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Bills of Rights as process: the Canadian experience

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Abstract

This article seeks to address a specific aspect of Bills of Rights that tends to be neglected in the literature. That is, the process of how Bills of Rights are drafted. In particular it focuses on the drafting of a particular right-equality with a view to identifying if there is a link between: (a) the manner of how an equality provision is drafted and securing legitimacy of the final product; (b) whether a participative process can influence the formulation and articulation of an equality provision; and finally (c) if the 'people' have spoken through this document, does this encourage the judges to take a less restrictive approach in interpreting the equality provision? This task is undertaken by drawing upon the Canadian experience, which then will be used to draw out lessons for those jurisdictions where the process of drafting an equality provision in a Bill of Rights is under way. The article is supported in its conclusions by a series of semi-structured interviews with key players involved in the drafting and interpretation of the equality provision in the Canadian Charter.

Introduction

In recent decades there has been a worldwide increase in the adoption of Bills of Rights as means to protect rights. Indeed this global phenomenon has been referred to as a 'booming industry' (Hirschl, 2004, p. 220), with one commentator speaking of the rise of 'world constitutionalism' (Ackerman, 1997).[2] Discussion about this 'booming industry' tends to be primarily centred on either a discussion on the content and document as a final product, or of how courts have interpreted and applied particular rights. This article will adopt a nuanced approach as it will focus on a specific aspect of Bills of Rights that tends to be neglected in the literature. That is, the process of how Bills of Rights are drafted. In particular, it will have a further focus as it will concentrate on the drafting of a specific right, namely equality.

The article will make three arguments. First, it is asserted that if the drafting of an equality provision is rooted in popular participation creating a space for the 'public' to be involved in the drafting process, this may potentially increase the 'legitimacy' of the equality provision and the Bill of Rights itself. In turn, this can help to create a sense of ownership and a feeling amongst the 'public' that this is 'their document' (Harvey, 2001; Gloppen, 1997; O'Cinneide, 2006). The notion of Bills of Rights as process will be discussed in detail in Section I. Second, the conceptualisation of Bills of Rights as process can also help influence the actual wording of an equality provision to incorporate a substantive

1 This paper is based on an earlier draft presented at an International Conference on 'Social Justice and Human Rights in the Era of Globalisation, Between Rhetoric and Reality' (Leuven, Belgium, 21–23 August 2006). Thanks are due to Fionnuala Ni Aoláin and an anonymous referee for their extremely helpful comments on earlier drafts of this article. I was greatly assisted by the Molson and Canadian Studies and the UK Postgraduate Students Canadian Studies Travel Awards, which enabled me to travel to Canada in August 2004 where I conducted interviews. All errors are of course mine.

2 The full list of countries that are part of this phenomenon is too long to cite; they range from Canada, Israel, South Africa, countries of central, eastern and southern Europe, Latin America and the United Kingdom. For comprehensive surveys, see generally Flanz, 2000.

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understanding of equality, most notably substantive equality. This understanding of equality, which will be discussed in Section II, is of particular importance for societies who are in transition to a more democratic order. The final nascent argument is that if a Bill of Rights is a product of popular participation where the 'public' have spoken through this document, judges will be less likely to take a restrictive approach to a Bill of Rights. These arguments will be tested by drawing upon the Canadian experience in the drafting process of the equality provision in the Canadian Charter of Fundamental Rights and Freedoms 1982 (hereinafter the Charter). In so doing, the article will explore both the challenges and opportunities each argument raises.

As noted, this article is being published in a period which has witnessed a global trend of jurisdictions who have protected or are in the process of protecting equality via a Bill of Rights. The issues raised will therefore have relevance for those jurisdictions who have adopted a Bill of Rights or where the process of protecting equality in a Bill of Rights is currently underway, such as Northern Ireland, or Australia as they continue to debate on whether or not to adopt a Bill of Rights.[3] Far from being unique to the area of Bills of Rights, this article will also be central to those involved in constitution-making and negotiating peace agreements (Bell, 2006; Tully, 1995). The article therefore, stands at a praxis of academic interface with real policy and political issues and maybe of assistance to those jurisdictions who are engaged in the debate about protecting equality in a Bill of Rights, state formation and change. Furthermore, despite the proliferation in Bills of Rights generally, issues such as the manner of how an equality provision is drafted, the importance of public participation at large in the drafting process, the link between concepts of substantive equality and a participative process, and the implications of a wide and open drafting process of a Bill of Rights on the judges' interpretation of an equality provision, have yet to be studied in some detail. Focusing on these issues, this article seeks to fill this gap and will add to the nascent literature on the topic of Bills of Rights. The article also seeks to open up a new window on the traditional discourse on protecting equality in Bills of Rights, thereby making an original and constructive academic contribution to the field of Bills of Rights.

In framing this article, Sections I and II address the theoretical definitions of Bills of Rights as process and substantive equality respectively. This discussion will demonstrate that while both understandings offer great opportunities, they also raise several challenges. These challenges and opportunities are then explored in Section III, as the validity of the three arguments which are at the core of this article is tested by using Canada as a case study. These three arguments are then brought together in the Conclusion, which will summarise the strengths and weaknesses of each of the three sets of arguments. In so doing, the Conclusion will highlight a number of important lessons for societies where the process of protecting equality via a Bill of Rights is underway.

An important caveat to note at the outset is that although the focus is on Bills of Rights, this does not imply that other attempts to combat discrimination and inequality, such as anti-discrimination legislation, European Union legislation and mainstreaming equality, are of less value. Indeed Bills of Rights constitute only one piece of the equality jigsaw and need to be supplemented and complemented by equality legislation at the national, European and international levels. However, by taking a step back and focusing on issues at a 'deeper' level, the article is deemed to contribute to the understanding of both the contemporary use of what it means to protect equality in Bills of Rights, and also the role and nature of Bills of Rights.

I have chosen the right to equality as it occupies a key position in a Bill of Rights, especially for countries making the transition from conflict to democracy, in the sense of being central to the success of that transformation and without which all rights in a Bill of Rights would remain empty

3 Note also the parliamentary body at Westminster, the Joint Committee on Human Rights, who recently launched an inquiry into whether Britan needs a Bill of Rights. See Joint Committee on Human Rights, *A British Bill of Rights*, Call for Evidence, Session 2006–2007, Press Notice 38, available at http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights/jchrpn38_220507.cfm

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and devoid of meaning. Indeed, as elsewhere in the world, inequality was rife in Canada and was experienced by a number of groups, such as indigenous people, women and francophones. In spite of, or perhaps because of, these realities, as we will see, civil society in Canada has been directly influential in the formulation of the equality provision. Furthermore, Canada can be regarded as a country in 'transition' not in the traditional understanding of 'transition' (Teitel, 2002–2003),[4] but more from a 'democratic renewal' perspective (Campbell, Harvey and Ni Aolain, 2003). This makes Canada an appropriate choice for a study aiming to demonstrate the potential of what Bills of Rights as process can do at a 'deeper' level for 'transitional' societies. Finally, by focusing on the right to equality, it gives the article a more particular focus than would be afforded by a general discussion on the drafting of a Bill of Rights.

Section I: Bills of Rights as process

Conceptualising Bills of Rights as process emphasises that the manner in which a Bill of Rights is created is of fundamental importance for a number of reasons.

First, it helps to create a space, allowing 'consultation' to take place amongst the 'public' and input from interested groups/individuals to discuss and deliberate on what type of an equality provision and Bill of Rights they want and need. Harvey calls this the principal reason and states that deliberation is always an important aspect of reflective law and policy formation in a political community (Harvey, 2001, p. 61). Second, there is the pragmatic reason – a public consultation process can help inject the level of participation and ownership necessary to inject 'legitimacy' and create a feeling amongst the 'public' that the Bill of Rights is 'their document' (Gloppen, 1997, pp. 259, 260; O'Cinneide, 2006, p. 5). This can only be achieved if the final product is a result of a broadly based process of popular participation. Third, a broad and open process can also help influence the actual wording of an equality provision. Finally, it can help encourage the judiciary to take a more robust and substantive approach when interpreting the Bill of Rights (Harvey, 2001, p. 61; Penner, 1996). Accordingly, this conceptualisation argues that an equality provision can only be understood as a result of the process that produced it and arguably that this is more important than the final wording of the equality provision. It may well turn out to be that a Bill of Rights is worth little if people do not relate to it, respond to it and regard it as a 'legitimate' tool, and if the popular imagination is not sufficiently captured to drive the agenda forward. After all, the Bill of Rights is one moment in time, but the process of bringing a Bill of Rights to an unequal world is a dynamic one and the usefulness of a Bill of Rights is the extent to which it can gain ground and safeguard gains that it will be hard to backslide from in the face of competing political pressures and agendas.

Theoretically, the picture painted by Bills of Rights as process is very appealing, especially to those groups who tend to be excluded from the ordinary parliamentary political process due to lack of representation and power in Parliament. As Perry argues, the non-judicial, electorally accountable branches of government – the legislative and executive branches – frequently have insufficient political or institutional (bureaucratic) incentives to attend a claim – or, if they do attend to it, to take seriously the claim – that government has violated, or is violating, an articulated human right (Perry, 2003, p. 655). Thus, they tend to use their power to mute critical voices or to favour the most powerful:

> 'The legislature reacts to those who raise their voices most loudly, and who apply the most insistent pressure . . . Many important causes are not "vote-winners" and according to them may be low profile issues and are therefore neglected by the Executive, which has achieved an ascendancy over the Legislature.' (Doyle and Wells, 1999, p. 21)

4 The traditional understanding of 'transitional justice' has been described by Teitel as a 'view of justice associated with periods of political change, as reflected in the phenomenology of primarily legal responses that deal with the wrongdoing of repressive predecessor regimes'.

