THE JOINT COMMITTEE ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

One of the most important questions before the Canadian public at the moment is the question of human rights and fundamental freedoms. The editors of the Review will do their best to keep readers informed of the interesting developments that are taking place in this field. In the March issue we reprinted the Draft International Declaration and Covenant on Human Rights adopted by the Commission on Human Rights of the United Nations. Elsewhere in this issue appear thought-provoking articles by Mr. Hayden C. Covington of Brooklyn on The Dynamic American Bill of Rights and by Mr. H. W. Macdonnell of Toronto on Freedom of Occupational Association and Human Rights. Here we describe briefly the work of the Special Joint Committee of the Senate and House of Commons on Human Rights and Fundamental Freedoms, which was set up at the last session of Parliament. When the Committee wound up its deliberations in the dying days of the session, it recommended that a similar committee should be established at the next session to continue its work. Although the present session is now several months old, steps are just now being taken to revive the committee. The Minister of Justice has however tabled in the House of Commons the replies so far received from provincial attorneys-general and law-school deans to an inquiry as to the power of the Dominion Parliament to pass a comprehensive bill of rights. To these replies detailed reference is made later.

On May 26th, 1947, the following resolution was adopted by the Canadian House of Commons:

> That a Joint Committee of both Houses of Parliament be appointed, and that Messrs. Benidickson, Breithaupt, Croll, Sinclair (*Ontario*), Belzile, Beaudoin, Pinard, Lesage, Marier, Rinfret, Whitman, Ilsley, Isnor, Michaud, Maybank, Mayhew, Diefenbaker, Fulton, Hackett, Harkness, Hazen, Macdonnell (*Muskoka-Ontario*), Massey, Miller, Irvine, Jaenicke, Stewart (*Winnipeg North*), Hansell, Herridge be members of such Committee, as far as the interests of this House are concerned, to consider the question of human rights and fundamental freedoms, and the manner in which those obligations accepted by all members of the United Nations may best be implemented;
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> And, in particular, in the light of the provisions contained in the Charter of the United Nations, and the establishment by the Economic and Social Council thereof of a Commission on Human Rights, what is the legal and constitutional situation in Canada with respect to such rights, and what steps, if any, it would be advisable to take or to recommend for the purpose of preserving in Canada respect for and observance of human rights and fundamental freedoms;

> That a message be sent to the Senate requesting that House to unite with this House for the above purpose, and select, if the Senate deems advisable, some of its Members to act on the said proposed Joint Committee.[1]

Subsequently the name of Mrs. Strum was substituted for that of Mr. Jaenicke. On June 3rd, 1947, the Senate ordered that a message should be sent to the Commons informing them that the Senate joined in the appointment of a Joint Committee. The Senate was represented on the committee by the following: Honourable Senators Ballantyne, Bouffard, Burchill, Crerar, Fallis, Gouin, Horner, Leger, McDonald (Kings), Roebuck, Turgeon and Wilson. The Rt. Hon. J. L. Ilsley and the Hon. L. M. Gouin acted as Joint Chairmen.

The Joint Committee on Human Rights and Fundamental Freedoms held eight meetings, the first on June 5th and the last on July 11th. The minutes of proceedings and the evidence have been printed and copies can be obtained from the King's Printer, Ottawa, by those of our readers who are interested. During the meetings evidence was heard from a number of national and international officials: R. G. Riddell, Chief, First Political Division, Department of External Affairs; E. R. Hopkins, Legal Adviser, Department of External Affairs; F. P. Varcoe, K.C., Deputy Minister of Justice; J. P. Humphrey, Director of the Division of Human Rights, United Nations; and D. H. W. Henry, Law Branch, Department of Justice. In addition written representations were received and filed from several private organizations; a number of other bodies requested permission to appear and present their views, but because of the advanced stage reached by the parliamentary session evidence was heard from the officials only.

In a country such as Canada with a federal system of government, where the doctrine of the supremacy of parliament prevails, the adoption of a Bill of Rights raises difficult and important constitutional questions. To these questions the Joint Committee paid particular attention. At one of their meetings the Deputy Minister of Justice, Mr. Varcoe, was heard and questioned, and on July 4th he summed up his views on the problems involved in a formal statement. At this latter meeting also the following resolution was adopted.

