A BILL OF RIGHTS AND FUNDAMENTAL LAW

Illusion and Reality

Edward McWhinney*

Shortly after the Conservative Party's surprise electoral victory in June, 1957, an Indian jurist who was acquainted with Mr. Diefenbaker's announced public support of a decade ago for the principle of adoption of a Canadian Bill or Rights, asked me as to the practical possibilities for translating the new Prime Minister's earlier, partisan advocacy (as an Opposition member)[1] into concrete action, now that he controlled the machinery of government in Canada and had the further potentiality (soon overwhelmingly realised in the elections of March, 1958) of a working majority in Parliament. In reply I pointed out[2] that the matter had to be examined from two different viewpoints — first, a procedural question as to machinery problems of formally establishing as part of the constitution or otherwise enacting as fundamental law, any Canadian Bill of Rights, once it had been finally drafted; and second, the substantive question as to the actual content of the proposed Bill of Rights — and that in either case the issues seemed at least as difficult and complex as the drafting of the Bill of Rights and the allied Directive Principles of State Policy had proved to be in the case of the Indian Constitution of 1949[3].

This is not the place to discuss in detail the machinery problems attendant on the adoption of any Canadian Bill of Rights. A brief review must suffice here. The most effective (and irrevocable) form of adoption would undoubtedly be the passage of the Bill of Rights as a formal amendment to the Canadian Constitution. Here we run into the major political problems that have stalemated, since 1950, all attempts at the securing of self-operating amending

*Professor of Law University of Toronto, Toronto.

[1]The function of an Opposition member, and particularly of one who is only a rank-and-file member and not the party leader, is so intrinsically different from that of the head of a government that Mr. Diefenbaker might readily have been pardoned if, in his new office as Prime Minister, he had neglected to proceed with the adoption of a Bill of Rights.

When, in support of President Truman's seizure of the Steel industry in 1952 during the Korean war crisis, and in argument for an expanded judicial interpretation of the scope of inherent Executive powers during an emergency, the government's counsel sought to rely on an opinion which, in 1941, the then Solicitor-General, Robert M. Jackson, had given to President Roosevelt in the North American Aviation Company case, Jackson, now a Justice of the Supreme Court, quite properly rebuked counsel, with the comment: "I do not regard it as a precedent for this, but, even if I did, I should not bind present judicial judgment by earlier partisan advocacy . . ." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 649 (1952).

[2]See my article, Problems in adopting a Bill of Rights in Canada, 6 Vyavahara Nirnaya (University of Delhi) (1957).

[3]Republic of India, Constitution, Part III, Fundamental Rights, (Arts. 12-35); Part IV, Directive Principles of State Policy, (Arts. 36-51).

machinery for the Canadian Constitution[4]. Has the old, (pre-Commonwealth of Nations era) mode of amendment of a formal request by the Canadian government to the British Parliament for passage of a simple statute amending the B.N.A. Act now lapsed into desuetude[5], except perhaps as to a final request for a British statute authorising new self-operating (i.e. to be operated, *in futuro,* wholly within Canada itself) amending machinery? If it has not yet effectively lapsed, is there a Constitutional Convention to the effect that the Canadian government must consult with[6], or even obtain the consent of[7], all or some of the Provincial government to any constitutional amendment to be effected in this manner[8] (including any proposed Bill of Rights)? Constitutional Conventions, of course, are in a somewhat different, (less absolutist, perhaps) category than the general positive (enacted) law of the constitution[9],

[4]Proceedings of the Constitutional Conference of Federal and Provincial Governments, January 10-12, 1950, Appendix V, p. 117; Proceedings of the Constitutional Conference of Federal and Provincial Governments, (Second Session), September 25-28, 1950, especially Appendix III, at p. 83-4.

And see generally Rowat, Recent Developments in Canadian Federation, 18 Can. J. Ec. and Pol. Sci. 1, 12 (1952).

[5]Compare the remarks of a French-Canadian jurist, L.-P. Pigeon: "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 co-operation of the Provinces, because it involves setting up a process whereby their powers and rights may be modified."

Comment of M. Pigeon, in The Joint Committee on Human Rights and Fundamental Freedoms, 26 Can. B. Rev. 706, 712-3 (1948).

[6]For the position that consultation by the Canadian governments with the Provinces regarding proposed constitutional amendments is a matter of courtesy, but only of courtesy, see, for example, Clokie, Basic Problems of the Canadian Constitution, 20 Can. B. Rev. 395, 429 (1942); Scott, Note, 8 U. of Toronto L. J. 201, 202 (1950).

[7]Gerin-Lajoie, Du pouvoir d'amendement constitutionnel au Canada, 29 Can. B. Rev. 1136, 1156 (1951).

[8]As to the procedure for amendment of the constitution generally, see Gerin-Lajoie, 29 Can. B. Rev. 1136 (1951); Gérin-Lajoie, *Constitutional Amendment in Canada* (1950); McWhinney, Amendment of the Constitution, in *Studies in Federalism* 790 et seq. (Bowie and Friedrich eds. 1954).

[9]On the other hand, one shonld beware of the correlative danger of regarding Constitutional Conventions as more binding and irrevocable than the enacted law of the constitution, especially where the special space-time political conditions that originally gave birth to particular Conventions and gave them, so to speak, their constitutional validity or *raison d'être,* are no longer present.

Thus Prime Minister Diefenbaker refused to be over-awed by essentially "eighteenth century" constitutional precedents (rooted in eras when arbitrary, unfettered Royal

but good manners and good federalism, in the case of a plural society, may require that in certain circumstances they be accorded all the deference normally given to other constitutional provisions.

