A BILL OF RIGHTS?

2nd EDITION

CHAEL ZANDER

With a foreword by
The Rt. Hon. Lord Scarman

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By Michael Zander

Professor of Law, London School of Economics

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FOREWORD TO THE FIRST EDITION

One of the main concerns of the British Institute of Human Rights is that fundamental civil and political rights should be adequately protected in Great Britain. In recent years (for example, in the Hamlyn Lectures of 1974), a New Bill of Rights has been increasingly urged as the best means for achieving that end.

It is nearly three centuries since the last Bill of Rights was passed in this country. The enactment of a modern one, which would take account of the social, political, legal, and cultural changes in our environment since 1689, has many attractions. But it also raises a number of problems: of content, of form, of enforcement, and of the manner and degree of the constitutional protection to be given it.

Those problems must be identified, assessed and resolved before serious progress can be made towards the enactment of a new and effective Bill of Rights in Great Britain. To advance the completion of that task, the Governors of the Institute have recently commissioned a study —

> "to investigate how fundamental human rights could best be protected in the law of the United Kingdom, what should be the provisions of any Bill of Rights designed to achieve that protection, and how those provisions could themselves best be safeguarded against subsequent repeal or derogation; and to make public by all appropriate means the results of that investigation."

It will be some months at least before that study can be completed and published. Meanwhile, Michael Zander has written, independently, the paper which follows here. In it he considers the recent history of the proposal for a modern British Bill of Rights, many of the arguments for and against it, and some alternative solutions.

This paper forms a valuable and timely contribution to the current debate. For that reason, the Governors of the Institute are glad to be associated with its publication. The addition of their imprint does not of course mean that every one of them would agree with every one of Mr. Zander's contentions. But in giving serious consideration to a Bill of Rights it is of the first importance that the subject should be analysed as deeply as it can be, and that every tenable position should be put forward, discussed and evaluated. It is that process which this paper takes an important stage further.

LESLIE SCARMAN

Preface to the Second Edition

Since the first edition of this pamphlet there has been furious debates on the subject of a Bill of Rights. The literature on the subject has expanded greatly. There have been official reports from a Working Party of senior civil servants, from the Standing Advisory Commission on Human Rights for Northern Ireland, and from a Select Committee of the House of Lords. There have been debates on the issue in both Houses of Parliament. All three main political parties have expressed views, the House of Lords Select Committee took voluminous evidence on the subject and there have been new pamphlets and numerous articles in both lay and legal journals.

The pamphlet has been extensively re-written and much new material has been added, especially to the first section which traces the successive stages of the developing debate up to the end of 1978. The second and third parts consider the great variety of arguments advanced for and against the proposal. In the final section there is discussion of some particular problems that would require to be solved if a Bill of Rights were introduced. A Select Bibliography has been added. It is hoped that the pamphlet will provide a guide to the entire literature on the subject as well as a review and analysis of the issues raised by this great debate.

Michael Zander
August 1979

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1. THE HISTORY OF THE BILL OF RIGHTS DEBATE 1968-1979

1968-1974

A few years ago no one would have thought that the question of a Bill of Rights for Britain was a subject worth serious discussion. It attracted little interest before December 1974 when Lord Justice Scarman (as he then was) delivered the first of his Hamlyn Lectures[1] in which he proposed that there should be an entrenched Bill of Rights. What was significant was not simply that a prominent judge was making a call for a Bill of Rights, but that his suggestion was treated as an event of major importance. *The Guardian* made the story the front page lead[2]; other newspapers took up the cry; profiles of Sir Leslie and discussion of the proposal appeared in many of the leading papers. In a matter of days an issue which had been discussed over the years in a desultory fashion suddenly became fashionable and a topic of some political moment.

But although it was Sir Leslie Scarman who made the subject a serious issue for debate, the question of a Bill of Rights, or some equivalent, has in fact been raised on a number of occasions in the recent past.