> That the clerk of the Committee write to the attorneys-general of the provinces and to heads of law schools requesting views and opinions on the question of the power of the Parliament of Canada to enact a

[1] See House of Commons Debates for May 16th, 19th and 26th 1947, pp. 3184 ff., 3246 ff., 3478 ff., respectively.

> comprehensive bill of rights applicable to all of Canada and that such written views be forwarded to the Minister of Justice.

On July 11th, 1947, the Clerk, Mr. J. G. Dubroy, wrote the provincial Attorney-Generals and Law School Deans pursuant to this resolution.

By no means all those to whom this inquiry went have answered, but a number of replies, in more or less detail, have been tabled recently in the House of Commons by the Minister of Justice. The Attorney-General of Prince Edward Island, the Hon. F. A. Large, K.C., replied: "I feel that it is doubtful whether such an Act could be drafted so as not to conflict with the provisions of the British North America Act; but that until I saw the draft of the Act and so knew how comprehensive it will be, I will not be in a position to give an opinion". Dean Vincent C. MacDonald of the Dalhousie Law School expressed the opinion that Parliament had no power "to enact a comprehensive bill of rights applicable to all of Canada". Hon. L. D. Currie, K.C., the Attorney-General of Nova Scotia, wrote that

> In my view, because of the distribution of subject matters of legislation between the Dominion and the Provinces, as contained in the British North America Act, and because a Bill of Rights would doubtlessly affect both subject matters that belong to the Dominion and subject matters that belong to the Provinces, the Parliament of the Dominion of Canada would not be competent to enact a comprehensive Bill of Rights applicable to all of Canada.

The Attorney-General of British Columbia, Hon. G. S. Wismer, K.C., said that he found himself "very much in agreement" with the views expressed in the written statement presented by Mr. Varcoe to the Joint Committee, and continued:

> Most of the matters relating to human rights discussed by the Committee appear to fall within the exclusive legislative jurisdiction of the province over 'property and civil rights', and are for the most part dealt with and safeguarded by the common law which is part of the law of this province.

Hon. J. W. Corman, K.C., the Attorney-General of Saskatchewan, Dean W. P. M. Kennedy of the School of Law of the University of Toronto, and Professor Louis-Philippe Pigeon of the Faculté de Droit, Université Laval, answered at greater length. Their replies, together with the formal statement of the Deputy Minister of Justice to the Joint Committee, are given in full here:—

F. P. VARCOE, K.C., DEPUTY MINISTER OF JUSTICE

> I. Implementing the U. N. Charter and providing a Canadian Bill of Rights are two separate and distinct legal or constitutional projects. The terms of reference relate primarily to the first.

II. I distinguish rights from freedoms as follows:

A right connotes a corresponding duty in some other person or the state toward the person holding the right; for example, if a person has a right to education, there is a corresponding duty on the state to provide it.

A freedom, on the other hand, is a benefit or advantage which a person derives from the absence of legal duties imposed upon him.

The distinction between rights and freedoms here made is of real significance in connection with the constitutional problem in Canada, as I will endeavour to show.

III. Examples of rights, so-called, are the right to own property, the right to education, the right to reasonable conditions of work, the right to social security, and so forth. Concerning these rights so-called, two things may be said. First, each of them is created by positive action by parliament or a legislature depending on the subject matter. There is no constitutional question involved since legislation in relation to each of these rights is at once recognizable as falling in the federal or provincial field. Second, the Charter calls merely for the promotion of observance of human rights, no list of these so far being included. One may safely say that at present Canada has implemented this obligation to the full and is in good standing.

IV. As regards the freedoms, they are principally three in number, namely, personal liberty, freedom of communication (speech, press, assembly) and freedom of worship. As regards these, it may be said that the Charter simply proposes that the rule of law be adopted by the nations, namely, that no person shall be prevented from exercising these rights except as prescribed by law. This rule is fully established in Canada, although of course it may be expanded by increasing the protective legal remedies enjoyed by the public.

V. A Bill of Rights as distinguished from the Charter purports to guarantee freedom in some particular or generally to the inhabitants, particularly against infringement by any legislature, government or official. A Bill of Rights is either a declaration of fundamental and permanent principles to be found in some written constitutions, as, for example, that in the French Constitution of 1791 providing that every citizen had the right to speak, write, print and publish freely his thoughts subject to legal protection against abuse. Or, it may take the form, as in the case of the English Bill of Rights of 1689, of a series of express statutory prohibitions. You might call the first a general declaration of rights, the second a special Bill of Rights, and different considerations arise depending on which type is under consideration. In some cases you may find a mixture of general declarations and specific prohibitions.