A second form of adoption might be — less than the securing of a formal amendment to the constitution — some type of constitutional "entrenchment" of the Bill of Rights against subsequent repeal or amendment or modification by subsequent transient majorities in Parliament. "Entrenchment", as a constitutional protection, has received a good deal of attention and study as a result of the great South African constitutional controversy of the last decade. The South African constitution, as adopted in 1909[10], embraced the general English constitutional principle, — as enunciated, classically, by Dicey, — of the Sovereignty of Parliament, except in relation to two principles, — the equality of the English and Afrikaan languages, and the retention, after the Union of 1909, of special voting rights of non-whites (i.e. their inclusion on the common electoral rolls) in the Cape Province. These two principles were sought to be specially safeguarded, under the constitution of 1909, by explicitly providing, in the constitutional instrument itself, that they could not be repealed or altered except by a special two-thirds majority vote at a joint sitting of both Houses of Parliament[11]. These provisions, so far as they secured the existing, (extremely limited) voting rights of non-whites in the Cape Province, were enforced, in their letter, by a resolute Chief Justice and Supreme Court against an intransigent legislative majority in two great judicial decisions of 1952[12]; but the court for reasons partly technical and principally psychological — the difficulty of long sustaining a judicial position against overweening government power — finally surrendered to the government in a land-mark decision of 1957[13]. The "entrenchment", in the case of South Africa, was, of course, an integral part of the constituent act of 1909, and so South African

Prerogative Powers were a political rule of the day), in successfully establishing, in connection with the dissolution of March, 1958, that dissolution of Parliament rests at the discretion of the Prime Minister of the day. The characterisation of the older view that dissolution of the legislature remained at the complete discretion of the titular Head of State (whether Queen, Governor-General, or Lieutenant-Governor) rather than the Prime Minister concerned as "eighteenth century" is not mine: it is cited in the Parliamentary Papers published in connection with the dissolution in the State of Tasmania, Australia, in 1956. See The Australian States and Dominion Status, 31 Aust. L.J. 42, 44 (1957).

[10] 9 Ed. VII, c. 9. (U.K.).

[11] South Africa Act, 1909, ss. 35 and 152.

[12] *Harris* v. *Minister of the Interior,* [1952] 2 S.A.L.R. 428 (A.D.), (the "Coloured Voters" case); *Minister of the Interior* v. *Harris* [1952] 4 S.A.L.R. 769 (A.D.), (the "High Court of Parliament" case).

[13] *Collins* v. *Minister of the Interior,* [1957] 1 S.A.R.L. 552 (A.D.), (the "Senate Act" case). And see generally Wade, The Senate Act Case and the Entrenched Sections of the South Africa Act, 74 So. Afr. L.J. 160 (1957); McWhinney, Law and Politics and the Limits of the Judicial Process — An End to the Constitutional Contest in South Africa, 35 Can. B. Rev. 1203 (1957).

analogies are not precisely in point in regard to proposals for "entrenchment" of a Canadian Bill of Rights, since the Canadian constitution is after all a living institution and there would be a certain element of contrivance and legal artifice in any move to declare, in respect to legislation enacted now by ordinary majorities, that it should only be subject to repeal or amendment in the future by some extraordinary process such as a special or two-thirds majority.

More precisely in point perhaps, in so far as involving "entrenchment", *ad hoc,* in a constitution that had already been in existence for a considerable number of years is the New South Wales "entrenchment", effected in 1929, by an outgoing government of the State. Fearing abolition of the then nominee upper House of the State parliament by an incoming Labour administration, the Conservative government of 1929 enacted, by ordinary legislative majority as was then all that was required for securing amendments to the New South Wales (State) constitution, that no bill seeking to abolish the Upper House should become law until, after securing passage through both Houses, it had also been submitted to and approved by a popular majority at a public referendum. This provision was upheld by the High Court of Australia, and by the Privy Council on appeal, in Trethowan's case in 1931[14]. It should be noted at once that the New South Wales "entrenchment" survived, as a matter of legal doctrine, because of the "manner and form" limitations as to the effecting of constitutional amendments regarded as being imposed on State (Provincial) legislatures by the old (Imperial) Colonial Laws Validity Act of 1865[15]. On this score alone, *Trethowan's* case's express approval of the New South Wales "entrenchment" of 1929 is irrelevant to Canadian problems of the present day since limited to "entrenchments" effected by State (Provincial) legislatures and similar dependent legislatures. A more serious objection to the New South Wales "entrenchment" of 1929, and even to the court decision in Trethowan's case, goes to their essential *ad hoc*-ness[16], —

[14]*Attorney-General (New South Wales)* v. *Trethowan,* 44 C.L.R. 394 (1931) (High Court of Australia); 47 C.L.R. 97 (1931) (Privy Council).

[15]28 and 29 Vict. c. 63 (U.K.) s. 5: "Every representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers and procedure of such legislature, provided that such laws have been passed in such manner and form as may from time to time be required by any Act of Parliament [i.e. the United Kingdom Parliament] . . . or colonial law for the time being in force in the said colony."

[16]Compare the remarks of the Australian jurist, Geoffrey Sawer, in discussing Trethowan's case for British readers more than a decade after the date of decision: "It is necessary to recall the facts . . . because they are already forgotten by most people outside New South Wales". Sawer, Injunction, Parliamentary Process, and the Restriction of Parliamentary Competence, 60 L.Q. Rev. 83 (1944). Trethowan's case has been severely criticised by authoritative jurisprudential opinion, first, as to its procedural aspects, the issue here being the judges' "premature" handling of the case, the High Court of Australia moving in quickly to rule on the legislative bill

first of all, as a purported exercise in democratic government by a soon-to-disappear legislative majority[17], and secondly, as a response by a court to a great political *cause célebre*[18]. For these reasons, I suggest, any invocation of the New South Wales "entrenchment" of 1929 as a constitutional precedent for Canada[19], legally fool-proof though such "entrenchment" turned out to be in New South Wales in the end result, would be politically unfortunate unless all major parties and all significant Provincial and regional opinion concurred in advance as to the precise manner of user of "entrenchment" in Canada and the precise end to which it was to directed[20].