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Difficulties with Bills of Rights as process

However, when one starts to unpack this nuanced understanding, the picture is not as straightforward as depicted above as a plethora of questions are raised. Who is the 'public'? What is meant by 'consultation'? What is the purpose of such consultation? Is it merely tokenism? In other words, is the fact that the public are part of the 'consultation' the most important consideration in helping to create a 'by-product' – legitimacy (Gloppen, 1997, pp. 259, 260). If so, what does this term 'legitimacy' mean? If the 'consultation' is really about asking people to contribute to the drafting process with a genuine interest in taking the content of submissions into consideration, this raises a number of practical and normative questions. Regarding the former, how do you take on board the numerous submissions to ensure that the 'public' efforts and their submissions are reflected? At the same time there is then the normative problem of how seriously do you treat the submissions. Do you take the political parties' views more seriously than the community and voluntary groups? What should take precedence – transparency or the need to reach a consensus which may require secret meetings with political parties closed off from the public? For after all political support is essential for the ultimate success of a Bill of Rights. Yet at the same time, as Hatchard, Ndulo and Slinn (2004, p. 28) argue:

> 'The process must come from the integration of ideas of the major stake-holders in the country including the government, political parties, both within and without Parliament, organs of civil society and individual citizens.'

Therefore a balance needs to be sought between creating a sense of ownership and legitimacy of the final product and the need to reach a political agreement. While the need to reach an agreement is central, and at times this may require unilateral or bilateral discussions between the key political players, if a Bill of Rights does not have the full backing of the community, it is likely to be a 'dead end' (Claire L'Heureux-Dubé, 1999, p. 275) and 'nothing more than words on a page' (Williams, 2003, p. 247). As we will see in Section III, this is exactly what happened to the 1960 Canadian Bill of Rights.

Who is the 'public'?

The term 'public' is one of those amorphous concepts which, like the term 'civil society', is subject to many different meanings. Both these terms have been debated by social theorists and philosophers over a number of decades (Chambers and Kymlicka 2002; Cohen and Arato, 1992). I do not intend to add to this theoretical debate since this is not the focus of my article. I refer to the 'public' to include 'civil society' such as the 'ordinary' people, community and voluntary groups, human rights non-governmental organisations (NGOs), social movements and the media. This is by no means an exhaustive definition but is deliberately loose and broad. What is important to point out for the purposes of this article, is that there is no such thing as a homogeneous public sharing similar ideas as to what equality guarantees should be enshrined in a Bill of Rights. Rather, as one report states, there are multiple 'publics' holding a wide variety of divergent views on equality that are highly dependent on individual, community and social contexts (Parliamentary Office of Science and Technology, March 2001, p. 3). The 'public' is also heterogeneous with respect to resources, power and influence (Hendriks, 2006, p. 489). This means that there will be certain groups who have access to more resources both in terms of finance and also in terms of members and staffing. This may result in such groups having more of an influential input in terms of the drafting process. Indeed, as Section III will reveal, this was certainly the case in Canada, as the women's sector was very well organised and played an extremely important role in formulating the wording of the equality provision in the Charter.

What does 'consultation' mean?

Consultation can take many different forms. The traditional methods are asking the 'public' to comment on specific issues, filling in questionnaires and conducting opinion polls (Parliamentary Office of Science and Technology, March 2001, p. 5). Other more innovative methods are the creation

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of working groups or committees composed of experts on a particular issue, holding conferences, meetings and workshops, 'Internet dialogue' – interactive discussion through the medium of the Internet (Parliamentary Office of Science and Technology, March 2001, p. 6) – and the use of the media – radio, television and newspaper advertisements, billboards and the publication of leaflets. While all of these methods are laudable, the effectiveness of some depends on a number of factors.

First, 'consultation' needs to be organised and managed adequately and effectively. It is important that those responsible for conducting the 'consultation' process have the resources they need to reach beyond the 'usual suspects' to those who would have been previously excluded, such as people with disabilities, people from ethnic minorities, young and old people and women. In other words, the consultation process needs to be inclusive. Furthermore, reaching out to marginalised and vulnerable groups and individuals may help to ensure that Bills of Rights are infused from 'below', which may subsequently result in Bills of Rights reflecting the particular needs and wants of the local community, thereby increasing their 'legitimacy' (see below).

If a Bill of Rights is infused from 'below', the more likely it is that a 'bottom-up' approach will be adopted. This approach takes its inspiration from the field of development and environmental studies where 'bottom-up' approaches enjoy a longer pedigree than in the field of human rights (Doherty, 2000).[5] The opposite of the 'bottom-up' approach is the 'top-down' model, where Bills of Rights are simply imposed from 'above'. In other words, on primarily the input of elite groups such as senior civil servants, politicians and lawyers with little if no input from the public. However, several authors have pointed out the risks of a 'top-down' approach. One academic argues that if Bills of Rights are produced from a 'top-down' approach, such Bills could be 'crippled' (O'Cinneide, 2006, p. 5) and will always run the risk of being regarded as merely 'damaged goods . . . and a lawyer's plaything' (p. 5). Vipond also argues that any constitutional strategy that does not understand the importance of building from below is profoundly 'short-sighted' (Vipond, 1999, p. 184).

Thus, if inclusivity is the key organising principle behind the drafting process, it may help turn the concept of a Bill of Rights from a negative blocking anti-democratic instrument to more positive, creative mechanisms, helping to reinforce rather than restrict democracy. Rather than depriving individuals of the right to participate and foreclosing discussion on the issue of equality as opponents of Bills of Rights suggest,[6] a Bill of Rights can provide a space whereby individuals and groups have the opportunity to own, share, shape and define rights. With the strong emphasis on the right to participate, there is an element of what has been termed 'deliberative/ participatory democracy' (Habermas, 1996; Rawls, 1971; Cohen, 1989). Such Bills of Rights are products of what Albie Sachs describes as 'participatory formulation of rights' (Sachs, 1991, p. 65). If viewed from this perspective, Bills of Rights have, as James Tully states, been removed from their 'imperial throne and put it in [their] proper place' (Tully, 1995, p. 30). Tully elaborates on this:

> 'A constitution [Bill of Rights] should be seen as a form of activity, an intercultural dialogue in which culturally diverse sovereign citizens of contemporary societies negotiate agreements on

5 See also the African Charter for Popular Participation in Development and Transformation, resolution 691, adopted at the 25th session of the African Commission on Peoples and Human Rights, 19 May 1990. See in particular paragraph 11, where the Charter emphasises 'the basic fact that the role of the people and their popular organisations is central to the realisation of popular participation. They have to be fully involved, committed and, indeed, seize the initiative. In this regard, it is essential that they establish independent people's organisations at various levels that are genuinely grass-root.'

6 The following are all fervent opponents of Bills of Rights: Waldron (1993, 1999, 2002, 2006); Allan (2002); Holmes (1993, 1995); Tushnet (1995–1996); Dahl (1989).

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> their forms of association over time in accordance with three conventions of mutual recognition, consent and cultural continuity.' (Tully, 1995, p. 30)[7]

However a prerequisite for an inclusive process is the need to educate the 'public' as to the importance of protecting equality in a Bill of Rights and to explain to people what is involved, and not to overestimate public interest in Bills of Rights generally. Furthermore, it is vital to use the right strategies especially to encourage any sections both in the community and political sector who may be sceptical about Bills of Rights. Otherwise, consultation processes will serve to accentuate existing divisions within society. Jeremy Sarkin aptly sums up the situation: 'inclusivity can inspire a sense of national ownership; a non-inclusive process can be a source of tension and further division' (Sarkin, 1999, p. 86).

Second, the consultation process needs to occur within a reasonable period of time. For the sake of the credibility of the process, it is important that deadlines are set and met to keep momentum alive. If there is a huge gap between the various drafts of the Bill of Rights, the public may become disillusioned and disheartened by the whole process. On the other hand, it is important to be realistic about the length of time drafting a Bill of Rights entails, which is certainly no easy task, as the Canadian process will illustrate. If the timescale is too limited and pressurised, this will leave insufficient time for public education and reflection. It is important that rights, especially those which are contentious, such as equality, are not glossed over and that there is sufficient time to move carefully crafted drafts to something else, in a way that ensures the same thought goes into it and that hostages to fortune are not created by legislating 'on the hoof'. Time needs to be taken to ensure the eventual product is actually worth the paper it is written on, and reflects the country's particular context and stands a chance of becoming a workable proposition in the implementation phase. There needs to be time to consult with experts and interest groups who are not directly involved in the negotiations. If such time is not set aside, not only could this negate the legitimacy of the Bill of Rights, it could also result in a vague and unfocused process.

Third, relating to the question of time, is the issue of timing. It is important that the drafting process takes place at a time where the public are not been asked to comment on other consultation exercises. Otherwise this may result in competing for public attention or worse, the public may suffer from 'consultation fatigue' as civil society is overwhelmed with information overload and by consultation processes.

Fourth, another important factor for the success of any consultation processes is the need for such processes to be deliberative, which involves careful consideration of views and submissions. This requires those responsible for the drafting process to be clear as to why the consultation is being conducted. As noted earlier, is the purpose of the process about asking people to contribute to the drafting process with a genuine interest to take the content of submissions into consideration? Or is the fact that submissions were made sufficient? If submissions from the public are given weight, it requires effective procedures to be in place so those responsible can manage the enormous amount of material that has to be taken into consideration. As noted, there are also a number of normative problems, such as whether you treat some submissions more seriously than others. Furthermore, as one report notes, if participants are led to believe that their submissions will in fact feed into the formulation of the equality provision, there needs to be a clear way of demonstrating that this has actually happened (Parliamentary Office of Science and Technology, March 2001, p. 11). If certain opinions are not accepted, the public needs to know why this has been the case. If there is no

7 Although Tully's work has been drawn on by many, it has attracted some criticism; see Scheuerman, 1997; Barry, 2001, chapter 7.

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explanation, there is a risk of undermining the development of a broad consensus in support of the Bill of Rights proposals, something which is essential, especially in a political environment which is sceptical towards Bills of Rights. Paradoxically, the public dimension of the drafting process may have the opposite effect – instead of creating feelings of ownership and reflectiveness, it may result in alienation and apathy towards participating in any further public participation programmes.

If the purpose of the consultation is to build a sense of shared understanding, awareness and ownership of Bills of Rights, the link between the process and the outcome becomes less relevant. It is the fact that a space is created to allow the public a chance to be part of a process marking an historical turning point for the country which is important. This suggests that the public dimension of the drafting process is more mythological/symbolic – a unique opportunity wherein the 'ordinary public' can get to 'know' the Bill of Rights and which they 'feel belongs to them' (Ebrahim, 1998, p. 239). In other words, it can result in a 'by-product' – legitimacy (Gloppen, 1997, pp. 259, 260). Legitimacy, as understood here, means much more than formal or legal legitimacy, which refers to the legal status of a Bill of Rights – is it a constitutional or a statutory document? Legitimacy is understood in the broad sense of the word as it relates to people's perceptions of the acceptability of a Bill of Rights. Arguably, the legitimacy of a Bill of Rights will be enhanced where processes are transparent and open and people know what to expect from the outcome of the consultation processes. This is labelled what I coin 'derivative legitimacy'. The argument that the legitimacy of a Bill of Rights is derived from the nature of the process of its adoption and the other arguments concerning public participation in influencing the formulation of an equality provision and the link between a participative process and judicial interpretation will be tested in Section III.

