Israel Law Review **49**(1) 2016, pp 67–102. © Cambridge University Press and The Faculty of Law, The Hebrew University of Jerusalem, 2016.
doi:10.1017/S0021223716000017

The Canadian Charter's Override Clause: Lessons for Israel[†]

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This article considers the role of legislative override clauses in the Canadian and Israeli rights-protecting systems, which share many institutional features. After providing a detailed account of the adoption of the override clause in the Canadian Charter of Rights and Freedoms, as a compromise between legislative supremacy and final judicial review, the article analyses the distinctive and unexpected political dynamics generated by this compromise, including its effect on the exercise of public power and elections. Although adopted to appease political leaders who opposed the Charter on substantive and institutional grounds, the legislative override has to date worked to legitimate judicial review and bring Canada further into the model of the modern constitutional state. The article then considers the lessons that Israel might learn from this analysis in the light of proposals to adopt an override clause to apply to a wider range of fundamental rights and to operate against Supreme Court judgments.

Keywords: rights, override, notwithstanding clause, modern constitutional state, Canada, Israel, judicial review, limitation clauses, proportionality

1. Introduction

In the aftermath of the Second World War, a new model of the liberal democratic state emerged. Its central feature is the state's pre-eminent duty to respect and protect fundamental rights and freedoms. This article focuses on the way in which one particular feature of the rights-protecting systems of Canada and Israel measures up to this aspiration. That feature is a temporary legislative override applicable to selected guaranteed rights and freedoms, authorised by the invocation of an override clause contained in the rights-protecting instruments of both countries.

A comparison of these clauses is of interest for a number of reasons which go beyond the fact that Canada and Israel have both intensified their commitment to this model in recent years. This commitment has been grafted onto the distinctive modes of governance in these two countries, based primarily on the Westminster model of parliamentary supremacy and the common law, with the addition of a strong civilian influence. Both systems also have a mix of formalised and informal constitutional content, which has precipitated an incremental process of constitutional development. They also have strong commitment to individual rights as well as to the community. In addition, the drafters of the two Israeli rights-protecting Basic Laws, adopted in 1992, adapted important features of the Canadian Charter of Rights and Freedoms, adopted in 1982.[1]

[†] This article is part of a symposium collection of contributions relating to the constitutional override clauses in Israeli and Canadian constitutional law. The other articles in this issue making up this symposium are Adam Dodek, 'The Canadian Override', and Rivka Weill, 'Juxtaposing Constitution-Making and Constitutional-Infringement Mechanisms in Israel and Canada'.

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[1] Constitution Act 1982 (UK), Sch B to the Canada Act 1982 (UK). The authority to amend Canada's written constitution remained under the authority of the UK Parliament pending Canada's adoption of a domestic

The Canadian override is the product of formal constitutional amendment to Canada's written Constitution, and has the status of supreme law. It provided the decisive compromise necessary to secure agreement to the adoption of the Canadian Charter as part of the most extensive package of constitutional reform in Canadian history.[2]

The negotiations that culminated in this package of amendments were prolonged, intense and acrimonious. On the domestic political front, they divided political parties on institutional and substantive questions, exacerbated tensions between some provinces, and between some provinces and the federal government, intensified Anglophone and Francophone confrontations, and, in the final stage, isolated the Francophone province of Quebec. More broadly, they unsettled the Canadian government's relations with the executive and Parliament of the United Kingdom (UK), raising the possibility of a unilateral declaration of independence by Canada to sever the last colonial tie. They also set in motion the informal transition of the Supreme Court of Canada, which had adhered to legislative supremacy at the expense of claims to fundamental rights and their underlying norms, into a strong guardian of Charter guarantees. By extension, the Supreme Court of Canada has also undertaken a role more often associated with that of a constitutional court: the guardian of the Canadian constitutional order as a whole so as to ensure its increasing adherence to the model of the modern constitutional state.

The most profound transformation that the constitutional negotiations ushered in was the alteration of the relationship between Canadians, as individuals and as some identity groups, and their governments. The negotiations provided the first opportunity for 'ordinary Canadians' to participate, through the engagement of social movement groups, in the drafting of the terms of their relationship with the state, encapsulated as fundamental rights guarantees subject only to demonstrably justified limitation.

This active engagement had the effect of turning occasional voters into full-time, real-time rights holders. This transformation is discernible in many dimensions of public life. It is most obvious in the litigation which leads to enforcement of the substantive guarantees that the Charter crystallised, in which a wide variety of public interest groups participate, including many of the social movement groups mentioned above. It is also apparent in the new dimension of politics generated by the override. More broadly, it is reflected in the fact that it is now inconceivable that constitutional reform could ever again be the prerogative of provincial and federal politicians, with or without legislative approval, without deep public engagement, despite the literal terms of the new amending formula.

amending formula. This remnant of UK authority over the Canadian written Constitution was the last vestige of Canada's colonial status within the British Empire. The Charter and all the elements of the 1982 constitutional reform package have the status of supreme law in Canada, and are part of Canada's written Constitution, because of their enactment by the UK Parliament. The reform package contains a domestic amending formula for Canada's written Constitution and terminates this UK authority. It also provides formal recognition of Aboriginal rights.

[2] The reform package amended Canada's written Constitution, the Constitution Act 1867 (UK), Canada's constituent instrument. This British statute forged a number of colonies within the British Empire into a federal Dominion in 1867. Under its terms, Canada became a federal parliamentary democracy, subject to British legislative, executive and judicial authority.

The Charter altered the relationship between the individual and the state by imposing upon all public officials and institutions the duty to respect and protect fundamental rights in the exercise of public authority. The judiciary, hitherto subordinated to the supremacy of the federal Parliament and the provincial legislatures, as well as the public officials and institutions they empowered, became the guardian of these rights as superordinate fundamental constitutional norms against these power holders.

It was the prospect of definitive judicial review along these lines that eight provincial premiers joined forces to prevent. The negotiation process denied them that victory. However, that process did secure agreement for inclusion of the override clause in the Charter text, which empowered the federal Parliament and each of the provincial legislatures, within their legislative jurisdiction, to suppress the application of some guaranteed rights by express statutory directive for a maximum renewable period of five years.[3]

Despite the fact that the override clause embodied the opposing premiers' last stand against the Charter project, this clause has not undermined the purposes of the Charter. On the contrary, it has strengthened, and to some extent legitimated, judicial protection of Charter rights. It has thus brought Canada into closer conformity with the model of the modern constitutional state.

The political background to Israel's existing override, and the recent proposal for its extension, are strikingly different. They are not rooted in a prolonged and wide-ranging set of negotiations by Israeli political leaders across the political spectrum. They did not involve extended public engagement. Rather, they are the product of the post-election leverage of political parties in the coalition-building process.

Israel's two rights-protecting Basic Laws constitute part of the incremental constitution-making process adopted by the Knesset pursuant to the Harari Resolution of 1950.[4] In 1995, in the *Bank Mizrahi* case,[5] the Supreme Court of Israel recognised these laws as constitutional in stature, vesting authority in the judiciary to strike down laws inconsistent with their strictures.

In their original form, these laws did not contain an override clause. In 1994, the Knesset added such a clause to Basic Law: Freedom of Occupation, 1992 to maintain its authority to regulate the importation of meat, a measure that the Supreme Court of Israel had indicated was in conflict with the guarantee of freedom to carry on a business.[6] The Knesset then used the new override to shelter a prohibition against the importation of non-kosher meat from judicial

[3] s 33 of the Charter provides: (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7–15. (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration. (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration. (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1). (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

[4] Knesset Resolution, 13 June 1950, DK (1950) 1743 (Israel).

[5] CA 6821/93 *United Mizrahi Bank Ltd v Migdal Cooperative Village* 1995 PD 49(4) 221, http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf.

[6] Basic Law: Freedom of Occupation, 1992 (Israel); see HCJ 3872/93 *Meatrael Ltd v Prime Minister* 1993 PD 47(5) 485; and Import of Frozen Meat Law, 1994 (Israel) (Meat and its Products Law).

review. It later made this arrangement permanent. It has not used the override clause on other occasions.[7]

The prohibition against the importation of non-kosher meat became a political priority as a consequence of the government's privatisation programme, which transferred this formerly state-controlled commercial activity to private initiative. The government had to impose this prohibition in order to maintain the support of the orthodox Jewish public and its political representatives, whose participation in the government coalition was vital.

In recent years there have been a number of proposals to extend the override to Basic Law: Human Dignity and Liberty, 1992.[8] After the Israeli election in March 2015, nationalist and religious parties entered into a narrow coalition, demanding the addition of a legislative override over Supreme Court judgments pertaining to the rights protected by this Basic Law. These parties have been critical of the Supreme Court's extensive protection of the guaranteed rights.

In this article, I trace the adoption of Canada's override and the constitutional politics that it has generated in order to shed light on the debate in Israel on the extension of its parallel clause. The framework for this analysis is the model of the modern constitutional state.

In the next section, I set out the principled foundation of the modern constitutional state model and the two modes of transition to its strictures – one step and incremental. I then highlight the particular importance of principled compromise for incremental transitions. This type of compromise can facilitate formal adoption of a full range of rights protection and then support internalisation of the modern constitutional state model over time.

In the third section, I present the Canadian override as a principled compromise that fulfilled the first of these two functions by uprooting structural impediments to constitutional reform generally and the adoption of fundamental rights protection in particular.

In the fourth section, I examine the ways in which Canadian constitutional rights protection, tempered by the override, has fulfilled the second function. This clause has precipitated a distinctive form of constitutional politics, in which public opinion and public reason play a strong role, resulting in intensified commitment to the foundational principles of the modern constitutional state.

In my conclusion, Section 5, I suggest the lessons that Israel can learn from the Canadian experience, given both the commonalities between the two rights-protecting systems and the important differences in the electoral and governmental structures and election politics. These include the need to assess the principled basis for any proposed extension of the override power by considering the prospects of fulfilment of the two functions noted above – facilitating formal adoption of a full bill of rights, and promoting deeper adherence to its guarantees within the wider set of principles that constitute the model of the modern constitutional state.

[7] Basic Law: Freedom of Occupation, 1994 (Israel), s 8.
[8] Basic Law: Human Dignity and Liberty, 1992 (Israel).

https://doi.org/10.1017/S0021223716000017 Published online by Cambridge University Press

2. THE MODERN CONSTITUTIONAL STATE: PRINCIPLES, TRANSITION AND COMPROMISE

The modern constitutional state model has two temporal orientations. Looking to the past, it is remedial. Looking to the future, it is perpetually transformative. It developed originally as a bulwark against repetition of the widespread hostilities and unprecedented atrocities of the Second World War. It now provides the template for international human rights and the good governance of individual states, a template that invites conceptual and comparative reflection.[9]

In this model, each state abides by certain principles of governance, including the separation of powers, the rule of law, the independence of the judiciary, the separation of religion and state, democracy and respect for the equal and inherent human dignity of all persons. These core principles bind the state to a range of positive and negative duties expressed in abstract terms.

These interlocking principles – which find expression in the 1948 Universal Declaration of Human Rights,[10] various international conventions and the constitutions of other free and democratic societies – provide a foundation for individuals and groups to flourish and peaceful relations between states.

This constitutional model permeated the reconstruction of defeated states at the end of the war. In later years, it served the same function in the reconstruction of states based on failed ideologies, such as communism and apartheid. More broadly, this model has inspired the rights revolutions which have taken root in established democratic states such as the United States, Canada, the United Kingdom, and Israel.

The state's duty to respect and protect equal and inherent human dignity enjoys pre-eminent status within this constitutional model. This duty generates a catalogue of guaranteed fundamental rights and freedoms, some between the individual and the state and others between particular groups and the state. The particularised guarantees are not absolute. Rather, they concretise respect for and protection of equal and inherent human dignity. Limitations upon these rights are permissible only when justified in court proceedings by the state. Justification requires a specific mode of argumentation supported by a factual record, which includes evidence relating to the specific breach, as well as social science data and expertise, historical material both legal and non-legal, and/or reference to transnational and international human rights law. The substantive framework for justification is the integrated whole constituted by the full suite of principles.

