

***Waiting for Coraf:
A Critique of Law and Rights***

Allan C Hutchinson
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The relative merits and pitfalls of introducing a Bill of Rights into the constitution of Australia are of current if not paramount concern to Australians. The debate they engender has also been at the forefront of new constitution-making in several other parts of the world. CORAF is the Canadian Charter of Rights and Freedoms and was introduced into the Canadian Constitution in 1982. The real worth of this book to those outside Canada lies in its critical analysis of the Canadian experience, and especially in how this should serve to awaken those whose ongoing support for such a Charter or Bill of Rights has more often been instinctive than rigorously demonstrated. At its most forceful, the argument that the liberal rights-talk embodied in such Charters is, perhaps counter-intuitively to many, profoundly undemocratic, is impressive and one that needs to be digested and debated in both legal and popular fore. For, like the horse of Troy, the rewards promised may be, as Hutchinson shows, neither what we get nor what we might really want. And while each country's experience of discussion, prioritising of rights, and implementation will be unique, the underlying assumptions and current socio-economic conditions of these western states are largely similar. As such the lessons to be learned from Canada should be considered not just by comparative lawyers, but by constitutionalists and interested parties generally. This book provides an opportunity to provoke such discussion.

The aim of this review is not to deal with the book's detailed arguments against liberal rights-talk, with which I largely agree, nor to enter into doctrinal squabbling over whether the many constitutional cases referred to have been properly construed, which would be to miss the point of the book, but to consider instead the nature of Hutchinson's political response to the perceived failure of contemporary liberal structures and attitudes. For if we are to progress toward a newly conceived nonliberal democracy we need to be persuaded of the worth and cogency of such innovative thinking. Proponents, and even potential critics, need to be able to explain and understand just what this response would mean, what it would require, and what it would offer.

It is here, I will argue, that the book's weakness lies. We may be convinced of the disservice of rights-talk to the democratic cause, but ultimately we have insufficient theoretical and political guidance as to what ought to be done. Moreover, such guidance as we do have is often incoherent and occasionally contradictory. Thus although I am sympathetic to Hutchinson's democratic aspirations, I want to explore some of the features of his political response as a way of developing the insights in a more structured manner. I must note here that at least a part of the problem is the nature of the book as a whole. It is often repetitive - sometimes startlingly so - and, reading as it does often as a collection of separate essays, would have benefited from a good edit. That aside, I want to turn now to the substantive concerns I have raised.

First let us consider some of the central political and theoretical aims of the book. Hutchinson seeks "to offer a more satisfying critique of civic life that can better inform the deconstructive and reconstructive dimensions of an uncompromising commitment to the radical cause of unmodified democracy."¹ This will involve "the adumbration of a critical theory and transformative program that can effect a shift from the reneged promise of liberal rights-talk to the untried possibilities of dialogic democracy", and will do so in part at least through providing an "expanded account of the modern state and a revised version of involved citizenship that places indeterminacy and personal empowerment at the heart of its progressive practice." (26-7) As uncompromising in its critique and reconstructive aims as the new society will be in its radical commitment to democracy, Hutchinson's goals do not lack for spirit. For radical critique this is as it should be. In an effort to abandon the old and explore the new, Hutchinson expresses dissatisfaction

¹ *Waiting for Corag* at 25. Page references in the text are to this book.

with certain traditions of thought that would hinder unmodified or dialogic democracy. Yet I find in his "transformative program" a curious admixture of several traditions, not all of which sit easily together. In a moment I want to extract these from the arguments made in Hutchinson's text, but must say something first about the way in which the overall aim of the work, as just expressed, tends to occlude its potential genesis.