Section II: formal and substantive equality

The importance of including a substantive understanding of equality in a Bill of Rights lies in the fact that it incorporates equality guarantees such as 'equality under the law' and 'the right to equal protection and equal benefit of the law without discrimination' as well as the general guarantee of 'equality before the law'. In so doing, it helps broaden the measure and reach of equality, enabling courts to move beyond a formal notion of equality, which is usually reflected in the general guarantee of 'equality before the law'.

Formal equality

This is important because there are a number of flaws with this highly mechanical Aristotelian conception of equality. First, under formal equality, equality is achieved by treating like persons alike and unalike persons unalike. For example, if it is assumed that men and women are alike, an absence of different treatment in the form of law, policy or practice, along with its universal application, is thought to make men and women equal. Formal equality therefore conceptualises equality as a matter of gender-neutral treatment.

Formal equality therefore provides little or no protection against discrimination for most disadvantaged groups as it adopts a symmetrical approach to equality. In other words, it does not take into consideration that individuals and/or groups are not all on the same starting point. It thus applies 'with equal strengths regardless of whether it is directed against or in favour of a disadvantaged group' (Fredman, 2002, p. 125). Formal equality, therefore, refuses to see that equality is actually a question of inequality, that is, of dominance and subordination between groups in society. Formal equality therefore promotes an understanding of discrimination, not as systemic, but rather as consisting of explicit, differential treatment. Such an individualised stance does not allow for a comprehensive understanding of the subordination experienced by disadvantaged groups in society. It is futile to have more equal treatment or requiring people always to treat people equally, if

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people nevertheless do not end up equally situated. As Justice O'Regan from the South African Constitutional Court stated:

> 'Although the long term goal of our constitutional order [the South African Constitution] is equal treatment, insisting upon equal treatment in established inequality may well result in the entrenchment of that inequality.'[8]

Second, disregarding all aspects of group membership tends to individualise everything, so patterns of group-based oppression and subordination are deemed invisible. As Fraser notes, by abstracting individuals from their social and cultural context, they become by default conceptualised and treated as being in the same position as those in the privileged groups (Lacey, 1992, pp. 102–103). Fredman describes this as 'being clothed in the attributes of the dominant culture, religion or ethnicity' (Fredman, 2002, p. 154). Thus, stressing sameness undermines the more important norm and value of diversity (Flax, 1992, p. 193). For example, outlawing slavery in the United States did not immedialtely put African-Americans on the same footing as Whites. Many African-Americans lacked even the basic education needed for many jobs. Giving people the opportunity to compete on terms which are stacked against them, is only to create a marginally less strong sense of injustice than not giving them the opportunity in the first place (Livingstone, 2003). The refusal of formal equality to recognise that relations of inequality between groups are sustained by government inaction as well as by government action, and its incapacity to deal with the adverse effects of facially neutral laws or policies, raise serious questions as to the suitability of incorporating such an understanding of equality in a Bill of Rights. The inability of formal equality to deliver equality for disadvantaged groups will be aptly demonstrated in Section III, as it highlights the dismissal record of the formal equality guarantee under the 1960 Canadian Bill of Rights. Indeed, as we will see, the limitations of formal equality were one of the reasons why Canadian women, in particular, mobilised to ensure that the equality provision in the Charter included more than 'equality before the law', but also incorporated a substantive notion of equality. Such an understanding of equality is essential, especially for transitional societies where inequality provided the fault line for violent conflict. It is to this that I now turn.

Substantive equality

Substantive equality requires that laws treat individuals as substantive equals, recognising and accommodating people's differences. Unlike formal equality, substantive equality takes into account the actual social and economic conditions of groups and individuals. It is the effects of laws, policies and practices which determine whether they are discriminatory, not the absence of presence of facial neutrality. This may include seeking to eliminate the barriers which exclude certain groups from participation in the workplace or public office, for example, examining criteria which may on the face it seem neutral, but when examined has an exclusionary effect on certain groups, or providing special training or education for members of a group to put them in a better position to compete. In other words, the equality right would guarantee 'equality of opportunity', which can be potentially stronger than 'equality before the law'.

For those who support the formalistic view of equality, the idea of taking positive measures (in other words affirmative action) is problematic, as this is perceived as conflicting sharply with the equal treatment principle (Abram, 1986). The right to individual equality takes precedence over the broader social purpose of promoting substantive equality between groups who have been subject to unequal treatment in the past. As such, under the formal understanding of equality, affirmative action is often characterised as an exception to the equality provision and is seen as 'reverse discrimination' – a practice of favouring those discriminated against in the past and discriminating against those favoured in the past.

8 *President of the Republic of South Africa v. Hugo* (1997) 4 SALR 1 (CC) 41, para 112.

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However, others view the individualistic approach as insufficient and flawed. This school of thought has been described as the 'social justice' model (McCrudden, 2003, pp. 22–28). Rather than viewing affirmative action as an exception to equality, they see preferential treatment of disadvantaged groups as part of the right to equality. This understanding of equality treats equality as a long-term goal, to be achieved through measures and programmes aimed at reducing current inequality. The starting point is that discrimination is so deep and entrenched against certain groups, such as women, Black Americans or Black South Africans, that individual-centred non-discrimination approaches cannot deal with the depth of such institutionalised inequalities that exist amongst these groups. Therefore, what is required is more than a simple prohibition of unequal treatment, but a positive obligation on the government to confer systemic remedies conferring benefits on the group concerned to remedy past injustice against the group. Thus, what may have been deemed directly discriminatory – measures which favour relatively disadvantaged groups at the expense of those who are relatively well off – will not constitute discrimination as the consequences of such measures are, in the end, a more equal society. In short, affirmative action is a crucial mechanism whereby the equality provision can be potentially used as to tool for correcting past inequalities as it ensures that it benefits most those who need it most. As Sachs convincingly argues, a Bill of Rights without a constitutionally structured programme of affirmative action, especially for countries in a transition to democracy from a violent conflict where inequality was at the core of that conflict, is 'meaningless' (Sachs, 1991, p. 12). He continues:

> 'this deprives the Bill of Rights of its true potential as a major instrument of ensuring a rapid, orderly, and irreversible elimination of the great inequalities and injustices left behind by apartheid.'

However, the notion of substantive equality is not without its difficulties, as tensions exist between the different elements of substantive equality, most notably 'equality of results', or equality as economic redistribution, and equality as identity.

Equality of results/Group justice model

Under this theory, equality is based on the idea of delivering equal distribution of goods and opportunities to economically disadvantaged groups to ensure that the result is equal. This is achieved by prohibiting practices which cannot be objectively justified and have the effect of disproportionately disadvantaging a particular group. Equality of results thus recognises that apparently identical treatment can in practice reinforce inequality because of past or ongoing discrimination (Fredman, 2002, p. 11). The group justice model, therefore, not only aims to redress past injustices but also seeks to achieve an equal distribution of social goods. As such, equality is about securing greater economic justice between groups distinguished by access to goods, and has therefore been referred to as 'material equality or equality of resources' (Dworkin, 2000, p. 131).

Underpinning the operation of this group justice theory is the need to rely on statistics on and monitor group behaviour to maintain an accurate picture so that steps can be taken to ensure a more equal and fair distribution of goods and opportunities. The importance of monitoring and the collection of data has been emphasised in a recent report by an Advisory Committee as a means to help improve the situation of minorities.[9] Such steps could include using quotas to improve the underrepresentation

9 EU Network of Independent Experts on Fundamental Rights, Thematic Comment No. 3: The Protection of Minorities in the European Union, 25th April 2005. In this Report, the EU Network surveys the Advisory Committee's opinions outlined in Advisory Committee on the Framework Convention for the Protection of National Minorities, Outline for reports to be submitted pursuant to Article 25 paragraph 1 of the Framework Convention for the protection of national minorities. Adopted by the Committee of Ministers on 30 September 1998. This is drawn from McCrudden, 2007.

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of groups in certain areas of the employment sector or taking proactive measures to actively promote equality to address the legacy of socioeconomic problems and group inequalities.

However, as noted, this idea of preferential treatment for the underrepresentation of groups is a controversial aspect of equality of results. Ensuring the attainment of a certain quota of a particular disadvantaged group at the expense of equal treatment of all, as Fredman states, 'appears to contradict the very principle of equality it purports to advance' (Fredman, 2001a, p. 19). Focusing on the most socially, politically and economically disadvantaged groups requires a 'recognition of the different cultural and political contexts of inequality in different societies' (McCrudden, 2003, p. 26). McCrudden argues that this understanding of equality appears 'to challenge the notion that all those included within the protectorate in the individual justice model are appropriately regarded as included within the ambit of the protectorate for the purposes of group justice' (pp. 24–25). This is where the tension can arise between the notion of equality as economic redistribution and equality as identity. This raises the thorny issue of the relationship between individual and group equality – the right of individuals not to treated as members of a distinctive group against their will and at the same time ensuring the group as a group enjoys equality, by adopting 'group' focused measures such as preferential treatment/affirmative action to achieve equality. If an individual has the right not to be treated as a member of a particular group or community, how would this impact on the rationale underlining the group justice theory which relies to a great extent on monitoring groups and group identification?

Equality as identity

This notion of equality emphasises the importance of recognising the cultural, political and legal choices of social groups. As for the emphasis on recognition and the need to protect the array of different identities and the special needs of different groups, Katherine Zappone has described this notion of equality as an 'inclusive definition of equality' (Zappone, 2001, para. 2.4). Other major figures who have been at the forefront in developing this notion of equality include Young (1990), Taylor (1992), Kymlicka (1995), Tully (1995), Lister (1997) and Honneth (1995). According to these political theorists, failure to accord due recognition and importance to the different identities in society is a form of inequality. They advocate a concept of equality as recognition of difference and not homogeneity, which may require different treatment because recognition may involve accepting and accommodating difference.