In some states, rights protection enjoys the status of supreme law. In this situation, a supreme court or specialised constitutional court has the authority to invalidate a statute or state action found to unjustifiably infringe the guaranteed rights. Where rights protection has the status of quasi-constitutional, higher law, or unwritten fundamental law, judicial review offers different remedial orders, such as a declaration of incompatibility or inoperability.[11]

[9] Lorraine E Weinrib, 'The Postwar Paradigm and American Exceptionalism' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006) 84.
[10] United Nations General Assembly Res 217A (III), UN Doc A/810 (1948) 71.
[11] Lorraine Eisenstat Weinrib, 'Canada's Constitutional Revolution: From Legislative to Constitutional State' (1999) 33 *Israel Law Review* 13.

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There are two basic modes of transition to the modern constitutional state model. The one-step transition generates a new political order. It entails the adoption of a comprehensive constitution, encompassing the full suite of principles, with the status of supreme law. This step displaces the former regime's ideologies, social and political hierarchies, and modes of governance. State failure of some kind precipitates this type of transition, such as revolution or civil war, the termination of colonial arrangements, the breakdown or creation of a federal arrangement, or regime collapse. This type of transition may be the product of external action or domestic constituent engagement, or a combination of both. It requires the creation of new public institutions, to replace the old institutions or to control them. This immediate, pervasive type of transition offers the fullest delineation of the many elements that make up the model.

The alternative mode of transition is incremental. It may be the product of a constituent process or amendment of an existing constitutional text. Alternatively, it may result from the adoption of new modes of interpretation of an old text or the acknowledgement of fundamental constitutional principles. This mode of transition has enabled well-functioning democracies to incorporate the protection of fundamental rights.

The incremental mode of transition may include the creation of new bodies to orchestrate and/or institutionalise the transition to rights protection, such as might be required for a constituent process, a new Constitutional Court, a human rights commission or officers, committees within the legislative organs, or law reform commissions. Alternatively, the existing institutions may orchestrate the transition and carry on with recalibrated functions.

When public officials and institutions deliberate upon new or expanded fundamental rights protection, they contemplate the reduction of their own powers and challenges to deeply rooted institutional structural precepts, such as democratic representation, accountability and the supremacy of the legislature. Consideration of this degree of change precipitates strong opposition, which creates the need for creative compromise. A legislative override clause is an obvious compromise measure because it tempers the new judicial review power with a degree of legislative control.

In the next section of this article, I delineate Canada's path to the final compromise necessary for the adoption of the Canadian Charter of Rights and Freedoms in 1982 – the legislative override. While it was not obvious at the time, the restricted political power that this clause created provided a principled bridge between Canada's past, as a federal parliamentary democracy based on legislative supremacy, and its future, as a modern constitutional state.

3. The Politics of Constitutional Compromise: The Adoption of Canada's Override

The Canadian Charter of Rights and Freedoms, 1982, delineates a distinctive structure of rights protection:

- a relatively broad set of guaranteed fundamental rights and freedoms, including minority linguistic rights and collective Aboriginal rights;
- a general clause permitting demonstrably justifiable limits on these guarantees if prescribed by law and conforming to the idea of a 'free and democratic society';

https://doi.org/10.1017/S0021223716000017 Published online by Cambridge University Press

- interpretive clauses pertaining to the multicultural heritage of Canadians and gender equality;
- access to the ordinary court system for determination of breaches of the guarantees and for just and appropriate remedies;
- a temporary, renewable, statutory override of some of the guarantees.

The deliberations that culminated in the 1982 constitutional reform package began in the immediate aftermath of the Second World War, just as Canada realised its legal independence from the British Empire. The project was kept alive by dedicated civil liberties groups and committed social interest groups, with strong support by the Canadian Jewish community.[12] Their inspiration was twofold: the developments in American constitutional law during the period of the Warren Court, and the post-Second World War rights revolution at the international level.

After the Second World War Canada opened its doors to immigration, which was far more diverse than its original British and French population. Many of the new Canadians had suffered during the war and all sought a better life and form of governance than they had left behind. Canada became a multicultural and pluralist society. The statute books retained many laws imposing British and Christian values: Catholic in Quebec and Protestant in the other provinces. The members of the judiciary either espoused these values or deferred to the legislature and executive. Many laws imposed burdens on women and disadvantaged racial, religious and ethnic minorities. The Aboriginal peoples were expected to assimilate into the white culture through a wide range of programmes, which included compulsory residential schools for their children. State authority was pervasive, with little recourse when fundamental interests were disregarded.

The Charter project was one element of a large reform initiative championed by a new Prime Minister who took office in 1968, after three years as Minister of Justice. Pierre Trudeau, a well-educated Francophone from Quebec, became a progressive and energetic politician who, as Justice Minister, spearheaded reform of Canadian law, inherited from Great Britain, pertaining to abortion, contraception, homosexuality, the death penalty and divorce.[13] He was also the government's point man on the national unity file, going head to head against Quebec's political leaders who sought a new political arrangement for Quebec, either within or beyond Canada. Trudeau had a distinctive vision of Canadian federalism: it was the best governmental structure for Quebec to retain its distinctive French language and culture, and would ensure that Anglophones resident in Quebec and Francophones resident in the rest of Canada had support for the continued vitality of their minority languages.

As Prime Minister, Trudeau initially proposed an ambitious, sweeping set of reforms for Canada's outdated and incomplete written constitution, but abandoned many elements when

[12] Ross Lambertson, *Repression and Resistance: Canadian Human Rights Activists, 1930–1960* (University of Toronto Press 2005); Christopher MacLennan, *Toward the Charter: Canadians and the Demand for a National Bill of Rights, 1929–1960* (McGill-Queen's University Press 2003); James W St G Walker, 'The "Jewish Phase" in the Movement for Racial Equality in Canada' (2002) 34 *Canadian Ethnic Studies* 1.

[13] Lorraine Eisenstat Weinrib, 'Trudeau and Canadian Charter of Rights and Freedoms: A Question of Constitutional Maturation' in Andrew Cohen and JL Granatstein (eds), *Trudeau's Shadow: The Life and Legacy of Pierre Elliott Trudeau* (Random House of Canada 1998) 257.

he faced strong opposition. He almost achieved the domestication of Canada's constitutional amending formula (from the UK Parliament) and the adoption of a bill of rights in 1971 in the form of the Victoria Charter, which for a brief moment enjoyed the support of all ten provinces. That unanimity faltered quickly with the decision by the province of Quebec to hold out for a better deal.[14]

Trudeau rekindled the constitutional reform initiative a few years later but the deliberations between his government and the provincial governments were acrimonious and unproductive until redirected by other developments. These developments included the intervention of the Supreme Court to change the rules for consensus; the possibility that the UK Parliament would deny Parliament's request for amendments; and the engagement of 'ordinary Canadians' in forging the relationship between the individual, identity groups and the state.

The following account of the proceedings that led to the 1982 reform package, including the override, demonstrates the extensive transformative range of these amendments. They reconstructed the relationship between the individual, some groups, and the state; they generated new political alliances and political engagement; and they also initiated the transition of Canadian governance to the model of the modern constitutional state.

The federal-provincial deliberations over the Charter had produced a stalemate on the question of legislative supremacy, the core principle of the British political system which Canada had inherited. The override presented a much desired middle position between legislative supremacy and final judicial review of rights claims. It was not a novel solution: the Canadian legal system already contained a number of such clauses, inserted in four rights-protecting statutes, one at the federal level and three at the provincial level.[15]

The purpose of these clauses was to ensure priority for the rights protection afforded over inconsistent enactment, unless the legislature expressly stipulated otherwise. While necessary to assuage those opposed to final judicial protection of fundamental rights at the time of enactment, these clauses lay dormant in all but exceptional circumstances. Chief Justice Laskin expressed the normative hierarchy of the forms of protection afforded by describing the federal example, the Canadian Bill of Rights, 1960,[16] as quasi-constitutional.[17]

The negotiations exacerbated the basic fault lines in Canadian politics. The federal (Liberal) majority government, under the leadership of Prime Minister Trudeau, had proposed a region-based amending formula for Canada's Constitution as well the addition of the Charter of

[14] Barry L Strayer, *Canada's Constitutional Revolution* (The University of Alberta Press 2013) 43–48.

[15] s 2 of the Canadian Bill of Rights, RSC 1985, Appendix III, a federal statute, stipulates that its terms would not apply to a later statute if the Canadian Parliament expressly declared in that later statute that it would operate 'notwithstanding the Canadian Bill of Rights'. Similar clauses are to be found in the Saskatchewan Human Rights Code, CSS, c S-24.1, s 44; the Alberta Bill of Rights, RSA 1980, c A-16, s 2, and the Quebec Charter of Human Rights and Freedoms, RSQ, c C-12, s 52. The Supreme Court of Canada has expressed the opinion that human rights legislation will 'prevail' over inconsistent statutes because of their fundamental and quasi-constitutional status, even without an express directive to that effect, if there is no 'clear legislative pronouncement' to the contrary: *Winnipeg School Division No 1 v Craton* [1985] 2 SCR 150, and *Quebec v Montreal* [2000] 1 SCR 665, para 27.

[16] SC 1960, c 44.

[17] eg, *Hogan v R* [1975] 2 SCR 574, 597.

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Rights, hoping to affirm national unity in response to the growth of the separatist movement in Quebec, and to align Canada with the emerging modern constitutional state model. The federal government had reason to be optimistic, at least initially. Its benches included 74 of Quebec's 75 seats in the national Parliament. It also enjoyed the support of the third largest party in the national Parliament, the socially progressive New Democratic Party. Also in support were two of Canada's ten provinces: the large and powerful province of Ontario and the smaller eastern province of New Brunswick, both ruled by Conservative party governments.

On the national stage, Trudeau faced the Leader of the Opposition in Parliament, Joe Clark of the Progressive Conservative Party. He advocated stronger provincial governments, parliamentary supremacy and socially conservative public policy. His leverage was not strong, given the Liberal majority in the House, but his alignment with the remaining eight provinces produced a formidable band of opponents.

These provinces came together as the Gang of Eight. Six were led by Conservative premiers who opposed the Charter for a variety of reasons. Some rejected change that would undermine the monarchy, legislative sovereignty in the British tradition, and a socially conservative policy orientation. The premier of Saskatchewan, of the New Democratic Party, stood apart. He opposed the Charter from left of the political spectrum, apprehensive that judicial review of constitutional rights would undermine redistributive social welfare policies.

Quebec's premier, René Lévesque, supported the Gang of Eight for strategic reasons. He headed up a separatist government seeking, at least, endorsement by a provincial referendum to change Quebec's constitutional relationship with Canada and, in the extreme, to effectuate Quebec's independence from Canada. His political party, the Parti Québécois, would benefit by any demonstration of deficiency or failure in the Canadian constitutional arrangements. It was widely believed, on both sides of the deliberations, that Lévesque's purpose was to prevent agreement on constitutional reform.

The reform package had both domestic and external dimensions. At the domestic level it divided the political leaders on federal-provincial as well as political party lines, exacerbated federal-provincial rivalries, created political confrontations based on ideologies and social values, and exacerbated the most contentious element in Canadian politics – national unity. The external dimension related to the fact that Canada did not have the power to amend its written constitution, originally enacted by the United Kingdom Parliament as the constituent statute for an advanced colony within the Empire. The United Kingdom Parliament retained the sole authority to alter its text, at the request of the Canadian Parliament, pending agreement by Canadian First Ministers (the Prime Minister and the premiers of the provinces) on a domestic amending formula.

By law, the UK Parliament had constrained itself to enact amendments to Canada's constituent statute, the British North America Act 1867, only at the request and with the consent of Canada.[18] By convention, the Senate and House of Commons of Canada forwarded requests for amendment, usually but not invariably with provincial consent.

[18] Statute of Westminster 1931 (UK), s 7.

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Trudeau's response to the domestic impasse was to announce his intention to secure the enactment of his reform package by the UK Parliament through a 'unilateral' request to that Parliament – that is, with only two provinces in support. His federal and provincial opponents responded with efforts to delay and frustrate this plan. Their efforts had the effect of broadening perspectives and engaging a wider range of institutions in the reform undertaking, thereby improving its quality immeasurably.[19]

In the provincial sphere, three of the opposing provinces sought clarification of the provincial role in the amendment procedure. Each requested an advisory opinion from its appellate court on the constitutional validity and legitimacy of Trudeau's plan for enactment of his reform package by the UK Parliament with the consent of only two provinces. There was not much legal foundation to the provincial arguments. It was certain, however, that this initiative would involve a considerable period of time, first for the three appellate courts to deliver their advisory opinions, and then for appeals, as of right, to the Supreme Court of Canada.

