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A
BRIEFING PAPER
ON
DISCUSSIONS WITHIN
THE COMMITTEE OF MINISTERS ON FUNDAMENTAL RIGHTS



FOREWORD

The purpose of this document is to provide each government with a summary description of the discussions which have taken place during the first two meetings of the Committee of Ministers on Fundamental Rights. It concentrates on identifying the main points of view and ideas which arose during the discussions. In the interests of brevity, many shades of meaning and auxiliary or illustrative points which were brought out have not been recorded here. While an attempt has been made to reflect as closely as possible the views and comments expressed by the members of the Committee, responsibility for the document rests with the Secretary of the Constitutional Conference.

INTRODUCTION

1. The mandate given to the Committee of Ministers on Fundamental Rights by the Constitutional Conference of February 1969 was,

"to study all matters relating to fundamental rights, including the question of entrenchment of such rights in a constitutional charter."

In its first two meetings the Committee has discussed the principle of entrenchment and has examined the fundamental political rights and certain legal rights, their nature and the implications of their entrenchment. Other categories of rights, notably egalitarian and economic and social rights, will be discussed at future meetings.

2. The Committee's discussions have centred around a proposition from the Federal Government which suggested in detail the kind of provisions which might be incorporated into an entrenched charter of human rights. Propositions from most provincial governments also have been considered. In addition two special studies, analyzing the implications of entrenchment and the experience of other countries with entrenched rights, were carried out under the auspices of some of the delegations and have been examined by the Committee. (1)

3. All members of the Committee are in accord with the underlying objective of protecting the rights of Canadian citizens. The differences in view arise with respect to the best method of achieving the objective. Three basic approaches have been put forward:

- 1) Entrenchment of a charter of Rights in the Constitution of Canada.
- 2) The entrenchment of a limited number of basic rights and the protection of other rights by federal and provincial legislation in keeping with the distribution of powers.
- 3) The continuation of the system of protecting rights by federal and provincial statutes.

There was also discussion as to the substance of the rights which could be entrenched or otherwise protected.

(1) It should be recalled that prior to the convening of this Committee of Ministers the subject of fundamental rights was discussed in the Continuing Committee of Officials. The substance of these deliberations was reported to First Ministers in February 1969.

The Principle of Entrenchment

4. The examination of specific categories of rights was preceded by a discussion of the principle of entrenching fundamental rights. Reactions varied from acceptance in principle through acceptance with reservations to definite opposition.

5. Delegations favouring the principle of entrenchment expressed the view that the rights of individuals should have precedence over the rights of government. In their view a revised constitution which did not articulate basic values and rights would not meet the expectations of the Canadian people. The declaration of these rights would give them greater clarity and ensure their protection. The entrenched rights would form a base on which implementing legislation would be enacted by each order of government within its areas of jurisdiction. Entrenchment would protect these rights from injudicious legislation by any order of government. By establishing a uniform standard it could also contribute to national unity and would have educational and symbolic effects exceeding those of ordinary statutes.

6. Other delegations accepted the principle of entrenchment for some rights but expressed the following reservations:

- the effect of entrenchment must not be to transfer jurisdiction from one level of government to another;
- it is difficult to discuss entrenchment without knowing the division of powers and which level of government could legislate to protect certain rights;
- the impact of entrenching specific rights could not be assessed in the absence of a formula for amending the constitution which could be applicable to these rights;
- there is a need to know what limitations would be defined for certain rights;
- there is a need to know which courts would have jurisdiction in matters involving fundamental rights.

With respect to the questions of the division of powers and the amending formula, it was the view of several delegations that work in these areas should be carried on concurrently with the study of fundamental rights.

7. Those rejecting the principle of entrenchment suggested that the concept is alien to the principle of the supremacy of Parliament. They argued that in the parliamentary system the rights of the people are in their own hands and it is their elected representatives in the legislatures who have the prime responsibility for the protection of their rights. The effect of entrenchment would be to transfer the burden of this responsibility to the courts. It was also suggested that entrenchment would freeze rights at a fixed point, decreasing flexibility and making it difficult to adapt to changing conditions. In their view the Canadian system has worked well without entrenchment, and it has not been proven to their satisfaction that the citizens in countries with entrenched rights have greater freedom than those in countries without entrenched rights.

