

Constitutionalizing Criminal Law

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Choosing among Rights

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In *Reference re Section 94(2) of the Motor Vehicle Act*,¹ the Supreme Court of Canada was asked to determine the constitutionality of a law imposing a mandatory seven-day jail sentence for anyone caught driving without a licence or with a prohibited licence. The legislation specifically excluded any requirement that the state prove that the accused intended to drive without a valid licence.² This law was contrary to the common law presumption that all criminal and quasi-criminal offences require proof of fault to commit an offence.³ Common law presumptions, however, are subject to clear legislative displacement. The impugned provision was therefore consistent with established law at the time subject to its compliance with the newly adopted *Canadian Charter of Rights and Freedoms*.

The *Motor Vehicle Act Reference* presented the Supreme Court with its first opportunity to interpret section 7 of the Charter. That provision provides that “everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”⁴ Because the impugned law in the *Motor Vehicle Act Reference* imposed mandatory imprisonment, the subject’s liberty interest was engaged. This raised a novel question: Was this deprivation of liberty inconsistent with the “principles of fundamental justice”?⁵

In answering this question, the Supreme Court was asked to interpret the phrase narrowly. There were textual, political, and historical arguments in favour of a narrow interpretation. Textually, the phrase “principles of fundamental justice” was borrowed from section 2(e) of Canada’s statutory Bill of Rights. The interpretation of that provision could not be definitive, however, of how “fundamental justice” should be interpreted under the Charter. Section 2(e) provides that “no law of Canada shall be construed or applied so as to ... deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.”⁶ The specific reference to “a fair hearing” made it obvious that the provision was meant to be reserved for procedural protections.⁷ The absence of such language in section 7 of the Charter implied a broader role for the term “fundamental justice.”

Politically, it was argued that allowing section 7 of the Charter to protect substantive principles of justice would convert the Supreme Court into a “super-legislature” empowered with the ability to decide both law and policy.⁸ To this contention, Justice Lamer responded that “the historic decision to entrench the *Charter* in our Constitution was taken not by the courts but by the elected representatives of the people of Canada.”⁹ Because the people had entrusted the courts with interpreting the Constitution, he was confident that a broad, substantive interpretation of section 7 would not be undemocratic if it were supported textually. For Justice Lamer, if the government wanted section 7 to provide procedural protections only, then it could have used clearer language by substituting the long-accepted term “natural justice.”¹⁰

Justice Lamer maintained this position despite historical evidence supporting the view that section 7 was intended to provide only procedural protections. Commentators have since uncovered significant evidence of intent from some of the drafters of the Charter supporting a narrow, procedural rights interpretation of section 7.¹¹ It was this evidence that drove leading Canadian constitutional law scholar Peter Hogg to predict that it was “unlikely that [the] section 7 phrase ‘principles of fundamental justice’ can be pushed beyond procedural safeguards.”¹² This view had also initially received support in the lower courts.¹³

Contrary to these earlier opinions, the Supreme Court concluded that evidence of the drafters' intent was of limited weight.¹⁴ As Justice Lamer wrote, "the *Charter* is not the product of a few individual public servants, however distinguished, but of a multiplicity of individuals who played major roles in the negotiation, drafting and adoption of the *Charter*."¹⁵ As a result, he asked "how can one say with any confidence that within this enormous multiplicity of actors, without forgetting the role of the provinces, the comments of a few federal civil servants can in any way be determinative?"¹⁶ For the Supreme Court, placing too much emphasis on this evidence would allow ministers to legislate indirectly that which they could not negotiate in the political arena.¹⁷

The Supreme Court ultimately did not accede to the arguments supporting a narrow reading of section 7 of the Charter. Instead, it held that "the principles of fundamental justice ... are to be found in the basic tenets of our legal system."¹⁸ Such principles are essential to the beliefs on which Canada is founded. They include a "belief in 'the dignity and worth of the human person' (preamble to the *Canadian Bill of Rights* ...) and in 'the rule of law' (preamble to the ... *Charter*)." ¹⁹ Given this broad interpretation of "fundamental justice," the court concluded that any law that engages an individual's life, liberty, and security of the person interests must conform to both procedural and substantive principles of justice.²⁰

