THE NATURE AND PROBLEMS OF A BILL OF RIGHTS

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When we ask to have a Bill of Rights declared or defined in some authoritative legal form, what are we really seeking? What does this mean in the constitutional and legal context of a modern state, not to mention the wider international sphere of our interdependent world? My thesis appears deceptively simple—that here we have nothing more nor less than the age-old demand of citizens for justice. To spell out a Bill of Rights is to give some sort of expression in general terms to the deep expectation and claim of the citizens of a country that their legal system shall be a decent and just one both in its general implications and its specific details. Alternatively, this claim for justice frequently appears as a demand for The Rule of Law, and to spell out what this phrase means in general and in detail is much the same thing as working out the meaning of a comprehensive Bill of Rights. In other words, to ask for The Rule of Law is to seek The Rule of Just Laws.

Whichever way one puts it, this is a wide-ranging search and also basically an ethical one. To pursue it properly means eventually to weigh the quality or value of all the principal parts of the legal system for the persons and circumstances contemplated by the many rules of law these parts respectively contain. I believe this to be very much worth doing, but the true nature and magnitude of the task ought not to be underestimated. More specifically, it ought to be appreciated that one does not finally or fully define and implement the values of a Bill of Rights or of The Rule of Law in one simple operation. Rather, adherence to the standards of a Bill of Rights or The Rule of Law is a complex process which permits and promotes progress to better things, but which involves also considerable legal change and adjustment at the hands of impartial courts and democratic legislatures from time to time, and indeed until the end of time. Each of us must live in a world crowded with

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other human beings and with things and events. There is much that remains the same but also much that changes, and we must pursue our fate taking account both of the constant and the changing factors, striving to control them for the better where we can. Accordingly, so far as this control can be exercised by the public order of a legal system, we must think in terms of an ongoing process rather than a single achievement. A Bill of Rights then may be a highly useful landmark on a continuing journey, but it is in itself neither a beginning nor an end. With this in mind, we now turn to some of the problems that a Bill of Rights poses for the processes and standards of a living legal system.

I. *Rights and Duties Distinguished from Freedoms or Liberties*

One of the characteristics of discussion and disputation about a Bill of Rights is that the words "right", "duty", "liberty" and "freedom" are critical terms and yet are extensively used with vague and overlapping meanings. But if we are to understand the problems posed by a Bill of Rights, there must be some real degree of precision and discrimination about these meanings. Fortunately, analytical jurists like Sir John Salmond and Professors W. N. Hohfeld and Hans Kelsen have provided some discriminating terminology to describe the different types of jural relations which is helpful at this point. The basic jural conception, as Kelsen emphasizes, is that of duty—of a bond of legal obligation subsisting between two persons. A is bound by contract to pay B one hundred dollars—here we have a single bond of specific obligation subsisting between two designated persons which, looked at from A's point of view is a duty, and looked at from B's point of view is a right. The thing to notice for present purposes is how specific this legal relationship is both respecting the persons concerned and what the one is to do for the other. Of course the specific conduct in a right-duty relationship may be and often is negative rather than positive. When this is so oftentimes we find many persons on the duty side of the equation. For example, this is the basis of the conception of property in the law—A is the owner and occupier of Blackacre, which means that all other persons are under a duty to refrain from making entry on Blackacre except as A permits. Here we see that the holder of the right and the forbidden conduct are both definite and specific. And on the duty side of this picture all comers are affected by present obligation or duty, and this too is definite and specific. Also, much of the criminal law consists of closely defined prohibitions (negative duties) addressed to all

comers. Strictly speaking, it is to these relationships of presently subsisting specific obligation that the use of the words duty and right ought to be confined.

The conception of power in the law differs from that of duty only as a matter of timing. He who possesses a legal power not yet exercised is legally qualified to impose a specific right-duty relationship, though he has not yet done so. The classic example in private law is the agent who has been empowered to buy a house for his principal and thus to create reciprocal right-duty relations between his principal and a vendor in the future, if and when a suitable vendor turns up. The point for present purposes is that such capacity or power of an individual is potentially as specific in the regulation of persons and conduct as the duty is actually and presently specific in these respects.