This conceptualisation of equality has been praised for asserting:

> 'The value of groups possessing and maintaining their distinct cultures within the larger community: the affirmatively multicultural society not only permits but actively encourages and assist different cultures to preserve their separate identities as best they can.' (Kane, 1997, pp. 540–41)

The manifestation of this notion of equality is found in Bills of Rights, which have described as 'tailor-made' (McCrudden, 2001, p. 379) for this type of equality, as Bills of Rights provide a mechanism for expanding the grounds on which discrimination on various bases, such as sexual orientation, race, ethnicity and other diversity, is prohibited. However, using such categories as racial, ethnic, religious and so on, McCrudden asks, 'does such categorisation facilitate or hold back the goals that equality is meant to achieve?' (pp. 379–80). Although such categorisation highlights the differences between groups, differences within groups are rendered invisible. This will inevitably lead to groups being defined 'as if they have fixed, unchanging essences' (Fredman, 2001b, p. 158). Is such a simplified conception of the characteristics of the social group required that it ends up reinforcing an essentialist view of the group, and further stereotypes the group that the equality provision was meant to protect? Does it reify the existence of such groups, encouraging exclusivity and polarisation between these groups (Fraser 2000; McCrudden 2003, pp. 29–31)? Viewed from this perspective, equality as recognition is a group's struggle for equal cultural space and ensuring that those groups are not subjected to stereotypical representation of their own culture, or forced to subordinate or assimilate themselves

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to the self-understandings of a dominant group (Fraser, 1975).[10] Thus, the key questions are: How to ensure that women's entry into citizenship is not made conditional on their simulating 'masculine' activities and values?[11] How to ensure that the rights of indigenous peoples are not swept aside in phoney promises about incorporation into institutional arrangements favoured by victorious settlers (Phillips, 2000, p. 245)?

These questions raise the difficult and important issues of separation and integration which will have to be confronted when drafting a substantive understanding of equality. One possible answer is to allow individuals not to be treated as members of a distinctive group against their will. In this way, the individual rights of members of the group are not infringed by putting pressure on them to maintain traditions or practices which they would prefer to abandon. However, as noted earlier, such a concept of equality poses a particular challenge to aspects of the development and interpretation of the previous model of equality – equality as group justice, where group identification and communal identity are central to the operation of this model of equality.

We can see immediately the tensions between the different notions of equality. On the one hand, individuals should have the right to be treated as an individual, and benefits should be given not on the basis of group identity but on individual achievement. On the other hand, the importance of group identity and using statistical evidence to determine any disproportionate adverse impact are equally important to securing real and effective equality. However, if the individual has the right to opt out of stating his or her ethnic origin, religious background and so on as the equality of recognition would permit, what implications would this have for the group justice model, where statistics on and monitoring of group behaviour and status is seen as central to the operational effectiveness of this model? Difficult though this debate may be, it is essential that these exact questions are considered by those involved in drafting a substantive model of equality in a Bill of Rights so that some guidance can be given. Failure to do this will result in confusion as to exactly what notion of equality is incorporated in a Bill of Rights and what type of equality should get prioritised when there is a clash between equalities. The particular dispute that arose in Northern Ireland on the proposed Bill of Rights between 2000 and 2005 is indicative of the importance of having such a debate between these equalities and the relationship between equality and identity and social and economic rights (McCrudden, 2007, chapter 15).

The challenges and opportunities that have been discussed in Sections I and II are now contextualised in Section III, as it examines first the impact, if any, Bills of Rights as process have had in Canada in securing legitimacy for the Charter. Second, whether the consultation process influenced the actual formulation of the equality provision in the Charter. If so, how and why? Finally, has the Charter been interpreted more substantively by the judiciary as a result of the public participation leading up to the adoption of the Charter? The first two questions will be dealt with collectively as they are closely related; the third question will be examined separately.

Section III: the Canadian experience

The situation prior to the Charter

Before addressing these questions, it is important to note that the Charter was not the first Bill of Rights for Canada, as a Bill of Rights was introduced in the form of an ordinary Act of Parliament in 1960, setting out basic human rights that were to be protected (hereinafter the CBOR). One of those

10 For a critique of Fraser see Young, 1997, and Butler, 1998.

11 Finley suggests that we should start thinking about what the significance of a perceived difference should be, and this in turn requires us to consider the valuation assigned to a particular difference. By doing so it moves us away from an orientation towards sameness and an acceptance of the premises underlying the labels 'same' and 'different' to one focused on thinking about the norms of prevailing values embraced by the attribution of difference; see Finley, 1986, pp. 1167–72.

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rights that were protected included the right to equality. However, this provision did not improve the position of minorities who lacked political leverage. For the purposes of this article, some of the reasons for the CBOR's ineffectiveness were as follows. First, the equality provision espoused a formal understanding of equality. Section 1(b) simply states 'the right of the individual to equality before the law and the protection of the law'.[12] The clause did not say 'equal protection of the law', although the word 'equal' could well have been implied. However, the Supreme Court adopted a very limited interpretation of section 1(b) which focused solely on the words 'equality before the law'.

The famous (or infamous) *Bliss v. Attorney General of Canada* case is an illustrative example of the Court's narrow approach vis-à-vis the equality provision.[13] Stella Bliss, the claimant, had worked long enough to claim ordinary unemployment insurance benefits, but not long enough to claim the special maternity benefits. When she applied for the ordinary benefits shortly after the birth of her child she was turned down despite the fact she had paid the premiums and was available for and capable of employment according to her doctor. A section of the Unemployment Insurance Act said that pregnant and recently delivered women could not receive the ordinary benefits. Bliss argued that she was discriminated against because she was pregnant and that this constituted sex discrimination. The Supreme Court held that Stella Bliss had not been discriminated against because of her sex but because she was pregnant. The Court held that 'any inequality between two the sexes in this area is not created by legislation but by nature'.[14]

These and other cases are examples of the dangers of adopting a very limited and formalistic approach towards an equality provision in Bills of Rights.[15] Indeed, they represent what George Williams describes as the 'powerlessness of law' (Williams, 2003, p. 247) for those who were disadvantaged as they were 'different' from what was considered the 'norm' in society. Arguably, the restrictive approach adopted by the judiciary could have been related to the fact that 'the people' did not speak through this document as the passage of the CBOR involved very little if any public consultation and debate. This view is also echoed by some commentators, who have argued that, due to the lack of public involvement, the CBOR never achieved a high level of recognition or support in the Canadian Community (Williams, 2003, p. 256). Subsequently, this seemed to have affected the Court's interpretation of the CBOR as the document was never given any 'real substance' by the judiciary (Penner, 1996, p. 107). Perhaps learning from the mistakes from the CBOR, the drafting and the adoption of the Charter were open to the public to ensure that the 'people' had a say. This in turn seems to have had an impact both in the judiciary's approach vis-à-vis the Charter and for building support amongst the public. These important points will now be discussed further.

12 For a detailed analysis of the Supreme Court's decisions on the equality provision under the CBOR, see Fogarty, 1987, pp. 35–84.

13 [1979] 1 S.C.R 183.

14 This case was overturned ten years later in the *Brooks* case where the Court ruled that discrimination on the basis of pregnancy is sex discrimination and overruled the *Bliss* decision: 'Over ten years have elapsed since the decision in Bliss. During that time there have been profound changes in women's labour force participation. With the benefit of a decade of hindsight and ten years of experience with claims of human rights and jurisprudence arising there from, I am prepared to say that Bliss was wrongly decided or, in any event, that Bliss would not be decided now as it was decided then. Combining paid work with motherhood and accommodating the childbearing needs of working women are ever-increasing imperatives. That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious.' *Brooks v. Canada Safeway Ltd* [1989] 1 S.C.R. 1219 at 212, the then Chief Justice Brian Dickson.

15 See also the cases of *A. G. Canada v. Lavell, Isaac v. Bedard* [1974] S.C.R 1349 and *A. G. Can. V. Canard* [1976] 1 S.C.R. 170.

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Participative process and securing the 'legitimacy' and expansion of the equality provision of the Charter

The difficult task of drafting the Charter was left to a Special Joint Committee of the Senate and the House of Commons (hereafter the Committee), which was initially given one month to hear submissions from the public. However, the Committee sat for nearly four months as it received over 1,200 submissions expressing people's views on rights and freedoms and more than 300 people appeared before the Committee representing women, Aboriginal people, ethnic and cultural minorities and persons with disabilities. These proceedings were nationally televised. The Committee successfully proposed sixty-five substantial amendments to the government draft. As we will see, one of these substantial changes was the expanding formulation of the equality provision, which resulted from the direct influence of civil society, in particular women's rights organisations. Given their experience with the CBOR, they lobbied strongly for women's equality rights. The government's first version of the equality provision was merely labelled as 'non-discrimination rights' and reflected the wording of the equality right in the 1960 Bill of Rights. It read as follows:

> '15(1) *Everyone* has the right to equality before the law and to *the equal protection of the law* without discrimination because of race, national or ethnic origin, colour, religion, age or sex [my emphasis added].
> 15(2) This section does not preclude any programme or activity that has as its objects the amelioration of conditions of disadvantaged persons or groups.'

