PARLIAMENT, THE LAW, AND FREEDOM

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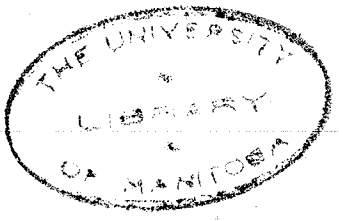

PARLIAMENT, THE LAW, AND FREEDOM

Three committees of Parliament in recent years have investigated the protection of the fundamental rights and freedoms of Canadians. The whole question of civil liberties and their guarantee by formal enactment of some kind received a strong impetus from the activities of the United Nations. The Commission on Human Rights had, in 1947, prepared a draft, "International Declaration of Human Rights,"(1) containing, in general terms, a statement of the rights and freedoms to be considered a "common standard of achievement" by the member nations. Subsequently in 1948 the General Assembly adopted the "Universal Declaration of Human Rights."(2)

In Canada, interest in the whole problem was exemplified by the appointment of a joint committee of the Senate and House of Commons in 1947 to "consider the question of human rights and fundamental freedoms and the manner in

(1) See (1948) 26 Can. Bar Rev., 1106

(2) See (1949) 27 Can. Bar Rev., 203.

which those obligations accepted by all members of the U.N. may best be implemented, and in particular ----- what is the legal and constitutional situation in Canada with respect to such rights and what steps if any it would be advisable to take to recommend for the purpose of preserving in Canada respect for and observance of human rights and fundamental freedoms."(3) The committee heard evidence from officers of the United Nations, the Department of Justice and the Department of External Affairs. Because of lack of time there was no opportunity to hear from interested organizations. In a final report the committee recommended that a joint committee be appointed at the next session of Parliament to make a detailed study of the subject. The committee also decided to invite the Attorneys General of the Provinces and the heads of Canadian Law Schools to furnish views and opinions on the question of the power of Parliament to enact a comprehensive Bill of Rights applicable to the whole country.

In April, 1948, the joint committee was reappointed with several changes in personnel. Its order of reference

(3) Minutes of Proceedings of Special Joint Committee of the Senate and the House of Commons on Human Rights and Fundamental Freedoms, 1947, King's Printer, Ottawa, Vol. 1, p. iii.

in addition to the matters referred to in 1947, authorized the committee to obtain the opinion of the Supreme Court on the question of federal legislation in respect of the fundamental freedoms, or to refer a draft Bill of Rights to the Supreme Court for the same purpose.

The committee received written submissions from six organizations(4) and heard evidence from officials of the Justice and External Affairs Department. Particular attention was paid to the Draft Universal Declaration, and later to the legal and constitutional position in Canada. The discussion by members of the committee on the first aspect of the problem points up the difficulty in drafting a Bill of Rights which, on the one hand, is sufficiently general in its terms, and on the other hand, is not too general so as to be meaningless. The difficulty, however, is mainly one of draftsmanship and is not insurmountable. Bills of Rights have been enacted in the past with excellent results. As a result of judicial interpretation the meaning of the terms used in the enactment may have been varied from the intention of the original draftsman,

(4) Canadian Jewish Congress, Congregation of Jehovah's Witnesses, Civil Rights Union of Toronto, Canadian Daily Newspaper Association, Organization representing the Chinese People of Canada, Committee for a Bill of Rights, Toronto.

but the fact remains that, that type of legislation has in the main, served its avowed purpose of protecting or safeguarding individual rights.(5)

In so far as the legal position is concerned, the committee stated that an attempt to enact a Bill of Rights for Canada as a federal statute would be "unwise;" and that the consequences of enacting a Bill of Rights by way of amendment to the British North America Act, 1867, "would be so uncertain and in some instances be so undesirable" that a great deal of further study and thought would be required before any recommendation for such amendment could be made.(6)

There is no doubt that the Committee was influenced to some extent by the opinions expressed in

(5) For a discussion of the American Constitution in this regard see H. C. Covington, The Dynamic American Bill of Rights (1948) 26 Can. Bar Rev. 638; and for a suggestion for a tentative Bill that might be passed under the "Criminal Law" power of the Dominion see F. P. Varcoe, Minutes of Proceedings of the Special Joint Committee of the Senate and House of Commons on Human Rights and Fundamental Freedoms 1948, King's Printer, Ottawa, Vol. 9, p. 174.

(6) Minutes of Proceedings 1948, op. cit. Vol. 11, p. 208.

the replies received from the Attorneys General of the Provinces and the Deans of law schools.(7) The consensus was that the Dominion does not have the necessary power to enact a comprehensive Bill of Rights applicable to the whole of Canada. However the form of question asked by the committee was so vague that the replies could not be expected to deal with specific issues as they are governed by the terms of the B.N.A. Act,(8) nor could the answers be taken to be definitive.

In any case the commitee found that the power of the Dominion to enact a comprehensive Bill was disputed; that a reference to the Supreme Court in order to determine the power of the Dominion would only occasion far reaching controversy with the Province without obtaining rulings which would have "the binding effect of a decision in a litigated case arising on particular facts" and finally,

(7) Some of the replies are collected in (1948) 26 Can. Bar Rev. at p. 706.

(8) British North America Act 1867 Brit. Statutes 30 Victoria Cap. 3.

that any statute passed as a result of such a reference would not be a true constitutional guarantee since the statute would only bind Provincial Legislatures (to the extent that it was constitutionally valid) but could be amended or repealed at any subsequent session of parliament.(9)

It should be remembered that there have been many circumstances where the authority of parliament has been disputed. The possibility of dispute did not deter the federal government from passing legislation in respect of those areas which it considered necessary or desirable to control, in the interests of the nation as a whole.(10) Further, although a Supreme Court decision is not binding in the same sense as a case arising out of particular facts, references have been made to the courts in the past to good advantage by both the Dominion and the Provinces.(11) Finally, although an enact-

(9) For a contrary opinion see F. R. Scott, Dominion Jurisdiction over Human Rights and Fundamental Freedoms (1949) 27 Can. Bar Rev. 497.

(10) There are many examples that could be given. Two are cases involving control over insurance abridged in 11 Can. Abr. Col. 277 et. seq. and the Labour Conventions Case 1937 A.C. 326.

(11) E.G. Reference re Alberta Rights Act 1946 3 W.W.R. 772 was reference by a Province and Reference as to Validity of s. 5A of the Dairy Industries Act 1949 S.C.R. 1 was a reference by the Dominion.

ment by Parliament would not be a guarantee in the sense of becoming part of fundamental law, it would serve as a strong moral force in favour of continuation of our basic freedoms.

On June 25th, 1948, the Right Honourable J. L. Ilsley, the then Minister of Justice, presented the final report of the committee to the House. Subsequently Parliament enlarged the jurisdiction of the Supreme Court in accordance with the recommendation of the committee but no other action was taken.(12) In the following year Mr. Alistair Stewart, the Member of Parliament from Winnipeg North, presented a petition signed by over 600,000 Canadians requesting that the B.N.A. Act be amended by insertion of a Bill of Rights. The petition was reported to the House on February 10th, 1949.(13)

On October 26th, 1949, Mr. J. G. Diefenbaker, the Member of Parliament for Lake Center, moved a resolution in the House in the following terms:

> That in the opinion of theHouse immediate consideration should be given to the advisability of introducing a Bill or Declaration of Rights to assure amongst other things:
>
> 1. Freedom of Religion, freedom of speech, freedom of the press and of parliament.

(12) See Bora Laskin, The Jurisdiction of the Supreme Court (1952) 30 Can. Bar Rev. and cf. Glen How, The Too Limited Jurisdiction of the Supreme Court (1947) 25 Can. Bar Rev. 573.

(13) Journals House of Commons of Canada Vol. XC, 1949, p. 61.

2. That Habeas Corpus shall not be abrogated or suspended except by parliament.

3. That no one shall be deprived of liberty or property without due process of law, and in no case by order in council.

4. That no tribunal or commission shall have the power to compel the giving of evidence by any one who is denied counsel or other constitutional safeguards;

And that as a preliminary step, the Minister of Justice do submit for the opinion of the Supreme Court of Canada the question as to the degree to which fundamental freedom of religion, speech, and of the press and the preservation of the constitutional rights of the individual are matters of Federal or Provincial jurisdiction.

