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RIGHTS AND FREEDOMS AFTER MEECH

SOME DRAWBACKS OF THE POLITICS OF CONSTITUTIONAL RIGHTS

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In my view, Meech Lake showed that the politics of constitutional rights has some serious drawbacks, drawbacks that we would be well advised to keep in mind from now on. In saying that the politics of constitutional rights have some serious drawbacks, I am acknowledging implicitly that such politics have some important merits as well. And I believe that quite strongly. However, in this brief commentary, I choose to err on the side of incaution, intemperance, and one-sidedness.

As Alan Cairns has pointed out so perceptively, the events culminating in the passage of the *Constitution Act, 1982*, involved a major (albeit incomplete) transformation of Canadian constitutional politics.¹ Prior to those events, constitutional politics was politics among governments, focused almost exclusively on the distribution of powers between provincial governments and the federal government. In Cairns's phrase, the constitution was "the governments' constitution." But in 1982, partly because of the intense political activity of numerous groups — especially but not exclusively women's groups, aboriginal groups, and groups of so-called "third force" Canadians — the governments' constitution was supplemented by a "citizens' constitution." Instead of seeing the populace simply as residents of various political jurisdictions, the *Charter of Rights and Freedoms* not only entrenched a number of traditional individual rights but also recognized a number of collectivities, defined by — for example — gender, ethnicity, and language. As Cairns remarks, "the *Charter* redefined the citizenry as bearers of rights."

Of course the *Constitution Act, 1982* did not involve the *supplanting* of the governments' constitution by the citizens' constitution. The move towards populism involved in recognizing citizens' rights was counterbalanced by a thoroughly elitist amending formula, which was to be a major factor in the Meech Lake hostilities.

Almost the whole of the Meech Lake process and, of course, the Accord itself, turned its back on the citizens' constitution. Few objected to the stated central objective of the Accord — "to bring Québec back into the Canadian family" — but many objected to the return to the governments' constitution. The deal was cut by governments;

it was conducted in a highly secretive manner; and, to add insult to insult, it was presented in a take it or leave it fashion; no significant changes would be entertained. Moreover, the substance of the Accord reflected a return to the agenda of pre-1982 constitutional politics: the distribution of powers between the federal and provincial governments.

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Not surprisingly, plenty of citizens — especially those who had achieved major substantive and/or symbolic gains in 1982 — were more than a little ticked off by the whole business. They were ticked off for one reason above all others — that they did not get in the Meech Lake Accord what they got in 1982: a recognition of their status, signified in particular by a reaffirmation of their rights. Why did they want their rights re-affirmed? Because constitutionally stated rights are the be-all and end-all in the politics of constitutional rights. The inscription of one's rights — the more often the better — in the constitutional document is the indispensable sign that one is taken seriously. Even if one's rights are not *violated*, it is still an unacceptable affront to one's dignity if they are not *publically re-acknowledged* at every reasonable opportunity.

What's wrong with the politics of constitutional rights? I concentrate here on three drawbacks of such politics. Earlier I quoted Cairns as remarking that "the *Charter* redefined the citizenry as bearers of rights." There is, of course, nothing wrong with being recognized, or even defined *in part*, as a rights-bearer. But there is plenty wrong with being defined *exclusively* as a rights-bearer. This narrow, legalistic understanding may be good enough for General Motors, but it isn't good enough for real people. Real people are not concerned merely with the protections afforded by legal rights. They seek goals — they strive to achieve

aspirations and struggle to achieve ideals. So one drawback of the politics of constitutional rights is that it encourages us to accept an emaciated, juridical conception of ourselves.

A second drawback of the politics of constitutional rights is that such politics are inimical to important political practices such as negotiation, persuasion, bargaining and compromise. Rights are "things" which, like a sports car or pneumonia, people either have or lack. They are not things, "like speed afoot or sensitivity to the feelings of others", that people possess in greater or lesser degree. As a result, disputes about rights tend to become very intransigent, and inhospitable to reasoned argument. I claim that homosexuals should have constitutionally-entrenched equality rights; you deny it. Where do we go from here? Into a shouting match? From a rights perspective, crucial questions tend not to get asked, let alone answered, much less answered in a way that appeals to rational argument and pertinent evidence rather than sheer assertion.

Finally, the politics of constitutional rights exacts a price which is, except in rare cases, not worth the gain. Political actors have only so much time, skill, effort, and money to

spend. Every expenditure of resources on securing recognition of rights leaves fewer resources for the pursuit of substantive objectives in the rough-and-tumble forum of democratic politics. Important objectives like day care programs, Native self-government, and a guaranteed annual income, are not going to be achieved through the politics of constitutional rights. They will be achieved, if at all, only by sustained, intelligent political participation.

Our polity is often described as a liberal democracy. If I were to summarize my view of the politics of constitutional rights, exhibited at its worst in the Meech Lake process, I would say that it is preoccupied with the liberalism and largely unconcerned with the democracy. And that is precisely the central drawback of the politics of constitutional rights.

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1. (1988) 14 *Canadian Public Policy* 121.

WOMEN IN THE AFTERMATH OF MEECH LAKE

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As we look ahead to the future of Canada in the wake of the Meech Lake Accord's collapse, my concern grows as we witness the accelerating disintegration of longstanding institutions and accommodations. I was one of the Accord's early critics, yet I am a lifelong Canadian nationalist; this country's survival in one form or another matters a great deal to me. I did not want to see the Accord die, since its basic purpose was so manifestly right and necessary. Yet along with many others active in women's organizations in Anglophone Canada, I was deeply disturbed by the manner of its introduction to the Canadian people: a deal done behind closed doors by the self-styled modern day Fathers of Confederation — eleven able-bodied white men who had apparently learned nothing from the constitutional debates of 1980-82. For Canada's excluded majority — women, native people, the disabled, visible minorities, the poor — this deal exposed with humiliating clarity our marginality and irrelevance in the Canadian political system. The Accord's defeat at the hands of this popular resistance was not, in the short term at least, a victory for Canada. Far better that our

political leaders had recognized early on what was behind this widespread restiveness, and found mechanisms that would have at one and the same time addressed the critics' substantive concerns, and also confirmed that the people have a vital stake in our constitutional arrangements. Sheer boneheaded arrogance prevented this, and so supporters and critics alike have to hope that despite the acrimony of the debate, the seeds for the regeneration, if not the transformation, of our national political community lie in the new voices that united with Elijah Harper to say "no" to Meech.

During the 1980-82 exercise, virtually every branch of Canada's multifaceted women's movement underwent a crash course in constitutional law and the intricacies of federal politics. Led by groups such as the Ad Hoc Committee on the Constitution, the National Action Committee on the Status of Women, the Canadian Advisory Council on the Status of Women, and the National Association of Women and the Law, women entered