This draft was subject to several criticisms from a number of equality-seeking groups led by the National Action Committee on the Status of Women (NAC), the National Association of Women and the Law (NAWL) and the Canadian Advisory Council on the Status of Women (CACSW). These groups regarded this draft as 'not good enough' and were astounded that 'the government would pick the Bill of Rights standard with no change . . . women couldn't believe it' (Atcheson, 1985). The reason for this astonishment was the fact that this draft espoused the notion of formal equality and did not recognise the multicultural nature of Canadian society. In other words, it failed to espouse the substantive notion of equality and equality as recognition. Even though the phrase 'equality before the law' was accompanied with 'equal protection of the law', women's groups were not impressed and asked for stronger words. Regarding 'equality before the law', it was pointed out to the Committee that this phrase already appears in subsection (1) of the CBOR and had been given a very narrow interpretation by the Supreme Court in a number of cases such as *A.G. Canada v. Lavell*, *Isaac v. Bedard*, and *Bliss v. Canada*. Essentially the phrase as interpreted by the Supreme Court in these cases meant equality only in the administration of the law but did not reach the substance or the content of the law itself. In relation to 'equal protection before the law', women's groups were not satisfied that simply adding the word 'equal', which was not explicitly stated in the CBOR, would be sufficient. Mary Eberts, legal counsel, CACSW:

> 'we are told, that s.15 also contains new wording that did not appear in s.1 (b) and that this new wording guaranteeing the equal protection of the law will achieve what s (b) was never able to do . . . We do not think that simply including the word "equal" in the old formulation will do the job that the charter needs to do.' (Eberts, 1980–1981, 9:126)

In response to these submissions, this draft was subject to considerable review and resulted in a subsequent draft. Before examining the draft, it is important to reflect why the submissions were accepted and simply not ignored. One reason was the active publicity campaign organised by the women's sector, and in particular, feminist lawyers. Beth Symes, a leading prominent lawyer, explained:

> 'It was literally going across Canada and speaking to whoever would hear us. We spoke to farm women, we spoke in church basements, in trade unions – we spoke to an incredible array of women

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> and what was astonishing is how well it was received. People had the most galvanising stories about discrimination in their own lives.' (Symes, 2002, quoted in McEvoy and Rebouche, 2007)

McEvoy and Rebouche (2007, p. 296) point out that the feminist lawyers also took advantage of the professional resources at their disposal and made use of political facilities they could access. For example, the lawyers used the supplies and mail offices of their firms to contact politicians with letters and telephone calls. To quote again from Beth Symes:

> 'every evening women poured in to use parliamentary resources – we used the phones, mail and copy machines. We spent so much time there that the guards mistook us for MP staffers. So when we arranged the conference on the draft Charter in 1981 [see below], we could hand out invitations personally to members in the halls – just walk up to them in the voting halls as if we worked for them!' (Symes, 2002)

Although the women's sector was influential, due to their members who knew how to lobby federal government and had the necessary resources to finance and advertise their publicity campaign, as we will soon discover other organisations also played an important role in ensuring their voice was heard and their requests taken into consideration. Returning to the amended draft equality provision, which was submitted to the Committee on 12 January 1981, changed the title from 'non-discrimination rights' to 'equality rights' and read:

> '15(1) *Every individual is equal* before and *under* the law and *has the right* to the equal protection and *equal benefit* of the law without discrimination *and in particular*, without discrimination based on race, national or ethnic origin, colour, religion, sex or age [my emphasis added].'
> 15(2) *Subsection (1)* does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including *those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex or age* [my emphasis added].

The renaming of clause 15 from 'non-discrimination' to 'equality rights', as proposed by NAWL, is important as it emphasises that equality means more than discrimination; it reflects the positive symbolic content of equality. The phrase 'equal under the law' attempts to make clear that the right to equality would apply in respect of the substance as well as the administration of the law. A number of submissions highlighted the importance of this point:

> 'Parliament should make its intention clear as to the scope of the offered protection. That is, does the offered protection apply to the substantive contents of legislation (only) or does it apply to the administration of legislation (only), or does it apply to both the substantive contents of the law and the administration of the law? It is the position of the Canadian Human Rights Commission that the offered protection should apply to the substance and the administration of the law. It has been noted that the first two phrases of section 15(1) orient or place the rights in the remaining phrases.' (Special Joint Committee of the Senate and the House of Commons on the Constitution, 1980–1981, 5A:1–2)

The phrase 'equal benefit of the law' was included following a number of submissions which wanted to ensure the notion of equality as one of distribution which operates under the framework of the group justice theory, as discussed in Section II. This would mean that the courts would not have to infer that equality of benefits was included under either equality before the law or equal protection of the law. This was articulated by a representative from the NAWL:

> 'We are concerned that the word "protection" is too restrictive because this ordinary meaning would not include "benefits" or "privileges". When the phrase "equal protection" was included in the American constitution in 1868, in the 14th Amendment, there were no social welfare benefit

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> programs around at the time. Now we have these programs. We think we should avoid the problem of the litigation the Americans are facing in trying to broaden the word "protection" to include in the constitutional guarantees benefits. We should learn from their experience that the courts have had a hard time in stretching that concept. If Canada is taking the opportunity now to offer protection and benefit, it is not too demanding to ask that those words be included.
>
> Also, because the courts have tended to take a strict and very literal interpretation of human rights in Canada, we think that every possible mechanism for guiding them and directing them how to interpret the Charter should be made available. Including the words "benefits" does this . . . We therefore recommend that the words "equal benefit" be added after "equal protection" in s 15(1).' (Special Joint Committee of the Senate and the House of Commons on the Constitution, 1980–1981, 22:56–57)

Following this amendment, there was virtually no debate in the Committee as to the words used to describe equality rights. In responding to these changes, the then Minister of Justice from the Committee stated:

> 'To ensure . . . that equality relates to the substance as well as the administration of the law, I would be prepared to accept an amendment to s.15 (1) so that it would read:
> "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and in particular without discrimination based on race, national or ethnic origin, colour, religion, sex or age."' (Special Joint Committee of the Senate and the House of Commons on the Constitution, 1980–1981, 36:14)

Thus, the inclusion of three additional equality rights, (equality under the law, equal protection of the law and equal benefit of the law (s.15(1)), the changing of the title from 'non-discrimination rights' to 'equality rights' and the recognition that equality and discrimination are interconnected, pointedly demonstrates that public participation was the main impetus for these changes. Other amendments included the strengthening of the affirmative action provision, s. 15(2).[16] Following the Ad Hoc Conference on Canadian Women and the Constitution, a broad-based women's lobby group, the Ad Hoc group helped to secure another concession – a specific clause that guarantees that the Charter's rights and freedoms are enforced and applied to men and women equally (s.28).[17]

However, while the inclusion of the particular phrase 'equal benefit of the law' is welcomed, as noted in Section I it does raise a number of difficulties. Although 'equal benefit of the law' may help in a fairer allocation of material or welfare benefits, what about structural inequality, where people are prohibited from participating in society in the first place, and societal features such as cultural and symbolic meanings that are important to people, that cannot easily be divided and allocated to ensure 'equal benefit of the law'? Put another way, equality should be about not only equality as economic distribution, but also about incorporating those societal features that are essential in maintaining a person's identity and distinct culture. In short, equality should also adopt the notion of equality as recognition. Given the increasing diversity of immigration in Canada, Jewish, Italian, Japanese, and aboriginal peoples, and francophone and anglophone minorities, attended the

16 S.15(2) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

17 S.28 reads: 'Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.' However, it has been noted that s.28 has not played an important part in the jurisprudence and has been described as an 'odd duck' (interview with Beth Atcheson, former Chair of LEAF, Toronto, August 2004). Atcheson believes that this is due to the fact that in some way, s.28 guarantees what was already negotiated for in section 15 and most cases involve more than one ground, in other words there are multiple grounds of discrimination. In this context, s.28 is used only in pure gender cases.

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Committee hearings to ensure that the equality provision would allow them the cultural space to exercise their beliefs and practices and at the same time to be treated as equal members. The wording of section 15 accommodated these concerns by ensuring that the above and other minority groups did not suffer discrimination on the basis of their ethnicity, race, gender and other diversities. The equality provision did this by setting out a list of grounds prohibiting discrimination. These include 'race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'.

The decision to expand these grounds to include 'mental or physical disability' was once again influenced by participation from civil society, most notably the Coalition of Provincial Organisations of the Handicapped (COPOH), a national cross-disability organisation. If one compares the government's position at the start of the process with the government's eventual decision to include these grounds, which was only decided at the eleventh hour, it is another apt illustration of how public participation can help shape an equality provision and demonstrates that the public's input was no mere window-dressing. The government's thinking in 1980 was clearly articulated in the following statement:

> 'Since an entrenched Charter is by its very nature a generalized document which does not lend itself to detailed qualifications and limitations, it was ultimately decided to limit the grounds of non discrimination to those few which have long been recognized and which do not require substantial qualification. Unfortunately such is not yet the case with respect to those who suffer physical handicaps and consequently provision has not been made in the Charter for this ground.' (Demers, 1980)

COPOH continued with its campaign, replying to government outlining the importance of a more inclusive clause. The then chairperson of COPOH, Allan Simpson, critically replied to the government's letter, noting that:

> 'To fail to prohibit discrimination on the grounds of disability in any constitutionally entrenched Charter of Rights and Freedoms which does prohibit discrimination on the grounds of race, national or ethnic origin, colour, religion, sex or age is tantamount to rejecting the fundamental humanity of disabled Canadians.' (Simpson, 1980)

However, when another draft of the equality clause was put forward on 12 January 1981, it still failed to include grounds of disability. Mr Chrétien made similar comments, expressed earlier by his Special Advisor:

> 'The position of the government is that certain grounds of discrimination have long been recognized as prohibited. Race, national or ethnic origin, colour, religion and sex are all found in the Canadian Bill of Rights and are capable of more ready definition than others.' (Chrétien, 1981)

As this statement promoted an open-ended list of prohibited grounds of discrimination, disability could conceivably be read in as a prohibited ground of discrimination. However, COPOH was still not satisfied, as it created a hierarchy of rights; some rights were worthy of specific protection while others were not. However the formation of a special Parliamentary Committee on the Disabled and the Handicapped, appointed by Parliament, brought new hope in the form of what became known as the Obstacles Committee as it supported COPOH's recommendations. After a number of submissions and speeches to the Committee, the Liberal government finally decided to include mental or physical disability as proscribed grounds for discrimination. The final wording of s. 15(1) of the equality provision reads:

> '15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or *mental or physical disability*' [my emphasis added].

Underlying the government's 'change of heart' was undoubtedly the continuous dialogue between the disability sector, the Committee and government. Had this space not been created by this notion

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of Bills of Rights as process, it is doubtful if Canada would have been the first democracy to give constitutional status to the equality rights of persons with mental and physical disabilites.[18] The importance of creating this opportunity was recognised by a member of COPOH's National Council: 'participation in the constitutional making process ... signified a historical turning point; an emergence of people with disabilities as a political force in Canadian democracy' (Peters, 2004). Even though section 15 lists a set of grounds prohibiting discrimination, which reflects the reality that certain groups in Canadian society are more prone to suffer discrimination and thus need constitutional protection, like the equality provision in the South African Bill of Rights, it adopts a flexible approach as it leaves the door open for equality claimants to base their argument on an 'non-enumerated'/analogous grounds. As Section III will demonstrate, this has proved to be instrumental in broadening the grounds prohibiting discrimination to grounds which are not explicitly listed.