The credit for opening up the subject in a considered way goes to *Mr. Anthony Lester,* QC, former chairman of the Fabian Society, expert on race relations and sex discrimination laws, and formerly Special Adviser to Mr. Roy Jenkins, the Home Secretary. In his 1968 pamphlet *Democracy and Individual Rights*[3] Mr. Lester drew attention to the threats to the individual citizen from a variety of sources - 'Parliament, the Civil Service, Local Government, or those clusters of private, oligarchal power which compete with Government in significance and scale'[4].

Parliament, he said, had on occasion reacted to popular prejudice or mass hysteria against a minority. At the start of the century, the sudden influx of mainly Jewish refugees from the pogroms of Eastern Europe had driven a timid government to pass the Aliens Act, 1905. Xenophobia and war hysteria had led to the Aliens Act, 1914, which passed all its Parliamentary stages in a single August day. Both statutes were passed as emergency acts; both were still in force in 1968.

In 1962, 'after a blatantly racist campaign against the immigration of coloured Commonwealth citizens,' Parliament had passed the first Commonwealth Immigrants Act, conferring sweeping powers over tens of thousands of migrant workers and their families without opportunity of a proper hearing or appeal. In 1965, the Labour Government had bowed to further pressure and put an inflexible limit on immigration from the Commonwealth. In 1968, the

Government had whipped the Commonwealth Immigrants Bill through all its stages in one week. The Act deprived a group of UK citizens of their previously unfettered right to enter the country. In these instances:-

> '. . . . the hallowed safeguards of our Parliamentary system were swiftly swept aside. Constitutional conventions, the sense of fair play of our legislators, the consciences of individual Members of Parliament, the Opposition, the independent judiciary, the Press, and public opinion were of no avail.'[5]

More typical of denial of individual freedom by Parliament, according to Mr. Lester, was the careless delegation to the executive of absolute and arbitrary powers. An example was the delegation of sweeping powers to the immigration officer in the Aliens Acts. Another was the system of security tests for an accused Government employee - he cannot be represented, is not entitled to know the evidence against him, cannot bring witnesses to contradict what he might guess is the evidence against him, and the evidence is not on oath. Another was the control over the issuing of passports. Mr. Lester instanced the withdrawal of the passport of Sir Frederick Crawford as part of the British Government's campaign against UDI in Rhodesia. The Commonwealth Secretary even declined to give the House of Commons any reasons for this action.

Other examples were the lack of adequate machinery to investigate complaints against the police, the inadequate provision of legal aid for those tried in the criminal courts, and the refusal by the social security authorities to publish the 'A' code governing supplementary benefits.

In the field of Local Government democratic and legal controls were, if anything, even weaker, and the abuse of bureaucratic power was more likely. Allocation of council housing, local decisions about such matters as education, censorship or control of meetings were all apt to be decided on the basis of unpublished criteria, without any hearing or appeal by the individuals affected. Mr. Lester called for a code of administrative procedure to govern the civil service, and for a Bill of Rights. But he doubted whether it would be wise to entrust a Bill of Rights to the judges. It would be wrong to give the judges the power to over-rule Parliament. 'It might take years to get the English Bench to interpret a Bill of Rights as a living document rather than an Income Tax Act'.[6] There was also the risk that 'some might use such a Bill to undermine radical social or economic legislation'.[7]

According to Mr Lester, the solution was to enact a Bill of Rights which could not be enforced by the courts; but instead there could be a Constitutional Council with the power (like the Ombudsman) only to make recommendations to Parliament about the compatibility of legislation or Executive action with the

provisions of the Bill of Rights. Such a compromise might be necessary in order to obtain immediate political support for the Bill. But 'the ultimate objective ought to be a Bill which is enforceable by the individual before a proper court'.

> 'That objective will not be reached until the judiciary can be trusted by Parliament to perform the major task of applying the Bill of Rights in a progressive and liberal spirit; it is a challenge to the Bench and the legal profession to win that trust'.[8]

Mr. Lester's final recommendation for immediate action was cautious - establish a Bill of Rights by enacting into English law the European Convention on Human Rights but make it merely an educative force, at least for the time being.

