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BILL OF RIGHTS FOR CANADA



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PARLIAMENT'S ALARM

FOR the first time in its history the Parliament of Canada is seriously concerned about the most basic principle of democratic government—the freedom of every citizen. In forming a committee of the House of Commons and the Senate to consider some kind of new charter of rights for all Canadians, Parliament is undertaking a task which the founders of the nation considered already completed. When they constructed the political machinery of the nation under the British North America Act they assumed that the basic rights of citizens were already established by the complex structure of English Common Law, which became the law of Canada, and by all those English precedents, from Magna Carta onwards, which asserted the rights of the citizen not only against his fellows but against the state itself.

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We have now reached a point in our history—as the British people did over and over again—where it becomes necessary to reconsider primary principles, to decide whether basic liberties are being infringed in spite of all the old safeguards, and perhaps to erect new safeguards. Two reasons impel this re-examination.

In the first place, a new and potentially powerful instrument of politics has come into being throughout the world—the United Nations. One of the objects of the United Nations, as stated in some of the first words of its Charter, is to protect the rights of the individual man. The Canadian government proposed the present parliamentary inquiry to consider the

means by which Canada, as a subscriber to the Charter, could make good its aims within the laws of Canada, so far as those aims affect individual Canadians.

Mr. Ian Mackenzie, who introduced the subject at the present parliamentary session in one of the most eloquent and scholarly speeches of recent times, warned the Commons that all members of the United Nations do not regard freedom in the same way. Democracy has a different meaning, for example, in Ottawa and in Moscow. Therefore, when the United Nations completes the international Bill of Rights which it is now slowly drafting, that instrument may fall far short of Canadian ideals of liberty. But the international Bill of Rights can grow over the years.

Meanwhile, Mr. Mackenzie said, Canada should aid the process of growth by making clear, within its own jurisdiction, its own theories of liberty. Canada must aid the world project of liberty by "experience, by example and by education." In other words, by itself framing a national declaration of the citizen's liberties, Canada will give leadership to the international movement. The first purpose of the Canadian inquiry, therefore, is to consider how Canada can best interpret and make good in its own territory any Bill of Rights which emerges eventually from the United Nations.

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THERE is a more local and perhaps a more urgent reason for the present inquiry. It is that Canadians have begun to suspect that all is not well with liberty here

at home. Mr. John Diefenbaker, the able young Conservative who introduced the whole subject a year ago, summarized the reason for these suspicions. He mentioned among other things the restriction of religious rights in Quebec; the attempt by an Alberta government to interfere with freedom of the press; the attempt to deport Canadians of Japanese origin because of their race and color; and the mistreatment of accused in the espionage trials.

All these disquieting developments have compelled Parliament to ask itself whether the citizen's civil rights, assumed under the British North America Act are, in fact, safe when a provincial or federal government undertakes to violate them, since these governments, separately and in combination, actually have complete legal control over every citizen. No legal barrier stands in the way of the exercise of such authority.

The government seems by its speeches to attach first importance in this argument to the project of implementing in Canada the proposed International Bill of Rights. Naturally, since it is accused of violating individual liberty, it is inclined to sweep aside as unproved and rather imaginary the fear that liberty has ever been

endangered by it. The opposition speakers attach first importance to the state of liberty now actually existing within Canada. They are concerned mainly with establishing a Canadian Bill of Rights whatever may be done by the United Nations. They do not have to go beyond the record of Mr. Mackenzie, who is so deeply concerned with human liberty, to discover reason for their own fears. It was Mr. Mackenzie who chiefly promoted the most serious recent interference with Canadian liberties—racial discrimination against Canadians of Japanese origin in particular—at the very time when he was powerfully defending liberty in general.

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The resolution finally introduced by Mr. Mackenzie provides two avenues of approach to the whole problem of individual freedom. Under it, the parliamentary committee will consider not only means of implementing an International Bill of Rights in Canada but also what steps should be taken "for the purpose of preserving in Canada respect for and observance of freedoms." The whole field of freedom, international and Canadian, human rights and fundamental liberty, is thus open to the inquiry which will shortly begin.

CITIZEN AND CONSTITUTION

NO sooner does the Parliament of Canada resolve to consider the protection of individual liberty among Canadians than it encounters the Canadian constitution and our system of power divided between federal and provincial governments.

The project of writing a Bill of Rights for Canadians becomes at once, like all major political projects in this country, a constitutional problem.

As was pointed out repeatedly in the recent House of Commons de-

bate, and as every Canadian should know, Canada's position in this matter differs from that of Britain and the United States, the two nations from which we derived our constitution, the British North America Act.