When one contrasts the government's first draft of the equality clause, which was originally similar to the 1960 CBOR wording on equality, with the final wording of s. 15, one could regard s.15 as a veritable example of the positive workings of 'participatory formulation of rights'. S.15 reads:

> '(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.'

The provision was in large measure the result of the determination of the women's movement and other organisations to effect positive change in equality in the country. Indeed this has been acknowledged by the co-chair of the Committee, the then Senator Serge Joyal, who stated that s.15 was 'absolutely' rewritten by women (Joyal, 1985). In the absence of such active involvement and input from civic society, it is doubtful if the text of s.15 would have undergone the significant writing to achieve the powerful presence it now holds at the heart of the Charter. The veracity of this conclusion is strengthened when one considers the following quote from an active participant involved in the process:

> '[The government] wanted a smooth road to bring in its constitutional package ... I don't think equality was actually even very high on the federal list ... There was a lot of feeling in the Federal Liberal Party that there was a value in a written Bill of Rights, although again I don't think the focus was so much on equality.' (Atcheson, 2004)

Arguably, central in ensuring that the introduction of the Charter did not proceed down a 'smooth road' was the major effort mounted by individuals and groups to ensure that process was as participatory as possible. As the Trudeau government wanted to strengthen their bargaining position, especially when there was some resistance from other provinces to a Bill of Rights, most notably from Quebec, they knew that if they had public support behind the idea of a Bill of Rights, this would strengthen their bargaining position. This is exactly what happened with the establishment of the Committee, as it helped build up public momentum and therefore strengthened the government's position as they had now public support behind the idea of an entrenched Bill of Rights. Indeed, it has been noted that the exchanges between the various organisations and individuals with the Committee and the parliamentarians served to 'mobilise important segments of the populace and

18 Yvonne Peters suggested another reason why the then Justice Minister changed his mind: 'perhaps it was the fact that denying the rights of persons with disabilities during the International Year of Disabled Persons could become a political embarrassment, or perhaps the lobbying efforts of COPOH and others really did make a difference'; see Peters, 2004.

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instil a far more participant constitutional ethic in the populace in general' (Fossum, 2002). As one participant stated: 'how many times in a lifetime do you open up a new constitution?' (Atcheson, 1985).

The implications of adopting a 'bottom-up' approach, as opposed to the 'top-down' approach which preceded the introduction of the CBOR, was an important factor in raising awareness of the Charter and securing the Charter's 'derivative legitimacy'. This is demonstrably evident in the results of two surveys. The first was carried out six years after the introduction of the Charter, where the author found that 90 percent of English Canadians and 70 percent of French Canadians had heard of the Charter and the majority of Canadians viewed the Charter 'as a good thing for Canada' (Russell, 1998, p. 398).[19] A second, more recent, survey, which was conducted on 14 April 2005, found that Canadians generally feel that the Charter's impact, especially on fostering equality, has been positive.[20] The positive results of this 'bottom-up' approach in helping to secure popular backing for the Charter have also been acknowledged by the Chief Justice of the Supreme Court:

> 'the process . . . in retrospect . . . was very important in securing public acceptance of the document. We heard so much about it; there was so much debate; so many different interest groups which were funded to participate and present their viewpoints . . . that in the end, practically everyone knew about the Charter and a lot of people felt that they had a hand in developing it. It was their document. It was not something imposed from the outside.' (McLachlin, 2006, pp. 2–3)

The Chief Justice continues to note that one of the factors in making the Charter effective was the 'process leading up to its passage . . . the fact that so many people had indicated that that they were serious about the document. This meant also that the courts themselves did a lot of thinking about it' (McLachlin, 2006, pp. 4–5). As one commentator stated, the Canadian judiciary gave the Charter 'real substance because the people took it up' (Penner, 1996, p. 107). Consequently, the Charter has been described as having a 'huge transformative effect' (Boyer, 1985) on how Canadians see themselves and how they define themselves as Canadians. In this respect, the way the Charter was adopted has helped to enhance rather than undermine democracy:

> 'it's an ongoing process. That's why it's exciting to live in such a dynamic country where this is an open and developing agenda. It's also a great thing that it's not just (coming from) any one place: it's the legislatures and it's the courts and it's the individual citizens all taking initiatives. That's the measure of a mature democratic society.' (Boyer, 1985)

Indeed, one commentator has argued that the open and broad consultation process sparked a period of 'mega constitutional politics in Canada' (Fossum, 2002) and has given rise to what one another academic has dubbed 'Citizens' Constitution Theory' (Cairns, 1991, pp. 78–79). The same academic concludes:

> 'There is general agreement that the Charter contributes to a more participant oriented constitutional culture, and in particular, that it has fostered constitutional interest groups devoted to the

19 The same author writing in 1987 stated that there was not enough public debate around the issue of equality. He argued that 'I would have been much happier about section 15 if its adoption as part of the law of our constitution had followed a widespread public and parliamentary discussion about the principles and practice of equality. But that is not the case'; see Russell, 1987, p. 299. However, from the above discussion, this is not the general view, and as Harvey notes, the Canadian process has been cited as a useful example for others in terms of the breadth of the consultation process; see Harvey, 2001, p. 59. Penner also argues that the process was open and deliberative; Penner, 1996.

20 Such sentiment is most strongly felt in the Atlantic provinces and is weakest in the Prairies, though a positive view is still held by the majority. The Association for Canadian Studies commissioned the firm Environics to conduct a poll in which some 2,022 Canadians responded to questions on equality issues and the Charter of Rights. The survey was conducted between 11 March and 6 April 2005.

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> protection and enhancement of "their" constitutional clause, section 28 for women, section 27 for ethnocultural elites, section 23 for official language minorities, and section 15 for the particular groups identities in that clause, and for equality-seekers in general.' (Cairns, 1991, pp. 78–79)

Before giving examples of how the Charter has had a 'huge transformative effect' and whether this 'transformative effect' is linked with the participative manner of how the equality provision was drafted as this article proffers, the following discussion addresses how Canada dealt with some of the challenges posed by Bills of Rights as process.

Challenges with Bills of Rights as process

One practical problem was that not every submission was reflected in the Charter. For example, the suggestion by women groups that 'every person' be used throughout the Charter has not been taken up as the Charter varies from 'everyone' to 'every individual' in different clauses.[21] Another example was the three-year moratorium on the equality provision, which was the only legal right to be singled out.[22] This was introduced despite numerous objections. Mary Eberts stated:

> 'We are considerably dismayed about the three year moratorium on the implementation of section 15. This will deny access to the courts for three years from patriation for all those who complain of denials of equality before the law. The fact that the provincial legislatures and federal government may be labouring mightily in the interim to change the law will not help those whose cases are not heard because of the three year moratorium. In many of these areas we are more than ready to proceed at the moment and there need not, in our view, be any further delay.' (Eberts, 1980–1981, 9:131.1)

The then Minister for Justice held that the federal government and the provincial governments needed time in order to review the laws on the statute books and to amend them as necessary to ensure compliance. This was despite the fact that a 1970 report, the 'Royal Commission on the Status of Women', had already being carried out and showed what laws had to be changed to eliminate discrimination. Minister Chrétien stated:

> 'We will have to review all our legislation . . . it is purely a matter of pure practicality. Parliament is operating and it will take a long time and it is a very difficult task. In fact, when Premier Blakeney came in front of this Committee one of his complaints . . . was that three years was not enough and, and you know, to get the provinces' approval it was going to take a hell of a long time, with the complexities of all our laws and complexities of all the laws of all the other legislatures we felt that it was reasonable to give three years; but for us we do think that we will be, even if we do not have the time to pass the legislation to amend our own legislation, we are morally bound by this

21 The underlying reason for this request was that the word 'person' had a clear definition in Canadian law and signified an individual human being, not a corporation. Furthermore, the word 'person' also carried symbolic significance from the *Persons* case – *In the Matter of a Reference in the meaning of the word "Persons" in s.24 of the British North America Act, 1867* (1928) S.C.R. 276. Up until this case, from 1788 until 1929, the British courts consistently refused women the right to vote in various electoral constituencies, to hold elected or appointed offices and to enter into training for various professional occupations, especially in the legal field. In the *Persons* case, five Alberta women argued that women should be considered 'qualified persons' who could be appointed to the Senate under s 24 of the British North America Act, 1867. The Supreme Court rejected this argument, but when it was appealed to the Privy Council in England, which was the highest court for Canadians at that time, their claim was upheld. The Privy Council ruled that the word 'person' was ambiguous and could include women.

22 The Constitution Act, 1982, s.32(2).

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> commitment whenever we will be faced with the problem we apply that standard. But sometimes it cannot be done in changing – you cannot change legislation instantly.'
>
> (Special Joint Committee of the Senate and the House of Commons on the Constitution, 1980–1981, 49:47–48)

This is illustrative that 'the will of the people need not always be the determining factor in deciding the content of the Bill of Rights' (Murray, 2001, p. 397). On the one hand, the rejection of some proposals simply reflects one of the realities of Bills of Rights as process – not every submission will be accepted. That said, the reasons for rejecting their requests could have been explained by producing a summary of responses so people knew what had happened and why the drafters had acted in a particular way. At least in this way it negates the risk of people feeling despondent and disillusioned about the process, which is vital in terms of building ownership and confidence in the process and ultimately ensuring the Bill of Rights has the respect and legitimacy it needs to function as a credible legal tool.

Another difficulty the Committee had to confront was the need to accommodate a range of political views to ensure widespread support, without which the prospect of adopting a Bill of Rights was slim.[23] A perfect example of such accommodation was the adoption of the legislative override, s.33. S.33 allows legislatures, subject to a number of restrictions, to use a 'notwithstanding' clause to reintroduce a statute even though it has been held by the court to be inconsistent with the Charter.[24] The introduction of this section was precipitated as the wording of s.1, the limitation provision, was strengthened despite provincial demands for a broader and weaker limitation clause. Aware of the likelihood of objections to such a provision from groups and individuals who appeared before the Committee, s.33 was negotiated in secret and sent to Westminster for adoption without any hearings before the Committee. While it may have been drafted behind closed doors, according to Weinrib, this section 'was not dreamt up in a midnight meeting of political cronies in a hotel kitchen. The arsenal of those resisting entrenchment had long contained an override' (Weinrib, 1992, p. 221). However such a closed process was considered essential to ensure a political settlement to be agreed upon. Thus, during the final round of constitutional negotiations in November 1981, without public participation, a final compromise was reached.