The resolution was ruled out of order on the grounds that the latter part of the resolution purported to convey a direct order to the government to do something which could not be done without an expenditure of public money.(14)

The most recent parliamentary committee to deal with the subject was appointed in April of 1950 by the Senate at the instigation of the Honourable Mr. A. V. Roebuck, who acted as chairman. The committee was instructed to "consider and report on the subject of human rights and fundamental freedoms, what they are, and how they may be protected and preserved and what action, if any, can or should be taken to assure such rights to all persons in Canada."(15)

(14) Journals of the House of Commons of Canada, 2nd Session 1949, p. 159.

(15) Minutes of Proceedings of the Senate Committee on Human Rights and Fundamental Freedoms 1950, King's Printer, Ottawa, Vol. 1, p. i.

The committee also considered in detail a series of draft articles dealing with the guarantee of those rights and freedoms. There were several meetings and in addition to hearing testimony from various United Nations and governmental officials, the committee received written statements and heard evidence from interested individuals, and representatives of twenty-one organizations.(16)

The final report, after reviewing the developments leading up to the United Nations Universal Declaration of Human Rights and the attitude of Canada and individual Canadians to the conception of "freedom" went on to suggest some practical means of enacting appropriate legislation. According to the committee, the "preferable place for such fundamental law is the B.N.A. Act." The conclusion was reached in spite of representations to the effect that a fetter on the sovereignty of the legislatures or parliament would be contrary to the spirit of our constitution. It is clear that there are at present some very real restrictions on the sovereign powers of both parliament and the provincial legislatures and that our legislative bodies are not sovereign in the same sense as the British Parliament, e.g.:-

(16) Of particular importance from the legal point of view was the testimony of Mr. F. R. Scott, Mr. F. P. Varcoe, Deputy Minister of Justice, and Dr. E. A. Forsey. Their testimony also set out in concise form the pros and cons of enacting a Bill of Rights by Statute or constitutional amendment.

> The use of the English and French language is guaranteed by section 133; the right to separate schools by section 93; the right to an annual session of Parliament by section 20; the right to a new Parliament every five years by section 50; the right to representation by population by section 51; the right to an independent judiciary by section 99. Every one of these rules protects a fundamental freedom, and every one is a limitation on the sovereignty of either the Dominion Parliament or the provincial legislatures, or both.(17)

The committee qualified its recommendation by stating that action to insert any guarantees in the B.N.A. Act should be deferred for the time being until complete control over the amending procedure lies in Canada and not at Westminster. A study of the efforts of the Dominion and Provinces to devise a satisfactory amending procedure makes it obvious that any change in the B.N.A. Act requiring concurrence of the provinces will not be merely a "passing difficulty" as the Committee refers to it, but a very real difficulty requiring inspired statesmanship.(18)

For the immediate future as an interim measure, the Committee recommended that Parliament adopt a "Declaration of Human Rights," to be limited to its own legislative juris-

(17) (1949) 27 Can. Bar Rev., F.R. Scott, op. cit. at p. 502.

(18) For a discussion of the problems involved see Proceedings of the Conference of Federal and Provincial Governments 1950, King's Printer, Ottawa; Constitutional Amendment in Canada, Gerin - Lajoie, pp. xxxv to xliii.

diction, which would declare the right of everyone in Canada to certain fundamental freedoms(19) subject to the proviso that none of the provisions of the declaration may be interpreted as "tending to permit any group or person to engage in any activity aimed at the destruction of the rights and freedoms of the people of Canada."(20)

In the spring of 1952 Mr. Diefenbaker again moved a resolution dealing with the enactment of a Bill of Rights. The resolution followed the general principles of the one moved in 1949 but instead of directing the proposed committee to obtain the opinion of the Supreme Court of Canada, the resolution suggested that as a preliminary step, the Government should consider the advisability of submitting for the opinion of the Supreme Court of Canada the question of jurisdiction over fundamental freedoms.(21)

Mr. Diefenbaker, in his speech, dealt with five main points, - first, whether there is a general demand in Canada for a bill of rights or declaration of rights; second, whether there is need of one; third, what should be among the terms, or the tentative terms subject to intensive consider-

(19) On the point of desirability of a Bill of Rights see Glen How (1948) 26 Can. Bar Rev. 759, McGregor Dawson, The Government of Canada 1948 ed., pp. 85 to 87, J. A. Corry, Democratic Government and Politics 2nd ed., p. 462 et seq.

(20) Proceedings (1950) op. cit. at p. 306.

(21) Hansard 1952, Vol. 1, p. 714.

ation later by Parliament; fourth, what would a bill of rights accomplish; finally, would it be binding and how should it be brought into effect, - by statute, by constitutional amendment, or by simple declaration having no legal effect. He proposed that a standing committee of Parliament be set up to "act as a watchdog" on freedom in Canada and suggested that guarantees under a bill of rights would help to combat communism by showing, to the peoples of the world, in an explicit way, Canada's attitude to freedom. After the resolution had been spoken to by several members, debate was adjourned on the motion of the Honourable E. W. Harris. The motion to adjourn was carried 86 to 28 and debate had not been resumed when the House rose.

Mr. Garson, in an address delivered March 12, 1952, outside the House, stated that until more cogent evidence had been brought forward in respect of the necessity for a Bill of Rights the Government would not proceed with its enactment. In an address made to Ottawa's University of Manitoba Alumni Association he said that basic freedoms are as safe in Canada today as in any other country with the possible exception of the United Kingdom. Essence of a bill of rights was a "distrust of Parliament", a conviction that a free people will not elect a parliament which will protect their freedom.

In the light of these remarks and of the action taken by the Government to date, we can assume that the

activity of the Dominion in this field will extend to protection of specific rights and freedoms as the Government considers the need to arise.(22)

II

The basis for the freedom enjoyed by Canadians is usually described in the same terms as the basic principle of English Law, i.e. that a person is entitled to do what he pleases so long as it is not prohibited by law.(23) The description is quite adequate when used in a general sense but is of little assistance when an effort is made to apply it to a specific legal situation. Similarly the definition by Lord Denning of freedom as "the freedom of every law abiding citizen to do what he will, to say what he will, and go where he will on his lawful occasions without let or hinderance from other persons," is of value only as a general

(22) cf. Fair Employment Practices Bill (Bill No. 100). The Bill received first reading January 13, 1953, and is designed to "prevent discrimination in regard to employment and membership in trade unions by reason of race, national origin, color or religion" in respect of those fields within federal control.

(23) Stephens Commentaries on the Laws of England 21 ed., Vol. 3, p. 550.

description.(24) The obvious difficulty lies in determining the extent of the qualifying words "law abiding and lawful occasions." In the constitutions of countries under communist domination, for example, there is usually a series of high sounding principles whose efficacy is destroyed by the addition of qualifying phrases in the document which presumably guarantees rights. Of greater importance, of course, is the attitude of mind and the spirit of the courts whose administration of justice is governed preeminently by the doctrine of state necessity. In the result it has been possible for vicious tyrannies to exist in those countries notwithstanding the so-called constitutional guarantees.

In Canada as in England, liberty and freedom mean something very real and tangible.(25) Even though the terms may be difficult to define with legal nicety, they do embrace certain specific legal rights and remedies. Freedom under the law must have reference to two underlying principles: firstly, freedom and security of the person, and secondly, freedom of mind and conscience. The first includes such

(24) See Sir Alfred Denning, Freedom under the Law, p. 5, and for other definitions see Halsbury, Vol. 6, p. 389; Ridges Constitutional Law, 8th ed., p. 370; A. J. Corry, Democratic Government and Politics, 2nd ed., at p. 434; Mr. Justice Irving in Rex vs. Sung Chong 1901, 14 B.C.R. at 277; the report of the President's Committee on Civil Rights, Government Printing Office, Washington, pp. 6 to 9.

(25) See Denning J. op. cit., p. 13 et seq. where the differences are discussed between freedom in a democratic state and the pretense of freedom in Russia and its satelites.

rights and remedies as: the right to have the legality of one's detention determined by means of the Writ of Habeas Corpus, the right to a jury trial, the right to bail, freedom from arbitrary arrest and search, and freedom from oppression while under arrest.(26) The second must include freedom of religion, speech, press, and assembly. It is proposed to deal with the Dominion jurisdiction generally over criminal law and specifically with habeas corpus, and freedom of religion.

