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Judges, Politics and the Law

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The recent controversy arising from the decision of the Supreme Court of Canada in the *Canadian Wheat Board* case[1] raises issues of particular significance in these days of great political and social changes. There is no need to repeat in any but the briefest form the facts of this now famous case, nor is it the purpose of this article to add yet another opinion on the actual merits of the decision. Rather is it concerned with the deep division in the approach to problems of this kind which the controversy has revealed.

Professor Willis in vigorous terms attacked the approach of the majority of the court which, as he alleged, read a "socialistic act of 1946 in the light of a free enterprise canon of legislative intent enunciated by judges of 1880" and read "measures implementing the twentieth century constitution through the spectacles of the nineteenth century constitution".[2] Messrs. Kent Power and Fillmore, in no less vigorous terms, attacked Professor Willis's comments as an onslaught upon the rule of law, the judicial process and individual rights.

The basic theme of this conflict is a perennial tension between

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[1] (1951), 29 Can. Bar Rev. 296, 572.

[2] 29 Can. Bar Rev. at p. 302.

public interest and private rights, but it inevitably involves such matters as the degree of inviolability of private property in contemporary democracy, the approach of law courts to problems of statutory construction, and, in particular, to statutes which deal with political, social and economic issues.

The two opposing viewpoints may be summarized as follows. One view, still the more widely accepted by bench and bar in Canada, is that the judge must ignore political and social issues, whether in the interpretation of statutes or in the application of common law precedent. Such problems as a clash between governmental planning powers and private rights, or the interpretation of the "property and civil rights" clause in the British North America Act, should be decided, it is claimed, on technical legal grounds, without any weighing of the political and social issues. One way of expressing this philosophy is to say that a constitution should be interpreted "as a statute".[3] More specifically, this means that a statute, whatever its background and purpose, should be interpreted strictly, according to rules laid down in text books and precedents on statutory interpretation. Most advocates of this approach also believe, however, that, whenever a statute interferes with private property rights, the decision, in case of doubt, should be in favour of the integrity of private property, regardless of the type of statute and problem under consideration. Many supporters of this view also believe that legislation by statute, and more particularly legislation by order in council or other form of government regulation, is an evil to be restricted to the absolute minimum. Government by regulation, it is said, violates the principle of separation of powers. Judicial impartiality and aloofness from political struggle is opposed to executive arbitrariness.

The opposite view[4] may be summarized as follows. The unpolitical treatment of predominantly political and social issues clothed in legal form is a self-delusion. It usually means the application of a thinly masked political philosophy of the court, opposed to that of the legislator. The alleged neutrality of this attitude conflicts with the simultaneous assumption that, in case of doubt, private property should prevail against planning powers and other legislative measures taken in the interest of the community as a whole. The interpretation of constitutional documents as "statutes" is therefore based on a misconception, but it is not

[3] Carter, in (1950), 28 Can. Bar Rev. 946. Cf. also Kent Power and Fillmore in (1951), 29 Can. Bar Rev. 572-578.

[4] Expressed *e.g.* by Willis in (1951), 29 Can. Bar Rev. 296, 580.

even a correct description of what really happens. Both the Supreme Court of the United States and the Privy Council have been guided by a definite political philosophy, notably in the interpretation of such general clauses as the "due process" clauses of the American Constitution or of the "property and civil rights" clause of the British North America Act. The view, moreover, that all statutes are of one type, and subject to the same rules of interpretation, is wrong and mischievous. In fact there are many types of statute, which require different approaches. Most advocates of this view also regard the antithesis of governmental arbitrariness and judicial impartiality as fictitious. There are many intermediate stages between administration and legislation, on the one hand, and between administration and judicial function, on the other. Courts exercise many discretionary functions which leave no less room for arbitrariness than the law-making or the administrative practice of government departments.

This article will on the whole—though not without some reservations — support the second view. It will seek to justify it not by personal belief but by an analysis of the social realities of contemporary western society, of the conclusions reached by eminent judges and jurists of our time, and of the technical rules and premises which are used.

Law Courts and the Evolution of Society

To what extent should law courts have to take note of changes in public policy as they are expressed in legislative trends, new social and economic conditions, and public opinion. This problem has, since the turn of the century, been discussed by many of the greatest jurists, both of the common law and the civil law jurisdictions. When the French jurist, François Gény, in a work first published in 1899,[5] looked back on nearly a century of legal developments under the Code Civil, he found that the courts had transformed the code through creative interpretation in many vital respects. Quebec lawyers in particular will be familiar with the way in which French courts have, for example, adapted the delict provisions of the Code Civil (articles 1382-1386) to the new realities of industrial accidents, of railway traffic, motor cars and aeroplanes. The results of such thought were apparent in the German Civil Code of 1900, whose general clauses have enabled the German courts to cope with such tremendous upheavals as the great inflation following the First World War and, even more clearly, in the Swiss Civil Code of 1907, which directs the judge

[5] Méthode d'interprétation et sources en droit privé positif.

to decide as if he were a legislator when he finds a gap in the law, guided by "approved legal doctrine and judicial tradition". A more recent version of the same idea is article 3 of the Italian Civil Code of 1942, which directs the court, in cases that remain doubtful after the exhaustion of normal methods of construction, to decide "according to the general principles of the jurisprudential organization of the State".