In one respect, it is arguable that going behind closed doors at the late stages of the process was necessary to prevent stagnation, as it allowed parties to make compromises without losing credibility amongst their respective constituencies and to reach a final agreement. On the other hand, while the need to accommodate political views to ensure their support is essential, it should not have been at the expense of negating civil society's input. No matter how difficult and contentious the discussion about certain rights or issues may be, even if a deadline is approaching, different viewpoints from society are important and need to be heard. Indeed this is the crux of 'participatory formulation of rights'. Furthermore, such a strategy runs a high risk of creating tensions and division amongst the community and turning the rationale of the 'bottom-up' approach on its head.

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23 Although Prime Minister Trudeau supported the Charter, his enthusiasm for a rights charter was not shared by other provincial governments. Their main fear was that a system of constitutionally entrenched rights, which would apply to the provinces as well as to the federal parliament, would undermine the principle of legislative supremacy. Indeed, all ten provinces initially and eight in the latter stages of the debate, opposed a Bill of Rights that applied to them. Quebec, in particular, strongly opposed the Charter as the province feared that the Charter would allow the federal judiciary to infringe upon the autonomy of the Canadian French population.

24 The restrictions are as follows. First, it only applies to sections 2 and 7–15 of the Charter. The democratic rights of ss.3–5, the mobility rights of section 6 and the language rights of s.23 are among provisions which cannot be overridden. Second, the expression declaration must refer specifically to the provision of the Charter which is to be overridden. Third, there is a 'sunset clause', which means that each declaration expires automatically after five years. S.33(4) does allow the declaration to be re-enacted but it requires periodic reconsideration of each exercise of the override power.

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Notwithstanding these difficulties, from the above discussion it is clear that the broad and open participatory process leading up to the adoption of the Charter was instrumental in securing legitimacy for the Charter. The juxtaposition of the closed manner of how the CBOR was drafted and the negative implications this had for securing ownership and legitimacy of the CBOR, with the 'lively and spirited' (McEvoy & Rebouche, 2007, p. 293) and 'prolonged and highly public process' (Hogg, 1982, p. 23) that preceded the Charter, substantiates one of the arguments made by this article. That is, there is a strong correlation between the manner of how an equality provision and a Bill of Rights is drafted with securing legitimacy and ownership of the final product. Likewise, the second argument concerning the link between the process and influencing and shaping the formulation of an equality provision has also been established. As argued above, this was mainly due to the concrete efforts from civil society organisations, especially the women's sector. This leaves the third and final argument to be tested – if a Bill of Rights has popular backing and substantial consensus amongst the public, does this increase the chances of the Bill been interpreted substantively by the judiciary?

Participative process and judicial interpretation of the equality provision

The following cases pointedly demonstrate that if a Bill of Rights has popular backing, this will encourage the judiciary not to be overly cautious (Penner, 1996, p. 40). One area where the Supreme Court has been very active is that of upholding claims based on discrimination on the analogous ground of sexual orientation.[25] As the director of LEAF stated:

> 'I think it's had a huge impact at different levels in terms of individuals who have been successful with their claims and in terms of group rights that have been advanced and have benefited from the individual complainants . . . There have been some very tangible results in terms of access to same-sex benefits and sexual orientation . . . It's had a huge beneficial effect, there's definitely loads of work left to do but I can't imagine where we would be without it.' (Sampson, 2004)

Examples of some of these 'tangible results' include the decision in *Vriend v. Alberta*,[26] where the Supreme Court 'read in' to Alberta human rights legislation the grounds of sexual orientation as a prohibited ground of discrimination. The decision in this case prompted a debate on same sex-marriages which eventually led to the passing of Bill C-38, which recognises gay marriage and which became law in July 2005. In passing such progressive legislation, Canada is the fifth country along with Netherlands, Belgium, Spain and South Africa to recognise gay marriage. The case of *M. v. H.*[27] is another example where the Court 'gave the Charter real substance'. The Court held that the equality provision entitled same-sex couples to sue for spousal support on the same basis as common-law opposite-sex couples. Not only did the Ontario government amend the invalid section, but the Court's judgment triggered the adoption of comprehensive legislative amendments to over sixty federal statutes to extend benefits and obligations to same-sex couples in wide variety of arenas.[28]

There has also been a series of cases where the judiciary has adopted an intersectionality approach which has enabled the judges to acknowledge that everyone has multiple identities and people are not

25 As Section II noted, the drafters of s.15 adopted a flexible approach as it permits other grounds to be added to those grounds already listed. This has provided an opportunity for those individuals in a group who are not listed to still make a case that they have been discriminated against on an *analogous ground.*

26 [1998] 1 S.C.R. 493.

27 [1999] 2 S.C.R.3.

28 However, the successful applicant and a number of gay and lesbian organisations were not happy with the direction the Ontario government took in extending benefits and obligations in the light of the Court's ruling because they argued it amounted to further discrimination. The successful applicant asked the Supreme Court to revisit the matter but the Court denied her request without giving any reason; quoted in the endnote section by Buckley, 2006, p. 205.

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defined by a specific facet of identity such as race, sexuality or class, but that the self is both 'constituted and fragmented' by the intersections of various categories of identity (Powell, 1996–1997, p. 1483). In other words, a person has a sex *and* a race *and* a religion *and* other identities. While such an approach fits in with substantive equality, it would be difficult under the framework of formal equality as it undermines the value of diversity with its emphasis on sameness. The cases of *Miron*[29], *Rehburg*[30], *Falkiner*[31] and *Sparks* [32] are cases in point. For example, in the *Sparks* case the judges found that the exclusion of public housing tenants from security of tenure provisions constituted discrimination because of race, sex and poverty. The link between the input from equality groups, in the period both leading up to and after the adoption of the Charter, has been noted by Porter:

> 'that these and other victories for equality-seeking groups under s.15 have owed a great deal to equality-seeking groups playing an active role in affirming a vision of equality as both a right to non-discrimination and as a positive social right.' (Porter, 2005, p. 28)

The cases of *Eaton v. Brant County Board of Education*[33] and *Eldridge*[34] are further stellar examples where the judiciary has given the Charter 'real substance'. The first case involved a challenge by the parents of a ten-year-old girl with cerebral palsy to the school board's decision to remove their daughter from a regular classroom and place her in a segregated class for children with disabilities. In upholding the challenge, the Ontario Court of Appeal found that to segregate a child with disabilities against the child's wishes as expressed by the child's legal representatives, contravened s.15 (1). Segregation against the child's wish should only happen if the school board could show under s.1 of the Charter (the limitation provision) that there was no alternative for meeting the child's needs in the regular classroom or otherwise in a less restrictive environment. The Court recognised the constitutional requirement that the school board had to reasonably accommodate the child in the regular classroom where possible.

David Lepofsky argues that this decision 'constituted the most effective judicial implementation of s.15 disability for several reasons' (Lepofsky, 1998, p. 191). First, the decision shows an explicit recognition of the duty to accommodate as a component of the guarantee of equality to people with disabilities. Second, the decision 'ultimately reflects a much-needed judicial willingness to take s.15's disability equality guarantee seriously and to undertake meaningful, though carefully-tailored action to put it into effect' (p. 196). It is a good example where the Court was willing to become involved in issues which some of the Charter critics would argue should be left to the experts and judges should not become embroiled in issues that are best left to the educational and governmental authorities. However, as Lepofsky properly states:

> 'superficially enticing as such reluctance might seem, it would involve a major abdication of judicial responsibility under the *Charter* . . . The *Eaton* decision is seminal because it heralds such

29 *Miron v. Trudel* [1995] 2 S.C.R. 418. At issue was whether the definition of 'spouse' under the Ontario Insurance Act violated s.15(1) because it was restricted to married couples only. The claimant was in a common law relationship and had three dependent children. After a serious car accident he was unable to work. He was denied insurance benefits under his wife's insurance policy because they were not married. The insurance company brought a motion to the court to determine if, as a common law spouse, the claimant was a 'spouse' under the Insurance Act. The Supreme Court by a close majority, 5–4, found that 'marital status' was an analogous ground and to exclude unmarried couples from insurance benefits available to married couples was a violation of s.15(1) and was not justified under s.1.

30 *R. v. Reherbg* (1994) 111 D.L.R (4^{th}) 336 (S.C.).

31 *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002) 212 D.L.R. (4^{th}) 633 (C.A.).

32 *Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993), 101 D.L.R. (4th) 244 (C.A.).

33 (1995) 22 O. R. (3d) 1 (CA).

34 [1997] 3 S.C.R. 624.

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> a change through a judicial pronouncement which clearly enunciates the core constitutional principles that should guide the change, while properly affording the education system scope for putting them into action.' (Lepofsky, 1998, p. 196)

In the second case, the Supreme Court unanimously rejected government's arguments that s.15 'does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action as a thin and impoverished vision of s.15 (1)'.[35] At issue in this case was the British Columbia's government refusal to provide sign-language interpretation to enable deaf patients to communicate effectively with their health-care providers. The Supreme Court ruled that failure to provide sign-language interpretation constituted adverse effect discrimination against deaf persons.

These and other cases have helped to generate the Charter's legitimacy, which in turn has been aided by the manner in which it was established.[36] Had it not been for the legitimacy provided by the character of the drafting process, which has been described as a 'democratic crucible' (Penner, 1996, p. 107), it is arguable that the judiciary may not have been as willing to take up these controversial issues without the initial support of Canadian society for the Charter.