Nowhere in the B.N.A. Act is there specific allocation of jurisdiction over any of these freedoms, although that function has been claimed for the second branch of the term "property and civil rights" as it appears in section 92 (13) of the B.N.A. Act.(27) The expressions civil liberties, fundamental freedoms, and civil rights are used interchangeably at the present time (28) but "Civil rights" as it appears in the Act was not intended to be used as a synonym for the

(26) J. A. Corry op. cit. at p. 434 and p. 435 lists other procedural rights which have become part of our legal tradition. There is also the protection afforded by a potential action in tort for false arrest.

(27) The report of the Committee of the Canadian Bar Association of Civil Liberties (1944) 22 Can. Bar Rev. 598.

(28) See Minutes of Proceedings (1948) op. cit. Vol. 5, p. 99, for the evidence by Mr. Humphrey, Director of the Division of Human Rights, United Nations. In answer to a question by the chairman Mr. Humphrey stated that "rights" and "freedoms" are synonymous terms. cf. F. P. Varcoe, Proceedings 1947 op. cit. 69 and F. R. Scott, op. cit. 506.

other expressions. It has been shown that the latter term was never intended to be as all embracing as judicial interpretation would make it seem, but was intended to apply to the relationship between subject and subject, to the field of private law and not the field of public law.(29)

The courts, however, take a different view. The same difference of opinion which exists between historians and writers on the one hand, and the courts on the other, in respect of the essential nature of Canadian federalism exists in respect of this section. According to a judgment of the Privy Council, "civil rights" as it appears in the B.N.A. Act is used in its "largest sense."(30) Sir Montague Smith, delivering the opinion of the Board said at p. 111:

> It is to be observed that the same words, "civil rights" are employed in the act of 14 Geo. 3, c. 83, which made provision for the government of the Province of Quebec. Section 8 of that Act enacted that His Majesty's Canadian subjects within the province of Quebec should enjoy their property, usages and other civil rights as they had before done and that in all matters of controversy relative to property and civil rights resort should be had to the laws of Canada, and be determined agreeably to the said laws. In this statute the words "property" and "civil rights" are plainly used in their largest sense; and there is no

(29) See O'Connor's Report to the Senate on the B.N.A. Act Annex 1, 109 et. seq. and (1940) 18 Can. Bar Rev. 331; F. R. Scott op. cit., pp. 508 and 509.

(30) Citizen's Insurance Co. v. Parsons 1881 7 A.C. 96, at p. 111.

reason for holding that in the statute under discussion they are used in a different and narrower one."

The question of civil rights came before the courts as a side issue in 1946 as a result of the latest effort by the Social Credit Government to control credit institutions in Alberta.(31) Harvey C.J. in delivering the judgment of the Court of Appeal held summarily that part I of the Act, which dealt with certain common law rights under the heading of rights of citizenship,(32) was intra vires. The Privy Council did not disagree. On appeal the judgment of the Privy Council merely raised the question of the precise application of the sections, but did not hold that the sections standing by themselves were ultra vires. The Board ruled that since Part I was inextricably bound up with the portion of the Act found to be ultra vires that it too was unconsitutional.

It is extremely doubtful that the courts will in the future interpret the meaning of civil rights in any but the "largest sense." In a case in Ontario, for example, the Court of Appeal held that the privilege to refuse to answer criminating questions is a civil right and may be taken away

(31) Reference re Alberta's Bills of Rights 1946 3 W.W.R. 772 varied 1947 2 W.W.R. 401.

(32) Sections 3 to 8 dealt with freedom to worship, expression, assembly, freedom to engage in work of one's choice, to acquire property, to enjoy the use of one's home and property and freedom to be free to do or refuse to do any act subject to the laws of the Province.

by the Provincial Legislature as to matters with respect to which it has authority to legislate.(33) The result of wide interpretation may be unfortunate as far as enacting Dominion-wide Legislation is concerned. Nevertheless in seeking to allocate jurisdiction over specific areas of proposed legislation the history of similar legislation before the courts must not be disregarded.

It is quite unlikely that Dominion legislation in respect of civil liberties would be sustained on the strength of the general power under the opening words of section 91.(34)

If the federal government has authority at all over the matter of freedoms, that authority would be based on Section 91 (27) of the Act, which provides that the Parliament of Canada has jurisdiction over "the criminal law, except the constitution of courts of criminal jurisdiction but including the procedure in criminal matters." The federal power over criminal law is one that has not been dessicated by judicial interpretation. The opinion expressed by Lord Haldane in the Board of Commerce case (1922 1 A.C. 91 at p. 198 and 199) that Parliament could only legislate in cases "where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence" was disavowed in a later

(33) Re Ginsberg (1917) 40 O.L.R. 136 (C.A.)

(34) See Bora Laskin, "Peace Order and Good Government" Reexamined (1947) 25 Can. Bar Rev. 1054.

case decided by the Privy Council.(35) Further, in the Trade Practices Case(36) Lord Atkin disposed of the "emergency" doctrine as applied to the criminal law power. During the course of argument counsel for the appellant had urged that the Dominion had not shown an emergency to exist. Lord Atkin stated: "An emergency is not required for criminal law at all. The momentous question is whether this is fairly within the scope of criminal law."(37) If a restricted view of the criminal law jurisdiction had prevailed the power of the Dominion to deal with new social situations requiring new concepts of crime would have been severely curtailed. Criminal law must take new forms as society develops and changes.

It is for the Parliament of Canada alone to say what acts the criminal law shall notice and punish as crimes and in what manner all criminal procedure in Canada shall be conducted.(38) The general power is subject to the restriction that Parliament cannot use its power in respect of the criminal law as an indirect means of unjustifiably obtain-

(35) Proprietary Articles Trade Association vs. Attorney General for Canada 1931 A.C. 310 (Combines Investigation Act Case) and see Plaxton, Canadian Constitutional Decisions 1930 - 1939, pp. xxii - xxiv.

(36) Attorney General for British Columbia v. Attorney General of Canada 1937 A.C. 368.

(37) Plaxton op. cit. at p. 321.

(38) In re McNutt 47 S.C.R. 259 per Duff J. at p. 274 quoted in Tremear's Criminal Code 5th ed. at p. 4.

ing control over a subject matter over which it would otherwise have no jurisdiction. In the case of Attorney General for Ontario vs. Reciprocal Insurers et al[39] it was stated by the Privy Council that:

> ..... it is no longer open to dispute that the Parliament of Canada cannot by purporting to create penal sanctions under s. 91 (27) appropriate to itself exclusively a field of jurisdiction in which apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Province, it cannot be upheld as valid.

However the judgment goes on to state the aspect rule as it applies to this subject in the following way:

> ..... What has been said above does not involve any denial of the authority of the Dominion Parliament to create offences merely because the legislation deals with matters which in another aspect may fall under one or more of the sub-divisions of the jurisdiction entrusted to the Provinces. It is one thing ..... to declare corruption in municipal elections, or negligence of a given order in the management of railway trains, to be a criminal offence and punishable under the Criminal Code; it is another thing to make use of the machinery of the criminal law for the purpose of assuming control of the municipal corporations or of Provincial railways."(40)

There are three recent cases of particular importance that deal with criminal law. In the first, The Combines Investigation Act Case[41] Lord Atkin said:

(39) 1924 A.C. 328 at p. 342.

(40) ibid. p. 343.

(41) op. cit. at p. 324.

> "Criminal Law" means "the criminal law in its widest sense;" Attorney-General for Ontario v. Hamilton Street Railway Company (1903 A.C. 524). It certainly is not confined to what was criminal by the law of England or of any Province in 1867. The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality--unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence;" for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the state to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.

In the second case dealing with section 498 (a) of the Criminal Code (42) making certain restrictive trade practices illegal, Lord Atkin expanded his earlier remarks and pointed out that interference with civil rights is not grounds for invalidating Dominion Legislation of this type:

> The basis of that decision (i.e. Combines Investigation Act case) is that there is no other criterion of 'wrongness' than the intention of the Legislature in the public interest to prohibit the act or omission made criminal. Cannon J. was of the opinion that the prohibition cannot have been made in the public interest because it has in view only the protection of the individual competitors of the vendor. This appears to

(42) 1937 F.C. 368 at pp. 375 and 376.