The law at issue in the *Motor Vehicle Act Reference* contravened a basic tenet of substantive justice: the "morally innocent" should not be deprived of liberty.²¹ This violation followed from the law's potential to convict and imprison an accused person even though that person has not done anything wrong. For instance, the person might have received a suspended licence because of a missed payment resulting from a clerical error. Although preventing such an individual from serving a mandatory jail sentence would appear to be just in the eyes of most people, how the Supreme Court chose to strike down the law had much broader implications. The fact that the court did not place any significant limitations on which types of principles of justice might qualify as "fundamental" provided a broad form of substantive review, unprecedented in modern constitutionalism.²²

In the ensuing years, the Supreme Court has used section 7 to constitutionalize two distinct types of substantive principles. First, it has constitutionalized a variety of moral philosophical principles. Because the vast majority of cases under section 7 implicate criminal law,²³ the principles constitutionalized derive primarily from criminal law theory. These principles are far-reaching, including prohibitions against convicting the morally innocent,²⁴ a requirement that offences exhibit proportionality between the *mens rea* of an offence and the moral blameworthiness of the actor,²⁵ and prohibitions against convicting accused persons for physically²⁶ and morally involuntary conduct.²⁷

Second, the Supreme Court has constitutionalized principles of “means-end” or “instrumental” rationality.²⁸ This method of review assesses whether a law’s effect is adequately connected to its objective or strikes an inappropriate balance between its objective and its effect.²⁹ It employs three main principles: arbitrariness, overbreadth, and gross disproportionality.³⁰ A law is arbitrary when its effect bears no connection to its objective,³¹ overbroad when its effect fails to achieve its objective in some circumstance,³² and grossly disproportionate when its effect is “totally out of sync” with its purpose.³³ As the Supreme Court’s interpretation of section 7 progressed, the court increasingly preferred the instrumental rationality principles in testing whether criminal laws are in accordance with fundamental justice.³⁴

The relationship that developed between criminal law and constitutional law under the Charter is notable for one further reason: it prioritized section 7 review at the expense of specifically enumerated Charter rights. To the dismay of some commentators,³⁵ rights such as freedom of expression,³⁶ the prohibition against cruel and unusual treatment or punishment,³⁷ and the right to equal treatment before the law³⁸ have taken on a secondary, and mostly modest, role in constitutional litigation of substantive criminal law issues.

Choosing among Rights

The existence of multiple avenues to challenge the constitutionality of criminal laws raises four key questions. First, to what extent is there overlap among these methods of substantive review? Although trial and appellate courts typically answer all rights questions raised at trial,

the Supreme Court generally abstains from striking down criminal laws on multiple grounds. Instead, the court almost always applies one right and deems it “unnecessary” to decide the merits of the remaining rights claims. If there are significant overlaps among the methods of constitutional review, then it is highly likely that the court is explicitly choosing from among the methods when striking down a criminal law.

Second, if the Supreme Court is choosing from among competing methods of substantive review, then what are the benefits and detriments of employing each method? To date, the court has not explained why it tends to favour the instrumental rationality principles over the principles of criminal law theory despite appearing to have made such an explicit choice on several recent occasions. Moreover, the court has not explained why it often avoids considering the merits of enumerated rights claims in constitutional cases implicating the substantive criminal law. To understand and critique these decisions better, it is necessary to pare back each method of substantive review to determine its overall purpose and its effect on the development of criminal law.

Third, is there any utility in preserving all three rationales for constitutionally challenging criminal laws? With a better understanding of the ends sought by each method, as well as the ability of each method to achieve its ends, it becomes possible to assess whether it is necessary to preserve all three methods of review. For instance, it is possible that there is complete overlap between the application of section 7 and other enumerated rights. It is also possible that enumerated rights serve purposes similar to those underlying each method of section 7 review. If so, then the democratic objection to section 7 review canvassed briefly above (and in more detail in later chapters) would favour abandoning substantive review under section 7 of the Charter. If, however, section 7 and enumerated rights do not apply with equal breadth and serve different purposes, then it becomes necessary to balance the ability of each method to attain its objective when employing the Charter to shape criminal law.