Without setting too much store by labels, one finds in Hutchinson's program a commitment to a hybrid of civic republicanism, postmodernism, and, despite claims to the contrary, liberalism. While this may be possible, the consistent faith put in the final goal of "unmodified democracy" has tended to obscure the possible antecedents of this notion itself. This problem is compounded by the fact that we never fully get to know what unmodified democracy would really be like, nor really how it would work. Because Hutchinson seems often (though of course presumably in practice this would not be the case) to see dialogic or unmodified democracy as an end in itself, we are left with insufficient detail about what the program would transform social and political relations *into*, and about how any ensuing conflict would be resolved. To use a rather functionalist-sounding phrase, the program lacks for insight into the question of institutional design. While it would be possible to fall back on an argument that such a question could only be answered once we had realised unmodified democracy, this alone is unsatisfactory. As such, we are prompted to ask questions like, Does unmodified democracy require full consensus in order to act?; if not, would a majority principle be instituted? If so, how would minority claims be dealt with? How would the new democratic state deal with the pragmatic problem of size of population? If in response to these issues, decision-making was to be localised as much as possible, would there be a hierarchy of democratic conventions up to state or national level? Would such localism be geographically-based or interest-based or issue-based or what? These seem to me to be merely a few important questions about the nature of instituting unmodified democracy (unless of course instituting is the wrong term here, that this kind of democracy would mean everyone voting on each issue, but then this would seem to cut across the notion of civic solidarity; here, in other words, the possibilities proliferate at an alarming rate) that require attention if we are to be drawn to the "model" of unmodified democracy. What I want to explore here is less this than the fact that belief in this goal works, as I have suggested, to obscure theoretical lineages that *would* be necessary to unmask, and be more clearly delineated, if unmodified democracy were to be realised even at a theoretical level. But at present, and largely because of the faith placed in the rhetoric of the ultimate end of

unmodified democracy, these lines are run together in such a way as to prevent an understanding of the transformative program itself. To grasp this I want to turn to a consideration of the different theoretical strands one can see at work in the book.

I have suggested that one sees traces of civic republicanism in the book. Although Hutchinson eschews modern variants of communitarianism as promoting an essentially and "profoundly elitist and undemocratic vision of social life"(186), the notion of community is central to his claims. The problem with current "liberal communitarianism" is that it tends merely to overlay an atomistic liberal individualism with a rhetorical community gloss, leaving true power in the hands of judges and their attempts at principled reasoning. As such, he says, "for citizens, politics becomes a spectator sport and the stunted character of public discourse confirms Rousseau's dictum that without robust debate and active citizens, there is nothing but debased slaves from the judicial and juristic rulers on down."(187) Hutchinson's argument for community begins instead by challenging the individualistic premises of liberalism (with which some forms of communitarianism may be essentially complicit) as both "ignor[ing] and suppress[ing] actual human experience." "Individuals," he says, "are not abstract or bloodless, but are in part constituted by their social context."(ibid) Only when this is realised as being the real or "actual" experience of people in society will the "possibility of developing a set of shared ends and values"(188) emerge. As he says

By developing a moral sense and practical experience of community, individuals will be better able to contribute to the growth of a shared set of values and institutions in accordance with which social life could not[sic] be organised ... In this way, society could develop a modus vivendi that encourages caring and sharing and actualizes the possibility for meaningful connection with others."(ibid)

There are a couple of difficulties with this. First (after the style of Stanley Fish), the realisation that one is contextually situated does nothing in itself to change one's ability to do anything about this. One will, the argument goes, be contextually situated whether one says so or not. Besides, and secondly, as situatedness is the "actual human experience" anyway, there is a qualitative jump between recognising this and being able to develop "shared ends and values". While Hutchinson is correct to be wary about communitarianism's potential lack of respect for individuals, it remains unclear just how unmediated democracy will "reconcile the tension between the extremes" of self and community by recognising that tension. The best

answer that seems to be offered is that, unlike liberalism or communitarianism, true "participatory politics is regenerative, experiential, and empowering"(189). But again, while this may be true, there is no necessary link between this and "the growth of a shared set of values". To suggest that there is, is little more than a guess. In precisely the way communitarians are criticised for trying to rejuvenate civic responsibility² through postulating an in effect unreal polity, there appears to be a suspension of disbelief when it comes to a future imagining in the political realm, and one that simply cannot be based on a theoretical interpretation of the present "actual human experience".