> narrow unduly the discretion of the Dominion Legislature in considering the public interest. The only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal is the condition that Parliament shall not in the guise of enacting criminal legislation in truth and substance encroach on any of the classes of subjects enumerated in s. 92. It is no objection that it does in fact affect them. If a genuine attempt to amend the criminal law, it may obviously affect previously existing civil rights .... there seems to be nothing to prevent the Dominion, if it thinks fit in the public interest, from applying the criminal law generally to acts and omissions which so far are only covered by provincial enactments.

In a recent case decided by the Supreme Court of Canada(43) Rand J. defined a crime as:

> .....an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the case is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.

In determining whether or not legislation under review is truly within the criminal law power, the judgment goes on to suggest the test to be applied, i.e.:

> Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality; these are the ordinary

(43) Reference as to the validity of Section A of the Dairy Industries Act R.S.C. 1927 c. 45 1949 S.C.R. 1 at p. 49.

though not exclusive ends served by that law.(44)

There are two other points of interest arising out of this particular judgment. Firstly, Rand J. pointed out that prohibitions have been used in the past to achieve positive results and by inference criminal law in Canada could be used for the same purpose. In other words the criminal law power could be used by Parliament positively to achieve a greater freedom for a greater number of Canadians. Secondly, a point to be kept in mind in all discussions of the question of criminal law is that all prohibitions may be viewed as criminal under the constitution of a unitary state such as Great Britain whereas the term criminal law has special meaning in Canadian law depending on the context in which it is used. The term as it appears in the Supreme Court Act and section 1024 of the Criminal Code has been defined as including the penal statutes enacted by the provinces. These statutes do not deal with "criminal law" in the sense of the word as it is used in 91 (27) of the B.N.A. Act. This distinction must be kept in mind when applying English cases to the legislative situation in Canada.

(44) The court found that the legislation in question was not valid dominion legislation since it was in relation to property and civil rights and could not be supported under any heading of section 91 nor under the general power. The Chief Justice and Mr. Justice Kerwin dissenting held that the legislation was an enactment creating a criminal offence following the principle laid down in the Proprietary Trade Articles Case referred to supra. p. 19.

The authority of the Provincial Legislatures under section 92 (15) to create penal offences in respect of matters within provincial jurisdiction must, therefore, be taken into account. A provincial legislature may prohibit and make subject to penalties when legislating on any matter coming within section 92 of the Act, but its power is strictly limited to that field.(45)

The conflict between section 91 (27) and section 92 was dealt with by the Supreme Court of Canada in a case in 1941.(46) Reference was made to the concluding words of s. 91 which provide:

> ..... any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.
>
> The effect of these words is, "that the Parliament of Canada may legislate upon matters which are prima facie committed exclusively to the provincial Legislatures by s. 92, where such legislation is necessarily incidental to the exercise of the powers conferred upon Parliament in relation to the specified subject 'The Criminal Law . . . including the Procedure in Criminal Matters. To the extent at least to which matters prima facie provincial are regulated by Dominion legislation in exercise of this authority, such matters are excepted from those committee to the provincial Legislatures by s. 92, and, accordingly the legislative authority of the provinces in relation to these matters is suspended. . . . In every case where a dispute arises the precise question must be whether or not the matter of the

(45) Rex vs. Nat. Bell Liquors Limited (1922) 2 A.C. 128 and Tremear's Criminal Code op. cit. at pp. 6 - 13 where the authorities are collected.

(46) Provincial Secretary of P.E.I. v. Michael Egan 1941 S.C.R. 396 per Duff C.J. at pp. 401 and 402.

> provincial legislation that is challenged is so related to the substance of the Dominion criminal legislation as to be brought within the scope of criminal law in the sense of s. 91. If there is repugnancy between the provincial enactment and the Dominion enactment, the provincial enactment is, of course, inoperative. It would be most unwise, I think, to attempt to lay down any rules for determining repugnancy in this sense.

An aspect of provincial jurisdiction which should also be considered is the power over "preventative justice." That term is applied to legislation "aimed at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime."(47) It has been held that legislation of this type deals with property and civil rights and with the power of the provinces to provide a civil disability following the commission of an offense. There could be no disagreement with this principle provided it is kept within its proper limits. The danger, however, lies in the extension of the purview of the doctrine far beyond the limits defined in the Bedard Case. In the case of Fineberg vs. Taub, the provisions of the Communistic Propaganda Act (1937 Que. c. 11) usually described as the Padlock Law were considered by Greenshields J.(48) The Court held that legislation authorizing the Attorney General of

(47) Bedard vs. Dawson & Attorney-General for Quebec 1923 S.C.R. 681 per Duff J. at p. 684.

(48) 73 C.C.C. 37 Mr. Justice Greenshields had given judgment in the Bedard Case as a member of the Court of King's Bench (Appeal Side) of Quebec.

the Province to padlock premises used to propagate "communism" (which was not defined in the Act) was intra vires the Province as relating to the use of property within s. 92 (13); the purpose of the Act was to "prevent and not to punish;" nowhere in the Act "was a crime created." The Act was considered valid notwithstanding its prohibition of the printing, publishing and distribution in the Provinces of newspapers, periodicals, pamphlets, etc., propagating or tending to propagate "communism" or "bolshevism".(49) The legislation did in fact, lay down serious restrictions of freedom of speech and assembly, - matters within the legislative jurisdiction of the Dominion.(50)

The Fineberg case should be compared to Attorney General for Ontario v. Koynok,(51) which dealt with the provisions of an Ontario statute restraining the publication of any newspaper or other publication "which publishes continuously or repeatedly writings or articles which are obscene, immoral or otherwise injurious to public morals."

(49) The judgment prompted the Editor of the Canadian Criminal cases to comment "Magna Carta is no longer law."

(50) See reference re Alberta Legislation 1938, S.C.R. 100 per Duff J. and Cannon J. for judicial comment on the attempt by the Province of Alberta to place restrictions on newspaper publishers.

(51) 75 C.C.C. 100, referred to in Tremear op. cit. at p. 8.

The Act was held to be ultra vires as being obviously aimed at the protection of public morals, and within the Dominion "criminal law" power.

One other aspect of "preventative justice" should be considered, i.e., the jurisdiction possessed by justices of the peace to require the giving of security to keep the peace by persons who have committed no offence but whose conduct gives rise to an apprehension of a breach of the peace on their part. The power has immediate relevancy to the question of freedom since a person's liberty may be curtailed as a result of being bound over where the opinions he expresses are contrary to those held by the majority. There can be no objection to the procedure where the cause of the proceedings does not lie in merely attempting to stifle expression of opinion, but where it does lie in a sincere apprehension of a breach of the peace.

S. 748 (2) of the Criminal Code provides:

> Upon complaint by or on behalf of any person that on account of threats made by some other person or on any other account, he, the complainant, is afraid that such other person will do him, his wife or child some personal injury, or will burn or set fire to his property, the justice before whom such complaint is made, may, if he is satisfied that the complainant has reasonable grounds for his fears, require such other person to enter into his own recognizance, or to give security, to keep the peace, and to be of good behaviour, for a term not exceeding twelve months.

It has been held in Alberta that this section is not exhaustive and that magistrates still possess the common

law power of binding over.(52) The same question came before the Court of Appeal of Ontario(53) on an appeal from an order of a magistrate who had directed the appellant to find two sureties for his good behaviour in the sum of $1,000.00 each for a period of three years and had ordered imprisonment for six months upon failure to provide the sureties. The acts alleged to have tended to a breach of the peace were not of a serious nature. Chief Justice Robertson delivered the unanimous judgment of the Court of Appeal. The judgment referred to the English case of R. v. Sandbach ex parte Williams, (1935, 2 K.B. 192 at 197) where Humphreys J. citing Blackstone, Vol. iv. p. 256 points out that "a man may be bound to his good behaviour for causes of scandal, contra bonos mores as well as contra pacem." Robertson J. (at p. 797) also referred to the Judgment of Duff, C.J. in delivering judgment of the Supreme Court of Canada in Reference re Authority to Perform Functions under the Children's Protection Act, etc. (1938 S.C.R. 398):

> Moreover, while as subject matter of legislation, the criminal law is entrusted to the Dominion Parliament, responsibility for the administration of justice and, broadly speaking, for the policing of the country, the execution of the criminal law, the suppression of crime and disorder, has from the beginning of Confederation

(52) R. v. Poffenroth, 78 C.C.C. 181 and see Tremear op. cit. pp. 910-912.

