Twenty Years of the Charter and Criminal Justice

April 2002 marks the twentieth anniversary of the Charter. This anniversary is of special significance to those of us who are interested in criminal justice and deserves to be celebrated. The vast majority of Charter cases arise in the criminal justice system and the Charter has had a profound and generally salutary effect on the Canadian criminal justice system. At the risk of spoiling the party, however, some reservations must also be expressed.

First, the successes. The Charter has added more discipline to the use of police powers. We have gone from writs of assistance, open-ended consent intercepts and warrantless entries into homes to arrest to the present regime of many specialized search warrants and carefully controlled powers of warrantless searches. The Court has looked to the Charter to restrict common law powers of search incident to arrest so that they do not include the gathering of bodily substances for DNA testing or routine strip searches. The right to counsel has been taken seriously so that detainees must be informed of legal aid (and in most provinces 1-800 numbers). Not without controversy, almost any violation of Canada’s more robust version of Miranda will result in the exclusion of the fruits of unfair self-incrimination.

The trial process has also been disciplined by decisions such as Askov, imposing speedy trial requirements, and most importantly Stinchcombe, placing broad and early obligations on the Crown to disclose evidence. Here, as in many other areas of Charter jurisprudence, the Court has compensated for Parliamentary neglect and inertia on key law reform proposals such as the recommendations by the Royal Commission into the wrongful conviction of Donald Marshall that Crown disclosure was an urgently needed measure. The Court has also recognized that the unfortunate reality of wrongful convictions makes it unconstitutional in almost all cases to extradite fugitives to face the death penalty. The Charter has placed the decisions of prosecutors, trial judges and even defence counsel under needed critical scrutiny.
The substantive criminal law has also been improved by the Charter. The Supreme Court has removed draconian constructive murder and vagrancy provisions from the *Criminal Code*. It is doubtful that a Minister of Justice would have risked undertaking reforms that could have appeared soft on gun-toting robbers or convicted sexual offenders. The criminal law is also no longer used to enforce the unfair decisions of therapeutic abortion committees, and absolute liability offences can no longer result in imprisonment. Some unprincipled restrictions on the intoxication and duress defences have been removed by the Charter.

These successes deserve to be celebrated, but some problems remain. The Charter has placed increased emphasis on search warrants, but the available evidence suggests that sloppy search warrant practices continue. It is unclear whether the serious violation arm of the s. 24(2) exclusionary rule is up to the task of ensuring that the administration of justice is protected from negligent warrant practices. Legitimate and praiseworthy Charter-based concerns about ensuring fair trials have unfortunately tended to eclipse concerns about responding to abuses of state power that do not threaten the fairness of trials. The Charter may result in the appointment of counsel when absolutely necessary to ensure a fair trial in an individual case, but it has not guaranteed adequate levels of legal aid funding.

The promise of s. 9 of the Charter in protecting people against arbitrary detentions remains largely unrealized. The Supreme Court has approved random traffic stops and has not yet taken a stand on the controversial area of profiling. It has also not used the Charter to require affordable technology such as toll free legal aid numbers or the recording of interrogations. The presumption of innocence has too often been honoured in its breach and the guarantee against cruel and unusual punishment under s. 12 of the Charter has not impeded the disturbing increase in the number of mandatory minimum sentences. It should also not be forgotten that Canada’s use of imprisonment has increased for most of the Charter’s 20 years. The Charter is no guarantee of enlightened criminal justice policy.

Problems also remain in the administration of the Charter. The standard of justification under s. 1 of the Charter is becoming more difficult to gauge in the criminal law. Gone are the days when a strict *Oakes* scrutiny could be anticipated in criminal law cases. The Court’s limited incursions into substantive criminal law have been based on the problematic and often circular concept of stigma.

In several cases, the Court has retreated to the idea that the Charter does not guarantee the ideal or criminal law theory or wise penological policy. Such trimming of the Charter’s sails is in part related to the near impossibility of allowing the legislature under s. 1 to justify violations of either ss. 7 or 12 of the Charter. Judges who interpret ss. 7 or 12 in a generous manner may be legitimately concerned that there is no room for a legislative response. Trimming of the Charter has sometimes had the unfortunate result of diminishing concern and respect for traditional common law principles of the criminal law, including the importance of subjective fault tied to the commission of the criminal act.
The political analogue to this sail-trimming process has been an increased fixation on whether legislation or practices are "Charter-proof" and not whether they are wise, restrained and effective uses of the criminal law.

Cynical derision of the Charter is not appropriate, and the overall impact of the Charter on the criminal justice system over the last 20 years has been both needed and healthy. Nevertheless, some skepticism about the Charter is necessary to keep alive a sense of justice independent from its minimum standards.

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