This problem is augmented when we realise that Hutchinson is talking about civic responsibility at the state level. The idea of citizenship, in other words, is not about entitlement to holding a particular national passport, but has its roots in the classical notion of active participation in governance. To be sure, the state must be redefined - be "not so much a solution, but the problem"(209) - yet it will still be possible to talk about participation in a "civic project"(214). It is here we encounter some ambivalence in Hutchinson's argument. On the one hand, Hutchinson seeks to transcend that aspect of liberalism which treats the state as a constant threat to individuals and instead allow for the possible emergence of a more classical notion of citizenship as genuine participation in and as the state (to be both governed and governing as Aristotle described it). Yet on the other, it seems he cannot depart from the wellimbued and practical realisation that contemporary society is diverse to the point where fully endorsing a classical republican notion of the common good is infeasible. The tension is clear and unresolved. At 214 it is said that "The state ... must become an institutional venue through which citizens struggle to achieve a common good", and on the next page, that "citizenship under radical democracy is not committed to a common good." To alleviate the apparent contradiction the argument tips its hat to postmodernist theory, and, ultimately, to a central premise of liberalism. Thus we find that "any vision of the 'good life' is always provisional and contingent. There is no fixed or final version of what amounts to the best way to live"(215); as such "a good life consists in public-spirited engagement with others over the shape and substance of 'the good life'."(ibid)

² See for example, Elizabeth Mensch and Alan Freeman, "A Republican Agenda for Hobbesian America?" (1989) 41 *Florida Law Review* 581.

Amid the general feeling of confusion here is the surprising use of Rorty's vocabulary (the man not afraid not use the term "we liberals", and for which Hutchinson so accurately criticises him earlier) in endorsing what remains an essentially liberal argument itself. The *reason* Rorty is "more a liberal than a democrat"(205) is at least in part because he recognises the worth to him of freedom, the contingency of what the good life is (as defined above), and the relation of both to his theory of politics. To attempt to synthesise Rorty's philosophical premises with a theory of civic responsibility is difficult if not impossible; what chance of "caring and sharing" through the state is there for the "strong poets" and "the utopian revolutionaries"? What chance of the fusion of public and private through civic responsibility?

Rorty premises his version of the good life (or lack thereof) on the idea that "There is no way in which philosophy, or any other theoretical discipline, will ever let us ... hold self-creation and justice, private perfection and human solidarity, in a single vision"³ Again, even when we acknowledge that freedom must always involve involvement and not detachment, it still requires a leap of faith and reasoning to turn that into meaningful solidarity at the level of the state.

The relation between self and community (or rather of self-in-community) is notoriously difficult to argue, but the way in which competing theoretical strands intertwine here makes it difficult to grasp what the recognition of contingency really means for the political theory of unmodified democracy. The recourse to a postmodernism which "rejects a belief in any single or accurate vision of community or social justice"(225) does not really help. Moreover it in fact seems to conflict with other aspects of the argument elsewhere, where Hutchinson seems already to have made up his mind about what social justice would require. Two examples will suffice. First, though unmodified democracy will "integrate all citizens in their social and political powers so that they become active participants"(211), this should be disallowed in certain cases. On the issue of abortion say, "the role of men is to step aside, listen, and act upon the demands and desires of women."(243) Of course, and though this should be endorsed - and enforced? - by the state(108), Hutchinson is keen to note that "there is no one woman's viewpoint on abortion and it would be folly to presume that there is ever likely to be one."(243) While the latter point would appear to be sufficiently postmodern - or liberal - the exclusion of half the population from deliberation ab intio is odd for an argument advocating "unmodified"

³ R Rorty, *Contingency, Irony and Solidarity*, Cambridge CUP, 1989, at xiv.

democracy. My point is not whether this suggestion is good or bad - I don't know - but that there do seem to be substantive issues about which Hutchinson is clear that the fact that "each of us is unavoidably tied to the fate of all of us" (216) can be superseded by a particular vision of just deliberation. If there is a clear agenda here - whether over women's lives, the life of the foetus, respect for minority groups, or whatever - why hold on to the fence-sitting language of postmodernism? What does that add?

