CIVIL LIBERTIES IN THE CANADIAN FEDERATION*

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In the never-ending dialogue of tension between man and the state the most convenient argument against any encroachment of authority on the preserves of the individual is the rallying cry of "liberty", accompanied by the qualifying adjectives "fundamental", "traditional", or "civil". A brief look at the contemporary scene will provide abundant illustration.

Take, for example, the arguments of those who favour a voluntary system of health insurance instead of the universal (or in effect compulsory) plan which has been proposed by the federal government on the model of the Hall and Saskatchewan plans. The most outspoken opponent of the federal proposals, Premier Manning of Alberta, said of it in a radio address which is now being distributed in the thousands by medical associations:

> It is a compulsory program in which participation is compelled by the state and not left to the voluntary choice of the citizen himself. This feature of the plan violates a fundamental principle of a free society, namely, the right of each citizen to exercise freedom of choice in matters relating to his own and his family's welfare.[1]

There are, of course, other arguments which Premier Manning and some members of the medical profession use against the federal Medicare proposals—arguments such as the cost to the government and the feared lowering of the quality of medical care —but in their own view it is the argument based on fundamental rights or liberties which is the decisive one. I am not here concerned with the rightness or wrongness of the Manning position, but only with the status of the argument from civil liberties.

Consider another example, the legislation proposed by Finance Minister Walter Gordon last spring and passed by the Canadian Parliament in June to protect Canadian magazines and newspapers from foreign domination.[2] This legislation denies

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1 Quoted by Peter McLintock, "Medicare: the 50-50 Cost Magnet Draws the Provinces," Toronto *Globe & Mail*, February 4, 1966, p. 7.

2 (1965), 14 Eliz. II, c. 18, s. 4 (Can.), adding s. 12A to the Income Tax Act.

advertisers the right to deduct as an ordinary expense of business for income tax purposes money spent for advertising in publications that are not owned and directed and published by Canadians, or that are held by corporations in which less than 75% of the voting stock is owned by Canadians. Further, publications published in a foreign country with a special edition aimed at the Canadian market, or any publication in which more than 5% of the advertising is directed specifically at the Canadian market will be excluded from the country by customs officers. Arguments of various kinds were advanced against this legislation. It was contended that it would be impossible for the government to determine who really controls the holding companies that control blocks of shares in Canadian publications and for customs officials to decide which foreign publications have too much Canadian advertising to be admitted. It was also said that there was serious danger of retaliatory measures in the United States and in Great Britain. But the key argument against the legislation in every case was that it was censorship infringing on the liberty of the press and on the right of Canadians to read what they choose. An article in the Winnipeg Free Press in June compared Mr. Gordon to King George III ("He taxed advertising"), Adolf Hitler ("He jailed editors"), Josef Stalin ("He made the press a Government mouthpiece"), and Fidel Castro ("He exiled editors").[3] Censorship of advertising, it was maintained, is the same as censorship of editorial and news matter, for it interferes with the right of people to inform themselves (of what products exist so that they may decide for themselves how to spend their money). In brief the legislation was held to interfere with the citizen's right to know and the newspaper's right to publish.

Two further examples may be borrowed from the United States. Along with some of his greater concerns President Johnson is this winter attempting to have Congress repeal section 14(b) of the Taft-Hartley Act, which allows states to pass "right-to-work" laws. (Nineteen states have passed such laws outlawing the union shop, which as you know compels all employees, not to belong to a union, but to pay union dues.) Senator Dirksen, opposing the repeal of the section, and much of the U.S. press regard this as a great civil liberties issue, viz. the right of people to work "without paying tribute" to unions, and the right of the states to give them that protection.

The other American instance to which I would draw your attention is the famous—or infamous—Proposition 14, the amend-

3 "Press Control Has a Long History", *Winnipeg Free Press*, June 19, 1965, p. 13.

ment to the constitution of California which was approved by the voters of that state in the 1964 election. The amendment reads as follows:

> Neither the state nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property to such person or persons as he, in his absolute discretion, chooses.

The operative concept in this amendment is the so-called "freedom to sell". The analogous concept "the freedom to do business" has frequently been used to defeat open-housing legislation in various parts of the United States, and arguments over these measures have raged principally around the abstract question of fundamental freedom.