The federal Conservative Party turned to the national Parliament to further obstruct Trudeau's plans, insisting upon the creation of a Special Joint Committee of the national Parliament to consider the draft text of the Charter. Trudeau reluctantly complied.

These two steps did much more than merely delay and frustrate the federal initiative. They transformed the political foundation of the deliberations altogether. The provinces' court actions transferred their concerns to a forum of law and principle where constitutional history, text and legitimacy merited serious consideration. The federal Special Joint Committee took on a dynamic of its own, as elected representatives from across the country, regionally appointed Senators, and a variety of public interest groups engaged in a joint venture of constitutional renovation, which stood apart from the established federal provincial rivalries and vested interests in the status quo.

From October 1980 to February 1981, the Special Joint Committee examined a draft of the Charter which had been considerably weakened by the many concessions Trudeau had made to the provinces in the hope of reaching consensus. The 267 hours of Committee hearings over 56 days, including 97 hours of clause-by-clause analysis, produced a dramatic strengthening of the Charter text. Public participation by a variety of social movement groups focused attention upon the sectors of the Canadian population most affected by the absence of fundamental rights in the past. Intensive engagement by experts and organisations devoted to rights protection offered constructive criticism and advice, including reference to systems of fundamental rights protection at the national and international levels. The limitation clause, which stipulated strong deference to legislative supremacy, to appeal to the objecting provinces, acquired additional restrictions after attracting pervasive and scathing criticism.

The Conservative Party's insistence upon live national televised broadcast of the Committee's proceedings ensured wide publicity for the submissions, sustained media scrutiny and easy engagement by the general public. It appeared that even the federal government was surprised

[19] For an analysis of the Progressive Conservative Party's contribution, at the federal and provincial levels, to the development of the constitutional reform package, see Nathan Nurgitz and Hugh Segal, *No Small Measure: The Progressive Conservatives and the Constitution* (Deneau 1983).

by the strong public support that the Charter project enjoyed. The federal Conservative and New Democratic parties got caught up in the public enthusiasm and became engaged in strengthening the Charter. The three major national political parties participated in the process, submitting 123 amendments, of which more than half were adopted. Trudeau's vaunted 'people's package' of constitutional reforms came to deserve that appellation.[20] The Charter rose above the partisan debate and became a 'motherhood issue'.[21]

On the substantive side, the proceedings produced a stronger set of guaranteed rights, informed by the Universal Declaration of Human Rights, emulating leading national and international rights-protecting instruments, and endorsing the modern constitutional state's duties to respect and protect the equal and inherent dignity of every person subject to the state's authority.[22]

The deliberations leading up to the Joint Committee's proceedings had assumed that the pre-Charter constitutional framework of parliamentary supremacy and the constitutional entrenchment of judicial review to protect guaranteed, justiciable, fundamental rights were incompatible. The penultimate formulation for justification of limitation on these guarantees had removed the perceived incompatibility by directing the judiciary to defer to the ordinary majoritarian process:[23]

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.

This clause attracted strong criticism in the Joint Committee proceedings because it signalled very weak protection of the guarantees, tantamount to re-introducing parliamentary supremacy through the back door.[24]

[20] The Committee received written briefs from 914 individuals and groups and 214 groups made oral presentations. Groups included a variety of religious institutions and organisations, ethnic groups, civil liberties associations, human rights groups, bar associations, medical associations, regional associations, a variety of business groups, Aboriginal groups and band representatives, groups representing the mentally and physically disabled, professional organisations, groups representing the aged and youth, representatives of sexual minorities, arts and culture councils, many language associations including a large number of Francophone organisations, various expert and professional bodies relating to justice and crime issues, etc. The various participants came from across the country and were organised at the national, provincial and local levels: Robert Sheppard and Michael Valpy, *The National Deal: The Fight for a Canadian Constitution* (Fleet 1982) 137; 'Special Joint Committee on the Constitution', *Canada's Human Rights History*, http://historyofrights.ca/archives/special-joint-committee-constitution-1980-1.

[21] Sheppard and Valpy, ibid 137–38.

[22] Walter Tarnopolsky, 'The Constitution and Human Rights' in Keith Banting and Richard Simeon (eds), *And No One Cheered: Federalism, Democracy and the Constitution Act* (Methuen 1983) 261, 262–63.

[23] Anne F Bayefsky, *Canada's Constitution Act 1982 and Amendments: A Documentary History* (McGraw-Hill Ryerson 1989) Vol II, 766.

[24] Participants in the constitutional reform negotiations for the province of Saskatchewan described this formulation – a federal concession designed to attract provincial support – as setting down 'as large an element of judicial deference to legislative choices as possible': Roy J Romanow, *Canada – Notwithstanding: The Making of the Constitution, 1976–1982* (Carswell/Methuen 1984) 245, 250.

The Joint Committee's deliberations rejected all of the elements that signalled the continuation of the status quo, such as 'generally accepted' and 'parliamentary system of government':[25]

> 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.

The final text was drawn from international and national rights-protecting instruments in the model of the modern constitutional state. The changes identify the guarantees as legal entitlements standing prior to the ordinary legislative process in a number of ways. The basic framework is provided by establishing two stages of argumentation, with a shift in onus between them. In the first stage, the burden of proving the breach of the right falls on the person affected while, in the second stage, the burden of justifying the breach falls on the state. This burden of justification consists of a logically sequenced set of tests. The term 'prescribed by law' sets a formal precondition for the state to satisfy before it can engage in the second, substantive stage. It calls in the rule of law principles of intelligibility and accessibility as well as the standard means of law formation – that is, legislation, judge-made common law, and statute-based executive lawmaking. This precondition makes clear that ordinary law formation is insufficient to satisfy the burden of proving substantive justification.

The substantive requirements of the second stage require judicial assessment of the state's arguments for reasonableness, demonstration (by adjudicative, legislative and social facts, and social science expertise) as well as justification, not merely excuse or explanation. The ultimate standard for justification is set out in the term 'free and democratic society', denoting a society committed to both rights protection and democracy. This understanding of the final text accords with the substantive underpinnings of the modern constitutional state.

These changes fortified the legitimacy of the Charter project given that each new textual element reflected public engagement in the Joint Committee proceedings to which a majority of the members of Parliament on the Committee acceded, including members of the Conservative Opposition.

In September 1981, the Supreme Court of Canada delivered its advisory opinion on appeal from the opinions rendered by the three provincial appellate courts.[26] As expected, the Court concluded that any amendments to the written constitution sought by the federal Parliament and secured from the United Kingdom Parliament would have the force of law in Canada, with or without provincial consent. If this conclusion had comprised the full ruling, it would have cleared

[25] Canadian Charter of Rights and Freedoms (n 1) s 1.

[26] *Re: Resolution to Amend the Constitution* [1981] 1 SCR 753. The legality and convention questions were each issued by a majority of the members of the Court, but by differently constituted majorities. After the constitutional reform package was enacted by the UK without Quebec's consent, Quebec initiated litigation claiming that its consent was necessary. The Supreme Court ruled that Quebec held no such conventional power of veto because it could not establish acceptance or recognition of such a convention by the relevant political actors: *Re: Objection by Quebec to a Resolution to amend the Constitution* [1982] 2 SCR 793.

the way for Trudeau to proceed unilaterally – that is, by resolution of the Parliament of Canada with only two provinces in support.

However, the Court also offered an unprecedented commentary on the question of constitutional convention. It recognised the existence of a conventional practice, based on the principle of federalism, that required substantial provincial consent for amendments that would affect federal-provincial relationships or the powers, rights or privileges of the provinces, their legislatures or governments. The Court refrained from stipulating the precise demands of the convention it articulated. After observing that only two provinces supported the federal initiative, the judgment states that '[b]y no conceivable measure could this situation be thought to pass muster'.[27]

The Supreme Court ruling prompted the opposing premiers to reassess their position. They were persuaded that Trudeau would not change his mind about seeking amendments without their consent from the United Kingdom Parliament. Accordingly, they concluded that compromise was necessary if they wanted to have any input into the amendments.

Absent compromise, they expected that Trudeau would send his preferred reform package to the United Kingdom to be entrenched in Canada's written Constitution, including the Special Joint Committee's stronger version of the Charter and an amending formula based on regional equality, rather than the provincial formula based on provincial equality. The Court's articulation of a constitutional convention requiring substantial provincial consent had reduced their bargaining power. As one astute commentator observed, they had not only lost the 'unfettered power to block' but found themselves facing 'the disturbing possibility of being left out'.[28]

Trudeau appeared intransigent. He had stated that the British parliamentarians should 'hold their noses' if necessary, but do their duty to pass his constitutional proposals and end the last legal vestige of Canada's colonial status.[29] However, he had reason to doubt that the UK Parliament would comply with his request.[30]

It was reasonable to expect that the Supreme Court's recognition of a convention requiring provincial consent would have a strong influence on British parliamentarians, given the importance of convention within the United Kingdom's unwritten constitutional system. In addition, some provinces had mounted strong initiatives to convince these backbenchers of the merits of their opposition to the constitutional reform initiative. Moreover, a British parliamentary committee had studied the question of provincial consent and come to the conclusion that the United Kingdom Parliament must exercise its own judgment on whether a request for amendment that would affect the federal structure of Canada reflected the 'clearly expressed wishes of Canada as a federally structured whole'.[31]

[27] *Re: Resolution to Amend the Constitution*, ibid 905.
[28] Alan Cairns, 'The Politics of Constitutional Conservatism' in Banting and Simeon (n 22) 28, 51.
[29] Edward McWhinney, *Canada and the Constitution 1979–1982: Patriation and the Charter of Rights* (University of Toronto Press 1982) 134–35.
[30] ibid 65–71.
[31] House of Commons, First Report of the Foreign Affairs Committee, 1980–81 Session, British North America Acts: The Role of Parliament, vol 1, 21 January 1981, xii. For the assessment that there was a strong possibility that the UK Parliament might not enact the amendments without provincial consent see Romanow (n 24) 146–53.

While Trudeau kept his unilateral plan alive, he also acted upon the Supreme Court's rejection of the claim that unanimous provincial consent was required for constitutional reform. Since the goal was now substantial consent, he turned his mind to breaking up the solidarity of the Gang of Eight by targeting its weakest adherent – René Lévesque, the separatist premier of Quebec, for whom any reform of the federal constitution was anathema.

Trudeau initiated his plan during the national televised broadcast of a First Ministers' Conference in November 1981, called in the aftermath of the Supreme Court's ruling. He offered the premiers a national referendum on the constitutional package.

Trudeau was secure enough in the public's support of the Charter across the country to make this offer. The polling was clear and consistent.[32] So, too, was the anecdotal evidence. Jean Chretien, Trudeau's Justice Minister, enjoyed taunting the members of the Gang of Eight with the popularity of the Charter: 'You come out against the rights of Indians and women and the handicapped, and I am going to cut you to pieces'.[33] David Erdos affirms the public appeal of the Charter in a quote he provides from an interview with Roy Romanow, Deputy Premier of the province of Saskatchewan, during this period:[34]

> [W]hat really beat the Premiers in this period of the tug of war was that Trudeau put the Premiers in front of the television cameras in the hearings on whether or not to have a Charter. … And he was very elegant in his description of what a charter of rights would mean and what it stood for – and then he would turn to one of the Premiers and say 'OK, well you tell me why you oppose it?'. And you just couldn't win in that political battle. To the average citizen it seemed like good was on the side of the Federal Government [and] evil was on the side of these little Premiers with their grabbing every little bit of territorial jurisdiction that they could.