A third form of adoption of a Canadian Bill of Rights could be by simple legislation of the Canadian Parliament, viewed either as a constitutional amendment limited in its effectiveness to the precise area of Dominion legislative competence in terms of the B.N.A. (No. 2) Act of 1949[21], or else as

involved in Trethowan's case even prior to its submission for Royal assent, Sawer, id. at 85-6; and second, as to its substantive aspects, Professor Friedmann in particular having strikingly demonstrated some of the unfortunate implications of the judges' signal failure to consider the practical consequences, in action, of their decision in the case. Friedman, Trethowan's Case, Parliamentary Sovereignty, and the limits of Legal Change, 24 Aust. L.J. 103 (1950).

[17]This is the nub of the thoughtful dissenting opinion, in Trethowan's case, by McTiernan J. of the High Court of Australia, in which the crucial distinction is drawn between a requirement as to "manner and form" and a requirement as to substance to which latter, in McTiernan J's view, no transient legislative majorities could bind their successors. 44 C.L.R. 394, 433 (1931).

It is not, of course, necessary to agree with McTiernan J's actual *factual* application of his test in the instant case — in effect that the 1929 Act's requirement of approval at a public referendum by (simple majority of the popular vote) is a requirement of substance and not of "manner and form" and therefore not binding on the State legislature Id. at 442-4. And compare, on this point, Friedmann, op. cit., 24 Aust. L.J. 103, 106 (1950). However, in an Australian context, a requirement of popular referendum approval is, in the light of voting patterns at such referenda, tantamount to a kiss-of-death. *Studies in Federalism* 790 et seq. (Bowie and Friedrich eds., 1954).

[18]See, in this regard, the latter-day doubts as to the correctness of the Trethowan's case rationale, recently advanced by the Chief Justice of the High Court of Australia, Sir Owen Dixon, who had himself participated in the High Court's decision in 1931. *Hughes and Vale Pty. Ltd.* v. *Gair*, 28 Aust. L.J. 437 (1955). And see generally McWhinney, Trethowan's Case Reconsidered, 2 McGill L.J. 32 (1955); Cowen, Note, 71 L.Q. Rev. 336 (1955); Kahn, Note, 72 So. Afr. L.J. 201 (1955).

[19]Compare, in this regard, the remarks of F. R. Scott, in Book Review (Wheare), 32 Can. B. Rev. 802, 804 (1954).

[20]The rescuing from a well-deserved oblivion that the South African Supreme Court in effect gave to Trethowan's case by its decision in the "Coloured Voters" case, [1952] 2 S.A.L.R. 428 (A.D.) was not, it is submitted, necessary to the end-result of that decision. The "Coloured Voters" decision itself (though not necessarily its actual rationale), must be regarded as having become severely attenuated by the court's *volte face* in the "Senate Act" case, [1957] 1 S.A.L.R. 552 (A.D.).

[21]British North America (No. 2) Act, 1949.

simple *declaratory* legislation for the future much after the fashion set by the Saskatchewan Bill of Rights of 1944[22]. As to the first of these two modes, we would undoubtedly be faced with a certain penumbra of constitutional uncertainty unless, in its substantive content, the Bill of Rights were so tightly drafted as to be clearly within the ambit of Dominion authority alone, as understood to date: the danger, here, would be of getting from the government's advisers a very skimpy, skeletal draft in which caution was the keynote. The better way probably then is for the Dominion Parliament to go ahead and simply enact a declaratory act that is accompanied if necessary by a formal *severability* clause declaring that the act is to be construed to the extent of Dominion legislative power and that any provisions in excess of such power are to be regarded as severed and as not affecting in any way the validity of any of the remaining portions. It may be suggested, in reply to this proposal, that the Bill of Rights will then be no very substantial thing, subject to possible repeal or amendment by the Opposition parties when they come to power again, and providing no adequate reason in itself why even the Supreme Court should give it any more deference than any other Dominion legislation. As to this, I think the answer clearly lies in the substantive provisions of the Bill of Rights when it is finally drafted and the enthusiasm with which government and general public respond to it. If the Bill of Rights succeeds in capturing the public imagination then the Bill will surely have teeth in it, and I see no difficulty as a formal matter in the Supreme Court's being persuaded to apply to it, (much as they have done, in Quebec, to the Quebec Civil Code)[23] a beneficial rule of interpretation that no subsequent Dominion statute should prevail over the provisions of the Bill of Rights except to the extent that such intention is clearly indicated by Parliament. The gap between paper, positive law affirmations and the "living law" reality of acceptance as part of a community's working attitudes and practice is a difficult one to bridge, as all students of sociological jurisprudence know full well, but it can be bridged. If the Bill's actual contents correspond to deeply-felt popular wants, no government is likely to interfere with it; if its provisions do not so correspond, then the business of formally "entrenching" or even adopting as a constitutional amendment can hardly, by themselves, ensure that it will be meaningful in action[24].

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[22]The Saskatchewan Bill of Rights Act, 1947. [Revised Statutes of Saskatchewan, 1953, Vol. IV, Cap. 345].

[23]Compare Scott, Dominion Jurisdiction over Human Rights and Fundamental Freedoms, 27 Can. B. Rev. 497, 504 (1949).

[24]Note the remarks, in this regard, of the late Mr. Justice Jackson of the United States Supreme Court: ". . . It is my belief that the attitude of a society and of its organised political forces, rather than its legal machinery, is the controlling force in the character of free institutions . . .