When so much emphasis is placed in current controversy on civil libertarian arguments, it is obvious that the dry question of classification of liberties into those which are genuinely classed as such and those which are not is of considerable importance, if only to dispel attendant myths and emotions. The four examples I have presented are instances in which I do not believe genuine civil libertarian values are being defended. Let me try to explain why I take this position.

One of the most widely accepted classifications of civil liberties in Canada is that of Professor (now Mr. Justice) Laskin, who proposed a fourfold division into political, legal, egalitarian, and economic liberties.[4] Political civil liberty is associated with the operation of parliament in a democratic state and comprises freedom of conscience and religion, freedom of speech, freedom of assembly, freedom of association, and freedom of the press and of dissemination of ideas generally. Legal civil liberty concerns the justice of the legal order, and includes freedom from arbitrary arrest, and from arbitrary search and seizure of person, premises and papers, the protection of impartial adjudication, involving notice and fair hearing, an independent judiciary and the right to counsel, and the privilege against compulsory self-incrimination. Egalitarian civil liberty has to do with human rights, and embraces access to public places and to employment without discrimination based on colour, creed or ethnic origin. Finally, economic civil liberty protects economic rights from undue state regulation and intervention. The alternate formulation by Dean Frank Scott[5] would supplement the last group of economic liberties by the addi-

4 "An Inquiry into the Diefenbaker Bill of Rights" (1959), 37 Can. Bar Rev. 77, at pp. 80-82.

5 *Civil Liberties and Canadian Federalism* (Toronto, 1959), at pp. 28-30.

tion of cultural rights, and would add a distinct class of minority rights, which, as he points out, "rank ahead of nearly all other rights in the minds of most people in Quebec."[6]

With all due respect to these two great civil libertarians, I would disagree with both of them, taking the position that they have cast their nets too wide. I would eliminate economic, cultural, and minority rights from their classifications and retain only political, legal and egalitarian civil liberties.

In my opinion the concept "civil liberties" should be reserved for those liberties which (1) are wholly negative in their scope and (2) relate directly to the human person. This position introduces the two concepts of "negative" and personal".

We usually think of ourselves as being free to the extent that no one interferes with our activity, to the extent that we can do what we want. This is a negative, laissez-faire, let-me-alone kind of freedom. Negative freedom is therefore the power to do what you want, the freedom not to be coerced or constrained by others. It is potential freedom, freedom *from* (freedom from interference), freedom of choice. It is contrasted with what we may call positive freedom, the liberty not just to avoid being pushed around by outside forces but actually to control those forces, to be *maîtres chez nous,* as our Quebec friends have it. In individual terms positive freedom will mean the determination to be masters of ourselves; in social terms it will mean the determination to possess the social and economic means to achieve what we want to do. Negative freedom is the jungle impulse of everyone-for-himself; postive freedom is the civilizing impulse of let's-do-it together.

It is obvious from my description that I regard positive freedom as in many respects superior to negative freedom; indeed we may say, philosophically speaking, that it is the end or reason for which negative freedom exists, or that it is related to it as the actual to the potential. Yet it is negative and not positive freedom that I am positing as a measure of the proper sphere of civil liberties. I shall explore the reason for this in a moment. But the area of civil liberties cannot simply be identical with negative freedom or there would be no authority and no law at all, for every law is an infringement of negative freedom. It is therefore only those negative freedoms which relate to the person which constitute civil liberties—those liberties which in the Laskin classification are designated as political, legal, and egalitarian. Thus in the concept properly understood we see the coalescence of the two requirements of "negative" and "personal".

6 *Ibid.*, at p. 29.

Now it may appear that these criteria have been chosen arbitrarily and that other criteria would do just as well. It must be admitted that there is an important element of selection and choice in the decision as to what liberties shall be classified as "civil". A dictionary is of little help in such a technical matter as this, and in any case I take it that the issue is more than just a question of semantics. What it is that we essentially have to decide is which liberties must be given pride of place; which liberties, in other words, are the most fundamental for democracy? Those which we decide are the more essential will be called "civil liberties", those which are less essential or merely beneficial will be described otherwise.