The second example is more telling. Again, along postmodern lines it is stated that in "rejecting comprehensive programs and universal positions, the postmodern critic must attend to local and contingent circumstances ..." (225) That said, in his discussion of free speech, Hutchinson has little reservation in noting that for free speech to be truly meaningful "wholesale socioeconomic redistribution will be necessary." (217) I cannot fathom this. It is hard to imagine a program that would be more "comprehensive" than this, and one for which attention to mere localism would be less effective. Once again it is not the goals that are at issue, but the fact that unmodified democracy does not seem to be particularly unmodified. Such a transformative program would indeed be radical, but it would need a kind of theorising and "civic conversation" that went far beyond one which was "suitably provisional, revisable, and contextual" (226). It might need to be all those, but it would also need to be a lot more.

Although unmodified democracy requires "wholesale socioeconomic redistribution", Hutchinson rejects a Marxist approach here. Marxism, he says, "has a marked tendency to offer explanations that are too systematically sweeping and one-dimensional in scope and content." (208) While in the new state "genuine participation of economic equals" (172) would be required, it is, he says, "no longer possible to invoke 'material interests' ... as a decisive ploy in political argument", since "the reductionist politics of class struggle fail to respect sufficiently differences of race, gender, and sexuality in its totalizing march to social justice." (174) Leaving aside the question of whether this accurately reflects contemporary Marxist theorising (for example on race C.L.R. James may be a strong counter-example) two things come to mind here that remain unanswered: first, just how will the economic equality of individuals come about and how will it be formally instituted and maintained?: while it may be true that Marxists focus on a particular set of economic relations, it is also true that they have responses to the economic question at an institutional level - it is unclear whether a "suitably provisional" postmodern theory does; and second, in such a dialogic democracy freed from the taints of contemporary society's biases (where we

will have a "truly just and egalitarian society"[220]), why will racial difference, say, be problematic? In other words, just how will economic, gender, and race, issues, as currently posed, be presented in the new civic conversation? Why will some, a priori, require equality and others difference? Once again, the strands of different types of arguments intertwine here and leave much both in terms of theory and of political praxis unexplored.

It might have been possible and interesting to develop some of these arguments. Of course, it might be responded that they are essentially too utopian to be concerned with now; that this kind of grand theorising should give way to contingent, provisional theorising. But as the points raised about the common good and wholesale economic transformation tend to show, this is not really where Hutchinson wants to leave the argument. There is indeed grand theorising in here, there is emancipative theorising, and there is, as the following passage shows, "enlightenment" theorising here:

When people's lived experience is filtered through the distorting lens of rights-talk, the world is presented in the absolutist and static terms of a black-and-white photograph ... When the limiting discourse of rights-talk and the dull refraction of its abstract vision are abandoned, it might be possible to comprehend the buzzing world of real-life social interactions in more than drab shades of existential grey. Instead, with a change of visionary focus, the world might represent itself in the full spectrum of bright blues, yellows, and reds for people's delight and edification.(122)

Indeed it might. Yet I do not think Hutchinson has consistently held the various strands of political and philosophical theorising together to produce a sufficiently rigorous and coherent theory of "unmodified democracy", and to demonstrate what it might be like and how it might come about. The rhetoric of empowerment, equality, difference, civic life, indeterminacy, contingency, radical economics, and community is all here. It sounds nice. But while the critique of rights has, I believe, been successful, the political, or critical transformative program, has not. There are contradictions here that need to be ironed out. Again, it might have been argued that such incoherence should be celebrated in an effort to open up new spaces for untried discursive possibilities. But this does not seem to be Hutchinson's approach given the conventional attack made on rights-talk in terms of *its* incoherence. Essentially then, Hutchinson is abandoning postmodernism and nihilist CLS, and seeking to progress having taken some of their insights on board. Such theorising is still in a state of infancy, though perhaps owes

more to older lines of theorising than it has yet admitted. But more needs to be done. To pursue a genuinely progressive politics, postmodern theorists need desperately to review their position regarding the grand theory they seek to (or say they) abandon, but quite clearly cannot really do without. The rhetoric needs to be reined in, and, moreover, if there "must be talk and action"(223), it needs to be fleshed out at the level of coherent political theory too. It appears it is time to lay aside the homilies, and, in the words of the slogan Hutchinson refers to, Just Do It.