Trudeau had other reasons to be confident that the public was on his side. The Special Joint Committee hearings, referred to earlier, had accepted amendments to the Charter text which

[32] 'Most Feel Trudeau Patriation Plan Will Help Unite Country, Poll Says', *The Globe and Mail*, 14 May 1981, P8, reported a Gallup poll indicating 62% national support for the Charter, 15% opposed and 23% indicating that they did not know. The regional breakdown demonstrated consistency: western provinces' residents, whose premiers most vehemently opposed the Charter, 56% positive; British Columbia residents, 59% positive; Quebec and the Atlantic provinces, 59% positive; and Ontario residents, 68% positive. The poll results were based on 1,032 in-home interviews, with an error rate of not more than 4% 19 times out of 20. 'Poll Shows 72 per cent Questioned Favour Rights Charter in Constitution', *The Globe and Mail*, 10 November 1981, P10, reported a poll conducted for the Canadian Human Rights Commission registering 72% of Canadians in support of a constitutional Charter of Rights. The results were based on 1,960 interviews in June 1981. Calgary Canadian Press, 'Westerners Favor Rights Bill by 80%, Survey Shows', *The Winnipeg Free Press*, 22 October 1981, 18, reported a survey by the Canada West Foundation research group on Canadians' support for the Charter. The survey canvassed 1,900–2,000 Canadians in May 1981. In the western provinces, the approval rate was 80%. The other provinces also showed strong support for the Charter: Atlantic Canada at 86%; Quebec at 84% and Ontario at 85%. The newspaper noted that support for the Charter was high across the country, in contrast to the western premiers' strong opposition to it.

[33] Sheppard and Valpy (n 20) 68. Chretien opposed a referendum because of the social bitterness and upheaval unleashed by the Quebec separatist government's referendum in 1980.

[34] David Erdos, *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World* (Oxford University Press 2010) Ch 5 'Canada and the Canadian Charter of Rights and Freedoms (1982)', 79.

had the effect of removing the institutional and substantive compromises that the Gang of Eight had insisted upon during the federal-provincial deliberations. The Charter's revised text, as it had emerged from the Special Joint Committee – supported by Parliament, the engaged public and the general public – gave Trudeau's commitment to and confidence in a referendum strong credibility, enough to encourage all but one of the premiers to focus on reaching a compromise.

Premier René Lévesque, the separatist premier from Quebec, had a stake in referendum politics that his fellow premiers did not share: his political career was based on his assertion that a provincial referendum was a legitimate basis on which to claim a revision of Quebec's relationship with the other provinces and the federal government. In 1980, he had lost the first referendum to that end to Trudeau. Perhaps he was already relishing a rematch. For any or all of these reasons, Lévesque immediately accepted Trudeau's public offer of a national referendum. He did not seek advice from his advisers; nor did he consult with the other members of the Gang of Eight, despite the agreement each premier had made to refrain from unilateral action.

This response had the effect of turning the other premiers into free actors, each seeking a basis for compromise for the remainder of the negotiations. In addition, Ontario and New Brunswick, until then strong federal allies, entered into the provincial strategy meetings with the other premiers in order to ascertain the best foundation for compromise.

All participants had reached the point when it was necessary to consider the repercussions, both domestic and international, of failure to reach an agreement. They knew that the Canadian public wanted an end to the constitutional 'wrangling' in general and, more particularly, the domestication of the amending formula and the adoption of a constitutional bill of rights. The members of the Gang of Eight had to avoid a referendum in which they would have to campaign against fundamental rights, which was, by definition, a referendum they could not win.

Without an agreement, Trudeau seemed likely to go forward unilaterally, but might not succeed. A refusal by the United Kingdom Parliament to pass the reform package would leave the power to amend the Constitution under British control, embitter Canada's relations with the British executive, and render futile all the effort devoted to deliberation on the federal and provincial domestic amending proposals.

Intense deliberations ensued. The premier of Ontario, hitherto Trudeau's most important provincial ally, increased the pressure on Trudeau by making his continued support conditional on reaching agreement with more provinces.

The final compromises reflected difficult choices for all participants. The federal government accepted the provincial amending formula, with some adjustments, in return for the strongest version of the Charter – the version that had emerged from the Joint Committee deliberations, again with some adjustments. One of these adjustments was the addition of the override clause to the Charter.

In the next section of this article, I examine the distinctive form of constitutional politics that the override clause has generated. I argue that the clause has required politicians to develop standards for its invocation and has ensured a continuing engagement by the general public in the quality and extent of rights protection that the Charter affords.

4. THE POLITICAL LIFE OF THE CANADIAN OVERRIDE

Without reference to its political genesis and the patterns of its use and non-use, the Canadian Charter's override clause appears to embody a degree of legislative supremacy and therefore to depart from the model of the modern constitutional state.

Familiarity with its political origin and its operation since 1982 suggests otherwise. The availability of the override has transformed the ways in which Canadians analyse public policy and action. Parliament and the provincial legislatures deliberate in their chambers and committee rooms on the scope of these rights, their justifiable limitation and the possibility of override. In this respect, these political bodies demonstrate their internalisation of the Charter's strictures, the judicial methodology for analysing breaches and justified limitations upon them, and the basic principles underlying the model of the modern constitutional state. Following each contentious Charter-based judgment of the Supreme Court of Canada that finds an unjustified breach of a Charter guarantee, the media questions whether invocation of the override is under consideration. The government's response then becomes the subject of media analysis, 'op-eds' and letters to the editor.

Pre-emptive invocation of this clause, to prevent judicial review altogether or in reaction to lower court decisions, no longer occurs. It is now considered important to wait for a ruling of the Supreme Court of Canada before contemplating a legislative override. This approach is important given that the Supreme Court has ruled that the override clause operates only prospectively.[35]

It is now well understood that the override embodies an exceptional power, because it signifies a departure from the duties that the Charter imposes on Parliament and on the provincial legislatures. Each of the strictures for use of the override contributes to its high, sustained political cost by signalling some degree of rejection of the constitutional status of the rights and freedoms in play and the judiciary's role as their guardian, as well as disregard for the strong public support for the Charter.

The first use of the override clause was the most expansive and perhaps the most instructive, in that it raised the possibility of routine, rather than exceptional, operation of the override power. Two months after the Charter came into effect on 17 April 1982, Premier René Lévesque's separatist government in Quebec applied the clause to the maximum extent possible in protest against the package of constitutional amendments made without its consent.[36]

[35] *Ford v Quebec (Attorney General)* [1988] 2 SCR 712; Lorraine Eisenstat Weinrib, 'Learning to Live With the Override' (1989–90) 35 *McGill Law Journal* 541.

[36] The Quebec government also instituted unsuccessful litigation to challenge the validity of the 1982 amendments on the basis that they lacked Quebec's consent. The Supreme Court of Canada rejected its arguments in *Re: Objection by Quebec to a Resolution to Amend the Constitution* (n 26), upholding the decision of the Quebec Court of Appeal in the same case: *Re: Attorney-General of Quebec and Attorney-General of Canada* 134 DLR (3d) 719 (1982). See also Mollie Dunsmuir and Brian O'Neal, 'Quebec's Constitutional Veto: The Legal and Historical Context', *Library of Parliament, Parliamentary Research Branch*, May 1992, http://www.parl.gc.ca/Content/LOP/researchpublications/bp295-e.pdf.

Quebec's desire to use the clause in an indiscriminate way required ingenuity. The provincial premiers who proposed the override clause set down specific requirements for its exercise. The legislature had to identify both the specific right to be suppressed and the legislation or part thereof affected. The first challenge, therefore, was to draft a uniform text for the override clauses. The boiler plate adopted expressed the legislature's intention to suppress all of the Charter sections subject to legislative override. This standard form eliminated the need to match the terms of the statute with the specific rights upon which they might impinge. It would have been costly and time-consuming to assign lawyers to assess the whole body of legislation. It would probably also have been an unrewarding exercise because at this early date there were no authoritative rulings by the Supreme Court on the Charter's guarantees. Moreover, it was unlikely that many of Quebec's statutes infringed Charter rights. Since its modernisation in 1960, Quebec has established a strong record for protecting rights, based in particular on its provincial Charter of Rights.[37]

The second challenge was to insert this standard form text into every statute. The National Assembly of Quebec, Quebec's legislature, repealed and re-enacted every existing statute through omnibus legislation in order to include this standard form override clause. This operation took effect on 23 June 1982. It also established the practice of including this type of clause in every new statute and to amendments of all statutes. To ensure that the citizens of Quebec had not acquired any Charter rights in the two-month period after the Charter came into force, the legislation declared the operation of the override clause to be retroactive to 17 April 1982.

In *Alliance des Professeurs de Montreal et al v Attorney-General of Quebec*, the Quebec Court of Appeal invalidated the standard form override clause based on its view that the specificity requirements stipulated in section 33 had not been satisfied.[38] In separate reasons, the judges emphasised the difference between the constitutional and normative character of the Charter and the exceptional character of the power created by the override clause; the irrelevance of the idea of legislative supremacy in this context; the need to read the clause's strictures narrowly, given that the statutory override clauses that provided the model for section 33 lacked such requirements; and the purpose of the specificity rules, designed to facilitate informed democratic discussion by citizens as to the important issues raised. The decision was not appealed against before the Supreme Court.

The case that brought the issue of Quebec's extensive use of the override clause before the Supreme Court of Canada was the *Ford* case, instituted by a number of merchants in the city of Montreal. They brought forward the arguments raised in the *Alliance* case to seek the invalidation of Quebec's expansive use of the clause.[39]

The Supreme Court of Canada rejected the wide range of reasoning that led the Quebec Court of Appeal to invalidate Quebec's use of the clause based on a lack of specificity, but did accept

[37] Quebec Charter of Human Rights and Freedoms, RSQ, Ch C-12.
[38] 21 DLR (4th) 354 (1985).
[39] *Ford* (n 35).

https://doi.org/10.1017/S0021223716000017 Published online by Cambridge University Press

the petitioners' argument that the legislative override could not be used retroactively based on narrower grounds.

The Court relied on the rules of statutory interpretation to reach this conclusion. After concluding that the text of section 33, in both English and French, was ambiguous on the question of prospective or retrospective application, the Court applied two rules of interpretation. First, the judiciary should avoid reading statutory language as having retrospective effect if the result would be to undermine an existing right or obligation. Second, clear language or necessary implication was necessary to indicate retrospective operation.[40] During the oral hearing, many members of the Court had indicated their strong reluctance to open the door to judicial review of the validity of instruments that override Charter rights.

The importance of this litigation goes beyond the Court's significant ruling against retrospective operation of the override clause. This case also generated Canada's first experience of the distinctive political controversies raised by the invocation of the Charter's override.

On the substantive Charter question in issue, the petitioners argued that Quebec legislation that required the use of French and prohibited the use of other languages on commercial signs breached the right of freedom of expression, as guaranteed under Quebec's human rights Charter as well as the Canadian Charter of Rights and Freedoms, 1982.

The Supreme Court of Canada might have decided that the Charter's specific guarantees for use of minority languages delineated the full range of protection afforded. Instead, the Court recognised that the guarantee of freedom of expression also encompassed protection against restrictions on the use of minority languages.

The Court reached this conclusion based on its characterisation of individual language choice as going beyond the medium of communication to encompass meaning which expresses one's identity, individuality and culture. On this basis, the Court concluded that the statute's prohibition of the use of languages other than French breached the Charter right of freedom of expression.

The Court rejected the arguments put forward by the government of Quebec to discharge its onus to justify this limitation on the guaranteed right. The government failed the proportionality tests applicable because it would have been possible to advance its purpose, the preservation of the province's *visage linguistique*, through means less detrimental to the right. The Court went further. It identified an alternative, less detrimental means of achieving the state's purpose: a mandatory requirement of predominant use of French combined with permission to use other languages.

The National Assembly did not take up the Court's suggestion. Instead, it re-enacted its restrictive legislation with a novel 'inside-outside' distinction. For exterior signs, the new legislation maintained the mandatory use of French with the prohibition on other languages, sheltered by an override. For interior signs, other languages were permitted.

Premier Bourassa, leading a Liberal government under pressure from the separatist Parti Québécois, appealed to the province's Francophone majority to support his government. He made clear that his commitment to protection of their language had been at the expense of the

[40] ibid paras 35–37.

https://doi.org/10.1017/S0021223716000017 Published online by Cambridge University Press

Charter's protection of individual freedom of expression as well as the linguistic minority. The extent of the betrayal felt by the Anglophone population is reflected in the resignation of three Anglophone ministers in the provincial cabinet.[41]

Bourassa must have anticipated the exacerbation of the language wars that followed his invocation of the override clause, but not the higher price that he paid in constitutional politics. Just at this time, proposals for constitutional reform were under review by the First Ministers, in what is referred to as the Meech Lake Accord, which included interpretive clauses directing the courts to read the Canadian Constitution, including the Charter, so as to preserve the 'distinct society' of Quebec. The Accord had enjoyed nationwide support, initially, because it symbolised the end of the schism caused by Quebec's isolation at the end of the 1982 negotiations for constitutional reform.