Fourth, what lessons might be drawn from the Canadian experience of constitutionalizing criminal law for other jurisdictions? Although section 7 of the Charter provides Canadian courts with unprecedented powers of substantive review, several other jurisdictions have similar

provisions that could be interpreted as providing similarly broad substantive rights.³⁹ Should these jurisdictions follow the Canadian path to constitutionalizing criminal law? What differences in comparable countries' constitutional frameworks would favour or reject the Canadian approach?

Argument of the Book

The fact that Canada is among the jurisdictions with the most experience in constitutionalizing criminal law makes it a natural choice for studying the relationship between criminal law and constitutional law.⁴⁰ The question for Canada and other countries with a similar constitutional design is whether allowing for the full constitutionalization of criminal law – principles of criminal law theory, instrumental rationality, and enumerated rights – is a prudent path to criminal justice. Answering this question requires significant empirical inquiry, a task yet to be undertaken comprehensively in the Canadian context. Equally important, answering this question requires a concrete understanding of the purpose underlying each of Canada's three methods of substantive review.

I agree with Victor Ramraj that constitutionalizing principles of criminal law theory affords courts the opportunity to create greater coherence in criminal law.⁴¹ This is a laudable aim since legislatures, faced with majoritarian pressures to be “tough on crime,” are unlikely to focus on defendant-friendly considerations when crafting criminal law. Constitutionalizing criminal law theory principles thus provides a valuable check on majoritarianism by allowing courts to constitutionalize a fair, balanced, and consistent theory of criminal law. I further contend that moral philosophical principles drawn from criminal law theory are theoretically better able to create coherence in criminal law than enumerated rights since the former provide more precise guidance to future courts and legislatures about the appropriate scope of criminal law.

Yet it is imprudent to assume that courts, by virtue of being courts, will constitutionalize a coherent theory of criminal law. Courts are imperfect actors with limited resources and expertise. The latter is especially true for generalist apex courts such as the Supreme Court of

Canada. A detailed review of its jurisprudence and the ensuing academic commentary shows that the court has constitutionalized a number of principles of criminal law theory in an incoherent manner. In essence, the court has constitutionalized several principles that are inconsistent (or refused to constitutionalize principles that are consistent) with the bedrock principles that the court maintains underpin criminal law. The court's inability to constitutionalize a coherent theory of criminal law suggests that allowing generalist courts to constitutionalize their own substantive principles of criminal justice can distort our understanding of criminal law.

The principles of instrumental rationality serve a different end. Unlike the vast majority of laws struck down based on principles of criminal law theory, instrumental rationality cases tend to elicit a substantive response from Parliament.⁴² As Peter Hogg and Allison Bushell explain, when courts and legislatures engage in such "dialogue" about the scope of rights, this softens the criticism that courts act undemocratically when they strike down laws.⁴³ As opposed to legislatures being told what they cannot do, as occurs when courts employ principles of moral philosophy, judicial use of instrumental rationality allows legislatures to choose from among a broad range of policy responses as long as in pursuing those objectives the impugned law does not have illogical or severe effects. Employing the principles of instrumental rationality is therefore designed to increase the legitimacy of judicial review. As a result, this method of review leaves it primarily to the legislature to develop the principles underlying the substantive criminal law.

The Supreme Court's development of section 7 of the Charter suggests that neither method of review fully achieves its aim. The court's constitutionalization of criminal law theory principles has led to some extent to greater coherence in criminal law. It remains unknown, however, whether the court could have improved its structuring of criminal law under section 7 of the Charter as it discontinued constitutionalizing principles of criminal law theory. The reason for this retreat was likely due to criticism from those who maintain that this form of judicial review is undemocratic.⁴⁴ Building on these criticisms, I contend that allowing courts to constitutionalize their chosen moral philosophical principles aggravates the traditional counter-majoritarian critique since doing so imposes rights

as opposed to applies rights explicitly adopted in the Charter. The need to maximize the legitimacy of judicial review therefore militates against allowing courts to strike down laws based on principles of criminal law theory that the court thinks are “fundamental” to justice.