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In Britain one Parliament is vested with total power over all the affairs of the realm and over every individual in it. The British Parliament can destroy the liberties of any individual or of the whole people simply by passing a statute. It is not prevented from doing so by any over-riding law but only by a vast and sacred volume of precedent, established through centuries of experience, revolutions and civil wars.

In the United States sovereign power is divided between the national and state governments. But even in combination these governments cannot repeal certain basic individual liberties because they are guaranteed by the Constitution, under a series of amendments called the Bill of Rights. Only by an amendment of the Constitution itself, a very difficult business requiring the assent of a majority of the states, could these basic liberties be touched by any power in the nation.

In Canada, however, while power is divided, as in the United States, between a central and nine provincial sovereign governments, there is no limit to the power of these governments, if they act together, to interfere with the basic rights of the citizen. Our constitution contains no Bill of Rights simply because its framers considered such safeguards unnecessary.

As was pointed out in a previous article, the people and Parliament of Canada are beginning to think that safeguards are needed because, in recent times, basic human liberties have been infringed in this country. The intangible safeguards of the constitution, the great body of precedent and custom, are in fact proving inadequate against the encroaching power of some governments. But when Parliament considers a plan to write a Canadian Bill of Rights it finds that, alone, it may lack power to do so. Since the provinces are sovereign in certain fields—and especially in the great field of property and civil rights which lie at the root of all individual rights—how can the national authority legislate in this area without invading the sovereignty of the provinces? Two methods are open to it.

Parliament could pass a statute asserting that certain basic rights are possessed by every Canadian and that they must never be invaded by any authority. Then, if some provincial legislature or government attempted to override this declaration, the legal issue could be fought out in the courts; or, if some provincial statute seemed to contravene the national legislation, that statute could be disallowed by the central government under its ultimate constitutional power—a right which no central government willingly exercises.

Admittedly, as the parliamentary debate showed, this would be at best a haphazard method of guaranteeing liberty, subject to doubtful legal dispute and likely to engender friction between the central and provincial governments. The only safe and satisfactory method

of establishing a national Bill of Rights is to graft it into the organic body of the national constitution, where it could be varied only by a constitutional amendment as in the United States.

How the Canadian constitution is to be amended in the future, whether it is to remain a statute of the British Parliament, subject to change at the request of Canada, is another and separate problem which Canada doubtless will solve in time. But in any case, a Bill of Rights written into the constitution itself, with the agreement of the provinces, or at least a large majority of them, would be the most effective safeguard of liberty we can provide.

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IT is toward such a constitutional amendment that Parliament obviously is working in its present consideration of the whole problem of human liberty. But even supposing an agreement is reached between the national Parliament and the various provinces on the terms of a Bill of Rights, there are those in Parliament who fear it as a possible restriction on liberty.

Mr. Ian Mackenzie, who spoke for the government, warned against "the impulse to put freedom in a straitjacket by seeking to define it

in words." He feared that if certain basic human rights were defined in law then some other rights might be left out of the law by an oversight, so that the courts would rule that they did not exist in law at all and therefore could be infringed.

To this Mr. Diefenbaker replied effectively for the opposition that there was no real danger here. The Canadian Bill of Rights, like that of the United States, could clearly state that it was guaranteeing certain stated liberties but that "the enumeration of certain rights shall not be construed to deny or disparage others retained by the people." And if any essential rights were found to be missing from the law, they should be added to it by a further amendment to the constitution.

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If Parliament decides to write a Bill of Rights into the constitution the next step presumably will be to consult the provinces. If they are as sensible as Parliament to the present dangers to human liberty, the provinces should not fear a constitution which does not infringe upon their jurisdiction in the practical affairs of government but only prevents them from infringing upon the rights of individuals, of whom they have always claimed to be the chief protectors.

THE PERSON AND THE PEOPLE

ASSUMING that the project of a Canadian Bill of Rights overcomes the constitutional problems standing in the way, it immediately encounters what might be called an ideological problem. This is a very large problem indeed.

It arises out of the revolutionary times in which we live. In Canada, as elsewhere, some parties and groups are determined to alter the economic and social system now prevailing. In place of private owners they would establish the

state as the dominant power over all man's economic activities.