(53) Re Mackenzie, 1945 O.R. 787.

been recognized as the responsibility of the provinces, and has been discharged at great cost to the people; so also, the provinces, sometimes acting directly, sometimes through the municipalities, have assumed responsibility for controlling social conditions having a tendency to encourage vice and crime.

Mr. Justice Robertson stated:

> Having in mind therefore, the nature of the jurisdiction conferred upon a magistrate by the common law to administer "preventative justice" by requiring security for good behaviour in certain circumstances, and having in mind also the power and obligation of the Provinces, ... that the proceeding against the appellant was a civil proceeding.

The opinion of the Supreme Court of Canada in the case of Frey v. Fedoruk and Stone,(54) (the "Peeping Tom" case) is along the same lines. Cartwright J. (whose judgment was concurred in by Taschereau, Rand, Kellock and Locke, J.J.) stated at pp. 526 and 527:

> In my view it has been rightly held that acts likely to cause a breach of the peace are not in themselves criminal merely because they have that tendency, and that the only way in which such conduct can be dealt with and restrained, apart from civil proceedings for damages is by taking appropriate steps to have the person committing such acts bound over to keep the peace and be of good behaviour.

The judgment quotes the English case of Exp. Davis (1871 24 L.T. 547 at p. 548) where Blackburn J. points out that the binding over of a person to keep the peace is not an action or proceeding by way of punishment but is only a precautionary proceeding to prevent a breach of the peace. And at p. 527, the judgment states:

(54) 1950 S.C.R. 517.

> In my view the Plaintiff's conduct in peeping through the window was contra bonos mores but not contra pacem in the sense of being a breach of the criminal law.

Mr. Justice Robertson in the Mackenzie case raised some doubt as to the magistrate's jurisdiction, where his commission does not expressly grant authority to bind over. In the case of Lansbury v. Riley, (1914 3 K.B. 229) Avory J. deals with the question at pp. 236 and 237 where he quotes from the judgment of Fitzgerald J. in Reg v. Justices of Queen's County (10 L.R.Jr. 294 at 301), who stated that the authority was well established "whether it exists at common law, or flows from the commission or has been conferred by statute." It is a fair inference to draw from the judgment in the Frey Case that the Supreme Court is of the opinion that magistrates have the necessary common law jurisdiction.

As far as limitations on the magistrates' power is concerned Lord Hewart stated in R. v. Sandbach(54a) that:

> the matter is discretionary and the limits are to be found in discretion. We should assume that judicial powers, when given will in all cases be exercised properly .....

We may sum up by saying that although the Dominion has wide powers under 91 (27) to deal with the subject matter of freedom, there is a large residue of power in the provinces to pass legislation that would have a vital bearing on the subject.

(54a) op. cit. at pp. 195 and 196.

III

The writ of Habeas Corpus has been defined as:

> ..... a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention, whether in prison or in private custody. It is a prerogative writ by which the King has a right to inquire into the causes for which any of his subjects are deprived of their liberty. By it the High Court and the judges of that Court, at the instance of a subject aggrieved, command the production of that subject, and inquire into the cause of his imprisonment. If there is no legal justification for the detention, the party is ordered to be released. The remedy by Habeas Corpus is equally available in criminal and civil cases, provided there is a deprivation of personal liberty without legal justification.(55)

Although Habeas Corpus has been described as "the principal bulwark of English liberty," its effectiveness as a means of obtaining release from unlawful detention has been questioned in recent times.(56) Even with its limitations, however, the writ may still be a powerful instrument for securing the liberty of the subject.(57)

At one time it was assumed that habeas corpus, as a safeguard of personal liberty -- one of the most important of civil rights, would fall within the ambit of section 92 of the Act. There has been a series of cases, particularly

(55) Halsbury Laws of England, 2nd Ed. Vol. 9 at pp. 701-702, and 713.

(56) Glen How (1948) Can. Bar Rev. op. cit. at p. 768 et seq.

(57) Denning op. cit. at p. 8 et seq.

before the courts in British Columbia which shows a decided flux in judicial opinion on the question of jurisdiction.(58)

New light was thrown on the problem by the English case of Amand v. Secretary of State for Home Affairs and Another.(59) The case arose as a result of a Netherlands subject who had resided in England for a number of years being called up for service in the Netherlands Army in England. At the expiration of a period of leave, he failed to return to duty and was arrested as a deserter under the Army Act, s. 154, as applied by the Allied Forces Act 1940, and an order in council made thereunder. He applied for a writ of habeas corpus on the ground that his conscription into the Netherlands Army, and, therefore, his arrest as a deserter from it, were unlawful. On his appeal against the refusal of this application, the preliminary point was taken that, the appeal being in a criminal cause or matter, the court had no jurisdiction to entertain it by reason of the provisions of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (a).(60) That section provides that

(58) "Various views have been expressed by many eminent judges in Canada but nowhere have opinions fluctuated to such an extent as in the Court of Appeal for British Columbia." Kerwin J. in re Storgoff, 1945 S.C.R. 526 at p. 558.

(59) 1942 2 A.E.R. 381 aff. 1942 1 A.E.R. 480.

(60) The statement of facts is taken from the headnote.

> no appeal shall lie except as provided by the Criminal Appeal Act 1907 or this Act from any judgment of the High Court in any criminal cause or matter.

The criminal cause or matter in question was the application to the Court to exercise its powers under the Allied Forces Act 1940 and the Allied Forces (Application cf. 23 Geo. V. c. 6) (No. 1) Order 1940, and to deliver the appellant to the Netherlands military authorities. Lord Wright stated at p. 387:

> It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter. That was the matter of substantive law. The writ of habeas corpus deals with the machinery of justice, and is essentially a procedural writ, the object of which is to enforce a legal right. The application for habeas corpus may or may not be in a criminal cause or matter.

Viscount Simon laid down the test for determination of the character of the writ at p. 385:

> It is the nature and character of the proceeding in which habeas corpus is sought which provide the test. If the matter is one, direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal.

The speech of Viscount Simon was concurred in by Lord Thankerton, and approved by Lord Wright and Lord Porter who added some observations of their own. Lord Porter stated at p. 389:-

> As long ago as 1888 it was unsuccessfully argued in "Ex p. Woodhall" that the decision to be in a criminal cause or matter must deal with what was a crime by English law, and in the same case it was contended in vain that an application for habeas corpus was a separate

> proceeding from that which the magistrate dealt with in the case brought before him. That case has been consistently approved by the courts of this country and I think at least once by your Lordships' House. The proceeding from which the appeal is attempted to be taken must be a step in a criminal proceeding, but it need not itself of necessity end in a criminal trial or punishment. It is enough if it puts the person brought before the magistrate in jeopardy of a criminal charge.

The case was referred to in several judgments of the British Columbia Court of Appeal but there was no unanimity of agreement as to the principle laid down by the House of Lords. Finally the Supreme Court of Canada considered the question in the Storgoff case.(61)

That case arose out of an application for writ of habeas corpus to the Supreme Court of Canada under s. 57 et. seq. of the Supreme Court Act. A reference to the full court was directed after application had been made in the first instance to Mr. Justice Hudson. The point of law for consideration of the court was in respect of the provisions of the Court of Appeal Act of British Columbia (R.S.B.C. 1936 c. 57) granting a right of appeal to the court of appeal in a habeas corpus matter. The relevant section of the Act reads as follows:

> 6 . . . . an appeal shall lie to the Court of Appeal:
>
> (d) From every decision of the Supreme Court or a Judge thereof, or of any County Court or County Court

(61) See Supra at p. 33, footnote (58)

> Judge, in any of the following matters, or in any proceeding in connection with them or any of them:-
>
> (vii) Habeas Corpus:
> .....; and in cases of habeas corpus in which the Crown is the successful appellant the Court of Appeal may make such order as it may see fit concerning the re-arrest of the accused person:

The applicant Storgoff was convicted in Vancouver of being found nude in a public place contrary to section 208 (a) of the Criminal Code and was sentenced to be imprisoned for a period of three years. As a result of habeas corpus proceedings the applicant was discharged from custody by order of Mr. Justice Coady of the Supreme Court of British Columbia on the ground that the trial magistrate did not have the authority to commit the accused to the penitentiary. Storgoff was released immediately. The Court of Appeal for British Columbia reversed this decision and ordered the accused to serve his sentence of three years in the penitentiary. Counsel for Storgoff argued that the Court of Appeal had no jurisdiction to hear the appeal by the Crown because the habeas corpus in the case at bar was proceeding in a criminal matter and the right of appeal could not be given by a provincial statute but only by the Parliament of Canada.(62)

The argument presented on behalf of the Attorney General of British Columbia was summarized at p. 577:

(62) A second point was taken before the Supreme Court that is of no direct application to the subject of this paper.