The proposition that democracy demands a limited government, one restrained by a deep respect for the civil liberties of individuals and minorities, is so manifest as to be in little need of defence. A wise philosopher of democracy, Sir Ernest Barker, has put it this way:

> [D]emocracy rests on . . . discussion—discussion of competing ideas, leading to a compromise in which all the ideas are reconciled and which can be accepted by all because it bears the imprint of all.[7]
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> The acceptance of these axioms is an inherent condition of any system of government by discussion. . . .
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> The first of the axioms which have to be accepted we may call by the name of Agreement to Differ.
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> The second of the axioms on which democracy proceeds is that of the Majority Principle.
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> There is a third axiom . . . This is the principle of Compromise. The will of a majority does not prevail when it is merely the formal will of a mathematical majority. It prevails when it has been attained in a spirit, and when it has thus attained a content or substance, which does justice to the whole of the community and satisfies its general and universal character.[8]

Democracy is not to be simply identified with the rule of the majority; but, if it is to be differentiated from tyranny, it must be characterized by a protectiveness towards dissenting individuals and groups.

Presumably we can all agree on this starting point. But the difficult question is which liberties of dissenters should be given a privileged status and how should this special status be justified? On the question of rational justification disagreement is to be expected, since the shape of the ratiocination depends on the

7 *Reflections on Government* (Oxford, 1942), at p. 36.

8 *Ibid.*, at pp. 63-68.

ideology of the ratiocinator, and many different ideological approaches to democracy are perenially present. My own preference would be for an argument based on the existential fact of man as a person, endowed with inalienable freedoms, rights and duties which flow directly from a nature characterized by intelligence and the faculty of free choice.

But perhaps if we cannot all agree on the causes, we can at least agree on the effects. The opening statement of American Declaration of Independence in 1776 asserts the existence of certain self-evident truths—"that all men are created equal, that they are endowed . . . with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness". Similarly the French "Declaration of the Rights of Man and of Citizen" of 1789 speaks of "the natural, inalienable and sacred Rights of Man". Such rights are by common consent freedom of thought, conscience and religion, freedom of speech and of the press, freedom of assembly and of petition, freedom of association, freedom from arbitrary interference with one's person, freedom from discrimination. It is possible to go on, to list other prized powers, the right to property, the right to free initiative in economic affairs, the right to work, the right to education, the right to culture, but the difference between the two groups is indicated by the fact that this latter group is more correctly given the name of *rights* rather than that of *freedoms* or *liberties*. The former group is composed of freedoms that are not only personal but also negative. The latter group is composed of freedoms that are either not personal but involve the possession of property or, if personal, are not negative, and require, not the removing of a barrier by the State but the providing of a service.

It is possible to defend the preferred status of the first group of freedoms from many viewpoints. To the extent that the priority reflects a distinction between spiritual goods and material ones it can be argued that spiritual goods appeal to man at his most truly human level, at the level at which he rises above the other beings in the universe. It can be argued that governmental control is more directly necessary with respect to material goods and that the "hands-off" status of non-material goods is thereby assured: for material goods like coal and lumber (or whatever form of property you care to enumerate, even so-called intangible personal property) are limited in amount, are not capable of satisfying to the fullest imaginable extent the present wants of the three billion people on the planet, and are limited in total reserves. Hence we need rules of behaviour such as the laws of contract, of property,

of labour, and of monopoly to regulate production, exchange and consumption. This is precisely the area in which law is most necessary; it is an area not of liberty, but of regulation.

Moreover, quite apart from the distinctive exigencies of materiality, the first group of freedoms have a prior relationship of necessity to the democratic process itself. Thus, in the *Alberta Press* case Duff C.J.C. was moved to comment: "There can be no controversy that such institutions [a parliament working under the influence of public opinion and public discussion] derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals."[9] And Cannon J. in the same case added: "Freedom of discussion is essential to enlighten public opinion in a democratic State; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the government concerning matters of public interest. There must be an untrammelled publication of the news and political opinions of the political parties contending for ascendancy. . . . Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State within the limits set by the criminal code and the common law."[10] And our greatest judicial civil libertarian, a native son of this province, Rand J. declared in the *Boucher* case: "Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life."[11] My examples have illustrated the fundamental necessity of the so-called political freedoms rather than the others, but in the *Saumur* case Rand J. placed the political and the legal rights of the person on the same level: "[F]reedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order."[12] I must concede that the egalitarian freedoms, essentially the freedom not to be discriminated against, are on a slightly lower level, though still deserving of the preferred status of civil liberties: for as the United States Supreme Court recognized in the famous desegregation case, *Brown v. Board of Education*,[13] discrimination

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

10 *Ibid.*, at pp. 145-146.