What we should now notice is that some of the "liberties" or "freedoms" so-called which we greatly value belong juridically in this specific realm of well-defined legal regulations, that is, in the field of rights and powers in the sense explained. For example, "freedom" from arbitrary arrest is the total picture given by the interaction of certain rights and powers: the right of everyone to be free of forceful interference with his physical person by virtue of the torts of assault and false imprisonment, except where such interference is justifiable because it is the exercise of the overriding power of arrest for reasonable suspicion of crime, which power is given policemen and private citizens by the Criminal Code and the common law. Similarly the "right" to vote is a power in the strict sense, at least between elections. So also the proposed Canadian Bill of Rights speaks of "the right to retain and instruct counsel without delay" (which is strictly speaking a power) and "the right to a fair hearing" (which is a proper use of the word right in the strict sense).

Perhaps enough has been said to establish that the right and the power, because of their specific and definite obligatory content, belong together for purposes of analyzing the implications of a Bill of Rights. For this purpose, rights and powers must be contrasted with liberties, freedoms or privileges which, while they are essential concepts of a legal system, nevertheless lack the specific and detailed obligatory character of duties and powers. In the proposed Canadian Bill of Rights we find declared the freedoms of religion, of assembly and association, of speech and of the press. (The latter two could be consolidated as freedom for the expression of information and ideas). What then is the juridical nature of

these freedoms, liberties or privileges, as they are variously called?

The concept of liberties or freedoms in a duly precise scheme of legal terminology is the concept of residual areas of option and opportunity for human activity *free of specific legal regulation.* In such areas of conduct there are neither affirmative legal prescriptions nor legal prohibitions—a man is at liberty to act or do nothing as he chooses, free of obligatory instruction by the law either way. Now to call these areas or classes of conduct residual is by no means to disparage them, far from it. Indeed, in a democratic country they are large and important areas, and one of the principal things a Bill of Rights attempts to do is to safeguard their essential boundaries. Only a relatively small portion of the total of actual or potential human activity is regulated in detail by specific legal duties, whether positive or negative, and life would be intolerable if this were not so. Indeed, just here lies one of the differences between democracy and dictatorship, for under a dictatorship there is in a sense too much law. The point is rather aptly made by the saying that, in a democratic country what is not forbidden is permitted, whereas in a totalitarian one what is not forbidden is compulsory.

But, if liberty is a matter of option and opportunity free of legal instruction, in what sense do liberties or freedoms touch and concern the law or depend on it? To take just two examples, why is a person's liberty to express a political opinion or worship as he pleases any concern at all of the legal system? Certainly, such options and opportunities are not directly created or specifically defined by the law or the constitution, as is my power to vote or my right to collect one hundred dollars from a person who has contracted to pay me this sum. Nevertheless, there are two important senses in which freedoms or liberties depend on the legal system. Though they are not the specific creation or gift of the law, they have their legal features and hence are properly included in the scheme of working jural ideas.

In the first place, by the specific prohibitions found in the classic crimes and torts, the legal system ensures a general state of public peace and order, and thus makes the areas of freedoms and liberties meaningful as realms of peaceful choice. In other words, the law of crime and tort safeguards each man's areas of option and opportunity against private coercion at the hands of other persons. My freedom (within broad limits) to do what I please with my own parcel of land would mean little without the laws against trespass and violence. But note also that the laws against trespass and

assault tell me nothing whatever about the use I am to make of my land, if any. They just leave me there in peace. Accordingly, peaceful human activity in such areas of freedom depends on these basic conditions of law and order. In this general sense of dependence on the portions of the legal system relevant to peace and order, it is proper to speak of freedom under law.

In the second place, we depend on the law to define the outside limits of the respective areas of freedom or liberty in the total realm of actual or possible human activity. What is not forbidden is permitted, but certain things must be and are forbidden. In the words of Chief Justice Duff:[1]

> The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned.

To speak generally, this means that when you have defined the extent of specific legal regulation in terms of existing duties, *ipso facto* you have drawn the outside boundaries of the areas of liberty or freedom. To delineate the unregulated area you must first define the regulated area, to do which is strictly a legal matter. So, in this residual sense the extent of liberty or freedom in some given respect is a matter of legal definition and properly has its place in the working concepts of the lawyer or jurist. For example, as Chief Justice Duff points out, the law forbids the uttering of defamatory, seditious or obscene words, and there specific legal prohibition stops. At the boundary so marked freedom of expression starts, and now the law takes no hand at all except to stop riots or other breaches of the peace. Beyond this boundary the law does not tell a man what to say or what not to say, nor does it compel anyone else to listen to him or to assist him to be heard by publishing in some way what he has said. So far as the law is concerned, he is on his own, and the factors and pressures involved in his choices and efforts concerning self-expression are extra-legal ones.