VI. Each of these freedoms is exercised by the doing of a great variety of separate and distinct overt acts. Some of these acts would be regulated or prohibited by parliament, some by the legislatures and some again would be regulated in different aspects by both parliament and the legislatures. The legislature which may so restrict or infringe may also to the extent of such possible infringement protect. The legislature which can infringe can refrain from doing so and can prevent others from doing so. As examples of what I mean, parliament might prohibit the broadcasting of political speeches altogether and the

province might ban the use of school houses for political meetings. Both of these would be restrictions on freedom of communication.

It cannot, therefore, be said that these freedoms fall exclusively in the legislative field of parliament or of the provinces. Each of these so-called freedoms might be described as an agglomeration or cluster of legal rights.

VII. Freedoms are comparative and not absolute. They are hedged about by necessary restrictions on the individual to protect other individuals against licence or abuse. If provincial legislation restricts or abolishes civil rights in the case of any class of citizen to the point where the union of the provinces is threatened, parliament might conceivably intervene.

VIII. The opinions of Sir Lyman Duff and Mr. Justice Cannon in the *Alberta Press* case, however, indicate that to a certain extent freedom of communication is protected by the constitution as it now stands. A free press is the breath of life of parliament and cannot be abolished. The same might be held to be true of personal liberty in some aspects and freedom of assembly. Parliament could probably find means to maintain these freedoms, it being within the power of parliament to protect the constitution. Such legislative act by parliament would, however, leave the legislatures free to enact restrictions which are not in pith and substance intended to limit political freedom.

IX. As regards religion there would seem to be no constitutional safeguard.

X. It is necessary to observe that the legal effect of a declaration guaranteeing any of these rights is uncertain since no legal consequences would seem to flow therefrom. So far as the provinces are concerned, such a declaration would not restrict their powers and of course such a declaration would not limit the exercise by parliament of its powers.

XI. In considering the amendment of the constitution certain matters should be kept in mind:

(a) We have a constitution similar in principle to that of the United Kingdom in that parliament is sovereign. Depriving parliament of sovereignty would deprive our constitution of this principle.

(b) It would be retrograde step in that we would be returning to Westminster a power now enjoyed here. Perhaps we should first consider means to amend the constitution.

HON. J. W. GORMAN, K.C.

On July 11th, 1947, the Clerk of the Committee on Human Rights and Fundamental Freedoms sent me a copy of a motion of the Joint Committee reading as follows:

> 'That the Clerk of the Committee write to the Attorneys-General of the provinces and to heads of law schools requesting views and opinions on the question of the power of the Parliament of Canada to enact a comprehensive Bill of Rights applicable to all of Canada and that such written views be forwarded to the Minister of Justice.'

I appreciate the spirit in which the motion was passed. I feel, however, it would be presumptuous for me as a Provincial Attorney

General to attempt to advise the Committee on matters of law. In the last analysis the Committee will have to be guided by the opinion of your law officers.

I note that in the discussion leading up to the passing of the motion it was suggested that the provinces might desire to make representations as to the contents of a Federal Bill of Rights.

I believe the feeling of this province is pretty well expressed by the Saskatchewan Bill of Rights, which was passed unanimously by the Legislature in 1947. I am enclosing for the use of the Committee five copies of that Statute.

In my opinion the Dominion can go much further than Saskatchewan did in the realm of Criminal Law, in giving protection against arbitrary arrest or detention and in guaranteeing the right of habeas corpus and the right to assistance of counsel.

Saskatchewan is wholeheartedly in favour of a federal Bill of Rights and is ready and willing to co-operate in the working out of any jurisdictional problems that may arise.

DEAN W. P. M. KENNEDY

I have received from the clerk of the Committee on Human Rights a letter under date of July 11th and enclosing me the minutes of Evidence and Proceedings, in which he requests me to give an opinion on the power of the Parliament of Canada to enact a comprehensive bill of rights applicable to all of Canada.