11 *Boucher v. The King*, [1951] S.C.R. 265, at p. 288.

12 *Saumur v. Quebec and A.-G. Que.*, [1953] 2 S.C.R. 299, at p. 329.

13 (1954), 347 U.S. 483.

based on natural facts like race and language or on fundamental personal choices like religion can destroy psychologically the very soul of a man, as well as demean the psyche of the perpetrator.

In summary, then, it is in my view crucial to distinguish between civil liberties and economic and social policies, for otherwise we shall make the realm of civil liberties co-extensive with the whole of the law, and so frustrate the fundamental purpose of conceptualizing and distinguishing civil liberties. The domain of civil liberties is a limited one, but of the first importance for the law, because it is the area of the most cherished, the most "sacred", values, and its criteria are the two attributes of negative liberty and personal liberty.

Instances of infringement of civil liberties as thus defined come readily to mind. The Alberta Press Bill which required newspapers in that province to publish official statements about government policy and to make full disclosure of all sources of information for any other statement published, both under penalty of total prohibition of publication, was incompatible with political liberties even though it did not directly attempt to prevent discussion of public affairs in the press, and it was so found by the Supreme Court of Canada in 1938.[14] Similarly the Quebec "Padlock Law" which allowed the Attorney General of the Province to close any building used for the propagation of Communism or bolshevism was justly struck down in 1957.[15]

With regard to legal freedoms, we can turn for illustration of potential interference to the abortive Ontario Bill 99 of 1964, the infamous Police Bill.[16] This Bill might have made it possible for a man to be pulled in off the streets by the police, brought before the Police Commission in secrecy, and in the event of refusal to answer the questions put by the Commission, to be thrown into jail indefinitely for eight-day stretches, and to be forbidden by law to communicate with anyone, even his own counsel. This is not the place to indulge in psycho-analysis of the proposers of the Bill, but whatever the reasons for its introduction it was speedily withdrawn in the face of outraged cries from the legislative opposition and the press.

For an example of racial discrimination we need look no farther than the neighbouring province of Nova Scotia, where some 12,000 Negroes, the largest coloured population in Canada, live.

14 *Reference re Alberta Statutes,* [1938] S.C.R. 100.

15 *Switzman v. Elbling and Attorney-General of Quebec,* [1957] S.C.R. 285.

16 See MacGuigan, "Press, not Lawyers, Saved Liberty," The Commentator, July-August 1964, p. 12.

In a brief presented last December 9 to the Federal-Provincial Conference on poverty the Nova Scotia Association for the Advancement of Coloured People maintained that racial prejudice and discrimination are at least partly to blame for the poverty of the Negro community in the province.[17] The brief proposed four projects providing new facilities for education, counselling, and health and welfare. On the view I take of civil liberties such proposals do not come within the domain of civil liberties but rather within the area of general socal policy. Nevertheless, erosions of egalitarian freedoms illustrate that positive legislation (e.g., a postive legislative act to forbid racial discrimination) may sometimes be necessary even to guarantee essentially negative rights. Indeed there has for some time been a Human Rights Act in Nova Scotia which provides for a fine of up to $500 for refusal to accommodate or serve anyone by reason of race or colour.[18] Such legislation is not only praiseworthy but a genuine protection of an important civil liberty; the only criticism of it has been with respect to its enforcement, which has been said to be so lax that Negroes have been discouraged even from complaining against offenders.

The "privileged position" view of civil liberties refutes the libertarian status of the arguments in the two Canadian and two American examples with which I began, for these arguments rest on the recognition of economic liberties as fundamental human liberties. As Finance Minister Gordon put it in the debate on his newspaper legislation: "The proposal interferes with one freedom and one freedom only. It means that a Canadian publisher wanting to sell his newspaper will have to accept the best bid he can get from other Canadians. . . ."[19] In my view this freedom is not a basic human right.

I want, however, to make it clear that I am not arguing that the Hon. Mr. Gordon's legislation is beyond question; indeed the cogency of many of the arguments against it is very great. I am confining myself to the question of the grounds on which the attack may be made, and am arguing only that an attack from a civil liberties viewpoint is a mistaken one. The encounter must be fought out on a social and political battleground, not on a libertarian one.