A number of provinces lost their enthusiasm for the Accord when Bourassa offered his reading of the 'distinct society' clause to the province's Francophone majority. The interpretive directive it embodied, he claimed, would alter judicial analysis under the Charter's justified limitation clause in cases, like the commercial signs case, that related to Quebec's distinctive language and culture.[42] Accordingly, Quebec would be able to withstand challenges to its restrictive language laws based on freedom of expression without having to resort to the legislative override clause. Moreover, he claimed, the 'distinct society' clause would enable Quebec to legislate contrary to the Charter's specific minority language guarantees, which are not subject to the override, based on the relaxation of the strictures of the justified limitation analysis, effectuated by the application of the 'distinct society' clause. The Quebec government held the view that the combination of the override clause and the new 'distinct society' clause were necessary to protect the province's cultural distinctiveness.

The Meech Lake Accord failed, probably because a number of provincial premiers objected, in particular, to Bourassa's reading of the 'distinct society' clause and, more generally, to his treatment of Quebec's Anglophone and Allophone minorities.[43] These premiers were reluctant to authorise any changes to the written constitution that would permanently disadvantage the Anglophone and Allophone minorities in Quebec. While invocation of the override clause produced some degree of disadvantage, it did so for a temporary period in a highly conspicuous manner, leaving open the possibility for a political reversal of policy in the future.

When the override clause came to the end of its five-year lifespan, Premier Bourassa decided to let it lapse and to enact new legislation for exterior commercial signs along the lines suggested by the Supreme Court. The new legislation required French signs, but also permitted the less predominant use of other languages.

[41] Benoit Aubin, '3 Ministers Resign over Quebec Bill', *The Globe and Mail*, 21 December 1988, A1.
[42] 'Premier Bourassa said the "Distinct Society" Interpretive Clause would have enabled Quebec to Override Charter Enshrined Language Rights', *The Globe and Mail*, January 1998, A15; Janet L Hiebert, *Limiting Rights* (McGill-Queen's University Press 1996) 139–40; Pierre Fournier, *A Meech Lake Post-Mortem: Is Quebec Sovereignty Inevitable?* (McGill-Queen's University Press 1991) 21–23.
[43] Elizabeth Thompson, 'Bill 178 Killing Meech Accord Bouchard Says', *The Gazette*, 1 February 1990, B1.

This decision reflected the desire to bring the legislation into conformity with the Charter. It also reflected concern arising from a United Nations Human Rights Committee ruling[44] that it infringed the right of expressive freedom and exchange of information in any medium protected by the International Covenant on Civil and Political Rights.[45]

In 1997 the question of the override arose again in Quebec. The Supreme Court of Canada delivered a judgment invalidating some of the restrictions on participation in public debate under Quebec's referendum legislation.[46] Parti Québécois Premier Bouchard refrained from using the override to reinstate the law, despite the fact that he had, before entering provincial politics, supported Bourassa's invocation of the override to protect his language law from invalidation[47] and described the clause as 'essential to the survival of Quebec'.[48]

He decided to align his policy on minority political rights during any future referendum on independence with the norms of rights protection on the world stage. International recognition of Quebec's independence after any future successful referendum on separation from Canada would depend on Quebec's respect for international human rights norms in the conduct of the referendum. '[T]he days when a PQ government would casually override fundamental rights without hesitation and almost without thought seem to be over'.[49]

These examples illustrate some of the political dynamics of the override clause. Its invocation raises the political profile as well as the political cost of the public policy it shelters from judicial review. This effect extends the public debate beyond local majoritarian preference to include its constitutional dimensions, especially its impact on minority rights. In this instance, it catapulted the constitutional question onto the international stage, where it threatened to undermine Quebec's separatist aspirations by drawing attention to restriction of the basic political rights of the Anglophone and Allophone minorities.

This example also reveals the importance of the five-year sunset rule. By the end of this period, Quebec's linguistic majority had reassessed its views on language policies.[50] While the invocation of the override clause had originally enjoyed Francophone support, so did its lapse. It is likely that the expansion of the debate beyond local to national and international concern affected popular opinion as new ideas, perspectives and metrics entered the local deliberations.

[44] HRC, *Ballantyne and Others v Canada*, Communication Nos 359/1989 and 385/1989, views of 31 March 1993, UN Doc CCPR/C/47/D/359/1989 and 385/1989/Rev.1.
[45] International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171.
[46] *Libman v Quebec* (*Attorney General*) [1997] 3 SCR 569 invalidated certain rules relating to participation in a Quebec referendum as breaches of political expression. See also 'Bouchard Angry … Again: Ready to Use Override Clause to Reject Federal Court Ruling', *The Record*, 27 October 1997, A4.
[47] Peter O'Neil, 'PM Vows to Kill Override Clause', *The Vancouver Sun*, 22 December 1988, A1.
[48] Darrel R Reid, 'The Election of 1988 and Canadian Federalism' in Ronald L Watts and Douglas M Brown (eds), *Canada: The State of the Federation* (Institute of Intergovernmental Relations, Queen's University 1989) 21, 24.
[49] Don MacPherson, 'PQ Reluctant to Override Charter', *The Gazette*, 7 December 2000, B3.
[50] 'Lead Me, Bourassa, Or Better Yet, Follow', *The Globe and Mail*, 1 April 1993, A22 cites a poll indicating that Quebec residents supported bilingual signs two to one. See also Philip Authier, 'UN Ruling Influences Quebec's Sign Debate; Will Be One Factor, Bourassa Says', *Hamilton Spectator*, 10 April 1993, A5, quoting Premier Bourassa: '… even the Parti Québécois concedes it makes Quebec an easy target internationally … there is not a majority of Quebecers who are enthusiastic about using the notwithstanding clause (again)'.

The override instrument allowed departures from the Charter's strictures but it also set the clock ticking for reassessment when the debate had matured to include the effects of denying rights. The sunset feature not only allowed for changes in government, but also for governments, and the public, to change their minds.

While Quebec's experience with the override clause provides insight into the actual use of the clause after a Supreme Court ruling, there is also much to be learned from proposed uses. The best examples come out of Alberta, the province which most strenuously resisted the adoption of the Charter and, when it lost that battle, championed the adoption of the override clause.

Alberta seriously considered invoking the Charter's override clause on two occasions in the late 1990s: one to pre-empt judicial review; the other to respond to a Supreme Court ruling. The Premier's statements and actions on these occasions, as well as the public response, exemplify the exceptional quality of the constitutional politics that this clause generates.

In the first example, Premier Ralph Klein's Conservative government decided to discourage litigation to seek compensation for the non-consensual sterilisation of individuals who had resided in provincial mental institutions from 1928 to 1972. The success of the first test case – in which the plaintiff secured an award amounting to one million dollars in damages, interest and legal costs – ensured that many of the 700 eligible plaintiffs would sue.

Premier Klein decided to enact legislation to impose a statutory cap of $150,000 on the government's liability for each claim and, on the suggestion of legal advisers, agreed to invoke the override to preclude constitutional challenges. Klein described this approach as fair to all concerned – to 'these poor souls' seeking compensation as well as to current taxpayers who were not responsible for the 'sins' of the past.[51]

A firestorm of criticism induced the Premier to repudiate the proposed legislation within 24 hours. The affected individuals and their representatives and supporters expressed outrage. So too, the provincial opposition parties denounced the infringement of rights and the interference with the judicial process. What was unexpected was the extent of the public reaction. The media highlighted the story and hundreds of emails and telephone calls flooded into government offices from alarmed Albertans and Canadians far beyond Alberta's borders.

Klein conceded that his 'political radar' had failed him. He explained that he had accepted his lawyers' suggestion to use the override clause to 'bulletproof' his legislative effort to protect the public purse. He had not realised that this clause operated in an unfamiliar political dimension. Albertans, when alerted to the possibility that Charter rights were in play, demanded a more compassionate approach. Canadians considered Charter rights to be 'paramount' and, for that reason, would tolerate a legislative override, anywhere in the country, only in 'very, very rare circumstances'.[52]

[51] Larry Johnsrude, 'Province Revokes Rights; Government Opts Out of Charter, Limits Sterilization Victims' Right to Sue for Compensation; Alberta's Sterilization Solution', *Edmonton Journal*, 11 March 1998, A1.
[52] Allyson Jeffs, 'About Face: Massive Outcry Forces Klein to Back Down on Controversial Move to Limit Sterilization Settlements', *Edmonton Journal*, 12 March 1998, A1; Brian Laghi, 'Klein Retreats in Rights Scrap', *The Globe and Mail*, 12 March 1998, A1.

As luck would have it, Premier Klein's introduction to the super-charged politics of the override clause was not over. Just weeks later, the Supreme Court of Canada rejected the Alberta government's arguments in a case involving a Charter claim of discrimination against the provincial Individual's Rights Protection Act.[53] This Act proscribed discrimination in the workplace and in relation to accommodation and public services on specified grounds, and provided dispute resolution services for those affected by discrimination. The prohibited grounds did not include sexual orientation.[54]

The complainant had been fired from his job at a Christian college when his superiors sought information on his sexual orientation. He brought a Charter challenge asserting that the denial of the dispute resolution process for discrimination on this ground infringed his right to equal benefit of the law under section 15 of the Charter.

The Court determined that this omission breached the Charter's equality guarantee and failed the justified limitation provision because there was no link between the purpose of the Act and the denial of protection to a historically disadvantaged group.[55] It also provided a strong remedy. Rather than declaring the legislation to be inconsistent with the Charter, leaving the next move to the Alberta legislature, the Court declared that the statute should be read as including sexual orientation in its list of prohibited grounds of discrimination.

The Court also took the unusual step of delineating the legitimacy of the judicial role under the Charter. Perhaps the Court considered it appropriate to respond to the argument submitted by the lawyer representing Alberta, which emphasised the sanctity of private law, provincial jurisdiction and legislative supremacy. The Court rejected the idea that judicial review of Charter guarantees usurped the legislative role or undermined the democratic function. On the contrary, it stipulated, this role was an integral part of a new social contract forged by elected representatives as a 'redefinition of our democracy'. This redefinition superseded simple majoritarian preferences to vindicate 'the values and principles essential to a free and democratic society', a phrase contained in the Charter's justified limitation clause.[56] The Court then cited the following explication of that phrase from an earlier groundbreaking Charter judgment:[57]

> [R]espect 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.

This formulation stands for the proposition that the reference point for justification of limitations on Charter rights is not social or majoritarian preferences but rather the principled foundation of the modern constitutional state model.

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[53] *Vriend v Alberta* [1998] 1 SCR 493.
[54] RSA 1980, c I-2 (amendment 1985, c 33; amendment 1990, c 23). This statute was revised and renamed the Human Rights, Citizenship and Multiculturalism Act in 1996: RSA 2000, c A-25.5.
[55] *Vriend* (n 53) para 119.
[56] ibid paras 134–40.
[57] *R v Oakes* [1986] 1 SCR 103, 136.

In the light of Premier Klein's first experience with the political dynamic unleashed by the override clause, it is not surprising that he quickly decided to accept the Court's ruling. He reconsidered his position, however, when his socially conservative party strongly supported invocation of the override clause to reject that ruling.

Klein shared his thought process in detail. He revealed that he had no disagreement with the judgment as a private citizen.[58] Speaking in his official capacity, on the policy issue he expressed surprise that the statute did not allow for access to the statutory dispute resolution process if a complaint was related to discrimination based on sexual orientation. 'Had anyone been paying attention', he stated, that would have been fixed.[59]

His willingness to consider invoking the override clause was constitutional: it related to the institutional roles established by the Charter. In his view, the courts had engaged in judicial activism, in effect displacing the legislative lawmaking function. Nonetheless, he stated that he would not invoke the override without 'widespread public support'.[60] A flood of emails and telephone calls, along with extensive newspaper and television advertising, soon provided evidence of such support.

He considered this evidence unpersuasive, however, because it did not reflect the full political spectrum. Rather, it emanated from the political right-wing, religious groups and rural ridings. Moreover, it was intemperate: it conveyed anger, hatred and intolerance.[61] For example, there were claims that the Supreme Court judgment would promote homosexuality, weaken the family and infringe religious freedoms.[62] Such sentiments, despite their breadth and intensity, he determined, did not warrant state suppression of the guaranteed Charter right of equality.