> The case for the province is put thus: habeas corpus is a special right to be freed from illegal detention whether the detention is under process in law, civil or criminal, or by private act. It is an original and detached proceeding, set in motion by a prerogative writ, that stands apart from other proceedings the consequences of which it may affect. Not being linked to the cause of detention, it constitutes an independent enquiry in protection of a civil right as such, and by section 92 (13) of the British North America Act, the legislative power in relation to it has been committed to the exclusive jurisdiction of the province.

Judgments were handed down by all seven judges at the hearing. The effect of the majority judgment is summarized in the headnote as follows:

> The provisions of section 6 of the Court of Appeal Act of British Columbia, granting a right to appeal to The Court of Appeal in a habeas corpus matter are inoperative, if the applicant for that writ is detained in custody by virtue of a conviction for a criminal offence under the Criminal Code . . . .
>
> The Dominion Parliament has exclusive jurisdiction to authorize such an appeal under section 91 (27) of the British North America Act, 1867 ("Criminal law . . . including the Procedure in Criminal Matters"); and a Provincial Legislature has no such power under section 92 (13) of that Act ("Property and Civil Rights in the Province").....

The Chief Justice delivered the only dissenting opinion. In his judgment he reviewed the cases on habeas corpus which had appeared before the lower courts in Canada, particularly in British Columbia, and quoted extensively from the speeches in the House of Lords in the Amand Case. He stated that the distinction made in the Amand case between criminal and civil causes could not be made in this country

in the interpretation or discussion of Canadian law;(63) and that the issue in that case, was not whether habeas corpus proceedings were in relation to a criminal matter but merely whether the antecedent cause or matter was criminal.

The majority of the Supreme Court held that the Amand case applied specifically to the case at bar in laying down the principle that there was a difference between a writ of habeas corpus in criminal matters and a writ of habeas corpus in civil matters(64) and, in approving the principle that the writ becomes a step in, or takes on the character of, the cause or matter out of which the question to be determined arises.(65) Otherwise that case would not have taken the form it did. The Court of Appeal and House of Lords would not have found it necessary to analyze the nature of the antecedent cause or matter unless it was assumed that the nature of the writ was governed by it. Kellock J. in expressing his opinion on the effect of the Amand decision stated at p. 588:

The fact that in Canada the field of legislation

(63) See supra p.23, and judgment of Kerin J. at p. 555.

(64) See judgment of Taschereau J. ibid at p. 573, "In giving their decision, their Lordships dealt, in my opinion, with the very issue with which we are confronted" and also see p. 574.

(65) per Rand J. ibid 579 refers to ex parte Alice Woodhall (1888) 20 Q.B.D. 832 approved in the Amand Case. The same principle was applied to prohibition in Re Rex v. Thompson 1946 O.R. 560 (Ont. C.A.) and to mandanus in R. v. Marathon Paper Mills of Can. Ltd. 89 C.C.C. (Ont.) (C.A.) 59.

> is divided between Parliament and the provincial legislatures by virtue of the provisions of the British North America Act, does not render the principle .... inapplicable in the present case. The result of the division of legislative power may reduce the area in which proceedings by way of habeas corpus are to be considered as falling within Dominion jurisdiction, but it has no other effect.

In dealing with the argument that the legislation was not aimed at criminal law, but that "its pith and substance was civil liberty" and was concerned with "the greatest of civil rights" Kerwin J. stated at pp. 559 and 560:

> The writ of habeas corpus is indeed a writ to enforce a right to personal liberty but that right may have been infringed by process in civil or criminal proceedings and that test serves to indicate the dividing line between the power of Parliament and the British Columbia Legislature to legislate with reference to the writ.

And at p. 561 the judgment states:

> The application to Coady J. was a step in the criminal proceedings which resulted in Storgoff's imprisonment and it was, therefore, a matter of criminal law or procedure as to which the British Columbia Legislature had no power to legislate. Being a designated subject matter in sec. 91 of the B.N.A. Act, it is exclusive to the Dominion, and the right of a person imprisoned to test the legality of his incarceration when it is alleged to have followed a conviction of a crime, being one of the great constitutional rights of the subject, cannot be said to be merely ancillary and, therefore, subject to the power of the British Columbia Legislature in the absence of parliamentary action. 'In such a case' to quote Viscount Haugham in Reference re Debt Adjustment Act, 1937 (Alberta); Atty.-Gen. of Alta. v. Atty.-Gen. of Can. 1943 A.C. 356 at p. 370:

> It is immaterial whether the Dominion has or has not dealt with the subject by legislation, or, to use other well-known words, whether that legislative field has or has not been occupied by the legislation of the Dominion Parliament.

Hudson J.(66) pointed out that the provincial power over property and civil rights must exclude from its application criminal law and procedure in criminal matters in respect of which Dominion powers are paramount and that "criminal laws almost always interfere with personal liberty." On the same subject Rand J. at pp. 578 and 579 stated that:

> Criminal proceedings abound with civil rights. Trial by jury is such a right, but no one would suggest that in criminal matters it is not part of procedure or that it would be abolished by the Provinces.(67)

Finally, Hudson J. drew attention to the fact that although the argument of counsel for the Province was based on the abstract civil right of liberty, in actual fact the intention was to deprive the accused of liberty. Storgoff enjoyed liberty when the appeal to the Court of Appeal was taken. The result of the appeal was to deprive him of it. The proceedings were really nothing more than an enforcement of the criminal law.

There is one other point of interest arising out

(66) ibid at p. 564.

(67) cf. R. v. M'Gavin Bakeries (1951) 2 W.W.R (N.S.) 1 where counsel for the accused corporations argued Dominion legislation abolishing trial by jury in certain cases was ultra vires. Mr. Justice McBride dismissed the argument and held that the subject was within federal competence. At p. 16 he stated "....never at any time since Confederation, has any Province so far as I am aware asserted the right ... to enact legislation saying that any criminal offences or offences should be tried with or without a jury ....."

of the Storgoff case. Both Mr. Justice Hudson and Mr. Justice Rand commented on the great practical difficulties which would ensue if the agency enacting legislation in relation to criminal law and procedure did not have the sole power to control appeals, and to control the methods of testing the validity of the procedure. Hudson J. stated at p. 566:

> Uniformity of procedure in criminal matters throughout Canada is a cardinal principle of the Canadian constitution. A power in each province to provide a different means of testing the validity of such proceedings would be fatal to the maintenance of such principle.

And Rand J. at p. 584 commented on,

> the incompatibility between jurisdiction over criminal law and procedure on the one hand, and an independent civil jurisdiction over habeas, even with its present limitations, on the other.

The provisions of s. 6 of the British Columbia Court of Appeal Act came before the courts in 1950(68) in respect of a conviction under the Summary Conviction Act (R.S.B.C. 1948 ch. 317). The accused had been convicted for failure to pay a license fee to the City of Victoria. When the matter came before the Court of Appeal counsel for the respondent argued that the Court of Appeal was without jurisdiction since s. 6 was ultra vires in giving an appeal from the County Court in a criminal matter. The

(68) Rex v. McIlree 1950 1 W.W.R. 894.

judgment of the Court was given by Smith J.A. who stated at p. 895:

> It is rather late in the day to bring forward this argument. It has been settled for many years that under sec. 92 (15) of the B.N.A. Act, 1867, the province can pass quasi-criminal law, and that what it can deal with under this is not "criminal law" within sec. 91 (27). See Can. Pac. Wine Co. v. Tuley (1921) 3 W.W.R. 49, (1921) 2 A.C. 417, 90 L.J.P.C. 233. It is also settled that what the province can deal with under sec. 92 (15) it can deal with in all of its aspects, including the creation of an offence, the procedure to punish it, and the right of appeal. See In re. Storgoff (1945) S.C.R. 526. I think there can be no doubt that sec. 6 (d) of the Court of Appeal Act is intra vires.