"In Great Britain, to observe civil liberties is good politics and to transgress the

My main remarks are directed to the question of the substantive provisions that the Bill of Rights is to contain, when finally drafted. There is, be it noted, a certain element of "datedness" in the whole concept of legislatively-established Bills of Rights. They stem, in the best sense, from the 18th century and the spirit of Rationalism *regnant*. Their archetype is the American Bill of Rights — the first Ten Amendments adopted immediately after the successful establishment of the United States Constitution and as part of the unofficial, background conditions to its establishment. Bills of Rights enjoyed a new wave of popularity in the Europe of the post-World War I era[25], as part of the American "Rationalised Constitutionalism" brought over to Europe in the wake of President Wilson's Fourteen Points, and as part also of a general post-war reaction to the excesses of the recent conflict and a new interest in ultimate right of man[26]. It is only necessary, in this context, to recall the Moral Re-armament Movement, "All Quiet on the Western Front", and the League of Nations, to understood the wishful thinking of the generations of the 1920's and 1930's that it was sufficient, to eliminate wars and man's oppression of man, to legislate to that effect in the form of international covenants and sounding declarations of human rights. It would be surprising if the Prime Minister, as one whose early adult years corresponded with that era, did not share something of the "lost generation's" hope in the efficacy of creating human-rights by legislative action, in spite of the subsequent tempering of his idealism through bitter experience in practical politics.

The antipodal approach to "human-rights-through-rationalised-constitutionalism" is the basic English constitutional concept, through Dicey[27], that

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rights of the individual or the minority is bad politics. In the United States, I cannot say that this is so. Whether the political conscience is relieved because the responsibility here is made largely a legal one, I cannot say . . ." Jackson, *The Suppreme Court in the American System of Government* 81-2 (1955).

[25]See generally, Mirkine-Guetzevitch, *Les Constitutions Européennes* (1951).

[26]The analogies of post-1918 European attitudes in law to similar reactions, three centuries before, to the destruction and carnage of the Thirty Years War, is striking: modern theories of Public International Law have their genesis in the 17th century in the great wave of Natural Law thinking, evidenced particularly in the writings of Grotius. The further analogy to the anti-positivist, fundamentalist, emphasis in Continental European, and especially German, philosophy of law after 1945, is not unfanciful: as to Continental legal thought, consult, for example, Radbruch, *Rechtsphilosophie*, 333-357 (4th ed., Wolf, 1950); von Hippel, *Die Perversion von Rechtsordnungen* (1955); Evers, *Der Richter und das unsittliche Gesetz* (1956); and, more generally, note the continuing pressure in the United Nations for a binding and enforceable International Convenant on Human Rights.

[27]Dicey, *Law of the Constitution* (1st ed., 1885). Though Dicey's theories are essentially rooted in basic English political and societal attitudes, he is not without his American followers. I have elsewhere sought to demonstrate Dicey's strong influence on Mr. Justice Felix Frankfurter's philosophy of law, through Frankfurter's revered mentor, James Bradley Thayer who certainly was well acquainted with, and an admirer of, Dicey's teachings. See, as to Thayer, his *Legal Essays* 191 et seq.

protection and safeguardings of minority rights and interests is a matter of the self-restraint of legislative majorities — the adhering to the "rules of the game" by both government and opposition parties. The best-known present-day exponent of this particular, essentially English, approach, is Sir Ivor Jennings[28]. Through the special ethical-cultural facts that have made the sovereignty of parliament palatable as a working principle of government in the United Kingdom in so far as they have provided moral checks to a power that is, legally, absolute and uncontrolled — the reasonable homogeneity of race and religion in the United Kingdom, and the general agreement on fundamentals of basic political and social beliefs — should perhaps have given Sir Ivor some pause because these facts are hardly paralleled elsewhere — it is true that the constitutions that he has drafted, or assisted in drafting, for the newly emergent colonial societies that have progressed to independence and self-government, are notable for their fairly general avoidance of elaborate checks and balances — formal separation of powers, federalism as a mode of decentralising political power, bills of rights — which might act as a barrier between government and people and also serve as a machinery protection for minority rights in what are, after all, in comparison to the United Kingdom, usually complex, multi-racial societies. Now, Sir Ivor's special bias in constitutional drafting can no doubt be justified, pragmatically, (even though this was not his own personal intention or belief), on the score that a constitutionalism of checks and balances is really only suited to politically mature, Western, society because involving fragmentation and dissipation of political power, where the newly independent, ex-colonial, communities urgently need some strong central direction and control if they are quickly to make the transition to a technologically-based type of society. This, after all, is Prime Minister Nkrumah of Ghana's concept of "guided democracy"[29]: we should not assume too easily that Western, and particularly American, — constitutional stereotypes are capable of successful reception in non-Western, non-

(1908); and, more generally, see my article, The Great Debate, Activism and Self-Restraint and Current Dilemmas in Judicial Policy-making, 33 N.Y.U.L. Rev. (1958).

[28]See, for example, Jennings, *The Approach to Self-Government* (1956) (reviewed 35 Can. B. Rev. 358 (1957)); *Constitutional Problems in Pakistan* (1957) (reviewed 35 Can. B. Rev. 993 (1957); *Problems of the New Commonwealth* (1958) (reviewed 36 Can. B. Rev. 278 (1958)).

[29]Though, as to some of the undesirable by-products of "guided democracy", and as to some of the dangers inherent in the English constitutional thesis of all power to executive and legislative authority where such uncontrolled constitutionalism is not accompanied by the traditional English political self-restraints vis-à-vis minorities, see, for example, as to Ghana, *On Being the Boss,* The Economist (London), August 31st, 1957; *Bossmanship in Ghana,* The Economist (London), September 21st, 1957; Anglin, Whither Ghana?, 13 International Journal 41, 50-1 (1958).

technological societies, without considerable modification and adaptation to special local conditions[30].