He preferred to focus on what was really at stake in the litigation: '[A]ll [that] the Supreme Court decision has done is given people the right to go to the human rights commission with complaints on the ground of sexual orientation'. It had not interfered with 'government policy on same-sex marriage, adoption rights or the school sexual education curriculum'.[63] In the light of these considerations, he concluded that it was inappropriate to invoke the override clause in these words: 'I will accept the ruling … I think it's morally wrong to discriminate on the basis of sexual orientation'.[64]

He appealed to Albertans who disagreed with him to consider the pluralism and diversity of Canadian society in the age of the Charter: 'We're heading into one of the holiest of weekends [Easter] and I would hope all Albertans will take this very, very special time to reflect on what it means to be tolerant and to provide people with dignity in life'.[65]

[58] Larry Johnsrude, 'Klein Poised to Attack "Judicial Activism": Alberta Tories Could Invoke Notwithstanding Clause to Keep Courts from Becoming "Lawmakers of the Land"', *The Ottawa Citizen,* 7 April 1998, A4.
[59] Sheila Pratt, 'Klein Swayed a Divided Tory Caucus Not to Override Top Court's Decision', *Edmonton Journal*, 30 March 2008, E4.
[60] ibid.
[61] Pratt (n 59).
[62] Larry Johnsrude, 'Klein Pressures Caucus to Accept Gay Rights Ruling', *The Ottawa Citizen*, 9 April 1998, A5.
[63] Brian Laghi, 'Alberta to Let Court Ruling on Gay Rights Stand', *The Globe and Mail,* 10 April 1998, A5.
[64] ibid.
[65] ibid.

https://doi.org/10.1017/S0021223716000017 Published online by Cambridge University Press

Premier Klein's expansive commentary on his decision not to invoke the override clause provides significant insight into the distinctive politics generated by the clause. He acknowledged the Supreme Court's role in delineating the scope of the guarantee of equality and protecting vulnerable individuals and minority groups who often suffer at the hand of majoritarian politics. Moreover, he went beyond these institutional considerations to highlight the way in which the Charter creates a public sphere in which respect for pluralism and diversity must prevail. He did not yield to the outrage of his caucus or his political supporters, but urged those who sought to suppress Charter rights to reflect on the shared values of tolerance and respect for human dignity – in other words, to reflect upon the Charter's affirmation of the principles of the modern constitutional state.

In order to prevent the repetition of the intensity of these two intense political debates on the use of the override clause, the Alberta government decided to divest itself of the authority to invoke it. In 2000, the government of Alberta legislated that any future invocation of the Charter's override clause would have to be preceded by a provincial referendum.[66]

The province of Alberta decided to draw the line not on the question of same-sex discrimination but on marriage. In 2000, the legislature amended the Marriage Act so as to preclude marriage between persons of the same sex. For good measure, the Act contained an override clause suppressing Charter rights. This statute was widely considered to be ineffective, because the legislative jurisdiction with regard to capacity to marry is federal, not provincial. The Minister of Justice voted against it for that reason. The legislation lapsed after its five-year period.[67]

In 2004, Alberta conceded that it was subject to court rulings, based on the Charter's non-discrimination clause, affirming that same-sex couples were entitled to marry, and it became the last Canadian province to provide the provincial regulations necessary for these marriages to take place.

Attitudes to same-sex marriage have changed dramatically in Alberta. In 2003, 57 per cent of adults were opposed and 41 per cent approved. Those who were opposed were more likely to be older, male, and resident in rural areas.[68] An opinion poll tracking attitudes on same-sex marriage between 2009 and 2011 indicated that support for same-sex marriage rose from 65.7 per cent to

[66] Constitutional Referendum Act, RSA 2000, c C-25.

[67] David Johansen and Philip Rosen, 'The Notwithstanding Clause of the Charter', *Library of Parliament Research Publications*, Background Paper No BP-194-E, 16 October 2008) http://www.parl.gc.ca/content/lop/researchpublications/bp194-e.htm, fn 34 of which states that 'Premier Klein's Conservative government subsequently decided in April 2005 not to renew the recently expired notwithstanding clause in that province's Marriage Act'. See also Graham Thomson, 'Tories Drop Same-Sex Marriage Fight: Klein Regains Control of Issue After Caucus Earlier Proposed Futile Federal Legal Battle', *Edmonton Journal*, 5 April 2005. A report prepared for Lethbridge College in 2011 noted that 63% of adults in Alberta supported renewing this override clause, while 30% did not. This poll was commissioned by the Family Action Coalition and carried out by Feedback Research Corporation: Faron Ellis, 'Albertans' Opinion on Six Policy Issues', *Lethbridge College*, October 2011, http://www.lethbridgecollege.ca/sites/default/files/imce/about-us/applied-research/csrl/Alberta_Opinion_Structure_Fall_2011.pdf.

[68] BA Robinson, 'Same-Sex Marriages in Canada: Debates about SSM in Alberta', *Ontario Consultations on Religious Tolerance*, 8 August 2005, http://www.religioustolerance.org/hom_marb38.htm.

https://doi.org/10.1017/S0021223716000017 Published online by Cambridge University Press

72.1 per cent in that period. Support in the urban areas was higher: 72.4 per cent in Calgary and 75.5 per cent in Edmonton.[69]

Indeed, social opinion and political attitudes in Alberta have changed dramatically in a more general way. In 2015, the Alberta New Democratic Party, a socially progressive party, unexpectedly won a strong majority of 54 out of 87 seats in Alberta's provincial election, replacing the Progressive Conservative Party, which had governed since 1971. This victory marked the end of eighty years of social conservative governance in the province.

The most recent controversy involving the override clause related to proposed legislation by the minority Parti Québécois of Quebec, which held power from September 2012 to April 2014. A key component of Premier Pauline Marois' policy agenda was the enactment of a Charter of Quebec Values.

The main thrust of this proposal was to secularise the public sphere of Quebec society. It would have banned a wide range of public sector employees from overt indication of a religious affiliation, for example, by wearing a hijab, turban, kippa, large visible crucifix or other 'ostentatious' religious symbol while at work. The employees affected would have included civil servants, teachers, provincial court judges, police, healthcare personnel and municipal employees. In addition, those involved in providing or receiving government services would have had to uncover their faces. In their application to public day-care facilities, the secularisation standards would have precluded accommodating children's religious dietary requirements.

These restrictions would have imposed greater burdens on women and on non-Christians because of the accommodation afforded for symbols of Quebec's cultural heritage, such as crucifixes in the Quebec legislature and the names of many schools and hospitals.

The public rationale for the proposal was to provide a unifying common identity for the province, running parallel with its language laws, which require the use of the French language. Premier Marois described her aspirations in these words: 'What divides Quebeckers is not diversity, it is the absence of clear rules so that we can move onward in harmony'. Polling indicated that the Francophone majority supported a ban on religious symbols in the public sphere.[70]

Premier Marois stated that her government had no intention of invoking the override clause, even though the terms of her proposal would have precipitated challenges under the Canadian Charter that would very likely have succeeded. The lead minister supporting the Charter of Values suggested that a confrontation between the two Charters would be to the separatist government's advantage, increasing its pressure on the federal government for enlarged provincial powers or demonstrating that the Canadian Charter inhibited Quebec's distinctiveness.[71]

[69] Ellis (n 67) 3.

[70] Sophie Cousineau, 'Marois Believes Quebec Will Rally Behind Controversial Secular Charter', *The Globe and Mail*, 25 August 2013, http://www.theglobeandmail.com/news/politics/charter-of-quebec-values-will-be-uniting-force-for-province-marois-says/article13945945.

[71] Daniel LeBlanc, 'PQ Plans to Shield Religious Symbols Ban from Legal Fight by Adding Secularism to Charter', *The Globe and Mail*, 10 September 2013, http://www.theglobeandmail.com/news/politics/pq-plans-to-write-secularism-into-quebecs-charter-of-rights/article14212154.

During the ensuing election debates, Premier Marois abandoned her insistence that the secular charter would prevail if challenged and announced that, if re-elected, she would invoke the override clause to ensure its operation. The leader of the Liberal Party, Philippe Couillard, expressed the view that the secular charter was not designed to address identity questions but rather to precipitate a 'big fight' in order to move 'in a truly Machiavellian way toward a [separatist] referendum'.[72]

It is credible that Premier Marois chose the secular charter as her wedge issue because it lacked one feature that had tainted Quebec's previous interactions with the Charter's override clause – international disapproval. The attitudes underlying the secular Charter coincide with France's anti-clerical history. The Marois government was also well aware of the overlap with policies adopted by many European countries with regard to their immigrant populations in recent years.[73]

Premier Marois called a snap election in March 2014, hoping to win a majority mandate to implement the secular charter. Instead, she was defeated as the federalist Liberal party secured an unexpected majority of the vote, with support from Francophones and younger voters who had usually supported the Parti Québécois in the past. She also lost her own seat.

The new Liberal Premier, Phillipe Couillard, described his election victory as a 'realignment of the political forces in Quebec … a moving of the tectonic plates'. His electoral campaign in many ways repudiated the nationalism that the Parti Québécois espoused. He did not demand additional powers or resources from the national government but spoke of the federal-provincial partnership to build prosperity for the country. When he emphasised the importance of French to Quebeckers' identity, he expressly included immigrants as full members of Quebec society. He also affirmed his commitment to provide more instruction in English, noting that bilingualism and openness to the world is always an advantage.

Mr Couillard was not alone in expressing such opinions. Francois Legault of the Coalition Avenir Quebec party, which took third place in the election, stated that the Parti Québécois' promise of an 'imaginary country' had damaged 'the real country', and insisted that sovereigntists had no monopoly on the French language or Quebec's distinctive identity.[74]

The recent elections in Alberta and Quebec reflect a wider shift of the tectonic plates. They replicated the voting patterns in several earlier provincial elections which replaced socially conservative governments with governments that are strongly committed to the Charter's strictures. Moreover, in the federal election in October 2015, Prime Minister Justin Trudeau, of the Liberal Party, unexpectedly secured a majority of seats in the Canadian Parliament. Prime Minister Stephen Harper resigned from his leadership of the Conservative Party, which fell to third

[72] 'Pauline Marois Willing to Invoke Notwithstanding Clause for Secular Charter', *The Canadian Press*, 31 March 2014, http://www.huffingtonpost.ca/2014/03/31/pauline-marois-notwithstanding-secular-charter_n_5063206.html.
[73] Ingrid Peritz, 'PQ Releases Holiday Guide to Defending Values Charter', *The Globe and Mail*, 26 December 2013, A8.
[74] Graemie Hamilton, 'The PQ's Story May Not Be Over, But It Feels Like Quebec Has Turned the Page', *National Post,* 8 April 2014, http://news.nationalpost.com/news/canada/the-pqs-story-may-not-be-over-but-it-feels-like-quebec-has-turned-the-page.

https://doi.org/10.1017/S0021223716000017 Published online by Cambridge University Press

place, leaving the New Democratic Party as the official opposition. Both the Liberal and New Democrats are pro-Charter parties.[75]

No national Liberal government has invoked the override clause or even seriously considered it. Some of its leaders repudiated the clause altogether, including Prime Minister Pierre Trudeau (as noted earlier) and Prime Minister Paul Martin, who called for an amendment to remove it from the Constitution. During the national election in October 2015, the Liberal party leader, Justin Trudeau, campaigned on a platform which supported Charter rights, characterising the Liberal Party as 'the party of the Charter'. One of his most effective interventions in this regard during the campaign occurred during a party leaders' debate in which he criticised the Harper government's implementation of ministerial authority to remove Canadian citizenship from convicted terrorists, on the basis of actual or presumed entitlement to another citizenship, by stating 'a citizen is a citizen is a citizen'.[76]

Prime Minister Harper's Conservative Party is the product of a 'unite the right' movement, which was animated by the realisation that the Liberal Party would remain the natural governing party as long as the right of centre vote was split. In 2003, it replaced the Progressive Conservative Party, which had been the Opposition Party during the final negotiations of the 1982 constitutional reform package with Joe Clark as its leader. Mr Clark opposed this step on the ground that it would move the Party too far to the right. When in power, the Progressive Conservative governments had never invoked the override and Prime Minister Brian Mulroney, Prime Minister from 1984 to 1993, condemned the clause, famously announcing that it rendered the Charter 'not worth the paper it was written on'.[77]

The new Conservative Party distanced itself from the pro-Charter supporters of the Progressive Conservative Party when it absorbed the supporters of two other parties – the Reform Party and the Alliance Party – both of which were more right wing in their social and economic platforms, hostile to the Charter and supportive of extensive reliance upon the override clause. When the Conservative Party came to power under Mr Harper there was no possibility of amending or repealing the Charter, so he channelled his antipathy to the Constitution into criticism of the Supreme Court. The override clause would have been the ideal tool for Mr Harper to counter many of the Supreme Court's rulings, but the nation's strong commitment to the Charter and greater faith in the judiciary than in the political arms of the state prevailed.