Unfortunately, the judiciary's willingness to adopt a substantive and purposive approach to s.15 has not been consistent. This inconsistency seems to be prevalent when the Supreme Court is confronted with issues that have financial implications. This was admitted by a former Justice of the Supreme Court, Claire L'Heureux-Dubé, who stated:

> 'The big problem in equality issues is when you are up against financial responsibility of the government . . . the court is very reluctant to interfere in matters which involve financial resources of the State and it's understandable. Only probably the blatant discrimination might survive but I think that's an area which is very difficult because we are not the State, we are not able to decide what would be the priorities of the State.' (L'Heureux-Dubé, 2004)

This point was also echoed by the Director of LEAF:

> 'In . . . cases involving public welfare, access to social benefits, anything where there is a dollar figure attached to it for the state, they have not been very progressive . . . I am concerned that the right will be protected when it's cheap. But if there is a cost attached to it then it's problematic.' (Sampson, 2004)

Sampson's consternation is aptly demonstrated in the case of *Egan v. Canada*,[37] where the Supreme Court found that federal legislation denying old-age security benefits to persons in same-sex relationships violated s.15, but, by a narrow majority of five–four, upheld the measure as a reasonable limit under s.1. The basis was that:

> 'Government must be accorded some flexibility in extending social benefits, and does not have to be pro-active in recognizing new social relationships. It is not realistic for the Court to assume that there are unlimited funds to address the needs of all.'[38]

35 [1997] 3 S.C.R. 624 at para.73. See also the case of *Nova Scotia (Workers' Compensation Board) v. Martin* [2003] 2 S.C.R. 504, where the Supreme Court found that the exclusion of chronic pain claimants on the basis of physical disability violated s.15.

36 For an excellent discussion on the effectiveness of the equality provision of the Charter, see Porter, 2005.

37 [1995] 2 S.C.R. 513.

38 [1995] 2 S.C.R. 513, 572, per (former) Justice Sopinka.

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Former Justice Sopinka continued to state that with regard to this 'socioeconomic question', the Court should be 'reluctant to second-guess the choice which parliament has made'.[39] The Court's approach is exactly a manifestation of the 'thin and impoverished vision' of equality the Court warned against in the *Eldridge* case. Even the seminal decision by the Ontario Court of Appeal in *Eaton* was overturned by the Supreme Court less than twenty-four hours after oral argument.[40] The Supreme Court held that the Court of Appeal erred procedurally by embarking on any assessment of the constitutionality of the education legislation. The Supreme Court also held that the special education tribunal did not violate the child's s.15 rights when it ordered her to be removed from an integrated class and placed in a segregated programme for children with disabilities.[41]

Furthermore, the recent decision in *Auton (Guardian ad litem of) British Columbia (Attorney General)*[42] has closed the door that was explicitly left open to a more positive approach to equality that was presented in *Eldridge* and *Vriend*. At issue was whether British Columbia's refusal to fund health services to ameliorate the effects of autism violates the equality rights of autistic children. The parents of children with autism argued quite clearly that s.15 imposes an obligation to fund treatment for their children irrespective of any particular statutory framework or underinclusive benefit scheme.

In a unanimous decision, the Supreme Court found that failure to provide autism-related health services did not breach s.15. The Chief Justice stated:

> 'this Court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner.'[43]

This statement is in stark contrast with an earlier judicial pronouncement by the same Chief Justice:

> 'To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.'[44]

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39 [1995] 2 S.C.R. 513 at paras. 575–576. The same premise was echoed by Justice La Forest in *Andrews*: 'much economic and social policy-making is simply beyond the institutional competence of the courts; their role is to protect against incursions of fundamental values, not to second uses policy decisions' [1989] 1 S.C.R. 143 at para. 194.

40 The Supreme Court gave judgement without reasons on 9 October 1996. Written reasons were only released on 6 February 1997.

41 Despite the reversal of the Ontario's Court of Appeal's decision, Lepofsky argues that the Supreme Court's decision is better seen as a mixed result for disability equality. It contains important principles which the author argues will serve disability well; see Lepofsky, 1998, pp. 197–214.

42 [2004] 3 S.C.R. 657.

43 *Auton (Guardian ad litem of) British Columbia (Attorney General)* [2004] 3 S.C.R. 657at para. 46.

44 *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 at para. 136. See also the judgement in the case of *NAPE (Newfoundland Association of Public Employees) v. Newfoundland* [2004] 3 S.C.R. 381 at para. 103: '[C]are must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the *Charter* places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament.' Other disappointing cases include *Law v. Canada* [1999] 1. S.C.R. 497; *Gosselin v. Québec (Attorney General)* [2002] 4 S.C.R.429.

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In the *Auton* case, the Supreme Court has done exactly what it warned against in the *MacDonald* case. In so doing, the Supreme Court in a 'shocking fashion' affirmed the government's 'right to do nothing' (Porter, 2005, p. 37), which, to quote from the above statement, can only 'diminish' the court's role and 'weaken the structure of rights upon which our [Canadian] constitution and nation is founded'.

Conclusion

This article has concentrated its examination in trying to determine whether there is a link between: (a) securing legitimacy of a Bill of Rights and the manner of how a Bill is drafted; (b) influencing and shaping the formulation of an equality provision to include concepts of substantive equality and a participative process; and (c) if the legitimacy of a Bill is derived from the 'people', it will encourage the judiciary to take a less restrictive approach. From the above discussion, one can conclude that while a prima facie link has been made in all three points, the link in point (c) is less tenuous than the previous two points. As the Canadian experience has shown, even though the 'people' did have a say in sharing and shaping the equality provision, at times this has not prevented the Supreme Court from adopting a very formalistic and narrow interpretation of the equality right. As the *Auton* case aptly demonstrated, rather than adopting a substantive understanding of equality, the Court erred on the side of caution. With the exception of same-sex couples, unmarried opposite-sex couples and their children, there is a relatively low rate of success for equality claimants under s.15 compared to other Charter claimants.[45] Even a former Justice of the Supreme Court noted that the experience of s.15 has been 'a bit disappointing ... we would have hoped that the main beneficiaries of the equality provision would be poor people or people disadvantaged in some ways' (L'Heureux-Dubé, 2004).

That said, despite some regressive decisions and some setbacks, the fact that the framing of the equality provision was as a result of public participation seems to have made some impact on the Court's interpretation. This has made the Charter more relevant from a substantive equality perspective, which was aptly demonstrated by cases such as *Vriend* and *Eldridge*. The point is eloquently made by a Justice of the Supreme Court:

> 'To the public interest groups that persuaded the Joint Committee to adopt the amendments, the Court's equality decisions may from time to time have come as a disappointment, but a disappointed tempered, surely, by an understanding that reasonable limits had to be accepted by the judiciary in defining their proper role in a constitutional democracy.' (Justice Binnie, 2002, p. 135)

The fact that there has been a mixed result for equality claimants simply reflects the reality that judges are just as capable of making narrowly restrictive decisions as well as progressive ones in the complex area of equality, a trend which is evident in all aspects of law. This should not form a legitimate basis for negating the link between interpretation and process. Regarding points (a) and (b), the Canadian experience suggests that the link is much stronger and tenacious. Not only did a participative process result in the public shaping and influencing the content of the equality provision, but it appears to have had a knock-on effect in helping to give the Charter the exalted status of a legitimate and 'sacred text' (Harvey, 2001, p. 61). This is vital for a Bill of Rights to function as an effective tool. This is an invaluable lesson for those societies such as Northern Ireland, which, as intimated earlier, is in the process of drafting a Bill of Rights.[46]

45 This is also shared by Bruce Ryder, who conducted a quantitative analysis of section 15 cases; see Ryder, 2004.

46 Under the Belfast/Good Friday Agreement and s.69(7) of the Northern Ireland Act 1998 (NIA), the Northern Ireland Human Rights Commission (NIHRC) has the task of consulting and advising the British government on what rights should be included in a proposed Bill of Rights for Northern Ireland.

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Yet some caution does need to be exercised. While Bills of Rights as process present opportunities, as the above account has illustrated, there are also challenges. In order to prevent the public input from becoming a proverbial drop in a bigger political ocean, it requires a strong commitment from civil society, some of whom may well be in a better position in a number of respects to respond to the consultation process. The women's sector in Canada were extremely well-organised and were central in ensuring that the new wording of an equality provision would have to be broader than that of the CBOR. This proved to be significant because although there was the appropriate political landscape and sufficient political will from the top about the value and need for a Bill of Rights, the principal motivation for Trudeau making the Charter the centrepiece of his project for constitutional renewal was not the equality provision, but more about securing the provision for minority language rights, s.23 (Welier, 1984–1985, p. 55). The fact that Trudeau refused to extend the legislative override, s.33, to minority language rights substantiates this argument. Furthermore, s.23 is one of the few rights that imposes detailed obligations on provincial governments to provide minority language education facilities at public expense.[47] Therefore to prevent the new equality provision from replicating its predecessor under the CBOR, as the above analysis has shown, the role of civil society was crucial.

Broadening the scope of the equality provision to incorporate concepts of substantive equality raises difficult issues such as the tension between individual and communal equality. Such tension is rife in Canada in the field of aboriginal women seeking equal treatment and the group rights of the native tribes to maintain cultural traditions that deny equal treatment to women. As noted in Section II, a similar tension, though in a different context, has also dominated the Northern Ireland Bill of Rights debate (McCrudden, 2007, chapter 15).

To conclude, it is important to remind the reader that protecting equality in a Bill of Rights cannot and should not be the primary instrument for achieving a more equal society. At the very least, Bills of Rights must be one of several tools, policies and approaches deployed to help change inequalities. However, to ensure the optimum use of such a tool, it is vital that the process in which it is created is taken into consideration. To borrow a phrase from a former United Nations High Commissioner, Mary Robinson, the process needs to be framed in a way which 'makes everyone an insider, and not simply changing the nature of the outsiders. Or as Maya Angelou said more pithily, you are engaged 'in a process of change not exchange' (Robinson, 2006, pp. 135, 139). It behoves those involved in the process of protecting equality in a Bill of Rights to abide by Mary Robinson's recommendation. Doing so can help increase a Bill of Rights to become an essential ingredient in protecting equality in transitional societies.

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47 This was in response to Quebec's attempts to make immigrants to the province enter the French educational system. The Quebec Bill 101 introduced by the Parti Québecois government in 1977, was meant to promote the use of French in Quebec by restricting the use of English in business and schools in the province. In *A. G. Quebec v. Quebec Protestant School Board* [1984] 2 S.C.R. 66, the Court ruled that the education provision of Quebec's Bill 101 contradicted section 23 of the Charter and should therefore be struck down. See also *Ford v. A. G. Quebec* [1988] 2 S.C.R 712, the 'sign law' case where the Court ruled that the provisions of Quebec's Bill 101 that required all public signs and advertisements be in French violated the Charter's freedom of expression. Trudeau did not want to expose these rights to the vagaries of the political process, especially as he knew that the Parti Québecois, the newly elected party with a solid legislative majority in Quebec at that time, would be quick to use s.33 to protect its quite different views about language policy.

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