the "right" disappears. The application of section 52 could lead to ridiculous results. Suppose that in a province there is a statute saying that instruction shall be given in English only. That statute would be inconsistent with section 23 and therefore of no force or effect. The result would be that school boards throughout the province would be free to provide instruction in any language other than English or French.

III. CONCLUSION

The Charter is not indisputable. The courts could hold that the British Parliament was not competent to enact it as a law for Canada. In any event, the courts could hold that even if the Charter is law in Canada it is not a constitutionally entrenched law.[36] And if it is merely an unentrenched law many of its provisions are meaningless, ineffective or unworkable.

It seems to be generally thought that the Supreme Court of Canada has held that the Charter is "legal". Not so. The question that was answered, in the words of the majority of the Court, was "whether the two federal Houses may alone initiate and carry through the process to invoke the competence of the United Kingdom Parliament".[37] The question whether that Parliament was "competent" is still open.

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[36] The constitutional discussions that have gone on for almost two years have been obfuscated by confusion and misunderstanding.

The intended result of the Canada Act, 1982 is simply that Britain will transfer to Canada its residual imperial power over our Constitution and will renounce the jurisdiction reserved to it under the Westminster Act. That is precisely what was provided for in the amending formulae that emerged from the 1961 and 1964 conferences and the one that was presented to the Victoria Conference in 1971; those formulae were not new Constitutions. The Charter of Rights and Freedoms is not a new Constitution; it is intended to be an addition to the collection of British statutes forming part of our Constitution, which are expressly continued in force by s. 60 of the Constitution Act, 1982.

The word "patriate" has been freely used, but never explained. If the amending formula is not "patriation", then all it can mean is the renunciation of jurisdiction. But if Britain simply renounces jurisdiction, that jurisdiction disappears and does not come to Canada. Renunciation is an essential element of an amending formula, and there cannot be "patriation" separate and apart from the amending formula.

The Canada Act, 1982 does not bring the Constitution "home" any more than it was "home" before. If a statute can have a residence then it must be the enacting jurisdiction. Hence, the "home" of all the British statutes that will continue in force in Canada will continue to be Britain.

[37] Reference *re* Amendment of the Constitution of Canada (Nos. 1, 2 and 3), [1981] 1 S.C.R. 753, at 798-99, 125 D.L.R. (3d) 1, at 41.

Moreover, the Supreme Court of Canada expressly disclaimed passing judgment on the proposed Canada Act. It said: "Nothing said in these reasons is to be construed as either favouring or disapproving the proposed amending formula or the *Charter of Rights and Freedoms* or any of the other provisions of which enactment is sought. The questions put to this Court do not ask for its approval or disapproval of the contents of the so-called 'package'."[38]

The Canada Act, 1982 is founded on a fallacy and a misconception. The fallacy is the assumption that the British Parliament still had jurisdiction to enact as a constitutional law for Canada any law on any subject. The misconception is that the purpose of a bill or charter of rights and freedoms is to define the rights and obligations of individuals as against other individuals. In addition, the Canada Act, 1982 has provisions in it that can only be described as statements of governmental policy rather than law (section 37 — constitutional conferences; section 36 — equalization and regional disparities; section 23 — language instruction; section 20 — government services); these might be appropriate as planks in the platforms of political parties, but they have no place in a constitution. Finally, there are the meaningless provisions — section 27, multicultural heritage; section 28, equality of sexes; and section 35, aboriginal rights.

It is unfortunate that the provinces that went to court over the constitutional proposals did not ask for an opinion on the most vital and fundamental question: to what extent would the "package" be law in Canada? A constitution and a charter of rights are too important to be left in a doubtful state. That question can still be raised, either on a reference or in litigation. If an amending formula only had been requested, then an unimpeachable charter of rights could be enacted pursuant to that formula.[39] It may come to that yet. So much is clear — our constitutional problems are far from settled. There remains the question: how does the Canada Act, 1982, overcome the repeal authority in sections 2 and 7 of the Westminster Act?

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[38] *Id.* at 808. 125 D.L.R. (3d) at 48.

[39] The writer has previously expressed the opinion that an entrenched bill of rights can be enacted for Canada only by getting an amending formula first and then enacting a bill of rights ourselves pursuant to that formula: *see supra* note 23; *The Canadian Bill of Rights*, in CONTEMPORARY PROBLEMS OF PUBLIC LAW IN CANADA 31 (O. Lang ed. 1968); and *The Meaning and Effect of the Canadian Bill of Rights: A Draftsman's Viewpoint*, 9 OTTAWA L. REV. 303 (1977). The writer has not yet seen a rebuttal.