IV

The development of Canadian jurisprudence in the field of religious freedom, as in the field of all civil liberties follows a pattern different from the American.(69) Specific guarantee of religious freedom is found in the first and fourteenth amendments to the American Constitution, whereas in Canada there is no guarantee of religious freedom as part of our fundamental law.(70) The first amendment provides in part:

(69) On the question of relevancy of American decisions generally, see Bank of Toronto v. Lambe, 1887, 12 A.C. 575, per Lord Hobhouse at p. 587, and Mr. Justice Kerwin in R. v. Storgoff, op. cit. p. 555.

(70) F.P. Varcoe 1947 Proceedings op. cit. vol. 4 at p. 76, and see Glen How op. cit. at p. 792 for brief historical reference to the history of religious persecution.

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

The guarantee provided by this section was made applicable to the States by the 14th amendment with provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherever they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

The mere insertion of these guarantees in the constitution did not end the matter. The courts have been called upon many times to determine whether specific acts are violations of the constitutional provisions. As J.A. Corry points out in his book on Democratic Government and Politices at p. 450:

> religious beliefs have led men to practise polygamy, to refuse the obligations of military service, and to refuse to provide medical services for their children in defiance of existing law. In these cases the Supreme Court has held that the requirements of public order, national security and public health justified these laws and that the guarantee of religious freedom does not entitle men to ignore these claims.

One of the most vexing problems facing American courts has involved the question of the compulsory flag salute. The Supreme Court in 1943 ruled for the first time, that Jehovah's Witnesses had the right to refuse to salute the flag.(71) The Witnesses' objections were based on their

(71) West Virginia State Board of Education v. Barnett, 319 U.S. 624, (1943) overruling Minersville School District v. Gobitis, 310 U.S. 586 (1940).

opinion, strongly held, that a flag is an "image" within the meaning of the Biblical injunction. Mr. Justice Jackson delivered the opinion of the Court which proceeded on the broad grounds of freedom of mind, and not on the question of specific religious liberty. He stated that the refusal to salute the flag presented no clear and present danger to the State.

> Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulstory unification of opinion achieves only unanimity of the graveyard.(72)

The judgment goes on to say:

> if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.(73)

Mr. Justice Frankfurter wrote the dissenting judgment and pointed out that thirteen judges had at one or more times, found no "constitutional infirmity" in legislation requiring the salute and prescribing penalties for disobedience. It is apparent that even with a guarantee written into the constitution the question of the boundary of religious liberty is a perplexing one and one on which the last word is still to be heard.

(72) Quoted in Fairman, American Constitutional Decisions, at p. 435.

(73) ibid p. 436.

There have been "flag salute" cases in Canada, but they have had quite a different constitutional background. It should first be noted that legislative power over education is committed to the provinces by s. 93 of the B.N.A. Act subject to certain rights and privileges which are set out in that section. The case of Ruman v. Board of Trustees of Lethbridge School District(74) came before the courts in Alberta as a result of the plaintiff children being dismissed from school because of their refusal to salute the flag. The children were Jehovah's Witnesses.

The court held that the school board was empowered by the School Act (R.S.A. 1942 C. 175) to prescribe the form of patriotic exercises and to dismiss any pupils who did not comply with the requisite procedure. The salute in question was a patriotic exercise and the board has the power to direct its performance. Subsequently in 1944, the School Act was amended(75) to grant an exception for those pupils who refused to salute the flag on religious grounds. The new section provides:

> In any case where the board directs that the flag shall be saluted, this exercise shall be conducted in such manner as the board may prescribe:
> Provided, however, that any pupil whose parent or guardian presents to the principal of the school a written statement setting forth that he or she is a

(74) 1943 3 W.W.R. 340.

(75) 1944 C. 46. s. 9; see (1944) 22 Can. Bar Rev. 840, for comment on this case and the Donald case, infra.

> member of a religious organization whose tenets forbid or are opposed to its members individually saluting the flag, shall not be required to participate in the saluting of the flag when prescribed by the board further than to come to attention and to remain standing silently and at attention while the salute is being given in the manner prescribed.

The section thus gives statutory recognition to the religious scruples of those persons who find saluting the flag contrary to their religious beliefs.

The same question came up in Ontario for decision by the Court of Appeal in the case of Donald et al v. Board of Education for the City of Hamilton et al.(76) The case came before the Court on appeal from the dismissal by Hope J. of an action for damages against the Board of Education, for the City of Hamilton. The Board had expelled the appellant's children from public school for the same reason that caused the expulsion in the Ruman case.

Gillanders J.A. delivered the unanimous decision of the Court. It was held that pupils in public or high school might refrain from saluting the flag or singing the national anthem, if their objection was based on religious grounds, without forfeiting their right to attend school. The Public Schools Act (R.S.O. 1937, c. 357) specifically provided that pupils could refrain from taking part in "religious exercises" but did not define the term.

(76) 1945 O.R. 518.

The judgment quoted two American cases, - West Virginia State Board of Education v. Barnette,(77) and The People of the State of New York v. Sandstron et al (1939 279 N.Y. 523), and stated at p. 530:

> For the Court to take to itself the right to say that the exercises here in question had no religious or devotional significance might well be for the Court to deny that very religious freedom which the statute is intended to provide."

Although jurisdiction over religion as it forms part of the subject matter of education, undoubtedly falls within the provincial sphere, the general power over religion is within Dominion competence by virtue of the Dominion power over criminal law. The cases on "Sunday observances" legislation are instructive on this point.

These cases have held that legislation having for its object "the compulsory observance of such day or the fixing of rules of conduct (with the usual sanctions) to be followed on that day" is within the criminal law power.(78) On the other hand, the Privy Council has held that permissive legislation, having for its object "permission to do on Sunday things which persons of stricter Sabbatarian views might regard as Sabbath breaking is no part of the criminal law

(77) supra p. 42.

(78) In re. the Jurisdiction of a Province to Legislate Respecting Abstention from Labour on Sunday 1905 35 S.C.R. 581 (sub nom In re. Sunday Laws).

where the act or things had not previously been prohibited."[79] It is also competent for the province to enact compulsory legislation of the nature of police or municipal regulation, although the statute may proscribe certain activities on Sunday as part of the general act.[80] The reasons advanced by both the Privy Council and the Supreme Court of Canada for holding that Sunday observance is within criminal law is of importance in determination of the location of the power to deal with religion generally.

In the Hamilton Street Railway case in 1903,[81] the first case on the subject to reach the Privy Council, the Board delivered a brief judgment, which is often quoted to show the extent of the federal power over criminal law. It was held that an infraction of the Act, entitled "An Act to prevent the Profanation of the Lord's Day" (R.S.O. 1987 C. 246) was an offence against the criminal law.

The decision of the Privy Council corrected the

(79) Lord's Day Alliance of Canada v. Attorney General for Manitoba 1925, 1 W.W.R. 296 (C.A.)

(80) See Trembly v. Quebec 16 C.C.C. 487 and R. v. Bachynski 1938 I.W.W.R. 619 (Man.) (C.A.) and cf. such cases as Clarke v. Wawken 24 Sask. L.R. 327 where the court decided the by-law in question was not designed to compel the observance of Sunday as a religious institution. In each case the court must really determine the intention of the municipal council or provincial Legislature. cf. (1952) 30 Can. Bar Rev. 840 for comment on a recent Quebec case.