I should add that I do not take the simplistic view that the mere categorizing of a liberty as civil puts an end to all problems. There may well be conflicts, for example, between two validly

17 Toronto *Globe & Mail,* December 10, 1965, p. 10.

18 (1963), 12 Eliz. II, c. 5, s. 16 (N.S.).

19 Debates, House of Commons, Canada, June 14, 1965, p. 2387.

recognized civil liberties. The most subtle point of contention between the litigants in recent American school prayer cases has been two versions of freedom of religion: on the one hand, it has been argued that the free religious exercise of the minority is interfered with by school prayer, and on the other hand it has been contended that the majority's freedom of religion is infringed by forbidding school prayer. Such conflicts are unavoidable, and I avoid them here only because they are a side issue to my main theme.

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Now this has perhaps seemed like an overlong prologue to the main subject of my address, "Civil Liberties in the Canadian Federation", but on reflection I hope it will appear that we have been discussing the main subject all along. For if "civil liberties" is a narrowly defined concept and a highly preferred domain of values, the stage is certainly set for a particular view of civil liberties in a federal state. I should probably call this view a "national" one if it were not for the double meaning of that word which has caused so much misunderstanding in recent constitutional discourse. The word "federal" is another that might be used to describe the point of view I have taken, but it too is subject to certain differences of interpretation, depending on whether it is being used as the contrary of "provincial" or as the opposite of "unitary". Besides, I want to stress the relationship of civil liberties not so much to government, be it provincial or federal, as to the basic human interests of the Canadian people themselves, wherever they may be. I therefore propose to describe this approach as pan-Canadian.

The pan-Canadian view is necessitated by the conceptualization I have developed for civil liberties. If civil liberties means the reflective and communicative liberties of the citizen which are necessary for the preservation of the democratic system, then it is not something which can be permitted to flourish only interstitially in our country, or to exist in nine provinces while being curtailed in the tenth. If civil liberties includes the freedom of the subject from arbitrary arrest and detention, we cannot believe that we are really free from oppressive authoritarianism while anywhere in the land men remain unjustly in custody. If civil liberties embraces the freedom from discrimination, we cannot rest while fellow men in any province continue to be subject to slings, arrows, outrages, and misfortunes.

You will recall that I was careful to exclude minority rights as a distinct class from my conception of civil liberties—that is,

minority rights in the sense of language or education rights, though they might indeed be included in another way, at least to the extent that they were threatened with legal extinction. There is therefore nothing in the concept of civil liberties which might be of exclusive concern to the government or people of only one province. There is nothing provincial about civil liberties; they are pan-Canadian in every sense. In my view there can be no leeway here for the expression of regional morality or for regional social experimentation which might cut into civil liberties. In general such regionalism is a healthy consequence of federalism, but civil liberties are too vital for trenching to be desirable in the event of conflict.

Now I have, of course, been talking about the ideal, without reference to the Canadian Constitution, which may prove to be a stumbling block to a pan-Canadian view of civil liberties. The first thing to observe, I believe, in turning to the Constitution is the generality of its language and the immensity of the judicial discretion. One need not go so far as the celebrated Bishop Hoadly ("Nay, whoever hath an *absolute authority* to *interpret* any written or spoken laws, it is *He* who is truly the Law Giver to all intents and purposes, and not the Person who first wrote and spoke them")[20] to recognize the generous area of judicial choice in the constitutional field, where the text is too general to be of significant help and recourse to legislative intention is forbidden.

In his little book on civil liberties Dean Scott describes the two ways in which, as a result of this wide judicial discretion, judges may in their interpretations lean to the side of liberty:

> First, there is the established rule that all statutes should be strictly interpreted if they limit or reduce the rights of the citizen. Parliament must always be presumed to have intended the least interference with our freedom, not the most. Hence if two views of what a statute means are possible, that one will be preferred which leaves the larger area to the individual. . . .
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> Secondly, the courts must say of any challenged statute whether or not it is within the powers of the enacting legislature. This judgment is a very complicated and difficult one, requiring a nice balance of legal skill, respect for established rules, and plain common sense. Law and statesmanship are inextricably intermingled in the interpretation of constitutions.[21]

With this advice in mind, let us look to the British North America Act to see where jurisdiction over civil liberties might come.

