

*The Constitution*

lected, undigested mass of statutes, legal decisions and vague understandings. They may not have been dissatisfied before the growth of credit, electronic eavesdropping, and Third World immigration began to change their social mores and practices. Their system worked well when laws were made by Parliament. But now the bulk of all laws, here and in Britain, are made without public debate, and embodied in thousands of regulations that, with the best of intentions, could infringe on people rights. Even in Britain, the bastion of Parliamentary supremacy, the growth of government has coined such phrases as "administrative lawlessness", and British legal experts are now pointing out that, when unwritten codes are weakened, written codes are required.

My third comment on Premier Lyon's trust in English common law is that any comparison is irrelevant anyway. Britain is a small country, Canada is huge. Britain has one government, we have 11. Theirs is a unitary state, ours is a federation. They have a strong family structure, a high tolerance of non-conformity, and a population that is still fairly homogenous. We have two official languages, and one-third of our people represent almost all the nations on the globe.

Mr. Lyon contends our system has worked better than that of the United States, where the existing constitution guarantees human rights. I agree that our record on rights is relatively good. But we disenfranchised Asians at the turn of the century in British Columbia, a decision upheld by the Supreme Court, which shows that Canadian citizenship does not guarantee the right to vote. We have denied Chinese in British Columbia the right to work in certain jobs. But it is true we have not systematically oppressed any minority as the southern United States have persecuted blacks. Nor have we had the problem those states have had.

The United States constitution could not disallow racial prejudice, but it was the United States Supreme Court that in 1944 declared the so-called "white primaries" unconstitutional and stopped politicians from making appeals to prejudice. It was a series of decisions by the Supreme Court in the 1940s that laid the foundation for laws giving blacks equal treatment in factories, streetcars, baseball and hotels. It was the United States Supreme Court that in 1954, in a landmark decision, ended segregation in the schools. Without the entrenchment of rights in the American constitution, the black people would be much worse off, and Premier Lyon should think of that.

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We have one vivid example, also cited by Premier Lyon at the first ministers' conference, where racial pressures and responses in both countries were similar. Following Pearl Harbour, in Canada and the United States west coast citizens of Japanese descent were rounded up, dispersed or interned, their homes and businesses confiscated and sold at bargain basement prices. Cars worth a couple of thousand dollars sold for a couple of hundred dollars. The chicken farm and two-storey house of a twice-wounded Canadian World War I veteran sold for \$1,492, after which sale expenses and taxes were deducted.

**Mr. Crosbie:** That is Liberal party history you are reading.

**Mr. Fleming:** The U.S. Supreme Court failed in this atmosphere of hysteria to uphold the most ordinary rights of citizenship. But after the war the U.S. constitution was invoked to provide compensation for all losses naturally and reasonably arising from the evacuation orders. In Canada there was no compensation unless claimants could prove that the Custodian of Alien Property had acted carelessly, which was never an issue.

In the United States the constitution recognizes an accused's right to free legal counsel at every stage from arrest to appeal. In Canada free legal aid is probably just as available, but the right to counsel has no such broad protection. The American constitution authorizes the court to see whether or not the accused had a fair hearing. In Canada the court only considers if the warrant of commitment is valid, it does not probe into the heart of the matter. And in such areas as women's rights, privacy and pollution, the American constitution has been more effective by far than our statutes.

Premier Lyon and Premier Blakeney might declare that it is too effective. Entrenching rights, they say, would put us at the mercy of the judges who would have to interpret what those rights would mean. They say it would transfer power from elected representatives to appointed officials who could strike down laws which people feel protect their community values. Premier Lyon asked at the first ministers' conference, "Does freedom of expression mean we can't combat pornography?". And he notes that the constitutional right of Americans to bear arms has hindered U.S. gun control legislation. The right to life has been a part of Canada's Bill of Rights for 20 years, but the court has yet to interpret it in relation to the death penalty, euthanasia or abortion; it has left that to our legislatures.

The Chief Justice of our Supreme Court, Bora Laskin, has chided writers who have implied, as he said, "That we have some sort of mandate . . . to overcome what Parliament has prescribed". Laskin says flatly, "We can't do that at all". Our courts do not take power from the people, as the premiers claimed at the conference, and constitutional rights would not give the courts new powers, only new laws. The courts have always decided disputes between citizen and state, and constitutional rights would not change that function. It would not take responsibility from elected representatives, and it would not mean relinquishing democracy. It would merely define the limits of power and thus ensure democracy at a level that it is not ensured at today.

It is, in fact, our governments of elected representatives that have most often infringed on human rights. Those same governments represented by the premiers at the conference should argue that the public wants first to go to government, not to courts. As Premier Lyon says, "We are representative of the people, but we are most representative of the people with the most influence".

The human rights codes and acts of the provinces all contain clauses that allow a cabinet minister to make exclusions in