I do not doubt that Sir Ivor's bias in drafting is due principally to Dicey's pervasive influence, on whole generations of British-trained students[31], in favour of essentially simple, skeletal, uncluttered constitutional instruments. Perhaps, to this extent, Sir Ivor would do well to remember Dicey's other famous teaching — well appreciated by students of sociological jurisprudence — on the necessary relationship, or symbiosis, between Law and Opinion: that while Public Opinion shapes and determines the content of the positive laws, the positive law, in its turn, may shape and mould new norms of community behaviour[32]. In looking back on the record of actual working practice over the past decade, there is quite a lot to be said in favour of rationalised constitutionalism as applied in the Republican Indian Constitution of 1949: certainly, India's has been much the most impressive achievement in democratic government to date among the countries that have gained their self-government and independence since War II, and the detailed, explicit, and exhaustive constitutional instrument has been of profound significance and importance in educating Indian citizens in democracy. Considering the marked percentage increases in Canadian population since the War and the effects both of immigration in bringing in new and widely differing cultural groups and also the continuing situation of the bi-cultural (French Canadian, English Canadian) society, it must be recognised that as in India in the past decade and as in the United States during the crucial period of population growth of the middle and late 19th century a Bill of Rights might be of great public educational value in the development of a distinctive Canadian ethos.

The problem, of course, remains of what actually is to go in the Bill of Rights. The American Bill of Rights enshrines the classic political rights of English constitutional law — Blackstone's Common Law rights of Englishmen, with their emphasis on free communication of ideas and procedural guarantees of speedy and fair trials and criminal administration. This is supplemented — in the case of the 13th, 14th, and 15th Amendments incorporated into the Constitution as part of the post-Civil War Reconstruction — by a series of guarantees historically intended to integrate the newly freed slaves into normal

[30]For the somewhat mixed results of introduction of American constitutionalism in a non-Western society, even though technologically based like the United States, see Kawai, Sovereignty and Democracy in the Japanese Constitution, 49 Am. Pol. Sci. Rev. 663 (1955).

[31]As to Dicey's influence in Ireland see Kohn, *The Constitution of the Irish Free State* xi (1932); in the Union of South Africa, — Pollak, The Legislative Competence of the Union Parliament, 48 So. Afr. L.J. 269, 286 (1931); in India, — Jennings, *The Approach to Self-Government* 20 (1956). And see the assorted comments of Mr. Justice Holmes, made after Dicey's death: 1 *Holmes-Laski Letters* 422, 712 (Howe ed., 1953).

[32]Dicey, *Law and Public Opinion in England* (1905).

community life in the United States, and so in effect to promote civil rights and in particular the ideal of racial equality.

Now these particular categories of rights — political and civil rights — are of course the rights associated, in a twentieth century with what Dr. Popper has since made into a term of art — the Open Society[33]. They are well suited to a society that has a continuing belief in its own ability to progress and that emphasizes a continuing exchange of ideas as a stimulus to such progress and that in general encourages vertical social mobility[34]. The further association with the Protestant ethic and the spirit of incipient capitalistic entreprise[35] is not completely fanciful — these concepts flowered in the England of the post-First Reform Bill era, in which Dicey was the high priest of the cult, up to the close of the 19th century, and in the United States in the period from after the Civil War until the late 1920's, and except for one period when the defenders of American capitalism temporarily lost faith in their own future and their own continuing entreprise and sought to use the Bill of Rights for purely defensive purposes vis-à-vis their own special interests, acted as a stimulus and instrument of political progress. But these rights, if we are to accept recent Canadian Supreme Court decisions and judicial dicta as of predictive value[36], are already part of Canadian constitutional law, and immune from abridgment by Provincial action[37], and possibly by Dominion action as well[38]. A Canadian Bill of Rights, if it is simply to be a repetition, in terms, of the American Bill of Rights would, apart from its public educational value already referred to, add nothing new to Canadian constitutional law except to the extent that it might care to declare the extent to which

[33]Popper, *The Open Society and Its Enemies,* (1st ed., 1945).

[34]Ibid.

[35]See Max Weber's, *Die protestantische Ethike und der Geist des Kapitalismus* (1904) [English translation, (Talcott Parsons), 1930]; and see also Tawney, *Religion and the Rise of Capitalism* (1926), a work heavily influenced by Weber.

[36]See, especially, Re Alberta Statutes, [1938] 2 D.L.R. 81, per Duff C.J.C. at pp. 107-8, and per Cannon J. at p. 119; *Winner* v. *S.M.T. (Eastern) Ltd.,* [1951] 4 D.L.R. 529, per Rand J. at p. 558; *Saumur* v. *Quebec,* [1953] 4 D.L.R. 641, per Rand J. at 670-1; *Henry Birks & Sons (Montreal) Ltd.* v. *Montreal,* [1955] 5 D.L.R. 2d. 321, per Rand J. at p. 322; *Switzman* v. *Elbling,* 7 D.L.R. 2d. 337 (1957), per Rand J. at pp. 357-8.

[37]This, certainly, has been the position taken by Rand J., and most recently by Abbott J. See, as to the latter's position, *Switzman* v. *Elbling,* 7 D.L.R. 2d. 337, 368 (1957). And see generally Laskin; Our Civil Liberties — The Role of the Supreme Court, 41 Queen's Quartely 455 (1955); Brewin, Note, 35 Can. B. 554 (1957); McWhinney, *Judicial Review in the English-Speaking World* 190 et seq. (1956).

[38]See per Abbott J. (concurring), *Switzman* v. *Elbling,* 7 D.L.R. 2d. 337, 371 (1957); and see, as to this point, my article, Mr. Justice Rand's "Rights of the Canadian Citizen" — The "Padlock" Case, 4 Wayne L. Rev. 115, 121 (1958).

these rights are safeguarded from abridgment, in the future, by Dominion action[39].

Where a proposal for a Canadian Bill of Rights might break new ground would be, — either if it sought to delineate more precisely the American catalogue of rights and to render concrete what the American Bill sometimes (quite fortuitously, I believe) spells out in vague generalities, — or else if it sought to add to and extend on the American guarantees, taking note of the general switch, in all the main Western countries, from laissez-faire to a more collectivist organisation of society and of the acceptance by all major political parties of the principles of the Welfare State.