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A government which undertakes this responsibility obviously must be equipped with far-reaching authority. In all countries where such a system has succeeded the state has accepted no limit on its authority whatever. But the major purpose of a Bill of Rights is to protect the individual from the state in certain prescribed areas. In the United States, for example, the Bill of Rights prevents the state from imprisoning the individual without trial, from inflicting on him cruel and unusual punishments, from taking his property from him without due process of law, and so on. Any such restrictions on the power of the state must curtail its right to manage the national economy as it pleases without regard to the individual.

Up to now the conflict between the state and the individual in the economic sphere has not been general or serious in Canada. Except in wartime the state has attempted to manage the daily economic activities of the citizen only under broad and general rules which do not conflict with the citizen's personal liberties. But lately the clash between the state and the individual in the economic sphere has developed, in a preliminary fashion, in Saskatchewan, where a socialist government is in office. Instances of this clash were cited in Parliament by Mr. Walter Tucker, the Liberal leader in Saskatchewan. The danger to which he pointed appears now as a small cloud on the horizon, no bigger than a man's hand, but it can grow. It will certainly grow if the Canadian people decide to embark on in-

creasing state management of the economy.

The advocates of state management admit no such danger. Indeed, in Parliament the most vigorous advocates of a Bill of Rights are among the C.C.F. members. The C.C.F. alone among the political parties denounced the most outstanding recent invasion of human rights, the present governmental discrimination against Canadians of Japanese origin. The C.C.F., jealous of these human rights, apparently believes that it can establish socialism in Canada without infringing them in any way. Mr. Tucker and many others do not agree. They point to Saskatchewan where, they say, the essential liberties of the individual in the ownership of his property already have been infringed by a C.C.F. government.

The core of this problem of human rights versus the power of state planning appeared in a brief and little-noted aside in the parliamentary debate. Mr. Tucker said that when an untaxed state enterprise in Saskatchewan put a private enterprise out of business without compensation this was an invasion of basic human liberties. For the C.C.F. Mr. Stanley Knowles replied that the government was doing such things "for the benefit of the people." Here is the crux of the economic problem of liberty and is worth examination.

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ALL governments which undertake to manage the economy of a nation and regulate the livelihood of citizens invariably act "for the benefit of the people." The individual may be sacrificed but the people benefit, or at least the

government thinks they do. As against this concept of society the whole theory of a Bill of Rights is that the state can never be allowed to touch the individual, in certain aspects of his life, no matter how compelling the reasons. State planning must stop at the point where it threatens to repeal the rights guaranteed to the individual by the Bill of Rights.

It is not to be expected that any Canadian government will make a practice of secret arrest, torture, murder or the other techniques of totalitarian governments, though we have lately witnessed an example of secret arrest and some of our citizens have been persecuted for their race and color. But even if governments could be trusted to avoid these more obvious forms of tyranny, there remains the broad question of the sanctity of the individual's property.

The United States Bill of Rights protects property and the individual's method of earning his livelihood by saying that they shall not be touched except by due process of law. If the individual considers himself unjustly used he can go to the courts and the courts have been rigorous in resisting the tyranny of the state. They have always insisted that if an individual suffers from the increasing econ-

omic power of the state he must be compensated by the state.

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A Canadian Bill of Rights, to be of practical use to the individual, would have to contain some such provision. It is true, of course, that a Bill of Rights is not designed to fix the exact pattern of a society. It is not designed to establish capitalism, socialism or any other particular system. The people must be free to choose their own system or they have lost their collective liberty. But it must be designed to make sure that, however the system changes, it cannot infringe on certain basic individual rights which are considered more important than any system.

The C.C.F., the chief advocate of a new state-planned system, says it wants a Bill of Rights. If so, it will have to abide by such a bill even though it is thus prevented from doing many things it would like to do, in Mr. Knowles' words "for the benefit of the people". For the basic theory of a Bill of Rights, and the most basic belief of our free society is that the individual, in certain sacred aspects of his life, must stand above the power of the state. The person, in these aspects, is more important than the people. The people are only safe collectively as the person is safe individually.

TOWARD A BILL OF RIGHTS

THE recent parliamentary debate on civil liberties must convince most Canadians of the need of a Bill of Rights in this nation. Certainly the debate seems to have brought this conviction to most members of Parliament, regardless of party, for two compelling reasons.

In the first place, Canada has a responsibility to the United Nations, whose Charter binds it to respect "human rights and fundamental freedoms for all." Since the United Nations is attempting to draft an international Bill of Rights, protecting the basic liberties of all peoples, it will be Canada's duty to apply such an agreement within its own boundaries. It was primarily in pursuance of this purpose that the Canadian government proposed the present parliamentary inquiry.