From very different premises, English and American jurists came to conclusions not very different from those of the continental jurists and legislators. Dicey, in his *Law and Public Opinion in England during the Nineteenth Century*, analyzed the transition from the liberal premises of Benthamite philosophy to the increasing importance of active social service legislation, and the beginnings of the collectivist society which is now in full blossom.[6] Meanwhile, in the United States, the constant challenge which the interpretation of a written constitution presents to judicial wisdom and impartiality made some of the greatest members of the Supreme Court think afresh about the relation of law and politics. For many years Oliver Wendell Holmes battled single-handed against the majority of a court which had elevated the "due process" clauses of the Fifth and Fourteenth Amendments to an absolute guarantee of private property, and had thereby time and again invalidated federal and state legislation aimed at social betterment or the suppression of abuses. An early and classical interpretation of Holmes' view is apparent in his dissenting judgment in the *Lochner* case:[7]

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinion in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. . . . The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same . . . is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . But a constitution is not intended to embody a particular economic theory,

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[6] The first edition of Dicey's work was published in 1905, the second in 1914.

[7] *Lochner* v. *New York* (1904), 198 U.S. 45.

whether of paternalism and the organic relation of the citizen to the State or of *laissez-faire*.

A few years later Roscoe Pound started to examine law and legal problems from the point of view of conflicting interests and values. The examination, not only of problems of constitutional law but of common law, labour law, criminal law and other fields, led Pound, and the many jurists who developed and modified his approach, to see law predominantly as an instrument of social engineering in which conflicting pulls of political philosophy, economic interests, ethical values, constantly struggle for recognition against a background of history, tradition and legal technique. Mr. Justice Cardozo formulated the result of a lifetime of reflection and practical experience in the following terms:[8]

> . . . logic and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired. One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or even arbitrary whim or fitfulness. Therefore in the main there shall be adherence to precedent. There shall be symmetrical development, consistently with history or custom when history or custom has been the motive force, or the chief one, in giving shape to existing rules, and with logic or philosophy when the motive power has been theirs. But symmetrical development may be bought at too high a price. Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare. These may enjoin upon the judge the duty of drawing the line at another angle, of staking the path along new courses, of marking a new point of departure from which others who come after him will set out upon their journey.
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> If you ask how he is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself. Here, indeed, is the point of contact between the legislator's work and his.

Even before the First World War the growing pressure of new industrial and technical developments, of new social and political philosophies, had led jurists of many countries, independently of each other, to think about law in new terms: to see it primarily as an instrument of social evolution. Legal logic and techniques are seen as elements, but by no means the sole, or even the predominant element in the unending race between law and new social problems.

[8] The Nature of the Judicial Process (1921) pp. 112-113.

The Impact of Social Pressures on the Common Law

Since the First World War the tempo of social change has accelerated beyond all imagination. With it the challenge to the law has become more powerful and urgent. We have seen that many years ago leading jurists and judges concurred that it was not only the right but the duty of the judge to take note of fundamental changes in public opinion. Indeed, it is almost certain that the common law would no longer exist if great judges had not from time to time accepted the challenge and boldly laid down new principles to meet new social problems. The decisions which reflect such judicial revolutions are few in number, but they stand out as landmarks. Every one of them symbolizes a new social epoch and has laid the foundations on which hundreds of elaborations or routine decisions can be built up. A few examples may suffice to illustrate this point.

When Blackburn J. formulated the rule in *Rylands* v. *Fletcher*, he began to adapt the principles of tort liability to the era of expanding industrial enterprise in a once predominantly agricultural society.[9] The technique by which that great judge accomplished this feat was the collection, synthesis and remoulding of several instances of liability without fault which, in Dean Wigmore's language,

> wandered about, unhoused and unshepherded, except for a casual attention, in the pathless fields of jurisprudence, until they were met by the master-mind of Mr. Justice Blackburn who guided them to the safe fold where they have since rested. In a sentence epochal in its consequences this judge co-ordinated them all in their true category.

Another judgment of Blackburn J.[10] laid the foundations for the principles of legal liability of public authorities, now a problem of outstanding importance in the age of government enterprise.

The twentieth century counterpart of the rule in *Rylands* v. *Fletcher*, the decision in *Donoghue* v. *Stevenson*,[11] is technically simply an abandonment of the principle that *A*, if contractually liable to *B*, cannot simultaneously be liable in tort for the same action or omission to *C*. But sociologically it means the judicial recognition of the age of mass manufacture and standardized products, an age in which the economic position of the retailer is vitally changed. In the field of contract the development of the doctrine of frustration was stimulated by the upheavals of the

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[9] This is brought out in Professor Bohlen's classical essay on the rule in *Rylands* v. *Fletcher*, Studies in the Law of Tort, pp. 1 ff.