8. There was considerable discussion of the effect of judicial review which would result from placing rights in the Constitution. It was put forward that the entrenchment of rights would have the effect of transferring policy decision-making with respect to fundamental rights out of the hands of the legislators and into the courts, where judges could impose their personal values and where they would be expected to rule on complex social issues without adequate investigative tools at their disposal. The American process of judicial review would be substituted for the present Canadian system. There would be a marked increase in frivolous and time-consuming litigation and perhaps some loss of Canadian identity through the use of American legal and political precedents. In reply it was suggested that the American experience with its Bill of Rights did not have a direct application in Canada because of the important differences in the two political systems. In particular, mention was made of the differences in responsibility in regard to the criminal law and residual powers. Moreover, it was pointed out that judicial review has always existed in Canada with respect to the rights now in the B.N.A. Act. Consequently, the entrenchment of certain additional rights would not of itself be conferring a new function on the courts.

9. Some alternatives to the entrenchment of fundamental rights were suggested. They included the creation of human rights commissions, the nomination of ombudsmen and the establishment of permanent law reform commissions.

Political Rights

10. This category of fundamental political rights was viewed as including:

- freedom of conscience and religion;
- freedom of expression (including the freedom of speech and of the press);
- freedom of assembly and association, and
- the right to freely held elections at maximum intervals.

11. There was unanimous support for the entrenchment of the right to freely held elections at maximum intervals of five years at both the federal and provincial levels. Some delegations felt that the entrenchment of this right was sufficient to protect the exercise of the other political freedoms without their being entrenched. The effect of this agreement would be to extend the provision in the B.N.A. Act covering Ontario, Quebec and the Federal Government to include the other provinces. There was also support for the idea that this provision should not interfere with the power of Parliament and the legislatures to re-adjust representation.

12. Discussions also show that the majority of delegations are prepared to support the entrenchment of the other three fundamental political rights listed above. In some cases this support is dependent upon the development of appropriate constitutional provisions and the satisfactory development of other elements of the constitution, especially the amending formula and the division of powers.

13. One view put forward was that these political rights are so basic that Canadians take them for granted. Stating them in the Constitution would make them visible and help to clarify their meaning. Entrenchment would affect both private and public actions and would protect minorities against the temporary will of the majority. Moreover, in cases brought to the courts, there would be a review of the scope of the right as well as a ruling with respect to which order of government has legislative jurisdiction.

14. The view was also expressed that the exercise of one man's rights must not have the effect of violating another man's rights. Consequently, these rights carry some implied restrictions. It is necessary to understand both the substance and limits of these rights. In defining

these rights in the constitution some delegations felt a simple, general declaration would be sufficient, while others favoured an indication of the limits "by authority of law" as is the case in the international charters of rights.

15. Some reservations were expressed with regard to the effect on the distribution of powers of entrenching these political rights. One reservation was that entrenchment should not become an indirect way of modifying the division of powers. Another was that the jurisdictional aspects of the administration and enforcement of entrenched rights would need to be considered.

16. While a number of delegations were prepared to support the principle of entrenching these political rights, they did not feel that a commitment was possible in the absence of an amending formula. The flexibility of the amending formula would determine the ease with which change could be effected, and so reflect the degree to which the responsibility for protecting fundamental rights would be transferred from the legislatures to the courts.

17. Delegations rejecting the principle of entrenchment suggested that, on the basis of experience in other countries, the entrenchment of the three political rights would be of no great practical value. In particular, they argued that the history of the American Bill of Rights shows that entrenchment is not a panacea to problems of human rights.

18. The Committee agreed that the next phase of its work would involve a more detailed definition of the substance and limits of these political rights. Such definitions would be articulated with a view to their possible inclusion in the Constitution, should a decision to entrench these rights be made. A sub-committee has been established to carry out preparatory work in this regard, to explore whether these rights should be expressed in general terms or should include a statement of some limitations on their exercise, and to draft definitions.

