

# HUMAN RIGHTS: PROGRAMME OR CATCHALL? A CANADIAN RATIONALE

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A Canadian rationale for Human Rights requires that there be asked, as a first question, "Why this quite remarkable and spontaneous developing of interest in 'human rights'?"<sup>1</sup> Why is there this vital, extensive academic and lay concern for a field which a generation ago, considering the number and scope of civil libertarian organizations, had a rather limited audience even though it might have been a very active one? Perhaps the explanation is to be found in the fact that the climate of international and Canadian opinion now has been altered totally beyond anything that could have been imagined two decades before, and among the reasons are the following: First, there has been a radical change—for want of a better term—in the level of conscience since World War Two. Indeed, the international conscience was so shocked by the events of the war—particularly by the death camps and gas chambers—that a trauma was suffered by much of mankind in a way from which few may have yet recovered. And that particular bruise on moral reserves likely will be there to discolour conscience for a long time to come, yet providing a sensitive environment for new ideas about human behaviour, new standards, and a new interest in such concepts as "human rights".<sup>2</sup>

The second reason for this interest everywhere, both internationally and nationally, is the role that human rights ideas have played in the contemporary movements, during the past fifteen or

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<sup>1</sup> See for example the plans for the National Conference on Human Rights arranged for Ottawa, December 1st-3rd, 1968 by the Canadian Commission, International Year for Human Rights. At least four other major conferences on Human Rights have been held by national or provincial organizations in Canada during 1968, Human Rights Year. Three International Conferences have been held, Montreal (private), Teheran (U.N.), and Paris (N.G.O.).

<sup>2</sup> See (1968), 9 J. of Int. Comm. of Jur., No. 1, Part Two, Special Issue, 1968, for a review of the world-wide interest in human rights.

twenty years, towards "self-determination" and "decolonialization". The anti-colonial movement was nourished by human rights ideas and, in turn, fed back into them. The interaction between these has been profound enough to have shaped basic attitudes and affected political alignments, decisions and systems as well as domestic social and legal policy.<sup>3</sup>

The third element that has caused this rise in the volume and variety of international and domestic interest relates to the issue just referred to, although it has its own unique quality; it is the confrontation of colour. Nothing at this time perhaps is more dramatic—apart from the constant terror of living with nuclear weapons with their total threat to the species—than the coming back to the stage of contemporary history of the majority of mankind who for the most part, in the Afro-Asian colonies of the seventeenth to early twentieth centuries lay dormant, waiting for some kind of stimulus which would re-awaken what might be their "national", ethnic or cultural capacities. The white population on this planet is now seen to be a minority, politically and numerically, an important minority, but still only a minority. It must now accommodate and adjust itself to the great non-white majority. That fact involves massive psychological changes for the privileged whites in their relationships with the remainder of mankind. This confrontation is now taking place in subtle ways, and in some cases not so subtle, from the civil rights movement in the United States to the chronic United Nations concern over apartheid—indeed, everywhere in the world.<sup>4</sup> That confrontation may be having effects on the level of conscience with which men approach many matters, for basic questions about colour which involve equally rude questions about human equality cannot be asked without raising the whole issue of the hierarchy of race relationships in the world which have operated up to the present time.

A fourth element is what often is called the "revolution of rising expectations".<sup>5</sup> It applies both to affluent, or more developed societies, as well as less developed ones, and it holds that there is a new level of expectations whether in a "socialist" state or a "welfare" state or in a developing country. Consider

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<sup>3</sup> Humphrey, *Human Rights, The United Nations and 1968*, in *Special Issue, op. cit., ibid.*, p. 1.

<sup>4</sup> *The United Nations and Human Rights, Eighteenth Report of the Commission to Study the Organization of Peace (1968)*, *passim*; and particularly Sohn, *A Short History of United Nations Documents on Human Rights*, in *Special Issue, op. cit., ibid.*, at p. 39 *et seq.*

<sup>5</sup> The phrase supposedly is Adlai Stevenson's and now has become the classic description of the phenomenon.