It may be said that Canada's protection of human freedom is certain to be above the standard set by any international code at the present stage of history; that we can accept any international Bill of Rights without altering our present laws and practices in any respect. But there seemed to be agreement among all parties in our Parliament that Canada should not be satisfied merely to follow the leadership of other nations in this matter but should give leadership to them.

Only a few nations in the world today can give such leadership for only a few nations enjoy real freedom. Among this small group, and as free as any of them, is Canada. The argument which apparently was accepted in Parliament is that, having declared in favor of freedom in an international charter, Canada should demonstrate its devotion to this ideal by positive action which all the world can see and understand. In short, if we believe in freedom for the individual, we should no longer hesitate to write it into definite law, which we presently lack. Thus, we shall not only provide protection for our own people but we shall encourage the development of freedom elsewhere.

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The second argument for a Bill of Rights was mainly stressed by opposition parties and, naturally enough under the circumstances, minimized by the government. It is that the personal freedom of some Canadians already has been violated by federal and provincial governments. The same Parliament which is bent on protecting human rights has consented to their suppression in the case of Canadians of Japanese origin, with only the C.C.F. objecting. The government which sponsors the present investigation, though it sought to defend itself, could

not explain away some of its actions in the espionage trials. Outside federal jurisdiction the Quebec government has been interfering with religious liberty while the Saskatchewan government has been edging steadily toward interference with the private property of individuals.

Thus, after assuming for eighty years that liberty was safe in Canada without any sure legal guarantee, Parliament has been compelled to realize that liberty has lately been infringed by the state in a fashion unforeseen by the framers of our constitution. The infringement as yet is small, but it can grow. The purpose of a Bill of Rights is to make sure that it does not grow.

If the two premises are accepted — that Canada has an international responsibility to the principle of freedom and that freedom is in need of legal protection here — it should not be too difficult for the parliamentary committee to agree on what freedoms should be guaranteed to all Canadians by law. The freedoms laid down in the British Bill of Rights, as signed by William of Orange, and the freedoms which the United States' Bill of Rights largely imitated from the British original, generally will meet Canada's present needs. The main problem will not be to define basic rights, on which nearly all Canadians agree, but to overcome the constitutional difficulties inherent in our federal state.

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Since sovereign power in Canada is divided between a central and nine provincial governments — the latter possessing the vital power over property and civil rights — it is highly desirable that a Bill of Rights should be the joint product of both authorities, federal and provincial. Parliament could write a federal statute purporting to guarantee certain freedoms, but its validity would be doubtful and subject to litigation as an invasion of provincial rights. A federal government could disallow any provincial statute which seemed to infringe on the freedoms laid down by Parliament, but no government willingly uses the ultimate power of disallowance and no government could be depended upon to use it whenever it was necessary.

Therefore, as seemed generally agreed in the House of Commons, a satisfactory Bill of Rights should take the form of a constitutional amendment, an organic addition to the British North America Act, which could be abridged only by a further amendment of the constitution.

It is true that the constitution, in its present unsatisfactory, equivocal and temporary position, can be changed by a simple resolution of Parliament, forwarded to London, but in fact it

would be difficult if not impossible, once a Bill of Rights is established, to persuade our Parliament to repeal it. Moreover, when control of the constitution is moved to Canada, as it will be, and rules framed for its method of amendment, undoubtedly the consent of a majority of provinces will be required before it is changed in vital respects and the repeal of a Canadian Bill of Rights would then be as difficult as the repeal of the United States Bill, which no one has ever dared to touch or question.

To secure agreement with the provinces it will be desirable for the federal authorities to consult with them in framing a Bill of Rights. It was said in the recent debate that any such statute would be in itself an invasion of provincial jurisdiction but this is true only in the most technical sense. No constitutional amendment which Parliament would pass would touch the present authority of the provinces over provincial business. It would only prevent them exercising that authority at the expense of liberties which all Canadians deserve. The provinces have always claimed to be the final protector of the individual. They can hardly object to this principle of individual liberty being written into law.

As for provinces like Saskatchewan which are bent on establishing a new social system, the same logic applies. The Saskatchewan government, for example, denies that any of its policies will narrow the field of individual freedom but says they will widen it. Therefore, this government cannot consistently oppose any general law which does not in the least prohibit socialism or any other social system but says simply that no system must violate certain inherent human rights. Actually the C.C.F. is one of the chief supporters of the Bill of Rights project, which thus begins without any ideological quarrel.

Indeed, the wholly nonpartisan approach of Parliament to this fundamental change in our constitutional structure is the surest sign that the public desires it and the best assurance that it will succeed.