As to the first point, we approach one of the major dilemmas of constitutional and general legal drafting. Is it better to draft generally — running the possible risk of being so vague and cloudy as to render one's Bill of Rights empty of content and meaningless in practice but having the advantage still of allowing the Bill's gaps to be filled in by subsequent judicial interpretation and allowing the whole document thus to be accommodated to changing social needs, demands, and expectations? It is a rather different American society now to what it was in 1787, but the constitution has stood the test of time — it is by far the oldest written constitution in existence — and it is this lapidarian generality of constitutional phrasing that has permitted new content to be poured into the Bill of Rights as American society has evolved. The constitution is a living one, indeed!

The risk of precision in drafting is that the constitutional Bill of Rights becomes an elaborate blueprint that may, because of its very length and detail, be ignored in day by day operation, or lend itself to selective interpretation in which some provisions are overlooked; and that it may eventually fall under its own weight. If, however, some greater precision than the American model is desired, then some special cultural facts in Canadian federalism need attention since they may require a different solution to problem situations than has emerged under judicial interpretation of the lapidarian phrases of the American Bill. Freedom of speech has never been regarded as completely unqualified even in an American context, it being recognised by the U.S. Supreme Court, very early[40], that certain categories of speech rank very low in the American hierarchy of values[41]. There is, however, as yet

[39]Abbott J., though denying the existence of any national power to "abrogate" these particular rights, would apparently concede a national power to "limit" them, 7 D.L.R. 2d. 337, 371 (1957).

[40]Recognition of the necessary qualification, in a democratic society, of any absolutist claims to user of free speech, is, of course, behind Holmes J's classic enunciation of the "clear and present danger" test's limitation of the First Amendment's Free Speech guarantee. *Schenck* v. *United States,* 249 U.S. 47, 52 (1919).

[41]See, most recently, *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940); *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942); *Kunz v. New York,* 340 U.S. 290 (1951); *Feiner* v. *New York,* 340 U.S. 315 (1951).

a certain tinge of absolutism in the Canadian judicial opinions, as they have emerged case by case: in particular, there may be insufficient judicial recognition of the fact that, in a bicultural country, what seems to one section to be a legitimate exercise of long-recognised rights of political discussion[42] may, to another section, with perfect consistency, seem to be an ill-mannered, and deliberately provocative attack on long-accepted local traditions and practices[43]. I do not pretend that there is any easy road to solution of this type of problem-situation: the answer sensibly, I believe, should be sought only in the concrete fact-settings of individual cases[44]. Here, examination of techniques and procedures actually employed by legislative or executive authority to implement particular values in particular contexts may yield an answer that alternative, more moderate, controls could have been availed of to achieve the same end-result[45]. Thus consideration of *means* used may shape and condition approval of *ends* sought to be attained. Emphasis, in pragmatist fashion, on technique or method thus liberates one from the dilemma of choice, (especially complex and difficult in a culturally plural society), among competing ultimate values[46]. But this is something — I mean this delicate business of balancing

[42]In effect, the majority position on the Canadian Supreme Court in *Saumur* v. *Quebec,* [1953] 4 D.L.R. 641.

[43]Compare Rinfret C.J.C. (dissenting), in *Saumur* v. *Quebec,* [1953] 4 D.L.R. 641, 659: "Who would dare to claim that pamphlets containing the preceding declarations, distributed in a city like Quebec, would not constitute a practice inconsistent with the peace and safety of the city or Province? What Court would condemn a municipal council for preventing the circulation of such statements? And I have chosen but a few passages from the books and tracts which are swarming with such affirmations. Besides, decency would command me not to cite any more of them. And that does not appear to me necessary to demonstrate that a municipality whose population is 90% Catholic not only has the right but the duty to prevent the dissemination of such infamies."

[44]I regret, in this context, the as yet rather inadequate attention given by the Canadian Supreme Court to the devising of new and more efficient techniques of fact-finding in constitutional cases. Note the court's summary rejection, (without supporting argument), of counsel's ambitious attempt, in the Saumur case, to introduce the American technique of adducing of factual evidence to the court through the Brandeis Brief.

See per Kerwin J., (concurring), *Saumur* v. *Quebec* [1953] 4 D.L.R. 641, 666.

[45]Compare Freund, *On Understanding the Supreme Court* 27 (1951); Frankfurter J., (concurring), *Dennis* v. *United States,* 341 U.S. 494, 539 (1951).

[46]Thus, I suggest, both the Saumur case and Padlock case (*Switzman* v. *Elbling*) clearly manifest, on examination of their actual fact-situations, a gross disproportion between the *ends* sought to be obtained by Quebec executive-legislative authority (in general, the protection of the Catholic Church and Catholic values against insulting or abusive attack) and the *techniques* used by Quebec executive-legislative authority to attain those ends (blanket or absolute prohibition, unredeemed by the establishment of any administrative standards moderating or otherwise controlling actual executive prohibitions). Whether or not, as a question of ultimate values of Canadian federalism, the Catholic church in Quebec should be entitled, in view of the particular

competing interests and scrutinising executive-legislative techniques — that requires the making of an ally of time[47]. The best solution can clearly only be reached through the trial-and-error experimentation of case by case elaboration. The Canadian Supreme Court is especially well equipped for this task, its record over the past decade since the final abolition of the appeal from Canadian courts to the Privy Council showing an increasing self-confidence and expertise and flexibility in the difficult business of handling public law materials. I do not, in any case, think that everything can be left to the parliamentary draftsman: apart from the risks of a *premature* solution to value-conflicts that would jell the status quo, the parliamentary draftsman cannot, without establishing something that is really an elaborate Code rather than a section of a constitution, foresee all possible proliferations of executive-legislative technique. My recommendation, then, to the Minister of Justice, in the area of political and civil rights, is to draft generally after the American fashion and leave it to the judiciary to fill in the gaps in the future and to make the necessary continuing adjustments, reconciliations, harmonising, and synthesis of competing societal interests.