the concern in Canada with the problem of poverty in an otherwise affluent society. This is equally true and even more dramatic in the United States, by far the richest assemblage of assets, productive skills and gross national product mankind has ever known. For this anxiety about the "poor" in the United States is one which expresses some notion of equality, the right to share. This "right to share" involves some conception as to the appropriate level of expectations, a minimum standard for all. And that standard now is not merely a national conception; it is transnational and invites the extraordinary adjustments which are now taking place, not merely in this confrontation of colour but in that other and parallel accident of human history wherein the white minority happens to be the affluent part of mankind and the non-white the non-affluent majority. Both must accommodate themselves to this new period of rising expectations with all of the rights and duties and burdens which ultimately must lead to new levels of international conscience. This relation of affluence to colour is one of the permanent and dominant facts of planetary life as far ahead as mankind can see, with unpredictable effects on conscience, particularly the conscience of the affluent white societies whose income and technology grow so swiftly while that of non-white mankind advances so slowly.<sup>6</sup>

Another perspective is the reflection that the phrase "human rights" itself is of relatively recent origin. The United Nations Charter, barely a generation old, was first to employ the phrase "human rights and fundamental freedoms" in a major constitutional document of international significance.<sup>7</sup> Up to that time, the semantics in this area had a somewhat different image; for the classical terminology of civil liberties did not project this particular pattern of language. Men talked of "fundamental law", about "rights", about "duties", about "civil liberties" and "civil rights", but the words "human rights and fundamental freedoms" took on a different level of significance, partly because of the facts referred to and partly because the phrase itself had become at the end of World War Two popular political syntax.

Yet the language "human rights and fundamental freedoms" has not an inherited legal definition. There is a much more "social" significance about the phrase than there is, for example,

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<sup>6</sup> Keenleyside, *International Aid, and Summary* (1966), pp. 17-35; Drogot, *The Challenge of Hunger* (1962), pp. 3-4, quoting M. André Piettre: "Economic growth tends to make the rich richer, while population growth tends to make the poor poorer."

<sup>7</sup> Robertson, *Human Rights in Europe* (1963), pp. 1-3, for a discussion of the origin of "human rights" as a legal concept.

about classical "civil liberties" and its kindred terminology. Human rights became, however, within the past twenty years, an important piece of "debating" language. The phrase "human rights" seemed to be used partly as the words "natural rights" and "natural law" have been used for two thousand years. But it is also employed now, in a modern sense, for all of the tough, inter-racial, "self-determination", ex-colonial debates that are going on. No one could have predicted in 1945-1946 the power or the semantic consequences of this kind of language, or its absorption into the wider area of political debate in this generation, and the ease with which it has become part of the political dialogue, part of the debating experience, of peoples in all parts of the world, even those in affluent societies.<sup>8</sup> Indeed Canadians today are as comfortable—or uncomfortable—with the phrase "fundamental freedoms and human rights" as any people in any part of the world. They regard it as relevant to the Canadian situation even though many of the things for which this phrase would be a battle cry in other lands are matters where Canadians have already achieved a considerable success—incomes, housing, education, leisure.<sup>9</sup>

Of equal interest is the discovery that the content of the phrase "human rights"—to which should be added its linking phrase, "fundamental freedoms"—has been very dynamic. Canadians have been able to pour into these words rising standards of social, economic, political and legal behaviour, in rich variety, so that they have become a large "catchall" for social claims. Indeed, an important question, already suggested, is that on the one hand "human rights" has become a rallying cry, a great repository for western standards, values and hopes and aspirations, but in the process of achieving that particular symbolic status it becomes looser and more general and perhaps potentially less effective in consequence.<sup>10</sup> There is, therefore, this double aspect—an immensely resilient phrase which may be so malleable and so broadly based that in the end it will perhaps remain no longer the useful tool it might have been had it been used more scrupulously, more exactly, more technically, more concretely.

<sup>8</sup> Sohn, *op. cit.*, footnote 4.

<sup>9</sup> See Trudeau, *A Canadian Charter of Human Rights* (1968), presented to the Constitutional Conference of Prime Ministers and Premiers, Ottawa, February, 1968, by the Government of Canada and now a basis for discussion by all the eleven governments concerned with the problem of constitutional review and possible reform.