Legal Rights

19. The Committee then discussed the category of legal rights. The attached list of legal rights was put before the Committee. It was pointed out that they are largely taken from the Canadian Bill of Rights and include

both rights of principle and procedural rights. Discussions centred largely on the need for entrenching this category of rights rather than on the substance of any particular legal right.

20. It was put forward that the entrenchment of legal rights would be a concrete means of ensuring equality before the law for all Canadian citizens. However, discussions showed that a majority of delegations did not favour the entrenchment of legal rights. In their view, the common law tradition provided a desirable element of flexibility which could be lost if these rights were entrenched. The Criminal Code and relevant provincial statutes were held to provide adequate protection for Canadian citizens. Consequently, if it can be shown where Canadians do not now have equal protection before the law, statutory changes should be considered in the immediate future.

21. Delegations rejecting the principle of entrenchment suggested it would affect the exercise of discretion by the courts and would change the whole construction of the judicial process. Fear was expressed that entrenchment would result in the importation of the weaknesses which were regarded as inherent in the American system of judicial review. There might also be the danger of constitutional objections being raised as a delaying tactic in cases brought before the courts.

22. The Committee agreed that it was important to have a clearer understanding of such terms as "the law of the land", "the principles of fundamental justice" and "due process". The previously mentioned sub-committee has been asked to study the meaning and implications of due process, both substantive and procedural. In addition, the sub-committee will explore the alternatives of whether certain legal rights should be entrenched or protected by both federal and provincial legislation. The sub-committee will have the task of considering which legal rights could be handled, one way or the other, and of exploring their substance and limits.

Résumé

1. The Committee unanimously agrees that the Constitution should guarantee the right of freely held elections at maximum intervals of five years at both the federal and provincial levels.
2. While some delegations reject the principle of entrenchment, a majority of delegations, some with reservations, agree that the constitution should guarantee the fundamental political rights of
 - freedom of conscience and religion
 - freedom of expression (including freedom of speech and press)
 - freedom of assembly and association,subject to acceptable definitions of their substance and limits and to a satisfactory amending formula.
3. The Committee agreed to continue its study of whether certain legal rights should be entrenched or should be protected by federal and provincial legislation.
4. The Committee established a sub-committee to which it referred specific matters related to political rights, legal rights and due process. The sub-committee is to report back in the spring of 1970.
5. The Committee agreed to examine egalitarian and economic and social rights at future meetings.
6. The Committee agreed to indicate to First Ministers that several delegations believed that an early discussion of a formula for amending the constitution would facilitate the progress of discussions on the entrenchment of fundamental rights.

LEGAL RIGHTS

- (a) the right of the individual to life, and the liberty and security of the person, and the right not to be deprived thereof except by due process of law;
- (b) the right of the individual to the enjoyment of property, and the right not to be deprived thereof except according to law;
- (c) the right of the individual to the equal protection of the law;
- (d) the right of the individual to be secure against unreasonable searches and seizures;
- (e) the right of a person who has been arrested or detained
 - (i) to be informed promptly of the reason for his arrest or detention,
 - (ii) to retain and instruct counsel without delay, and
 - (iii) to the remedy by way of habeas corpus for the determination of the validity of his detention and for his release if the detention is not lawful;
- (f) the right of a person not to give evidence before any court, tribunal, commission, board or other authority if he is denied counsel, protection against self-crimination, or other constitutional safeguards;
- (g) the right of a person to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;
- (h) the right of a person charged with an offence to be presumed innocent until proved guilty according to law in a fair hearing by an independent and impartial tribunal, and the right not to be denied reasonable bail without just cause;
- (i) the right of a person to the assistance of an interpreter in any proceedings in which he is involved as a party or witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted;
- (j) the right of a person not to be held guilty of an offence on account of any act or omission which at the time of its commission or omission did not constitute an offence, and the right of a person on being found guilty of an offence not to be subjected to a penalty heavier than the one applicable at the time the offence was committed;
- (k) the right of a person not to be subjected to cruel and unusual treatment or punishment.