Although utilizing the instrumental rationality principles increases dialogue between courts and legislatures, the Canadian experience reveals that employing these principles typically does not give rise to healthy dialogue. Parliament frequently responds to judicial decisions in a politically charged manner that does not address core rights issues. This is possible because the legislature can claim to have “rebalanced” the effects of a law vis-à-vis the impugned law’s now (typically) overblown objective. Legislatures therefore can pass laws with identical effects and, importantly, do so without proving that the new law substantially furthers the social good that it claims to accomplish. As a result, instrumental rationality review softens the counter-majoritarian critique by providing legislatures with fewer concrete barriers to passing laws. However, this method of review comes at a high price: complex, costly, and time-consuming relitigation of important rights issues.

Alternatively, courts could fall back on enumerated rights to constitutionally structure criminal law. There are at least two reasons to prefer enumerated rights to those constitutionalized by a court. First, employing enumerated rights is more democratic since those rights utilize the most precise language on which the polity agreed to challenge democratically enacted laws constitutionally. Utilizing terms such as “fundamental justice” invites courts to imbue the law with its own subjective sense of justice. Second, preferring enumerated rights limits generalist judges’ ability to venture into areas of moral philosophy where there is little prospect of agreement. Without the explicit wording of an enumerated right, judges simply will be forced to pick from the principles that counsel maintains would forward the case if constitutionalized.

Preferring one of these methods to the exclusion of the others is nevertheless unlikely to satisfy the competing objectives underlying the constitutionalization of criminal law: creating greater coherence in criminal law while maintaining the legitimacy of judicial review. As I contend, the enumerated rights of the Charter do not apply in numerous

situations in which the Supreme Court has struck down an unjust law under section 7 of the Charter. The court therefore faces a choice in such circumstances – allow a clearly unjust criminal law to remain in force or sacrifice some legitimacy in conducting judicial review by allowing courts to constitutionalize their own principles of substantive justice under section 7 of the Charter.⁴⁵

To balance these competing objectives, I maintain that the Supreme Court should render constitutional decisions implicating the substantive criminal law based on enumerated rights where possible. This approach is not only the most democratically legitimate but also allows courts to achieve substantively just results in many cases. However, I also maintain that the Supreme Court was not wrong to constitutionalize other substantive principles of criminal law theory. Constitutionalizing those principles can serve two purposes. First, it can serve a gap-filling role by providing a means for constitutionally challenging criminal laws that are unjust but do not implicate the Charter’s enumerated rights; second, it can serve a limited communicative function. Put differently, the principles of criminal law theory should be used *in addition to* an enumerated right where they provide guidance to Parliament and courts that can aid them in resolving future legal issues likely to come before them for legislative reform.⁴⁶

Although concerns will remain that courts will provide “overprotection” of rights under section 7, these concerns can be assuaged for two reasons. First, the opportunity for courts to constitutionalize overly broad principles of justice is limited if they prioritize enumerated rights review. Given the significant overlap between enumerated rights and the principles of criminal law theory, I argue that many of the principles of criminal law theory that the Supreme Court constitutionalized were unnecessary. Second, the structure of the Charter provides Parliament with the option of justifying an infringement of rights under section 1 or invoking the section 33 notwithstanding clause. Although the court has been reluctant to justify infringements of section 7 of the Charter,⁴⁷ I maintain that this choice was unprincipled. Moreover, strong support for “tough on crime” policies suggests that criminal law is an area where legislatures should be able to garner majority support to override rights. Should political support not be forthcoming, it is because the Canadian

polity generally trusts its courts to make fair decisions about the scope of criminal law.