I have read his enclosures with great interest and I think that it would be somewhat useless for me to write you in detail. In this connection, I wish to associate myself in general with the evidence of Mr. Varcoe. It is evident that a comprehensive bill of rights would mean, both for the federal parliament and the provincial legislatures, a surrender of their supreme powers. In other words, we would be departing from the doctrine of legislative supremacy, for it is obvious that a bill of rights, if it is to have any meaning, must be beyond the everyday authority of the legislatures, and must be subject to change only by some method extra-legislative. Secondly, I do not think it would be possible to have a comprehensive bill of rights covering the whole of Canada. I submit that any bill of rights, however drawn up, must be divided into two parts — one dealing with federal subject matters and the other dealing with provincial subject matters. I have given this a good deal of consideration and my submission is the outcome of the consideration. No matter how I elaborated all this, I do not think it would be profitable to go into any further detail.

Although it is not therefore the question submitted to me, I do not believe that a bill of rights is really necessary. I think that our 'freedoms' are well enough protected in the ordinary law and, if this is not so, it ought to be possible to change the law in the various jurisdictions to suit occasions. I would also like to submit that a bill of rights must, by its very nature, be drawn up in terms which are not terms of art. As a consequence, there would be interminable litigation and the interpretation of the terms would vary in a different manner with the changes of the judiciary. This is the experience of the United States.

PROFESSOR LOUIS-PHILIPPE PIGEON

The Dean of our Faculty came to the conclusion that, being a judge of the Court of King's Bench, he could not properly express views or opinions on the question submitted to him by the clerk of the Special Joint Committee of the Senate and the House of Commons on Human Rights and Fundamental Freedoms. For this reason he has suggested to me that I should answer the inquiry because I happen to be professor of Constitutional Law. I trust this substitution will be considered in order.

The question on which the Committee invites views and opinions is the power of the Parliament of Canada to enact a comprehensive bill of rights applicable to all of Canada.

At the outset, it seems necessary to consider what is meant by a 'bill of rights'. The minutes of the Committee make it clear that in passing the resolution it was fully aware that the expression could be used to designate widely different juridical conceptions. For practical purposes, these conceptions may be reduced to two in number: the British and the American. The British conception is founded on the principle of the sovereignty of Parliament; the American, on the principle of the sovereignty of the people.

From a legal standpoint the British Bill of Rights is nothing but an ordinary statute passed in the ordinary way and containing a specific set of provisions designed to secure certain fundamental rights and freedoms of the King's subjects. These provisions are no more inflexible than those of any other statute; Parliament may at will amplify or restrict them. Thus it must be said of the British Bill of Rights that its effect is to secure fundamental rights and freedoms from invasion by the executive and not by the legislative authority, the latter authority remaining absolute by definition. This is the British concept of the 'rule of law'.

The American concept is quite different. The American Bill of Rights is essentially a set of restrictions upon the legislative authority of Congress and of State legislatures. The protection of the rights and freedoms secured by the American Bill of Rights is entrusted to the judiciary armed with the power and duty of invalidating any laws infringing upon these rights and freedoms, which may only be modified through the process of constitutional amendment. From this, it is fairly obvious that a bill of rights on the American pattern is directly linked up with the process of constitutional amendment and indirectly with the constitution of the Supreme Judicial authority.

With respect to the process of constitutional amendments, Canada's present situation is anomalous. Canada's constitutional evolution has clearly not kept pace with recent developments in national sovereignty and independence. As long as legal power over Canada's constitution remains vested in the British Parliament, it would clearly be a retrograde step to seek constitutional safeguards of human rights and fundamental freedoms. This could properly be done only by seeking at the same time to evolve a process of constitutional amendment consonant with Canada's situation as a sovereign power.

In my view this is a most desirable development, a development which is really past due. However, no one I think will deny that such

a development requires the cooperation of the Provinces, because it involves setting up a process whereby their powers and rights may be modified. I therefore conclude that a bill of rights on the American pattern, involving as it does a fundamental change in the constitutional compact and requiring the evolution of a process of constitutional amendment, would obviously require concurrent action on the part of Dominion and provincial authorities.

As previously pointed out, in order to make this effective, consideration would also have to be given to a revision of the constitution of our Supreme Court. It is certainly an anomaly that there should be constitutional security of tenure for judges of the Superior Courts and not for the judges of the highest Canadian tribunal. Of course, at a time when no one could dream of the abolition of appeals to the Privy Council, this could well pass unnoticed, but it could certainly no longer be overlooked in any rational scheme for bringing Canada's constitutional situation up to date.