This residual and unspecified character of liberties or freedoms in relation to specific legal obligation is critical when we come to consider the relation of public legislative power to liberties or freedoms. Freedom of expression, for example, is not a single simple thing that may be granted by some legislature in one operation—it is potentially as various, far-reaching and unpredictable as the capacity of the human mind. Freedom of expression is the

[1] *Reference Re Alberta Statutes*, [1938] S.C.R. 100, at p. 133.

residual area of natural liberty remaining after the makers of the common law and the statute law have encroached a little by creating inconsistent duties as explained. This line of thought has important implications for the distribution of law-making powers in a federal country like Canada. It is difficult if not impossible to consider freedom of expression as a single simple thing that is the subject of a grant by either the federal Parliament or the provincial legislatures. The federal question is not which legislative authority may give it, but rather which may take it away in this or that specific respect in the manner explained. In the words of Mr. Justice Rand:[2]

> Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order. It is in the circumscription of these liberties by the creation of civil rights in persons who may be injured by their exercise, and by the sanctions of public law, that the positive law operates. What we realize is the residue inside that periphery. Their significant relation to our law lies in this, that under its principles to which there are only minor exceptions, there is no prior or antecedent restraint placed upon them: the penalties, civil or criminal, attach to results which their exercise may bring about, and apply as consequential incidents. So we have the civil rights against defamation, assault, false imprisonment and the like, and the punishments of the criminal law; but the sanctions of the latter lie within the exclusive jurisdiction of the Dominion. Civil rights of the same nature arise also as protection against infringements of these freedoms.

So, to repeat, the question for Canada is: Which legislative body may encroach on what areas of liberty and to what extent? In the example just used, the limitation of freedom of expression, the encroachments made by the crimes of sedition or treason are found in the Criminal Code of Canada, whereas those made by the tort or delict of defamation are within provincial legislative power. So, in this sense of the power to make some specific encroachments, the present constitutional position in Canada would seem to be that legislative jurisdiction over freedom of expression is somewhat divided.

But, having reached this point, one finds that there may be different kinds of encroachment—some justifiable and others not justifiable, the latter being trespasses on essential parts of the areas of freedom. The necessary implication of the *Alberta Press* case[3] seems to be that there is an essential core of the area of freedom of expression that must be preserved from legal encroachment if

[2] *Saumur* v. *City of Quebec*, [1953] S.C.R. 299, at p. 329.
[3] See *supra*, footnote 1.

our national democratic Parliament is to have the motive power of a free public opinion that is for it the breath of life. Thus provincial legislative encroachments may not breach this inner boundary, though they may pass an outer boundary from the point of view of defamation and civil compensation. Furthermore, as Mr. Justice Abbott noted in *Switzman* v. *Elbling*,[4] this reasoning of Chief Justice Duff in the *Alberta Press* case is a double-edged sword —for the sense of it is necessarily to imply that the same inner boundary should stand likewise against legislative encroachment by the federal Parliament itself. If this is correct, then the Supreme Court of Canada is specially entrenching essential freedom of expression by necessary implication in its interpretation of the British North America Act. Special entrenchment here means that duties or powers inconsistent in essential respects with freedom of expression may not be enacted by the ordinary statutes and legislative majorities of either a provincial legislature or the federal Parliament. Only a constitutional amendment, as in the United States, could then effect this object.

A Bill of Rights in a federal context then requires us to think in terms of withholding from both Parliament and the provincial legislatures legislative power to encroach upon essential parts of the areas of freedom by ordinary statute. Yet this cannot be the whole picture, for freedom cannot be unlimited—some legislative body must have some degree of power to impose by ordinary statutes certain limitations desirable in the public interest. Obviously, this power of enacting necessary limitations for this or that type of freedom may be assigned to the provincial legislatures or the federal Parliament, or indeed may be shared by both as concurrent powers under the double-aspect doctrine well known to our constitutional law. Full implementation of a Bill of Rights in Canada would seem to call for attention to both these matters. We must assign some degree of power to make legislative encroachments by ordinary statute on this or that field of liberty, yet also we should draw an inner boundary for such fields beyond which neither Parliament nor a provincial legislature can pass. Breaching the inner boundary would require constitutional amendment. So far, with the possible exception of Mr. Justice Abbott, the judges of the Supreme Court of Canada seem to be addressing themselves just to the problem of distributing legislative power to limit freedom between Ottawa and the provincial capitals, without erecting an inner fence against such limitations by ordinary statute coming

[4] [1957] S.C.R. 285, at p. 328.

from either direction. Even so, just to distribute limiting power is difficult enough, because areas like those of freedom of expression and religion are so wide, various and indefinite in extent that they may be approached from many different aspects with a view to limitation. The application of the double-aspect doctrine to confer concurrent powers would seem, to some extent at least, to be unavoidable in the nature of these situations. By way of contrast, problems in the distribution of powers to regulate banking or the solemnization of marriage, to take just two examples from the British North America Act, are relatively much more simple.