<sup>10</sup> For a discussion of the possible uses to which the concept may be put by the proposed United Nations High Commissioner see Macdonald,

It will be useful now to examine the range of meanings attributed to the phrase "human rights" and some problems that result from these meanings. Whatever may be the ancillary uses attached to the phrase the central concept that dominates is one which links the past with the future, links the classical ideas of civil liberties, with which our political history is familiar, to the more modern ideas of social and economic expectations now so important. That dominant concept linking the past to the future is to be found in the words "freedom and equality". Indeed, human rights is a field where the notion of human "freedom", whatever it may mean, is basic. Although these words themselves present all the difficulty as to precision which "human rights" itself poses, at least the terms "freedom and equality" have an ancestry that gives a kind of respectable lineage to the modern use of a concept such as "human rights", through a kind of syntactical succession. Thus, "human rights" connects with the past and also leads to the future.<sup>11</sup>

Notice here three aspects: 1) the older meaning which attaches to human rights through the phrase "freedom and equality"; 2) a later meaning which has become more or less contemporary, perhaps during the past forty or fifty years, which the League of Nations may first have developed, and the United Nations even more so, namely that included in the idea of freedom and equality (and therefore in the idea of human rights) are varieties of social and economic matters which perhaps two generations ago were excluded from any of the more strictly legal interpretations of classical civil liberties; 3) then there is a future meaning to which the phrase is moving, indeed something beyond the classical, beyond the economic and social, into what might be described as the most difficult of all to apply or achieve, a "sense of community". Human rights programmes, wherever they are emerging in any degree of seriousness and sophistication, may in fact be programmes which, at their highest level of intensity, represent a search for "community" with all of the difficulties that such a modern search presents in excessively structured, often atomized societies.<sup>12</sup>

The problems of living in great cities, the tensions that give rise to the sense of alienation of which so much is said in Western,

The United Nations High Commissioner for Human Rights (1967), 5 Can. Yr. Bk. Int. L. 84.

<sup>11</sup> For an interesting discussion of the terminology here see, Sorensen (ed.), *Manual of Public International Law* (1968), pp. 496-499.

<sup>12</sup> Lorenz, *On Aggression* (1966), pp. 203-236. for a suggestive approach to social relations among humans.

urban societies, compels a search for the restoration of a sense of community under the difficulties of modern life. But does this ascribe almost too much to "human rights", viewing such programmes as a way of marching toward a new sense of community? There are great dangers here that few have yet begun to explore. It may be asking for a concept and programme that is almost impossible to formulate. Yet it is valuable to do so because the concept goes beyond individual rights, the civil, economic and the social. It gives to them a unity under a particular umbrella that is very attractive. Nevertheless, what is raised here is the entire question of all the values of "community", and the danger is that the moment the human rights programme is used as a means of developing a new, integrated sense of community, there is posed the question as to what makes for a viable society, a stable, decent society, if that kind of goal, in modern, human terms, is possible. There should be no illusions therefore that if the next stage in human rights thinking goes beyond economic, social and legal rights into some sense of an integrated community, fundamental questions are being asked as to the very nature of society itself, questions that transcend anything which a human rights programme *per se* normally is concerned with.

There are both gains and losses here. The gains are the emergence of a grand concept with many values outlined and integrated, and with the energizing consequences of so large a concept. The losses are the increasing involvement of the programme with every aspect of society, so that in doing everything it does nothing. Indeed, the danger may be such that it is necessary to have a sense of discipline at some point beyond which a government will yield reluctantly to the temptation to look at the total reform of society as a legitimate objective of a human rights programme.

Now for a specific rationale for Canada at this time. It is fair to say that a Canadian looking at human rights problems, in the kind of context here described, will have a double vision—the domestic and the international. This would suggest that Canada cannot have an international image of any significance in the human rights field, however defined, whether legal, political, economic or social, or even a "sense of community", if she is not a good model at home of what is expected from abroad. The presence of major, unsolved human rights problems in the domestic setting gives Canadians less right to speak with a strong voice. This argument, on paper, is a serious one and justifies taking a hard look at Canadian achievements and failures in many areas of

federal and provincial jurisdiction. At the same time it is important to be realistic. To pretend that Canada is not doing better than are many parts of the world, notoriously retarded in the development of standards and laws in the field of human rights, is, of course, absurd. The wide spectrum of achievement in developed societies, with their human rights programmes, is a measure of the common sense to be applied as to what may be expected from Canadians. To put it another way: given the comparative knowledge as to what is meant by human rights, legally, politically, and socially, and looking at these comparatively, in relationship to other states, where does Canada stand in the hierarchy of international achievement? It would be only proper to state that she stands quite well on any list, however much remains to be done.

For example, in the matter of anti-discrimination laws, equality of opportunity, legislation to provide for sharing more equitably in the goods and services available in an affluent society, in the whole march toward freedom and fairness there are achievements of the past generation that cannot be ignored. Of course, they fall far short of any serious ideal. They fall short for certain minorities, of which the Indian-Eskimo problem is perhaps the classical Canadian situation. But admitting they fall short, it remains a fact that Canadian achievements are significant even though there are important goals yet to be reached.