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20 See MacGuigan, *Jurisprudence: Readings and Cases* (Toronto, 1966), p. 162.

21 *Civil Liberties and Canadian Federalism* (Toronto, 1959), p. 26.

The principal provincial power under which jurisdiction over civil liberties could be claimed is the power to legislate in relation to "property and civil rights in the province". The term "civil rights" is, of course, used interchangeably in the United States with the term "civil liberties", but that is not in itself a warrant for treating the phrases as synonyms in Canada. The phrase "property and civil rights" was not used for the first time in the British North America Act, but appeared first a century earlier in the Quebec Act, where it seems clearly to have been governed by the word "property", and at most to extend property rights to include all private laws, i.e., laws relating to dealings between subjects rather than between subject and state. Generally speaking, the broadest interpretation the courts have given the phrase is the regulation of economic activity within the province.[22]

The federal heads of power under which civil liberties jurisdiction might be supported are either the federal residual power (over matters not specifically assigned to any government) or under the criminal law power, or both. However, in order to discuss the problem of constitutional jurisdiction more precisely it would be necessary to examine in some detail the question of jurisdiction with respect to each group of civil liberties. I propose to do this only in summary form. The civil liberties cases I have already referred to had to do with political liberties, and here the consensus of students of the Supreme Court is that jurisdiction over this area has been implicitly assigned to the federal power, though a majority of the court has never so declared in explicit terms.

Thus, federal jurisdiction was asserted by the Supreme Court of Canada in the *Alberta Press* case.[23] Similarly, the court, in striking down a Quebec statute which allowed municipalities to require stores to close on Catholic holy days in the *Birks* case,[24] laid down a rule that laws affecting religious observance belong exclusively within the field of criminal law. Again, in the *Padlock Law* case[25] the court held that the subject matter of that law came within the criminal law power. Such cases seem to establish indirectly that jurisdiction over political liberties is an aspect of the power of the federal Parliament over criminal law.

The possibility is still also open that authority to infringe on fundamental liberties is denied to both federal and provincial parliaments. The Quebec Court of Appeal has rested the right of

22 See Schmeiser, *Civil Liberties in Canada* (Toronto, 1964), pp. 75-78.

23 *Reference re Alberta Statutes,* [1938] S.C.R. 100.

24 *Henry Birks & Sons v. Montreal,* [1955] S.C.R. 799.

25 *Switzman v. Elbling and Attorney-General of Quebec,* [1957] S.C.R. 285.

a Witness of Jehovah to have his children exempted from Catholic religious instruction in school on a natural-law principle of religious freedom,[26] and there have also been dicta by Supreme Court judges in a number of cases, most notably by Mr. Justice Abbott in the *Switzman* case,[27] which might go to support this approach. More likely, however, such a total exclusion of all legislatures from civil liberties would be based upon a kind of common-law natural law, which would find its justification in the words in the preamble of the B.N.A. Act stipulating a constitution similar in principle to the British: using these words as a principle of interpretation, a court would be free to find that the concept of "parliament" implies free speech, a free press, etc. Such an approach finds judicial support at the highest level in the 1938 judgments of Chief Justice Duff[28] and Mr. Justice Cannon[29] in the *Alberta Press* case, where the court held *ultra vires* Alberta legislation interfering with the freedom of the press.

With respect to legal liberties, there is a certain priority in the federal Parliament in the light of the federal power over criminal law, including procedure in criminal matters. Obviously, however, there must also be power in the provinces to legislate in this area, or there could be no administration and enforcement of provincial laws: it may be said that in a certain sense, despite the Constitution, the criminal law power is a concurrent federal and provincial power. In the case of conflict federal law will prevail, but, barring that eventuality there will be room for the operation of provincial jurisdiction as well. Egalitarian liberties have generally been thought of as under provincial control, and almost all the existing legislation in this area is provincial, but there can be little doubt that the federal Parliament could decide to legislate against racial or religious discrimination under the federal criminal law power, and that this legislation would then have paramountcy over any provincial legislation. Laskin points out that a criminal law approach to this problem "would be on a par with the approach reflected in section 367 of the Criminal Code, dealing with discrimination in employment on account of union activity".[30] Provincial legislation in this area, then, depends on the absence of federal legislation, and of course the provinces

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26 *Chabot v. School Commissioners of Lamorandiere* (1957), 12 D.L.R. (2d) 796.