The Harper government's legislative agenda endured many defeats in the Supreme Court of Canada. The government could easily have prevented many of these losses by respecting the advice that the legal staff in the Department of Justice have traditionally provided as to the

[75] The New Democratic Party has never held national office.

[76] Glen McGregor, 'Ottawa Man Convicted of Terrorism Challenges Constitutionality of Revoking His Citizenship', *Ottawa Citizen*, 2 October 2015, http://ottawacitizen.com/news/national/ottawa-man-convicted-of-terrorism-challenges-constitutionality-of-revoking-his-citizenship. The proposed legislation affects members of the Jewish community since they are entitled to acquire Israeli citizenship under the Israeli Law of Return: David Berger and others, 'New Law Makes Canadian Jews Second-Class Citizens', *Toronto Star*, 14 October 2015, http://www.thestar.com/opinion/commentary/2015/10/14/new-law-makes-canadian-jews-second-class-citizens.html.

[77] Canada, House of Commons, Debates, 19–23 December 1988, 295–97, 424–25, 522–27, 615–21, 716–17.

likelihood of invalidation in the event of a challenge in the courts to its constitutional validity. This tradition was not a matter of political preference. The Department of Justice Act requires the Minister of Justice to examine every statute presented to Parliament for enactment for consistency with the 'purposes and provisions' of the Charter and to report any such inconsistency 'at the first convenient opportunity'.[78]

There is reason to believe that the Harper government lowered the threshold for these assessments. In the documentary record submitted in litigation launched by a former lawyer in the Department of Justice and argued at the trial level of the Federal Court in September 2015, there is evidence to support the claim that the standard actually applied is a 'faint hope' assessment, rather than the 'credible argument' standard used in the past.[79] Under the 'faint hope' standard, it is alleged, the Minister of Justice may introduce new legislation to Parliament as being consistent with the Charter if some argument as to consistency is available that would provide a 5 per cent likelihood of acceptance.[80]

A 5 per cent rule, applied to the nine-member Court, would permit the introduction of legislation which the Department of Justice legal staff had deemed vulnerable to invalidation by the full bench. Why would a government proceed on that basis? One suggestion is that the government had a long-term plan to replace retiring members of the Court with appointees who would alter the analysis of Charter claims. This would be possible because the power of appointment lies in the hands of the Prime Minister, as part of the outdated arrangements set up under the written Constitution in 1867. It is conceivable because the government had relaxed the merit standards for judicial appointment put in place by previous governments. In addition, some recent appointees to the lower courts have discernible ideological affinities with Mr Harper. These affinities include deference to the executive and legislative branches, adherence to the doctrines of originalism and textualism, and social conservative leanings.[81]

One example of Mr Harper's exercise of his authority to fill appointments to the Supreme Court recently attracted a constitutional challenge. The Court determined that the appointee lacked the stipulated qualifications for appointment to this Court and took the unprecedented step of invalidating the appointment.[82] In a related episode of conflict between Mr Harper and

[78] Department of Justice Act, RSC, 1985, c J-2, s 4.1.

[79] Alice Woolley, 'The Legality of Legal Advising', *ABLawg*, 25 January 2013, http://ablawg.ca/2013/01/25/the-legality-of-legal-advising: '[The plaintiff] alleges that the policy of the Legislative Services Branch is that legislation will not be viewed as clearly or manifestly inconsistent provided that all of the arguments in favour of proposed legislation's consistency with the … Charter add up to at least a 5% chance of success. … [ie,] that proposed legislation that has a 70%, 80%, 90% or even 94% chance of being struck down by a court is not viewed … as giving rise to any duty to report [inconsistency with the Charter] to the House of Commons by the Minister of Justice'.

[80] The court documents in this litigation are available at http://www.charterdefence.ca/trial-related-documents.html.

[81] Sean Fine, 'Stephen Harper's Courts: How the Judiciary Has Been Remade', *The Globe and Mail*, 24 July 2015, http://www.theglobeandmail.com/news/politics/stephen-harpers-courts-how-the-judiciary-has-been-remade/article25661306; Sean Fine, 'Appointment of Russ Brown Extends Harper's Influence on Supreme Court', *The Globe and Mail*, 27 July 2015, http://www.theglobeandmail.com/news/politics/alberta-appeal-court-judge-russell-brown-named-to-supreme-court-of-canada/article25728554.

[82] *Reference re Supreme Court Act, ss 5 and 6* [2014] 1 SCR 433.

https://doi.org/10.1017/S0021223716000017 Published online by Cambridge University Press

the Supreme Court, Mr Harper raised serious allegations against the Chief Justice of Canada. These allegations were determined to be baseless after investigation by the International Commission of Jurists.[83]

Mr Harper's disregard for his obligations under the Charter, and persistent disrespect for the independence, expertise and constitutional obligations of the judiciary, may be related to the override clause. During the recent election period, there was abundant reference to his many recent defeats in the Supreme Court and to the numerous Charter challenges in progress that were considered likely to be added to the list. In addition, Mr Harper implemented executive action and defended political initiatives that were very likely to face invalidation, such as:

- the removal of Canadian citizenship from convicted terrorists by ministerial action on the basis of a presumption of entitlement to citizenship elsewhere;
- the requirement that a woman take the citizen oath in public, with her face uncovered, with no authoritative directive;
- certain amendments to the anti-terrorism laws, including the pre-authorisation of unlawful or unconstitutional investigative powers; and
- the creation of a hotline to enable Canadians to report their neighbours' barbaric cultural practices to the police.

The common element in these policies seemed to be the desire to stir up anti-Muslim sentiment for electoral advantage. However, it also seemed to suggest a more long-term aspiration: to receive an electoral mandate to bring these policies into law through invocation of the override clause.

The transformation of Canadian politics, including electoral politics, by the override clause delineated here is multifaceted. Invocation of the clause ignites media and public attention, and legislative deliberation; it also affects electoral debates and, perhaps, results. Consideration of its invocation – even the possibility of its invocation – attracts public engagement and close media coverage and debate. Ministers of Justice and First Ministers must respond. Political repercussions extend beyond provincial and international borders. The sunset clause vitiates any long-term resolution of the controversial issue in favour of the government, as it forces the question of reinstating the clause within the time frame of electoral frequency and with a rigidity that is beyond state control. In the rare cases where the override clause has been used with popular support, governments have let it lapse and polls demonstrate that public support has shifted in favour of the Charter right.

There are a number of reasons for this shift in public opinion. One reason is the educational value of public debate as more people learn about the precise reasoning in the judgment and the actual significance of the ruling. Another is that people can become used to unthinkable social change when they see it happening without calamity in other provinces. The shift in public opinion relating to sexual orientation – from sin, to crime, to an element of human dignity – illustrates

[83] Tonda MacCharles, 'Stephen Harper Urged to Apologize for Spat with Chief Justice Beverley McLachlin', *Toronto Star*, 25 July 2014, http://www.thestar.com/news/canada/2014/07/25/chief_justice_cleared_in_spat_with_stephen_harper_government.html.

https://doi.org/10.1017/S0021223716000017 Published online by Cambridge University Press

this phenomenon. Another factor is that the passage of time marks generational change, which reduces the number of people who cling to traditional values, social hierarchies and attitudes, which they insist that the state must enforce.

The override clause has thus introduced a new form of public reason into debates on Charter rights and their justified limitation. Judicial deliberation on the scope of the right and the sequenced methodological steps of proportionality analysis define and refine the core questions in the light of political and social history, international and transnational comparative reflection, and social science data and expertise. The public and the political classes internalise these patterns of thought. Rights claimants who had no traction in the political arena to protect their interests acquire the entitlement to take their complaints to courts of law, represented by lawyers and supported by public interest groups as interveners in the litigation. These claimants and their representatives voice their concerns in the media, often shedding light on aspects of human life for which many members of the public had definitive opinions but no interest, facts, insight or respect. Examples include religious pluralism; violence against women, particularly racialised women; prostitution; sexual diversity; the right to die; and the plight of the Aboriginal population both in their traditional communities and in urban centres.

Objection to using the override following controversial judicial rulings came to extend beyond the individuals and groups affected by the unjustified infringement of the particular rights. This dynamic reflects the fact that the Charter is understood not as a miscellaneous list of rights and freedoms, but as a system of rights protection, such that the suppression of one right undermines the enjoyment of the others.[84] It also reflects the fact that Canadians tend to trust the courts more than they trust their politicians, with 61 per cent expressing confidence in the Supreme Court of Canada, 51 per cent in the courts in general, 31 per cent in the media, 28 per cent in Parliament (the House of Commons), 13 per cent in political parties, and 12 per cent in politicians.[85]

There is little social science research on public attitudes to the override clause or specific instances of actual or proposed invocation. A study carried out in 2002 found that, in the abstract, 54 per cent of respondents reject the idea of legislative override of court determinations of

[84] Angus Reid Institute, 'Canadians Have a More Favourable View of Their Supreme Court than Americans Have of Their Own', 17 August 2015, 6, 9, http://angusreid.org/wp-content/uploads/2015/08/2015.08.14-Supreme-Court-final.pdf. This study of Canadian public opinion, carried out in 2015, referred to a number of Supreme Court judgments and then asked some questions. The subject matter of the study is set out with the percentage of those polled who agreed with the judgment in brackets: judgments included striking down criminal code prohibitions against brothels, selling sex and soliciting a prostitute (54%); recognising Aboriginal tile to land in British Columbia (48%); requiring formal constitutional amendment for reform of the national Senate (50%); striking down a law prohibiting doctor-assisted suicide for consenting competent persons suffering from illness, disease or disability (52%); and striking down mandatory minimum sentences for unlawful possession of a firearm (37%). On the question whether the Charter has been good for Canada, 84% agreed. When asked if the recent decisions mentioned indicated that the Court has had a positive effect 57% said 'yes' with regard to Canada as a whole; 58% said 'yes' with regard to individual rights and freedoms of Canadians; 50% said 'yes' with regard to everyday life for Canadians; and 34% said 'yes' with regard to themselves personally. The commentary on these results in the study: 'Canadians are markedly less likely to see themselves as affected by the Supreme Court personally, yet they embrace it nonetheless'. The responses were higher for the more general question of whether the Supreme Court has had a positive or negative effect in these four dimensions.

[85] ibid 13.

https://doi.org/10.1017/S0021223716000017 Published online by Cambridge University Press

constitutional breach while 41 per cent think such power is appropriate. There is little regional difference in these results, but there are differences depending on the specific rights in issue. When asked if the government should or should not override a court decision that the Charter requires same-sex marriage, 67 per cent of respondents said 'no' and 28 per cent said 'yes'. Of those who supported gay marriage, the 'no' vote went up to 85 per cent; for those who opposed gay marriage, the 'yes' vote went up to 51 per cent. The numbers changed when the same question was applied to a court ruling striking down anti-terrorism legislation: the 'yes' vote was 55 per cent and the 'no' vote was 40 per cent.[86] Of those who opposed the override clause in principle, 44 per cent supported its use in this context.

Perhaps the most important effect of the override clause is that it has to some extent deflected the accusation of judicial activism – that is, the claim that the judiciary has usurped the political mandate of elected, representative and accountable legislative bodies to make public policy. The history of the clause makes clear that its drafters deliberately chose the rights to be subject to legislative override. If some rights were left to the finality of judicial review by those most opposed to the Charter, it does not make sense to criticise the judiciary for carrying out that function. For the other rights, the courts are to some extent also liberated from the accusation of illegitimacy, since it is not clear why they should defer to legislatures that possess the political power to temporarily reverse their rulings, as long as they are willing to do so by legislation, subject to the required specificity, and pay the political price. Both the judiciary and the legislative bodies, in other words, acquire distinctive constitutional capacities under this framework, which reflect their institutional strengths and legitimacy. The political function is not transferred to the courts. In fact, the political function is measurably improved to the extent that the override clause precipitates legislative deliberation upon the current effect of public policies, both old and new, at the initiative of those most affected by them in the light of newly acquired rights and freedoms which have the status of supreme law, and through the filter of the judicial methodologies developed to accord with the precepts of the modern constitutional state.

