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## Reasoning with the Charter

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## *Reasoning with the Charter*

Leon E. Trakman

Butterworths Canada Ltd. 1991, pp.239

*Reasoning with the Charter*, a critique of the current "liberalist" interpretation of the *Charter* of Rights and Freedoms. Through deconstruction of main judicial interpretations of the *Charter* Professor Trakman reconstructs the interpretative process to reveal the *Charter's* potential for positive action.

Professor Trakman considers the attempts by the judiciary to limit interpretations of the *Charter* to traditional negative rights. He suggests that notwithstanding this limitation, these interpretations often reveal the potential for a positive construction within the *Charter*. Further, Professor Trakman criticizes judges for denying their political roles in society and demonstrates how judges do, in fact, exercise political influence. These philosophical underpinnings are extensively explored.

Professor Trakman proposes a communitarian conception of liberty which does not abolish *Charter* liberalism, but puts it in its place by treating "private rights as a subset of the social sphere".<sup>1</sup> Individual rights, he argues, cannot be, and in reality are not separable from their social milieu. Thus, Professor Trakman seeks "community through communication" whereby groups are acknowledged as having a distinct role apart from government and the individual. To encourage "communicative discourse" between the parts, in their social context, with the *Charter* as the focus, is "to seek political harmony among diverse peoples".<sup>2</sup>

This is an ambitious task. Reinterpreting the *Charter* to provide "discourse" to seek "political harmony", however, is not the book's main thrust. Except for the occasional diversion into these broader goals, Professor Trakman's focus is on the fallacies and inconsistencies of current judicial interpretation of *Charter* rights.

A difficulty in following Professor Trakman's train of thought lies in the lack of concrete development of case law and societal issues. The general style throughout the book is to state very specific conclusions without guiding the reader through his process of reaching these conclusions. For example, in Chapter Two, Professor Trakman attempts to develop a theme of group-group interaction to refute the traditional liberalist state-individual dichotomy:

No group of litigants, blacks, women or aboriginal people, can personalize collective attitudes towards sex, race and religion without also affecting the social climate around them... They affect prayer... They encompass special interest groups... Within this wider sphere,

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social interests move beyond adverse relations... they entertain public perceptions of hunger, employment... Thus, the pregnant woman's right not to give birth hinges as much upon the perceived availability of safe and humane abortion facilities as upon the right to foetal life itself.<sup>3</sup>

Although the statements are by no means substantively incorrect, they do contain perspectives which need a context in order for the reader to fully appreciate them. The reader might like to know how or why the author came to a particular societal example, or why he uses it in a specific circumstance. Without any such elaboration, the technique of drawing on these examples is more distracting than illuminating.

An exception to, and support of, this criticism is the chapter entitled "Morgentaler as Illustration"<sup>4</sup> in which Professor Trakman grounds his critique in a review of the 1988 Supreme Court of Canada decision *R. v. Morgentaler*. Although he reiterates many of the statements made earlier in the book, this chapter does provide an effective case illustration of his critique of current judicial interpretation of the *Charter*.

Where Professor Trakman does not attempt to allude to societal examples in a random manner his ideas are persuasive. For example, in a subsection to Chapter Three entitled "Rights as Hierarchy"<sup>5</sup> he critiques judicial interpretation of *Charter* rights as producing hierarchical relationships between groups and the individual. His argument establishes why courts should not seek this interpretative process. This analysis forgoes the distractions of random allusions to undeveloped issues and is all the more compelling for being an uncluttered statement of his ideas.

On a more substantive level, Professor Trakman does not respond to prevalent criticism of the system of rights as it exists in the *Charter*. His basic premise is that the rights themselves are valid. This is made clear by his constant focus on the interpretative process as engaged by the judiciary rather than on an evaluation of the rights as they stand within the *Charter*. Clearly, Professor Trakman's purpose is not to deconstruct the rights themselves. What he does not dispel however, is the possibility that his critique of the interpretative process may more properly be, in fact, a critique of the rights on which that interpretative process is based.

For the purposes of the book, it might be that a response to criticisms of the system of rights as it exists within the *Charter* is not essential. Professor Trakman's apparent concern is not to move away entirely from a system of rights, but rather to reinterpret it so that it shifts away from the Western liberalist tradition. Yet, *Reasoning with the Charter* is situated within the Canadian context and, as such, requires a response to this fundamental criticism. The author does allude to the issue where he states "the rights discourse, undoubtedly, is alien to some".<sup>6</sup> It is possible that the construction of the rights as they exist within the *Charter* is not amenable to take account of certain

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experiences in Canadian society. Professor Mary Ellen Turpel, for example, in "Aboriginal Peoples and the Canadian Charter: Interpretative Monopolies, Cultural Differences", states:

It is difficult for me to see any potential for sensitivity to the cultural differences of Aboriginal peoples in the constitutional rights paradigm. I could imagine a strong defence argument being developed under section 25 to the effect that, in the light of cultural differences, Aboriginal peoples are immune from Charter jurisprudence or interpretation. The Charter according to this argument, does not extend to them because of the incommensurability of the conceptual framework of the rights paradigm.<sup>7</sup>

Perhaps, within the Canadian context, Professor Trakman could have directly responded to this viewpoint and specifically stated how his "communicative discourse", as based on a Western liberalist document, would operate to include those to whom the system of rights is traditionally uninclusive.

Above all else, the book is a strong critique of the current judicial interpretation of the *Charter*. It forms the basis for compelling interpretative reconstruction. Unfortunately, although Professor Trakman provides some reconstruction he shies away from concretely examining his conceptions of community and communicative discourse through the *Charter*. *Reasoning with the Charter* is thought provoking, but, if it had more bravely pursued its own potential for "communicative discourse" it would be all the more satisfying.

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1. at 1.

2. at 4.

3. at 50.

4. at 173.

5. at 56-60.

6. at 79.

7. M.E. Turpel, "Aboriginal Peoples and the Canadian Charter; Interpretive Monopolies, Cultural Differences" in *Canadian Perspectives on Legal Theory*, ed. R.F. Devlin (Toronto: Emond Montgomery Publications Ltd., 1991), 503 at 526-27. The article was reprinted with the permission of the Human Rights and Education Centre, from (1989-1990), 6 C.H.R.Y.B. 3.