These considerations serve to remind us that the problem of the amendment of the Canadian constitution arises if one contemplates a Bill of Rights for Canada, for such amendment would likely be necessary if we are to have a specially entrenched Bill of Rights. It is doubtful how far the Supreme Court of Canada could or would go in developing such entrenched clauses by necessary implication, though some people think the wise thing to do would be to leave the matter to the Supreme Court for gradual development along the lines already started by Chief Justice Duff. On the other hand, if there is to be formal constitutional amendment, under the present state of our constitutional law probably this requires the unanimous concurrence of all the provincial legislatures and the federal Parliament—a condition not likely to happen. This points up our need for some constitutional amending process like that which obtains in the United States or Australia. Prime Minister Diefenbaker's proposed Canadian Bill of Rights is to be an ordinary statute of the federal Parliament, and so would enjoy no special constitutional status. It would not limit the provincial legislatures nor, indeed, preclude a later repeal by the federal Parliament itself. Nevertheless, a Canadian Bill of Rights may be well worth doing as an ordinary federal statute. My own reasons for thinking this to be so will appear later. Meanwhile, we turn to another class of problems posed by attempts to give effect to a Bill of Rights, whatever its constitutional or legal form.

II. *The Bill of Rights as a Declaration of General Principles*

A Bill of Rights is usually expressed in very general terms, that is, in words that denote concepts running at a high level of abstraction or generality. A comprehensive set of such principles, for instance as one finds them in the United Nations Declaration of Human Rights,[5] reaches potentially to every part of the legal system of a

[5] The Universal Declaration of Human Rights is given in full in (1949), 27 Can. Bar Rev. 204.

modern country. In fact, the United Nations Declaration specifically states that "The General Assembly Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations . . . ." Then come thirty articles which are in effect standards to which the legal system of a democratic country in all its departments and details should conform. For example, consider the following:

Article 9

No one shall be subject to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

To determine the way in which we measure up to these principles or work them out in detail in Canada, one must review the judicature statutes and also the whole of the codes of civil and criminal procedure, including evidence, confessions, burden of proof, bail, habeas corpus, and so on. We discern when we do this for instance that much of the secret of the fairness of a British system of criminal trial lies in the independence of the judges and such specific detailed rules as the following: the charges must be precise and detailed so that the accused knows exactly what allegations he must meet; the prosecution must prove the guilt of the accused beyond a reasonable doubt; a confession secured by the police or anyone else cannot be used against the accused unless it was given by him voluntarily. It is apparent that the general principles of articles 9, 10 and 11 would mean little or nothing unless they were implemented in detail in some such way as this.

Indeed, here is the key to the reasoning of those who claim that general declarations of rights are either unnecessary or useless. The argument goes like this: if you have the necessary mass of detailed procedures and rules for fair trial, then you do not need highly abstract general exhortations on the subject. On the other hand if you do not have this detailed legal equipment for fair trials, abstract declarations, whatever their legal form, will not avail the little man who finds himself in the hands of the police. There is a lot in this, and I am enough of a common-law lawyer that if I had to choose between the high-sounding general declar-

ations and the volumes of detailed rules about the judicature and procedure, I would take the latter. But do we have to choose? Is it not a positive advantage to have both? It is true that such general principles mean little unless worked out on a massive scale in precise detail, and yet we need also to appreciate the general implications of what it is that we are doing in detail. Particular detailed rules cannot be properly understood or kept in their respective places as part of a reasonable system unless we pursue the general implications involved as far as the mind can reasonably reach. Only thus can we bring order and purpose to the mass of detail in our laws. Dean Roscoe Pound, possibly the leading philosopher of the common law in our time, has said:[6]

> William James tells us that "the course of history is nothing but the story of man's struggle from generation to generation to find the more inclusive order". Certainly such has been the course of legal doctrine. . . . In law this means an endeavour to eliminate the arbitrary and illogical; a conscious quest for the broad principle that will do the work of securing the most interests with the least sacrifice of other interests, and at the same time conserve judicial effort by flowing logically from or logically according with and fitting into the legal system as a whole.