The Supreme Court of Canada has dulled the force of the judicial activism critique by an additional aspect of this mode of rights adjudication: remedial orders which do not take effect immediately. The legislatures thus have a period of time in which to enter into investigation of the subject matter with the benefit of the judicial analysis of the breach of the right and of justified limitation. The Court's rulings often provide guidance for the legislature to fulfil its purposes by alternative means. Given the political cost of invoking the override clause and the short duration of the reprieve it offers, revising government policy in this way often makes sense and produces better quality law.

5. CONCLUSION

In this conclusion, I suggest some of the insights that the Canadian experience might provide for assessing the proposed extension of the Israeli override clause to Basic Law: Human Dignity and

[86] Centre for Research and Information on Canada, 'The Charter: Dividing or Uniting Canadians?' April 2002, 24–25, https://library.carleton.ca/sites/default/files/find/.../cric-crf-02-not.pdf.

https://doi.org/10.1017/S0021223716000017 Published online by Cambridge University Press

Freedom. The first set of considerations relates to a comparison of the legal structure of the proposed legislative override with its Canadian counterpart. The second set relates to the political dimensions of the proposal, including an assessment of whether it marks progress towards the incremental development of a coherent and comprehensive constitutional framework for Israel. Two questions are pertinent to this inquiry:

- Would the proposal facilitate formal adoption of a full bill of rights?
- Would it promote deeper adherence to the wider set of principles that constitute the model of the modern constitutional state?

The 2015 proposal for a legislative override put forward by Justice Minister Ayelet Shaked follows a number of earlier proposals put forward by her predecessors. These proposals were formulated for a new Basic Law: Legislation. They tied the creation of a legislative override power to a confirmation of the authority of the Supreme Court of Israel to invalidate statutes that are inconsistent with Basic Laws generally or to the two rights-protecting Basic Laws. Some of the proposals would have restricted the power to invalidate statutes to the Supreme Court sitting as a larger panel of nine judges. The duration of the legislative override would have been five years, with the possibility of renewal. The number of Members of Knesset (MKs) required to support the invocation of the legislative override varied from a baseline of 61 of 120 MKs to high numbers that would encompass more than the margin of a small coalition.

These older proposals embody an institutional compromise similar to that achieved by the First Ministers in Canada in 1982, in that they tempered the constitutional affirmation of judicial review of statute by the Supreme Court by the allocation of the override power to the Knesset, to reflect the principle of parliamentary supremacy.

So, too, these older proposals, like the Canadian proposals, arose in an effort to continue the incremental development towards a more comprehensive constitutional framework. They were designed to empower the legislature to shield a particular statute from judicial invalidation for a period of time. It is not clear whether the proposals would have created a routine override mechanism that was part of the day-to-day working of the political system, or one that was exceptional, operating in a different dimension of constitutional politics, as does the Canadian example. This important question would depend on the degree of Knesset support required, and therefore raises one of the most challenging dimensions of the incremental mode of constitutional development – that existing political institutions must reach agreement on curtailing their own powers in favour of judicial review of higher or supreme law guarantees of fundamental rights.

The debates on constitutional reform pertaining to guarantees of fundamental rights, demonstrably justifiable limitations and legislative override in Canada were removed from the day-to-day political process. They took place in meetings of the First Ministers and the Special Joint Committee proceedings, which involved public participation, and in the courts. These deliberations had the effect of reconfiguring the regular political dynamics of the major political parties, turning them away from ideology and tradition to the rationality, transparency, standards of expertise and commitment to the long-term wellbeing of the members of the public encompassed by the modern constitutional state model.

The contrast between the genesis of the proposals for an override clause in Israel and the 1982 Canadian constitutional negotiations is also striking. The Israeli example offers none of the countervailing forces that came into play in the deliberations of the First Ministers to forge a complicated set of compromises encompassing the new constitutional amending formula and the Canadian Charter's substantive and institutional terms. There are no parallels with the complex confrontations between the federal and provincial delegations that supported and opposed different parts of the final package of reforms, and between the federal and provincial political parties that had split along a number of ideological lines. There is no parallel with the deep engagement of the public in the delineation of the rights of individuals and groups as against the state. The Israeli engagement in constitutional development remains more closely tied to the day-to-day political process.

The 2015 Israeli override proposal differs from both its predecessors and the Canadian example in one important way. Its operation does not countermand the application of a particular guaranteed right (or rights) to a particular statute. Rather, the legislative override envisaged would operate to invalidate a court judgment, presumably one that invalidated a statute (or provisions thereof) based on a finding of infringement of one or more fundamental rights and freedoms. It is not clear whether it would act only prospectively.

The contrast is striking. The Canadian approach provides a clear, intelligible, and circumscribed directive: a statute or part thereof would have force, for a limited period in the future, as if the Charter guarantee did not apply to it. The operation of the proposed Israeli override clause does not act on a statute directly; rather, it negates the force of a particular Supreme Court judgment which would otherwise invalidate a statute. This effect does not provide the same level of clarity or intelligibility as the Canadian example: the Canadian override clause countermands the operation of the Charter in a particular respect and leaves the legal system intact; the Israeli proposal has the potential to undermine basic structural elements of the modern constitutional state – the rule of law and the independence of the judiciary.

Many questions arise as to how the Israeli proposal would work. Court judgments provide more than the definitive resolution of the litigated dispute(s). They provide the scaffolding of the legal system: methodological development that affirms or rejects earlier or lower court approaches; interpretation of various legal instruments such as constitutional texts, statutes, regulations, contracts and other legal sources; the application of legal rules to particular facts; reference to relevant facts and expertise; the application of onuses and presumptions; the endorsement and rejection of arguments and precedents; adaptations of rules to particular circumstances; the application of procedural rules; mention of possible permissible extensions and exceptions to the final ruling; and many other elements. They also provide remedies for particular litigants that implicate a complicated mesh of other relationships.

It is difficult to imagine what it would mean to remove a particular judgment from the legal system for a temporary, possibly renewable, period. It is especially difficult to consider the implications of this type of legislative override for the Israeli legal system, where rights protection is integrated into the whole legal order in a comprehensive and coherent manner. It is not unreasonable to presume that the judgments that would meet this fate would be exceptionally important either in legal or political terms, or both. Indeed, the more important and groundbreaking the

reasons for the judgment and the result in legal, constitutional and political terms, the more exposed it would be to legislative override. There might be political deliberation, even agreement, on the invocation of the override power even before the Court issues its reasons in such a case. How would that affect the Court's deliberations?

The life cycle of the judgment would be peculiar. If an override lapsed, would there be political undertakings or further debate for renewal, if that were made possible? If the override were invoked against a judgment, would the Court ignore the precedential status of the judgment as a whole or only some element of it that seemed to have precipitated disapproval? If the judgment later became free from the override, would it come back into effect? Would it take effect as of the time of its original delivery or the time of its revival?

The uncertain and perhaps undefined fate of important judgments would impose considerable stress on the legal system, even if the window for effecting this temporary nullification were limited. It would be difficult for lawyers to provide legal advice to their clients as to the consequences of particular actions. It would also be difficult to conduct litigation, and adjudication would be more challenging in a world of unstable precedents. Of particular concern would be instances of judicial determination of personal status, such as a ruling of guilt or innocence in criminal proceedings or a resolution of entitlement to public benefits. The relationship between Israeli law and international law would also be destabilised.

The political ramifications of the 2015 proposal are also complicated. Political leaders and parties would be able to signal their concerns relating to particular cases in advance, with the possible effect of undermining the independence of the judiciary. The government, as a participating litigant in all public law litigation, would cease to be subject to the rule of law since it would have the option of reversing any case that it lost. Setting a supermajority for the passage of such a legislative override might make its imposition more politically difficult, but it might not. It might precipitate back room cooperation among political parties to forge a list, satisfactory to all, of cases to be targeted for legislative override. Or there might be sequential trade-offs between support for an override of a particular case important to one or more parties by other parties which have their eye on a case to come up later or other political advantage.

This dynamic would reflect the fact that the override originated in the most intensive horse trading of all – post-election formation of the government coalition. The high stakes bargaining entailed in coalition formation is a vortex where competing ideologies and electoral leverage contend, rather than principles, rights, and the broader norms of modern governance. This is a context in which even the principles of democracy are jeopardised, as small parties with specific agendas and dedicated constituencies can demand more political influence and/or allocation of resources than their political standing would otherwise afford. Time is short; the stakes are high; and expediency trumps rationality and fairness. This political context may be suitable for day-to-day governance but is unlikely to forge good constitutional development.

The politics of the override clause have entered into electoral politics in Canada, but in ways that diffuse rather than concentrate hostility towards rights protection. Perhaps this is because the Charter is entrenched by an amending formula that requires such a high degree of federal-provincial consensus that it is now considered hopeless to entertain the prospect of further

amendments. The major political parties have more or less made their peace with the Charter, or at least determined that the political price of the override clause is too high. Moreover, the prospect of successful suppression of the Charter guarantee is too short-lived.

In any event, Canadian political parties are as a rule large and diversified, and must accommodate a pluralist and multicultural public. Recent efforts to foment social division and distrust as between different demographic sectors for electoral advantage have failed. Issues of security against terrorism do not overshadow domestic issues. The federal structure gives voters the option to support one type of party at the provincial level and another type at the national level, and therefore allows for split allegiances. All of this diffusion stands in contrast to the Israeli situation where local and regional war and terrorism are constant, pressing and even existential concerns in every national election.

The debates on rights, demonstrably justifiable limitations and legislative override in Canada, during and between elections, have had the effect of reconfiguring the modes of deliberation of the major political parties in Canada, turning them away from ideology and tradition to the rationality, transparency, standards of expertise, and commitment to the long-term wellbeing of the public encompassed by the modern constitutional state model. Charter values have become an important element of political platforms and election debates. Majoritarian political practices have had to bend to accommodate the idea of state concern for each and every voter, permanent and temporary resident, and even refugees. In addition, these debates and the Supreme Court's Charter judgments have affirmed international human rights norms and raised interest in other democracies' rights-protecting instruments and adjudication thereunder.

Despite the many similarities between the Israeli and Canadian override clauses, the basic motivation behind the Israeli 2015 proposal is very different. It embodies dissatisfaction with the restraints that the rights-protecting Basic Laws have imposed on the government and the Knesset. It seeks to turn the constitutional clock back, not further adapt to the precepts of the modern constitutional state. The appropriate forum for deliberation on this dissatisfaction is not the intense vortex of coalition creation, where small parties fight for the enlargement and security of their loyal supporters' preferences and way of life. Rather, the deliberation should take place in a forum that abstracts from these particularities to some extent in recognising the pre-eminent constitutional stature of the constitutional rights implicated, as well as the institutional constraints that these pre-eminent rights and freedoms impose, in order to secure the most fundamental normative features of governance in the modern constitutional state.

One would think that the principles that underlie this model are such that Israel would not abandon them without serious deliberation. Their genesis lies in the same history that not only precipitated but also, to some extent, legitimated the founding of a Jewish state in the land of the Hebrew Bible and the ingathering of the dispersed diaspora. The countries and international institutions that have internalised this model are the ones whose support and allegiance Israel requires in order to address its very serious and particularised domestic and international challenges. Despite the fact that no other democracy faces such challenges and still endeavours to be true to these principles, these countries often offer criticism that is at times insensitive, ill-informed and counter-productive. It seems clear that the adoption and invocation of an

override clause applicable to Basic Law: Human Liberty and Dignity will increase the frequency and intensity of such criticism. Moreover, each use of the override power would offer to the world examples of the Knesset's express repudiation of the core principles of the modern constitutional state, as encapsulated in its own constitutional instruments. The heavy burden of the international censure of Quebec's invocation of the Canadian override power, and the fate of the political movement that supported this posture, suggests that the long-term implications for Israel would also be of great significance.

https://doi.org/10.1017/S0021223716000017 Published online by Cambridge University Press