I also contend that the instrumental rationality principles ought to be abandoned as a method of judicial review. I come to this conclusion for two reasons. First, as I explain in [Chapter 3](#), the Supreme Court has had significant difficulty developing the instrumental rationality principles. Originally, these principles mirrored the section 1 test for justifying infringements of Charter rights. After “individualizing” these principles, they applied so broadly that they allowed for any bright-line rule that engaged any individual’s life, liberty, or security interests to result in a breach of fundamental justice. Although I maintain that these principles can be repaired, the fact that the court failed to develop them coherently illustrates a generalist court’s ability to constitutionalize its own principles of justice.

Second, and more importantly, the instrumental rationality principles are unlikely to achieve their laudable end of creating sustained and meaningful dialogue between courts and legislatures. The structure of these rights, properly conceived, communicates only narrow instances of unconstitutionality. This, in turn, allows legislatures to respond without meaningful restrictions. Any increased legitimacy that results from using the instrumental rationality principles is therefore offset by the uncertainty for rights bearers resulting from instrumental rationality decisions. Because I find that the combination of the principles of criminal law theory and enumerated rights applies as broadly as the instrumental rationality principles, the latter principles can be abandoned without any cost to criminal justice.

Several lessons can be derived from the Canadian experience constitutionalizing criminal law. Although constitutionalizing principles of fundamental justice allowed the Supreme Court to rid the law of many unjust criminal law doctrines, doing so also added confusion to the conceptual underpinnings of criminal law. This fact supports the view that a generalist court such as the Supreme Court of Canada should use section 7–like review only as a last resort. Instead, similarly situated courts should employ enumerated rights where possible to increase the legitimacy of judicial review. Given the more specific language inherent in the text of enumerated rights, decisions based on those rights are also

less likely to add confusion to the law when using the Constitution to strike down a criminal law.

It is also important that the structure of the Charter allows legislatures to justify or override constitutional rights. Although section 1 has yet to be used by the Supreme Court to justify an infringement of section 7, the Supreme Court recently signalled that it is willing to revisit this position.⁴⁸ Similarly, I argue that the moribund nature of section 33 is of no concern in the criminal law context. Given the majoritarian biases implicit in criminal law, legislatures should have little difficulty convincing a majority of the public to override controversial decisions implicating substantive criminal justice. Parliament, I maintain, has simply refused to try to persuade the public that the notwithstanding clause ought to be used as a response to alleged judicial overreach in the criminal justice context. By providing such a means to check judicial overreach, the Canadian model of judicial review preserves a better balance between the need to ensure fairness to criminal accused and legitimacy in judicial review. Jurisdictions without a similar power have one less tool to preserve this balance and are therefore relatively less justified in allowing courts to constitutionalize their own principles of justice.

A final factor in favour of allowing courts to constitutionalize limited substantive principles of criminal justice arises from the fact that Canadians exhibit a high level of trust in their courts as the *de facto* arbitrators of rights. As the empirical evidence shows, even when Canadians are unlikely to agree with the reasoning underlying a particular Supreme Court decision, frequently they still agree with the result because judicial review is viewed overall as a necessary check on state power.⁴⁹ In other words, Canadians are much less concerned with rights “overprotection” than they are with rights “underprotection.” If a polity holds similar beliefs, I maintain that its courts will be relatively more justified in constitutionalizing their own principles of justice, at least in circumstances in which enumerated rights are not applicable.

Structure of the Book

In [Chapter 2](#), I review the Canadian experience constitutionalizing principles of criminal law theory. This review shows that the Supreme Court has rid Canadian criminal law of a variety of outdated and unjust forms

of criminal liability. Yet I also find that the court has caused significant confusion when constitutionalizing principles of criminal law theory. First, and most concerning, at times the court has misunderstood the principles that it has constitutionalized. Second, it has become hesitant to build on its previous rulings, leaving litigants and lower courts guessing about how the law will develop in future cases. This hesitancy has derived from the court's increased awareness of the questionable legitimacy of constitutionalizing its preferred principles of moral philosophy. These findings suggest that the court might not have sufficient expertise or willingness to engage in constitutionally entrenching a complete theory of criminal law.

