

Here, of course, we are dealing with something which is really entirely new, something which has not developed any tradition. We are discussing what the rules should be. We have a dilemma to face. We have an argument for judicial review which rests on an analogy, which stresses an analogy between the usual processes of law which do allow a judicial decision to be the ultimate test of the validity of anything in our society and certainly any governmental act or any law. On the other hand, the argument against a judicial review is normally made in terms of responsible government, the feeling being that the principle of ministerial responsibility cannot be squared with the establishment of a judicial review. It seems to me that neither approach is satisfactory, because I believe that neither goes to the heart of the question, neither the analogy to the older law nor the resting on ministerial responsibility or responsible government.

The fundamental question seems to me to be whether the matter in question is justiciable or not. To be justiciable, that is, capable of judicial determination, something must be able to be resolved by fairly precise criteria. Judges through their powers of interpretation are inevitably legislators in an indirect way. I think all sophisticated jurists would admit that. But, it seems to me, they must not be asked to assume the responsibility to be legislators directly, to make directly political decisions.

I find that the courts are appropriate as decision makers when the kind of questions that are involved are between a subject and the state, and where the subject is asking for some information from the state which is directly relevant to him, where his freedom or his rights or his property are in some way imperilled. But with respect to general questions, I would have great difficulty in finding to my own satisfaction that there is justiciability which I believe could be dealt with by a court. I am strengthened in this attitude by some words of the Franks committee, and I would like to quote from pages 54 and 55 of the first volume. The Franks committee said:

In relation to these basic functions of government, the question of injury to the nation is essentially political, in the broadest sense of the term, not judicial. It is essentially a government responsibility to assess the importance of information . . . The government is accountable to parliament and the electorate for its discharge of these basic functions. Any system which placed this responsibility elsewhere would detract from the responsibility of the government to protect the security of the nation and the safety of the people. It would remove the element of constitutional accountability.

The committee went on to say:

● (1732)

The questions arising in these cases would, by definition, concern matters which the government wished to keep secret. It might be impossible to show why the information disclosed by the defendant was secret, except by revealing other secret matters in the evidence. Cases of this kind have arisen in the past and will arise in the future. It might not be sufficient for the court to sit in camera, since the accused himself, his legal advisers and the jury would all remain present. The government might not be prepared to take the risk of letting them hear the secret evidence. Yet it is basic to natural justice that an accused person should know the evidence against him.

I am impressed by those words. It would be a serious mistake for us to present the courts with issues which, because of their very nature, cannot be properly decided by judges.

Freedom of Information

That is the question. Can these issues be properly decided by judges or not? Are they political issues which must be placed before parliament and the people?

Therefore, I recommend an information commissioner with ombudsmanlike powers to consider complaints, but more importantly, to scrutinize government documents in general. Just as government accounts are open to the Auditor General, all government documents must be continuously available to him. I should like to propose five characteristics of this office: First, it must be independent. Second, it must have total permanent access to all government documents. Third, it must be an internal examination conducted within the walls of government itself. Fourth, it must give public advice to government, not only in general periodic reports, but in specific reports which pinpoint particular documents—It should say whether such a document should be released to the public. Fifth, it would be an advisory rather than a compulsory body, which would employ the powers of public opinion.

A spokesman for the Ontario government, before its royal commission looking into these matters, said that all these issues cannot be solved by legislation. The power of public opinion is the final protection in these areas. Mr. Justice Brandeis of the United States once said the following:

Publicity is justly commended as a remedy for social and industrial disease. Sunlight is said to be the best disinfectant and electric light the most efficient policeman.

Publicity could be mobilized by an information commissioner with the powers I have described. His powers would be greater than any other government official, even the Auditor General. As a representative of parliament and the people, he could keep us adequately informed on areas where the government was not living up to the general principles and categories of exemptions otherwise laid out. In the final analysis, this is not strictly a legal matter. It is a political matter and, as such, there must be a political solution.

Some hon. Members: Hear, hear!

Mr. Ray Hnatyshyn (Saskatoon-Biggar): Mr. Speaker, I have been listening with a great deal of interest to various spokesmen who have participated in this debate. The first spokesman I listened to was my leader. He made a very masterful presentation of an eminently sensible proposition which I thought would not obtain the full support of the House of Commons, and I have been reinforced in my thoughts.

I participated in the all-party committee on freedom of information. The hon. member for Wellington-Grey-Dufferin-Waterloo (Mr. Beatty) indicated that 90 per cent of the responses to a questionnaire which was put out by us supported in essence the proposition contained in the motion before us.

As I listened to the Secretary of State (Mr. Roberts) and the hon. member for Windsor-Walkerville (Mr. MacGuigan), who has some influence in his party with regard to this particular topic, I am now convinced that the issue of freedom of information unfortunately is becoming a matter of partisan politics. Now there seems to be a clear statement on the part of the Liberal party, notwithstanding any resolution passed in