The point is that general principles and their detailed implications go together in a legal system. They are complementary one to the other. There is necessarily a constant interaction between the general and the particular in living legal processes. For instance, when one reads the thirty articles of the Universal Declaration of Human Rights of the United Nations, one can see that most if not all of these very general principles are derived from (that is, logically express the general implications of) the modern constitutions and legal systems of the Western democratic nations like Britain, Canada, the United States and France. For example, article 25 of the Universal Declaration states in part:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

This expresses in abstract terms the purport of the development of the welfare state in Western countries during the past one hundred years. It gives the general implication of thousands of pages in the official books of statutes and regulations covering children's al-

[6] Juristic Science and Law (1918), 31 Harv. L. Rev. 1047, at pp. 1062-3. See also Sir F. Pollock, A First Book of Jurisprudence (2nd ed., 1904), p. 81.

lowances, old age pensions, health and unemployment insurance, workmen's compensation, graduated income taxes, and so on.

This reasoning affords the chief basis for my own view that the proposed Canadian Bill of Rights is well worth doing, even though it takes the form of an ordinary federal statute—a relatively modest form for such a document. It would still be an authoritative expression by the Canadian Parliament of valid general standards, and as such would give leadership and promote education in these matters, though strictly speaking its application is confined to the federal part of the Canadian legal system as defined in the British North America Act. Law is not primarily a matter of coercion and punishment at all, it is primarily a matter of setting standards for society that attract willing acceptance because they offer some measure of justice.

Nevertheless, in this imperfect world, there are difficulties in following through the implications of general principles for specific and detailed legal action that should not be underestimated. A Bill of Rights does not implement itself, it needs to be worked out in detail by judges, legislators, lawyers and citizens who possess only imperfect powers of reason and moral insight for the task. One of the difficulties with general principles is that at times they overlap and conflict so far as their relevance to particular problems is concerned. For example, the Universal Declaration says in the first part of article 23 that "Everyone has the right to work" and in the last part that "Everyone has the right to form and join trade unions for the protection of his interests". The union shop or even the closed shop may well be vital to the effectiveness of trade union organizations, and yet they deny the right to work of the man who refuses to meet the conditions of union membership. The right-to-work laws being promoted in several of the states of the United States are directed against the union shop and the closed shop. Which rights have precedence here, those of the individual man or the organization man? And what of the interests of the whole community of citizens? Also, to give another example, the Universal Declaration speaks of freedom of religion and of freedom to manifest one's religion "in teaching, practice, worship and observance".[7] But it speaks also of the right to medical care,[8] education[9] and of the right to life itself.[10] Are parents entitled in the name of free observance of sincere religious beliefs to deny to a child the blood-transfusion that would save his life, or to deny him all normal

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[7] Art. 18. [8] Art. 23. [9] Art. 20. [10] Art. 3.

education because the state school system is regarded as wicked?[11]

Such issues of conflict arise again and again in any legal system, whether or not there is a formal Bill of Rights. One of the principal tasks of our legislators and judges is to work out compromises that resolve such conflicts so far as possible on fair terms, and to give these compromises expression in legal decisions and rules. A Bill of Rights very properly exhorts us to direct our minds to the general implications for justice of detailed legal action, but it is quite illusory to think that a Bill of Rights will do away with difficult conflicts between different persons and groups and eliminate the need for painful compromise at many points in the operation of our legal system.

III. *Conclusion: The Importance of Procedure*

From what has been said in the preceding parts, it is apparent that the legal system must in some measure undergo a continuous process of adjustment to changing conditions in our society. New conditions give rise to new conflicts of interest, so that fresh compromises are called for. Old equilibrium points established by law between freedom and restriction may require to be reviewed and altered. The primary agencies for making these adjustments are the legislatures and the courts, so that in the end the best constitutional guarantees of justice we can hope for are those that safeguard the democratic character of our legislative bodies, the high quality and independence of the courts, and the fairness of procedure in both. It is principally in these ways that our constitutional processes seek to provide for the best that man can accomplish in reasonable thought, social research and moral insight as the basis for official decision, however partial these powers of reason and insight may be from time to time. In particular, an independent judiciary of high quality would seem a necessity for the tasks of adjusting and also safeguarding the inner boundaries surrounding the essential core of our freedom.

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[11] *Perepolkin* v. *Supt. of Child Welfare (No. 2)* (1957), 11 D.L.R. (2d) 417.