Does this give Canada a right to speak to the world? Do Canadians have a decent face with which to look at other peoples and give them advice in the area of human rights? Is Canada in such good order that she can speak with moral force elsewhere? Surely the answer is yes. Indeed, it is in sufficiently good order to justify speaking with effectiveness, on simple, comparative grounds. There is no need to exaggerate. There are other countries where the march toward human equality and human freedom may be found to be superior. Comparisons between peoples of western countries, for example between Canada and some of the Scandinavian countries, are perhaps both invidious and salutary. There the level of "human equality", of welfare, of social protection, of cultural integration, and of a sense of freedom, perhaps may be among the most successful yet known to Western society. Aside from the reasons for that particular model—a model created by societies that have had long experience with homogeneous populations in a quite different and "modest" political and cultural setting—it nevertheless may be asked whether the Canadian achievement compares favourably with Denmark, Norway or Sweden as the

case may be. Not everyone is competent to answer. Certainly not this writer. But an impression remains that by contrast the Canadian achievement has a long way to go. Yet it is quite respectable in its own terms viewed alongside other societies facing like heterogeneous populations under the kind of ethnic and linguistic pressures Canada has had to face in its particular setting. Hence the fact that Canada must do better at home, still justifies a moral posture that should provide some confidence in speaking to others abroad.

It is necessary to somehow strike a balance between the ideal and the specific. Without ideals, without some of the goals implicit in "a sense of community", there is not the energy or the focus for great programmes. But if there is reliance only on ideals without being concrete and self-limiting in legislative objectives, or specific social measures, the effect is likely to be frustrated by the very abstractness of a too long view. Hence statesmanship in the human rights field in Canada must draw a balance between the ideal and the specific, between the long and short term, between the really attainable and the some-day-to-be-hoped-for. But this is true of much of life generally and there is nothing new in such a warning. Yet it is necessary to warn when idealism in the human rights field may outrun the moral and institutional capacities to realize those ideals. But Canadians should never lose sight of them and of the ultimate search for community which a mature and advanced human rights programme may have as its greatest goal.

Specifically, a concrete programme for Canada, within this framework, suggests the following. Anti-discrimination statutes in most provinces are in need of general attention; their administration needs review and refurbishing. In some provinces there is no adequate legislation or administration hardly exists and the policing, or enforcement where it does exist, often is very weak. There is also need for a more positive approach toward the implementation of the important international conventions which are emerging, for example, The Convention of the Elimination of all Forms of Racial Discrimination to which Canada has now adhered. There is need of a more vigorous approach to Bills of Rights, both federal and provincial, and this of course is the firm policy of the federal Government today. It is one of the minor tragedies of the past nine years that the Canadian Bill of Rights of 1960, which the Conservative Government passed,—technically inadequate though that document is from the lawyers' view—nevertheless was



given a kind of "kiss of death" by the academics and never really got off the ground. There were only two or three Canadian students of public law who gave it support.<sup>13</sup>

There are, of course, two sides to this story. The present Bill of Rights has much language in it that is ambiguous and unfortunate. But the Bill had possibilities which courageous courts could have developed. In the *Lafleur* case,<sup>14</sup> Mr. Justice Brossard did use language that was courageous and forward-looking, about the Bill's use in putting a restraint on bureaucratic power. In a recent Nova Scotia case, Magistrate Green made some useful references to the Bill.<sup>15</sup> But in general, the federal Bill of Rights is technically and professionally a failure, and would require a decade of imaginative judgments to revive it if it can be revived at all, and there is a great deal of doubt about it. In any case, of course, a constitutionally entrenched Charter of Human Rights (and of Language Rights) may "soon" replace it.

If this is true, there may be a Canadian Charter which promises serious constitutional and administrative action at the federal and provincial levels. However, Canada is not going to have an easy time with constitutional amendment. It is perfectly clear that the constitutional conferences now being held are not certain of achieving easy consensus on a bill of rights to say nothing of general constitutional reform. Should that effort be delayed, are Canadians to get along without any systematic, national approach to bills of rights even if they are to be enacted only by statute? A human rights programme which does not try to have some practical, early approach to provincial and federal bills of rights will not be fulfilling its proper tasks.