In [Chapter 3](#), I detail the Supreme Court's development of the principles of instrumental rationality and its trajectory in replacing the principles of criminal law theory as the primary method of substantive review. As the court itself has observed, its initial foray into constitutionalizing the principles of instrumental rationality illogically mirrored the proportionality test for justifying a rights infringement under section 1 of the Charter. As this approach imposed the government's justificatory burden on the accused, the court rightly switched course. In so doing, however, it failed to ask whether its new "individualistic" principles of instrumental rationality qualified as principles of fundamental justice. Such an inquiry reveals that the court has constitutionalized at least one principle that cannot, on any account, qualify as fundamental to justice.

I also find that the principles of instrumental rationality have failed to achieve their aim of facilitating productive dialogue between courts and legislatures. The structure of the Supreme Court's principles of instrumental rationality instead allows for legislatures to respond to rights violations by passing a substantively similar law while making unfounded claims that its law achieves a vague but important objective such as furthering substantive equality or protecting vulnerable groups. The dialogue between courts and legislatures has instead turned into more of a shouting match in which the legislature forces the court to reconsider its initial assessment of a law's constitutionality without having responded seriously to the often severe effects that the legislature's law has on people's life, liberty, and security of the person interests.

In [Chapter 4](#), I answer one of the questions left unanswered by the preceding chapters: Could the explicitly enumerated provisions of the Charter related to substantive criminal justice give rise to protections equal to those provided for under section 7 of the Charter? In considering this question, I use alternative arguments provided in lower courts and other novel applications of enumerated rights to test whether the results would be similar to those that arose under the court's section 7 jurisprudence. Although there is significant overlap between the court's moral philosophical and instrumental rationality methods of substantive review, I find that enumerated rights do not apply to several unjust criminal laws.

In [Chapter 5](#), I then consider whether the various costs and benefits of each method of substantive review support the Supreme Court's current approach of using all three methods but heavily favouring instrumental rationality. Employing enumerated rights is defensible under several theories of judicial review. The democratic objection to judicial review, however, is qualitatively different under section 7 of the Charter. Although the text of section 7 is worded broadly enough to allow the court to constitutionalize substantive principles of justice, I contend that prioritizing section 7 review over enumerated rights is tantamount to a judicial rewriting of the provisions of the Charter affecting criminal justice. The court should acknowledge this objection and respond by using section 7 only as a last resort.

In deciding which principles of fundamental justice to constitutionalize, I also contend that the court should utilize principles of criminal law theory over principles of instrumental rationality. Although the court has constitutionalized several questionable principles of criminal law theory, the cost to the coherence of criminal law must be weighed against any cost imposed by the principles of instrumental rationality. The benefit of employing the principles of instrumental rationality is that they allow courts to rid the law of unprincipled doctrines of criminal liability without constitutionalizing potentially confusing theoretical principles. However, the principles of instrumental rationality also invite Parliament to respond to judicial rulings by ignoring their substance, thereby allowing Parliament to impose its own interpretation of the Charter over that of the court. In my view, the cost imposed on rights

bearers by this coordinate construction approach to judicial review is far greater than any potential confusion arising from the court's occasional constitutionalization of an incoherent principle of moral philosophy.

I conclude in [Chapter 6](#) by distilling the lessons learned from the Canadian experience constitutionalizing criminal law. I find that the relative specialization of a country's apex court, the structure of its bill of rights, and the degree of trust that the citizenry holds in its top court all affect whether courts ought to be allowed to constitutionalize their own principles of substantive justice. Even where these factors favour providing courts with such discretion, I nevertheless contend that it would be preferable for legislatures to consider explicitly constitutionalizing more substantive criminal law principles when enacting a bill of rights. Legislatures, as opposed to courts, have sufficient time and resources to prepare a coherent set of principles to guide judicial decision making. A section 7-like provision might nevertheless often need to be included in a bill of rights since gathering support to enact the types of substantive rights at the heart of criminal law might prove to be politically unfeasible. In such a scenario, I suggest that the enacting legislative body make it clear that a section 7-like provision is applicable only where the Constitution's enumerated rights are inapplicable.

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