The remaining question is — going beyond political and civil rights — what notice, if any, the proposed Canadian Bill of Rights should take of the onset of the Welfare State and the general acceptance, in all main politieal parties of the Western World, of principles of social utility. Two constitutions which the Canadian draftsmen should undoubtedly study in this regard are the Irish Constitution of 1937 and the Republican Indian Constitution of 1949. One may hope, of course, that any such recourse to comparative constitutional law will not be a mere exercise in scissors-and-paste eclectisism[48] but will

facts of Canadian history, to some form of special Provincial protection against certain types of attack, — an issue, perhaps, too important to be decided in a single case — the Province on this view can have no licence as to modes of protection it may employ.

Somewhat analogous to this more modest, fact-oriented, approach to decision-making, in intent if not in actual form, is Kerwin J's "statutory construction" emphasis in his crucial, tie-breaking, opinion in the Saumur case, [1953] 4 D.L.R. 641, 661.

[47]I am referring, here, to the dangers of making the first case that comes along, in years, in a particular area, the occasion for a thundering enunciation of broad policy principles: thus the United States Supreme Court's decision in the Steel case has rightly been censured as one where a court has rushed in too quickly and suffered for its pains because of the absolutism, and lack of qualification for the future, in the majority judicial opinions filed in the case. *Youngstown Sheet and Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952). See, for example, Pritchett, *Civil Liberties and the Vinson Court* 249 (1954); Freund, (Book Review), 29 N.Y.U.L. Rev. 1164 (1954); Freund, The Year of the Steel Case, 66 Harv. L. Rev. 89 (1952).

[48]Thus the idea of having in the constitution Directive Principes of Policy, which are to be of a Fundamental Rights-character but which are, however, non-justiciable, seems to have been arrived at, in the case of the Irish Constitution of 1937 and later the Indian Constitution of 1949, as just such an exercise in mechanical eclecticism. The Irish constitution-makers borrowed the idea from the Spanish (Republican)

proceed upon systematic study of background societal conditions in the countries concerned, and on examination of the extent to which the positive law of the constitution in those countries is a response to those special conditions which may or may not be reproduced in full measure in Canada.

Ireland's constitution, as that of a Catholic polity, deserves special attention in Canada of course in view of the Catholic affiliations of so many Canadians. The Irish constitution gives special place, in its Bill of Rights, to the position of the family[49], and, in a Catholic setting (reflecting much of Maritain's inspired teachings)[50], to the rights of labour in modern society[51]. It is only necessary to add, here, that these provisions of the Irish constitution have been but rarely invoked in practice, even the judiciary seeming to prefer to have recourse to other, non-Catholic, sections of the Constitution in the arriving at decisions whose actual end results would be equally capable of justification, in terms of legal doctrine, under the essentially Catholic sections[52].

In attempting any listing of social and economic rights, due regard should be given to the fact that community attitudes change most quickly here as knowledge of the technical facts of social and economic organization improve. As already noted, there is a risk, in attempting too concrete an enumeration of social and economic rights, as with the enumeration of any other rights, of simply perpetuating the *status quo* of socio-economic organisation with all the risks that that involves in a society that is still growing economically, and, furthermore, a *status quo* that may be, in fact, already dated in view of basic changes in economic thinking over a period of years. One has only to examine

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constitution of 1931, the Indian constitution-makers in turn from the Irish constitution.

In practice, in the case of both countries, the Directive Principles seem to have been highly amorphous — Jennings called the Indian Directive Principles "Fabian socialism without the socialism", Jennings, *Some Characteristics of the Indian Constitution* 31 (1953) — and the judiciary have shown an extreme disinclination to rely on them in their decisions. For a somewhat more optimistic appraisal of their utility than that advanced by Jennings, see, however, Alexandrowicz, *Constitutional Developments in India* 103-7 (1957); and see also Gledhill, *Fundamental Rights in India* (1955); Aiyar, *The Constitution and Fundamental Rights* (1955).

[49]Republic of Ireland, Constitution, Art. 41, (The Family).

[50]For Maritan's most recent writings in this area, see, for example *True Humanism* 156 et seq. (6th ed., 1954); *The Rights of Man and Natural Law* 50-60 (1944); *Christianity and Democracy* (1945).

[51]Republic of Ireland, Constitution, Art. 40, (Personal Rights, including the "right of association" [Art. 40 (6) 1]).

[52]See, especially, In the matter of Tilson, Infants, [1951] Ir. R. 1, and also the discussion, The Courts and the Constitution in Catholic Ireland, in McWhinney, *Judicial Review in the English-Speaking World* 152-169 (1956); Delany, The Constitution of Ireland: Its Origins and development, 12 U. of Toronto L.J. 1 (1957); Donaldson, *Some Comparative Aspects of Irish Law* 154-180 (1957).

the widespread changes in thinking among all major political parties in the last decade or so to appreciate this truth[53].

On the whole, then, if we are to have an enumeration of social and economic rights, I think we should make sure that, as recommended with political and civil rights, they be drafted generally and not focus too much on detail and thereby confuse transient community emphasis on techniques for achieving ultimate values with those values themselves. The better way may well be not to have an enumeration of socio-economic rights at all. Whatever the academic invalidity of the various judicial attempts at demonstration that, historically, the "Open Society" guarantees were intended to occupy a "preferred position" under the U.S. Constitution[54], the fact remains that for most purposes they are more than enough to ensure maintenance of a democratic polity. So long as the basic political processes remain free and unobstructed[55], every political opinion may have its day[56] and the business of community pro-

[53]For example, the evolution in official socialist doctrine, (as associated particularly with the British Labour Party), is most striking in the years between first publication of the *Fabian Essays* in 1889 and the sobering responsibilities of having to maintain a government in the difficult reconstruction years from 1945 to 1951: nationalisation of the means of production, distribution, and exchange, for so long regarded as an end in itself, is now seen as only a possible technique not always satisfactory in itself and even then only one technique among a number of techniques — of achieving ends of social welfare. See, for example, *New Fabian Essays* (Crossman, ed., 1952).