In considering now a bill of rights on what I have termed the British pattern, one must turn to a discussion of what is meant by a 'comprehensive' bill of rights. The very nature of the question appears to indicate that this means a bill dealing with the question of fundamental human rights and freedoms irrespective of our constitutional division of legislative authority between the Dominion and provincial parliaments.

It is clear that many of the rights commonly considered as fundamental human rights fall mainly, if not exclusively, within the provincial field of legislative authority. Such is the case for the right to own property, the right to education, the right to reasonable conditions of work.

With respect to freedoms, it is equally clear that they are apt to be restricted or curtailed in many ways by the exercise of provincial legislative authority. Very often, indeed, under our constitution the same activities are apt to be regulated or restricted in various aspects or from various points of view both by the Dominion and by the Provinces.

For instance the freedom of the press is properly restricted both by the libel provisions of the Criminal Code and by the Civil libel laws of the various Provinces. While both civil and criminal libel laws are classic examples of proper restrictions they might easily be so framed as to deny reasonable freedom to the press. The decision of the Supreme Court of Canada in the *Alberta Accurate News Act Reference*, [1938] S.C.R. 100, would seem to indicate that in this respect there may be an implied limitation in our constitution.

Personal freedom may also be restricted by provincial legislation just as by federal legislation. The decision of the Privy Council in *The King* v. *Nat Bell Liquors*, [1922] 2 A.C. 128, shows conclusively that the power of the provinces in the infliction of penalties by fine or imprisonment is just as unlimited as the federal power.

Thus it will be seen that, to secure human rights and fundamental freedoms, legislative action is required in both the federal and provincial spheres of action, in the case of rights because their extent must be defined, in the case of freedoms because they must be safeguarded against

abuses. Moreover in view of the fact that freedoms result from the absence of legal restrictions other than safeguards against abuses, it is also necessary that excessive restrictions, if any, be repealed.

This is the limit of legislative action on the British pattern. Going beyond this would imply restricting the powers of the Legislatures. To the extent that a bill enacted by the Dominion Parliament would endeavour to secure human rights or fundamental freedoms from interference by provincial Legislatures, it would clearly amount to a curtailment of the powers of these Legislatures. In other words, while in the federal field the proposed bill would not differ from any other statute and would leave unrestricted the power of Parliament to alter the law at will, for the Provinces the enactment, if valid, would amount to a constitutional restriction of their legislative powers. The Dominion Parliament would thus assume the power which the B.N.A. Act (s. 92.1) confers upon the Provincial Legislatures of amending provincial constitutions. It would mean that the Provincial Legislatures would become subordinated to the Dominion Parliament, while it is axiomatic that they are 'mistresses in their own houses' just as the Dominion Parliament is in hers: *Persons* case, [1930] A.C. 124.

For these reasons, I am of the opinion that the Dominion Parliament does not have the power of enacting a comprehensive bill of rights, that is a bill intended to define human rights and fundamental freedoms irrespective of the division of authority effected by the B.N.A. Act.

I presume that in inviting views and opinions on this subject the Committee did not have in mind inviting opinions respecting the possibility of enacting any specific provisions within the ambit of Federal authority. As to this, of course, no opinion could be given unless a proposed text was suggested for detailed study.

A RETURN TO ETERNAL TRUTHS

The current denial of natural law is one of those strange anachronisms in human thought by which, instead of going forward with a progressively clearer understanding of a doctrine, the course of thought suddenly reverses itself and turns backward toward ancient errors and discredited sophistries. Natural law had pushed its way up from cloudy apprehensions of it among the early Greeks and Stoics to its position in mediaeval thought, whereby it was recognized as the end principle of positive laws, the moral limitation of the ruling power, and the foundation of free government. At that point in history, the prospects were bright. A new era had dawned. It was recognized that the state was entitled to the allegiance of the people, but it was also recognized that the rulers were the servants of the people and ruled with their consent, and that the people possessed rights which were paramount to the will of the ruler. The constitutional mechanism which would define citizenship, restrain tyranny and enfranchise the populace, was yet to be developed, but standing on the mediaeval doctrine of the dignity of man and the nature of society, its growth was clearly prefigured. But then a serious thing happened. The mechanisms of constitution and ballot box went forward; but their doctrinal basis began to disintegrate. (Harold R. McKinnon: Natural Law and Positive Law (1948), 23 Notre Dame Lawyer 125)