27 [1957] S.C.R. 285, at p. 328.

28 [1938] S.C.R. 100, at pp. 132-135.

29 *Ibid.*, at pp. 142-147.

30 "An Inquiry into the Diefenbaker Bill of Rights" (1959), 37 Can. Bar Rev. 77, 106.

can also go further than the federal Parliament (though in that case no longer acting within the realm of civil liberties as I have defined it) in providing educational and employment opportunities for minorities. If this outline of constitutional jurisdiction can be defended in detail (as I have no doubt that it can), then substantially the whole area of civil liberties as I have defined it is under federal jurisdiction, so that there is no difference between what is ideologically desirable and what is constitutionally possible. The irresistible conclusion, of course, is the need for a bold new federal initiative in the field of civil liberties.

I have left to the last the question of a Bill of Rights, since this is the logical place for federal initiative to focus. We have had a Bill of Rights since 1960,[31] but it is timid in conception and has been largely ignored by the courts in practice. The Bill recognizes and declares a number of freedoms which "have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex",[32] and the courts are ordered to construe and apply every federal statute so as not to abrogate, abridge or infringe any of the rights recognized, unless Parliament expressly declares to the contrary.[33] As I suggested, it has already been reduced to impotence by judicial interpretation, primarily because of the unwillingness of the courts to consider it as a piece of fundamental law to which all other statutes are to be conformed—and considering the fact that it is merely an ordinary statute of the Parliament of Canada and in no way entrenched, there is something to be said for this judicial attitude. The most ingenious bit of judicial nullification of the broader purposes of the statute takes as its point of departure the statement that the enumerated freedoms "have existed and shall continue to exist".[34] That language means, the courts have held, that these freedoms shall continue to exist in the future in the same way in which they have existed in the past; that is, the Bill of Rights has made no change in the existing law, and all rights continue to exist in the same attenuated way as before.

But in the light of the general federal jurisdiction over civil liberties the most serious question to be raised about the present Bill of Rights is its self-imposed limitation in the main body of the Bill to Acts of the Parliament of Canada and orders, rules, or regulations thereunder,[35] thereby excluding from its purview any

31 (1960), 8-9 Eliz. II, c. 44 (Can.).
32 *Ibid.*, s. 1.
33 *Ibid.*, s. 2.
34 *Ibid.*, s. 1.
35 *Ibid.*, s. 5(2).

acts hostile to civil liberties which may happen to emanate from a provincial legislature. This timidity is only partially redeemed by the fact that the fundamental freedoms enumerated in the Bill are not so restricted, but that jurisdiction to all "matters coming within the legislative authority of the Parliament of Canada",[36] but this is merely a declaratory section of the Bill with no provision for striking down offensive legislation. The drafters of the Bill were timid beyond constitutional necessity and beyond the requirements of sound policy. Where full exercise of constitutional power was needed, under-use of existing power was the order of the day.

Now, six years later, the need for a strong federal Bill of Rights is even greater, for in the interval we have witnessed the Quiet Revolution in Quebec with its strong—and sometimes strident—assertion of provincial powers, we have watched the flexing of muscles by a number of provincial premiers, and we have seen the appointment of the McRuer Commission of Inquiry into Civil Rights in Ontario. What area could be more ready for federal initiative than one in which the federal Parliament possesses unused powers, what area could be more appropriate for a federal showing of strength than one which is intrinsically related to the survival of democracy itself, what area could be more symbolic of the fundamental unity of Canadians than one which reflects their common dedication to the rights of man?

What most civil libertarians would like to see is a constitutionally entrenched Bill of Rights which could not be amended or abrogated except by extraordinary means and which because of its exceptional constitutional position would be taken at face value by the courts. Such an entrenched Bill would permanently prevent derogations from civil liberties by either federal or provincial authorities. However, if this is not attainable in the present impasse over constitutional repatriation and amendment, the next best thing would be a federal Bill of Rights which would proclaim the pan-Canadian character of civil liberties. The passage of an adequate, effective, and eloquent Bill of Rights by the Canadian Parliament would in my opinion be the most fitting gift which the people of Canada, through their representatives, could give to themselves for their one-hundredth birthday celebration.

36 *Ibid.*, s. 5(3).