(81) Att. Gen. for Ont. v. Hamilton Street Railway, 1903 A.C. 524.

general impression which prevailed until then, that Sunday observance legislation was within the provincial sphere of authority. In the Lord's Day Alliance case[82] the Privy Council referred to its earlier decision and stated:

> For many years after 1867 it was apparently assumed on all hands that the power of legislating with reference to Sunday observance within a Canadian province was by sec. 92 of the Act exclusively committed to the provincial Legislature as being either a matter (sec. 92 (13)) relating to property and civil rights in the province or as being one (sec. 92 (16)) of a merely local or private nature in the province. It was assumed also that appropriate penalties for the non-observance of Sunday might under sec. 92 (15) be enacted by the provincial Legislature as a means of enforcing a law of the province made in relation to a matter coming within a class of subjects enumerated in the section. So widely held was this view that not only was no Dominion statute with reference to this subject ever promulgated, but in most of the provinces legislation was passed having for its object the compulsory observance of Sunday within the provinces or the laying down of rules of conduct to be followed on that day, accompanied by appropriate sanctions for non-observance or breach. The Lord's Day Act, 1902, of Manitoba is one of these provincial statutes; the Ontario Act of 1897, ch. 246, An Act to Prevent the Profanation of the Lord's Day, is another.
>
> It was not until 1902 that the validity of any of these enactments was called in question.

In the "Sunday Laws" case the Supreme Court expanded on the first judgment handed down by the Privy Council in 1903 by stating at p. 592:

> ..... it appears to us that the day, commonly called Sunday, or the Sabbath, or the Lord's Day, is recognized in all Christian countries as an existing institution, and that legislation having for its object the compulsory observance of such day or the fixing of

(82) Referred to supra p. 47, footnote (79)

> rules of conduct (with the usual sanctions) to be followed on that day, is legislation properly falling within the views expressed by the Judicial Committee in the Hamilton Street Railway reference before referred to and is within the jurisdiction of the Dominion Parliament.

A Quebec statute on the subject came before the Supreme Court of Canada in 1912.(83) The section of the Act in question read as follows:

> No person shall, on Sunday, for gain, except in cases of necessity or urgency, do or cause to be done any industrial work, or pursue any business or calling, or give or organize theatrical performances, or excursions where intoxicating liquors are sold, or take part in or be present at such theatrical performances, or excursions.

The Court held that the section was ultra vires on the ground that the profanation of the Lord's Day had always been regarded as a breach of the criminal law. The law dealt with public wrongs rather than private rights and was properly described as criminal. The Chief Justice referred to the history of similar legislation and pointed out that the profanation of the Lord's Day was an indictable offence at common law.(84) The judgment at p. 508 quotes from the report of the Commissioners on Criminal Law Vol. 2 at p. 81 where under the general heading of "Offences against religion" the Commissioners say:

(83) S. 2 of the "Act respecting the observance of Sunday" 7 Edw. VII ch. 42 as amended by 9 Edw. VII, ch. 51 considered in Oimet v. Bazin 46 S.C.R. 502.

(84) ibid p. 508.

> Certain religious observances, such for instance as that of the Sabbath, may properly be conceived as exercising so important and beneficial an influence on moral conduct, that the wanton violation of them ought to be prevented by penal laws. The other general principle which we have above referred to as furnishing a legitimate foundation for all laws of the class we are now considering may also, to a certain extent, be applicable, namely, that with respect to institutions and observances which carry strongly with them the opinions and feelings of the community, and open defiance of them may justly be the subject of punishment.

The principle applies to offences against religion generally, and not merely to profanation of the Sabbath. Blackstone deals with offences against "religion, morals and public convenience" as part of the general subject of crime,(85) as do the standard English reference works on criminal law. In the case of Bowman v. Secular Society Limited(86) the House of Lords held that although the object of the Society(87) was a denial of Christianity, that it was not criminal, inasmuch as the propagation of anti-Christian doctrines, apart from scurrility or profanity, did not constitute the offence of blasphemy. Implicit in the decision, however, was the principle that conduct which could be

(85) Stephen's Commentaries on the Laws of England 16th Ed. Book VI Chapter VII and see Tremear's Criminal Code, Chapter V headed "Offences Against Religion, Morals and Public Convenience."

(86) 1917 A.C. 406.

(87) The main object of the company was "to promote . . . . the principle that human conduct should be cased upon natural knowledge and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action.

classified as blasphemous was within the scope of criminal law. Lord Finlay at p. 422 for example refers to a prosecution for blasphemy in the common law courts as early as the reign of Charles II.

Since the general subject matters of religion falls within the criminal law power it is the federal Parliament which has the authority to protect the freedom of religion. "Freedom of worship exists because no province could prevent it and the federal Parliament has not made any religion a crime."(88)

In the provincial field, the provisions of the Saskatchewan Bill of Rights Act (1947, ch. 35) was considered in the case of R. v. Naish.(89) Section 3 of the Act reads as follows:

> Every person and every class of persons shall enjoy the right to freedom of conscience, opinion and belief, and freedom of religious association, teaching, practice and worship.

The Police Magistrate held that

> a city by-law which prohibits the distributing of handbills containing advertising matter on the public streets cannot make it illegal for a religious sect, to distribute religious handbills in order to make their beliefs known, provided the distribution is made in a peaceful manner and the handbills do not contain any seditious or other unlawful material.

The judgment stated at p. 996 that the Act is intra vires

(88) F. R. Scott (1949) 27 Can. Bar Rev. op. cit. at p. 520.

(89) 1950 1 W.W.R. 987 - per Wakeling P.M.

of the Provincial Legislature.(90) It had not been argued that it was incompetent for the Legislature to pass the section under review.

Legislation of this type may be intra vires in respect of matters within Provincial sphere of authority notwithstanding the paramount power of the Dominion. It would be effective insofar as the Provincial legislative jurisdiction extends and would for example, apply to a situation similar to that arising in the Ruman and Donald cases. There is no doubt that if a legislature wishes to guarantee certain rights in respect of matters over which it has jurisdiction it can do so.

It has been held that the provinces cannot deprive their residents of rights which they hold as citizens of Canada.

In the Reference re. Alberta Statutes(91) Mr. Justice Cannon, after referring to the fact that Canada is a democracy with a constitution "similar in principle to that of the United Kingdom," went on to discuss the power of the provinces to interfere with the right to public discussion. He stated at p. 146:

(90) See Bora Laskin, Canadian Constitutional Law, p. 52, for a note on the paramountcy doctrine.

(91) See supra p.26, footnote (50).

> Every inhabitant in Alberta is also a citizen of the Dominion. The province may deal with his property and civil rights of a local and private nature within the province; but the province cannot interfere with his status as a Canadian citizen and his fundamental right to express freely his untrammelled opinion about government policies and discuss matters of public concern. The mandatory and prohibitory provisions of the Press Bill are, in my opinion, ultra vires of the provincial legislature. They interfere with the free working of the political organization of the Dominion. They have a tendency to nullify the political rights of the inhabitants of Alberta, as citizens of Canada, and cannot be considered as dealing with matters purely private and local in that province. The federal parliament is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press in discussing public affairs and the equal rights in that respect of all citizens throughout the Dominion. These subjects were matters of criminal law before Confederation, have been recognized by Parliament as criminal matters and have been expressly dealt with by the criminal code. No province has the power to reduce in that province the political rights of the citizens as compared with those enjoyed by the citizens of other provinces of Canada.

In the light of the status of religion as part of criminal law it is suggested that the same considerations would apply to freedom of religion as to freedom of public discussion.

In concluding this topic, reference should be made to a recent case decided by the Supreme Court of Canada.(92) The case came before the Court on appeal from the judgment Court of King's Bench for Quebec (Appeal Side) dismissing the appellant's appeal from his conviction at a trial before

(92) R. v. Boucher, 1951 S.C.R. 265.

a jury, of uttering a seditious libel. The case arose out of what was, in substance, a religious controversy.(93) The libel was contained in a document distributed by the accused who was a member of the Jehovah's Witnesses. The document was headed "Quebec's Burning Hate for God and Christ and Freedom is the Shame of all Canada" and was severely critical of the Catholic Church and the administration of justice in Quebec. It was held that

> neither language calculated to promote feelings of ill-will and hostility between different classes of His Majesty's subjects nor criticizing the courts is seditious unless there is the intention to incite to violence or resistance to or defiance of constituted authority.

Mr. Justice Rand stated at p. 288:

> Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality.

(93) per Rand J. at p. 284.