Over the next few years, the subject was sporadically ventilated in Parliament. On April 23, 1969, *Lord Lambton* (Conservative) sought leave to introduce a ten-minute rule Bill 'to preserve the rights of the individual'. His main motivation, he said[9], was to restore rights to citizens which had been eroded. He instanced the Race Relations Act which curtailed freedom of speech, the educational policies of the Labour Government which denied parental choice and the Town and Country Planning Acts which he said, limited the rights of farmers. Factory and health inspectors had rights of entry to private places. Passports had been withheld for political opinions.

His Bill was modelled on the Canadian Act for the Protection of Human Rights and Fundamental Freedoms 1960. This ensured that all future legislation was checked by the Canadian Minister of Justice to ensure that it did not conflict with the Act. A similar check should be made here by the Attorney-General. Such an act would ensure individual rights.

The motion was opposed by Labour MP, Mr. Alex Lyon, (subsequently Minister of State at the Home Office) but, as he said, diffidently 'because any radical conscience, aware of the need to preserve the liberty of the individual, must always seek some new institution to enable that to be done'. A Bill of Rights would put a fetter on Parliament's capacity to change the law. If the fetter were progressive and liberal, that might be desirable.

But if it was conservative (whether through a constitutional court, a supreme court, a committee, or the Attorney General) and regressive, 'then the inflexibility of our machinery for changing the law when obvious social injustice appeared, would make it a gravely retrograde measure for human liberty'.[10] The debate lasted a total of fourteen minutes. No-one else spoke, and Lord Lambton's proposed Bill was rejected by 161 votes to 137.

Mr. Lester was Labour; Lord Lambton was Conservative. The

next major contribution, again in 1969, came from three Liberals - Mr. John Macdonald, with his pamphlet *A Bill of Rights*,[11] Lord Wade, who initiated a debate in the House of Lords and Mr. Emlyn Hooson, QC, who introduced a ten-minute rule bill in the House of Commons.

Mr. Macdonald's pamplet, based on the work of a group of Liberal lawyers, went further than Mr. Lester's — advocating a Bill of Rights enforceable in the ordinary courts. The need for such protection, he thought, derived from a variety of causes. He instanced (1) the growth of bureaucracy and the individual's difficulties in presenting his case; (2) new threats to privacy from phone-tapping, industrial espionage and the computer; (3) the increasing concentration of power in Whitehall, in industry and in the mass media; and (4) growing intolerance, exemplified by Mr. Enoch Powell, against minorities.

His tract included a draft Bill with clauses giving rights in twenty four specific areas - for instance, banning discrimination (on grounds of race, religion, sex, national or social origin); guaranteeing security of the person against injury without consent; freedom of speech and opinion; freedom of religion, of association and assembly; freedom from unlawful arrest or detention, liberty to marry freely, to educate children ('in such manner as the parent shall think fit') etc. Mr. Macdonald did not think it was necessary for the Bill of Rights to be entrenched in the sense that it would require any special Parliamentary majority to pass or amend. It was enough, he thought, to provide that the Bill could only be validly amended by legislation which specifically stated an intention to do so.

On 18 June, 1969, *Lord Wade* started a four hour debate in the House of Lords based on the Macdonald pamphlet. His motion was

> 'to call attention to the need for protection of human rights and fundamental freedoms, to the increasing power of the State in relation to the individual, and to the threat to personal privacy resulting from technological advance; and to possible measures, including the enactment of a Bill of Rights'.[12]

He referred to earlier proposals: Lord Reading's Preservation of the Rights of the Subject Bill, 1947; Lord Samuel's Liberties of the Subject Bill, 1950, and Lord Mancroft's Rights of Privacy Bill, 1961. Although the subject, therefore, was not new, it was, he thought, becoming increasingly important.

Lord Wade referred especially to the growing concentration of governmental powers, to the speed with which important bills were sometimes rushed through Parliament and to invasions of privacy. On enforceability, he adopted the proposal of John Macdonald, that the rights proclaimed be capable of being determined by the ordinary courts.