The evolution of right-wing, conservative, political thinking from an erstwhile rigid and unyielding faith in undiluted *laissez-faire* and uncontrolled "free entreprise" to Mr. R.A. B. Butler's "Tory Democracy" in the case of the United Kingdom, and the Dewey-Eisenhower "Modern Republicanism" in the case of the United States, is much better known, by comparison.

[54]As to the "preferred position" of the First Amendment guarantees under the United States Constitution, see Black J's dissent in *Dennis* v. *United States,* 341 U.S. 494, 580-1 (1951). And compare the severe strictures by Frankfurter J. in *Kovacs* v. *Cooper,* 336 U.S. 77, 90 et seq. (1949); and also in *Dennis* v. *United States,* 341 U.S. 494, 526 (1951).

[55]Compare *United States* v. *Carolene Products Co.* 304 U.S. 144, 152, — Stone J. for Court.

[56]We should, of course, recognise that the dividing line between political rights of the "Open Society"-type and socio-economic rights may occasionally become blurred or confused. The fatal equation made by the U.S. Supreme Court majorities, in the period between the Civil War and the mid-1930's, of political rights (the 5th and 14th Amendments to the constitution's guarantee of "Due Process of Law") and the interests of corporate entreprise in being free from governmental regulation of any kind — the so-called "Substantive Due Process" — is so notorious that every country drafting a constitution since that time has been at pains to avoid having, in terms, a "Due Process" clause. Mendelson, Foreign Reactions to American Experience with 'Due Process of Law', 41 Va. L. Rev. 493 (1955); Frankfurter, *Of Law and Men* 22 (Elman ed., 1956).

gress through experimentation and trial-and-error may go on unimpeded[57].

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The author draws attention to the fact that this work was completed for purposes of publication in early July, and that subsequently on September 5, 1958, the Prime Minister introduced into the House of Commons for first reading, a bill entitled:

BILL C-60

An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms.

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

PART I
Bill of Rights

1. This Part may be cited as the Canadian Bill of Rights.

2. It is hereby recognized and declared that in Canada there have always existed and shall continue to exist the following human rights and fundamental freedoms, namely,

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
(b) the right of the individual to protection of the law without discrimination by reason of race, national origin, colour, religion or sex;
(c) freedom of religion;
(d) freedom of speech;
(e) freedom of assembly and association; and
(f) freedom of the press.

3. All the Acts of the Parliament of Canada enacted before or after the commencement of this Part, all orders, rules and regulations thereunder, and all laws in force in Canada or in any part of Canada at the commencement of this Part that are subject to be repealed, abolished or altered by the Parliament of Canada, shall be so construed and applied as not to abrogate, abridge

[57]In this regard, the Federal Constitutional Court (Bundesverfassungsgericht) of West Germany has, profiting from the past mistakes of Supreme Courts in other countries, refused to spell out from the general provisions of the West German constitution of 1949 either a constitutional guarantee of governmental non-intervention in the economy or a guarantee of the principles of the "social market" economy.

"Das Grundgesetz garantiert weder die wirtschaftspolitishe Neutralität der Regierungs- und Gesetzgebungsgewalt noch eine nur mit marktkonformen Mitteln zu steuernde "soziale Marktwirtschaft"." (Decision of July 20, 1954. 4 B Verf GE 7, 17 (1954)). And as to this, see Nipperdey, *Die soziale Marktwirtschaft in der Verfassung der Bundesrepublik* (1954); Cole, The West German Federal Constitutional Court: An Evaluation After Six Years, 20 J. Politics 278, 301 (1958).

or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms recognized by this Part, and, without limiting the generality of the foregoing, no such Act, order, rule, regulation or law shall be construed or applied so as to

(a) impose or authorize the imposition of torture, or cruel, inhuman or degrading treatment or punishment;

(b) deprive a person who has been arrested or detained

(i) of the right to be informed promptly of the reason for his arrest or detention,

(ii) of the right to retain and instruct counsel without delay, or

(iii) of the remedy by way of habeas corpus for the determination of the validity of his detention and for his release if the detention is not lawful;

(c) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel or other constitutional safeguards;

(d) deprive a person of the right to a fair hearing in accordance with the principales of fundamental justice for the determination of his rights and obligations; or

(e) deprive a person of the right to a fair and public hearing by an independent and impartial tribunal for the determination of any criminal charge against him.

4. The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the Regulations Act and every Bill introduced in the House of Commons, to ensure that the purposes and provisions of this Part in relation thereto are fully carried out.

PART II

5. Nothing in Part I shall be construed to abrogate or abridge any human right or fundamental freedom not enumerated therein that may that existed in Canada at the commencement of this Act.

6. Section 6 of the War Measures Act is repealed and the following substituted therefor:

"6. (1) Sections 3, 4 and 5 shall come into force only upon the issue of a proclamation of the Governor in Council declaring that war, invasion or insurrection, real or apprehended, exists.

(2) A proclamation declaring that war, invasion or insurrection, real or apprehended, exists shall be laid before Parliament forthwith after its issue, or, if Parliament is then not sitting, within the first fifteen days next thereafter that Parliament is sitting.

(3) Where a proclamation has been laid before Parliament pursuant to subsection (2), a notice of motion in either House signed by ten members thereof and made in accordance with the rules of that House within ten days of the day the proclamation was laid before Parliament, praying that the proclamation be revoked, shall be debated in that House at the first convenient opportunity within the four sitting days next after the day the motion in that House was made.

(4) If both Houses of Parliament resolve that the proclamation be revoked, it shall cease to have effect, and sections 3, 4 and 5 shall cease to be in force until those sections are again brought into force by a further proclamation but without prejudice to the previous operation of those sections or anything duly done or suffered thereunder or any offence committed or any penalty or forfeiture or punishment incurred.

(5) Any act or thing done or authorized or any order or regulation made under the authority of this Act, shall be deemed not to be an abrogation, abridgement or infringement of any right or freedom recognized by the Canadian Bill of Rights."