Don’t Blame the Judges
Roger Kerans, Globe and Mail
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Mr Stockwell Day, a newly announced candidate for the leadership of a gestating political party, last week opened his candidacy with a call for Canada to limit the scope of the Canadian Charter of Rights and Freedoms because it impedes the traditional liberties of Parliament and legislature.

Mr Day went out of his way to avoid blaming judges for his present dissatisfaction, saying they are merely doing the job set for them. I congratulate him for that. Canadian judges did not seek the Charter. On the contrary, Canadians thrust it upon them. The Charter undeniably makes judges the referees between Government and the people. Like any good umpire, the judges call 'em the way they see 'em, and then stand quietly while the crowd roars its disapproval with choice epithets. These days, suggesting that a judge may be merely blind is mild. Critics also refer disparagingly to age, gender, and state of mind, to mention a few.

Activist is the epithet that most confuses me. Would the critics prefer judges to be inactive? I have never quite understood why some Canadians complain when judges do the job Canadians ask them to do. Is it so rare these days to see public officers actually doing their jobs that people are shocked at the sight? It is true, I admit it, that judges are guilty of making decisions, guilty of facing issues squarely and honestly, and guilty of not sending problems off for study to committees, or Royal Commissions.

Most uses of the "activist" epithet are shorthand for dislike of the decision. That dislike should not surprise judges. It goes with the territory, like having people complain that we overpay them in their cushy jobs. Almost by definition, Charter decisions will be unpopular. This is because the Charter offers to individuals trump-cards against the popular will. In other words, the Charter is most likely to be invoked by those Canadians who - momentarily at least - are unpopular. Judges who apply the Charter to protect the unpopular can expect to be bashed - along with gays, criminal defendants, accused pornographers, and those who come into this country illegally.

This unhappiness is sometimes difficult to understand. The Charter, after all, expresses values most Canadians treasure. Ideas, for example, like fairness and equality. We would be shocked if the Charter failed, for example, to protect women who are pregnant from losing sickness benefits just because they are pregnant. So why do other cases cause such controversy? My theory is that people forget about these values sometimes, particularly when excited or outraged by more novel claims. But judges cannot forget, and must face the demands of the Charter in ways Canadians need not. And they know they must be consistent in their approach.

Consistency seems elementary to the Canadian notion of fairness. If there is a statute, the ruling must comply with the statute. If there is a rule, judges should follow it. The demands of consistency prevent the judge from applying his or her own sense of the rightness and wrongness of things. Judges must instead tie legal decisions to values that seemed to have gained wide acceptance. They do that largely by testing the proposed rule against other legal rules, which clearly have gained social acceptance, and finding the best fit. Finding the best fit is principled consistency. The Charter cannot, for example, protect Roman Catholics but not Sikhs.

Take the Vriend case as an example of the need for consistency. Vriend was a teacher fired simply because he was gay, not because of anything he did. One task of the thirteen judges who dealt with that case was to decide if a homosexual has, in the Charter offers to individuals trump-cards against the popular will. In other words, the Charter is most likely to be invoked by those Canadians who - momentarily at least - are unpopular. Judges who apply the Charter to protect the unpopular can expect to be bashed - along with gays, criminal defendants, accused pornographers, and those who come into this country illegally.

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is roughly twenty years since its arrival on the scene. And, no doubt about it, some Canadians lament the Charter. These Canadians see in the development of Charter law the death knell of democracy. In a democracy the majority rules, and entrenched rights give some a privileged status. Worse, they permit an unelected elite, judges, to define the scope of the privilege. This raises the real danger of new forms of intolerance by newly privileged groups. It is a contradiction of democracy for judges to challenge the majority will.

This position of course is nothing more nor less than the British tradition. We prized liberty before the Charter became law, but we had a different "culture of liberty". That culture - modelled on the British - accepted a free Parliament as the institutional means to protect individual liberty. Peter Jenkins wrote,

The British "cultures of liberty" is essentially parliamentarian. Most of the great battles for liberty were fought by Parliament for Parliament. . . On the traditional view Parliament is the guarantor of liberty; liberty is not the guarantor of parliamentary government.

By this tradition, Parliament respects individual liberty essentially by restraint, by not legislating against an unpopular minority. This tradition remains. Although the new Labour Government in Britain has adopted a Bill of Rights, it has refused to give to British judges the power Canadian judges hold under our Charter to strike down legislation.

Most lamenters have never accepted the wisdom or need for the Charter. Each new decision is another occasion for despair and indignation.

Lamenters will be required to debate with those Canadians who find the Charter profoundly stirring. To them it is a clarion call, not a cause for lament. Their insight is that injustice is usually a function of the fact that we all have difficulty tolerating those who seem inextricably and even frighteningly different from the rest of us. In the past, Canadian society denied citizenship to Chinese-Canadians, transplanted Japanese-Canadians, fenced off aboriginal Canadians, and harassed religious minorities like the Jehovah Witnesses. And all this despite the fact that the most of us most of the time firmly believe in tolerance, the idea that we can be different from others, even disagree with them in a profound way, and yet can leave them alone. (A notion zealots of every stripe tend to choke on.). To Canadians with this insight, the placing of human rights beyond the reach of Parliament, in a Constitution, recognizes the past failures of our tradition for tolerance and accepts the risk we may again some day forget ourselves.

There is the stuff for a great debate between these two positions. But, please folks, be fair to the judges. Leave them out of it.

Questions:
1. Explain the importance of consistency when judges make decisions.


3. Explain how the Supreme Court came to their ruling in the Vriend case.

4. Why do some Canadians lament the Charter?

5. a) Define tolerance.

   b) Do we live in a tolerant society? Have we always been tolerant? Explain.

6. How does placing human rights in the Constitution prevent future rights abuses?