As to "equality" and "welfare", Canadian programmes, at the provincial and federal levels, are now committed to the widest support for such goals. Guaranteed annual income concepts are now emerging which seem to be at the very heart of much modern social and economic policies "equalizing" the position of all. How ready are Canadians, against their "Calvinist" or "Jansenist" backgrounds, to accept the idea that the unemployed deserve to be paid even if they are not working; that what was formerly regarded as menial labour now must be well paid because these are the kind of jobs no one else will do? Indeed, a whole series of attitudes which are essentially cultural have to be revised in order to achieve

<sup>13</sup> See discussion in (1959), 37 Can. Bar Rev., pp. 1-236.

<sup>14</sup> *Lafleur v. Guay et Ministre du Revenu National*, [1962] Que. S.C. 254.

<sup>15</sup> *Regina v. Steeves* (1964), 49 M.P.R. 227, at p. 232 (N.S.S.C.).

the kind of "social" equality implicit in human rights programmes.

Finally, there is a need for awareness of the potential of "racism" involved in some of the present national debate. Indeed, one of the more important achievements of the "quiet revolution" in Quebec is that it might have been captured by "racist" thinking but it was not (at least not yet). For it managed to be a dynamic expression of the best in modern French-Canadian thought, in its art, in its academic and general development. That the harsh side of nationalism did not capture it is a triumph of moderation and common sense in French-Canadian life. Yet it is important to be aware that the capacity to be "racist", to somehow look with fear or contempt upon others who are different is not something that was known only to Nazi Germany. It is a quality of which all mankind is capable, the darker side of human character.

Canadian experience therefore with hate propaganda is not to be ignored.<sup>16</sup> The data in the *Report of the Special Committee* speaks for itself. From the evidence assembled there, and from the psychological studies made by the committee, it was clear how vulnerable and how sensitive all people are to that kind of propaganda, to the intrusion of hate into the social relations of even a democratic country with an essentially unviolent tradition.

A word is necessary here about an international Canadian policy. Here Canada has an obvious duty as a country with a gross national product now exceeding sixty billion dollars a year. Our total External Aid Programme is now over three hundred million dollars per annum with perhaps a target in the next two to five years reaching six hundred million dollars a year, or one per cent of our Gross National Product. Within that affluent, financial pattern there is scope for scholarships, for teacher training, for civil servants and business executives to go out to the developing world, to bring students here, to tell them what Canada knows and the success she may have had in some particular areas of human rights. Indeed, Canada's international contribution should be measured not by attendance at international conferences or even by seeing what can be done for the development of international conventions in related fields. Instead, Canada should take a major part of our External Aid Programme and use it for these varied human rights activities against the background of particular Canadian skills and achievements.

Two other important steps are indicated. Canada should con-

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<sup>16</sup> *Report of the Special Committee on Hate Propaganda* (Ottawa, 1965), *passim*.

sider a regional agreement on human rights with the Anglo-Caribbean countries and possibly include the United States as fellow signatories and participants in such a regional scheme. It might provide a kind of model for this hemisphere, no less significant than that which the European Convention on Human Rights has provided for its signatories in giving them perhaps the most advanced transnational programme yet devised. It is unlikely that the United States would readily join, but even if they stood outside such a treaty, they might very well find it worth their support in due course; and meanwhile, Canada and the Commonwealth members of the Caribbean could experiment with a regional system with Canada taking the necessary lead.

Finally, Canadians should give a high priority to the establishment of a National Council on Human Rights to be made up of all of the non-governmental private agencies interested in the field, with government agencies, provincial and federal, participating as members or observers. This proposal<sup>17</sup> already has had the general support of the former Prime Minister of Canada, the Right Honourable Lester B. Pearson, for in a speech in May 1966 in Toronto he encouraged the exploration of such an idea and gave it his blessing in general terms. Such a Council could become an important sounding board for the development of human rights programmes at all levels—international, federal and provincial—and would, in any case, be a valuable instrument for the encouragement of research in the broad field of human rights, a concept now so all encompassing. For the field, like the terminology, is almost too embracing. It may be hoped that Canadians, perhaps among the most fortunate of peoples, will have the humility, the insight and the good will to pursue the most imaginative of programmes. The way is open and road is beckoning.

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<sup>17</sup>This proposal was "first" made by the writer on May 2nd, 1966 in Toronto in an address on "Human Rights in Canada" to the Brotherhood of the Beth Sholom Synagogue.