[10] *Mersey Docks Trustees* v. *Gibbs* (1866), L.R. 1 H.L. 93.

[11] [1932] A.C. 562.

First and Second World Wars. The doctrine, in English law, has not yet assumed the same significance as on the continent, mainly because the social and economic upheavals have not been as great. It was the shattering inflation following the First World War which led the German courts to develop the doctrine of frustration of contract from certain general clauses in the German Civil Code. It became an instrument for the judicial adjustment of obligations which had become grossly unfair as a result of currency devaluation. This doctrine has had great influence on other continental systems such as French, Swiss and Greek law. That its significance in English law has also increased is shown by some recent decisions of the Court of Appeal.[12] Finally, the decision of the House of Lords in the *Crofter Harris Tweed* case[13] gave definite legal recognition to the equality of business and labour in the use of collective pressure to secure economic advantages and disposed of the tort of conspiracy as a legal weapon in labour disputes.

The doctrine of judicial precedent has set certain limits to judicial law-making which are apparent in the fate of the doctrine of common employment. This doctrine, invented at a time when judges thought in terms of patriarchal households and small scale business, has long been found utterly unsuited to the facts of modern industrial employment. In a number of decisions the House of Lords whittled down the doctrine, but was unable to abolish it.[14] This was eventually accomplished by the legislator through the Law Reform (Personal Injuries) Act, 1948.[15]

Periods of judicial boldness in the adaptation of the law to new social problems have usually been followed by periods of consolidation and reaction. In recent years the swing of the pendulum has been clearly enough illustrated by the remarkable contrast between the approach to these problems by the House of Lords during the 30's and early 40's, under the leadership of Lords Atkin and Wright, and by the present House of Lords. The conflicting philosophies are significantly expressed in two dicta by eminent British judges. In Lord Wright's view:[16]

> Law is not an end in itself. It is a part in the system of government of the nation in which it functions, and it has to justify itself by its ability to

[12] *Parkinson* v. *Commissioners of Works*, [1949] 2 K.B. 632; *British Movietonews* v. *London Cinemas*, [1950] 2 All E.R. 390. The latter decision was reversed by the House of Lords, [1951] 2 All E.R. 617.

[13] [1942] A.C. 435.

[14] Friedmann, Legal Theory (2nd ed.) pp. 289-91.

[15] In Canada, it has been abolished by workmen's compensation legislation.

[16] (1942), 4 U. of Toronto L.J. at pp. 271-272.

> subserve the ends of government, that is, to help to promote the ordered existence of the nation, and the good life of the people.

This contrasts with Lord Macmillan's pronouncement of a few years later:

> Your Lordships' task in this House is to decide the cases between litigants and your Lordships are not called upon to rationalize the law of England. That attractive if perilous field may well be left to other hands to cultivate.

The judicial practice of the House of Lords strikingly illustrates these conflicting approaches. Between 1932 and 1945 the House of Lords, in several vital fields, adjusted the common law and, in particular, the law of tort, to new social conditions. The principle of *Donoghue* v. *Stevenson*, the whittling down of the doctrine of common employment,[17] the extension of the common law duties of the employer,[18] the redefinition of statutory negligence,[19] the reversal of the rule in *Chandler* v. *Webster*,[20] the new approach to social reform statutes,[21] and the recognition of economic realities in conspiracy actions[22] are some of many examples.

By contrast, the present House of Lords has time and again emphasized that it does not regard it as its task to rationalize or reform the common law. It has, sometimes, gone out of its way to re-establish historical rules and distinctions, however antiquated. It was reaffirmed the anomalous exemption of farmers from liability for animals straying on the highway,[23] which had been strongly criticized by Lord Greene in *Hughes* v. *Williams*.[24] It has given restrictive interpretations to the rule in *Rylands* v. *Fletcher*,[25] and to the principle of *Donoghue* v. *Stevenson*,[26] and has repudiated the idea that the decisions should be regarded as expressions of new principles of tort liability. It has gone some way towards reverting to the earlier approach to tax evasion which the House of Lords and the Court of Appeal had repudiated some years ago.[27] It has reversed the Court of Appeal, in its attempts to rationalize the legal duties of occupiers, and reaffirmed old

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[17] *Radcliffe* v. *Ribble*, [1939] A.C. 215.
[18] *Wilsons* v. *English*, [1938] A.C. 57.
[19] *Lochgelly Iron and Coal Co.* v. *M'Mullan*, [1934] A.C. 1.
[20] *Fibrosa* case, [1943] A.C. 32.
[21] *Summers* v. *Salford Corporation*, [1943] A.C. 283.
[22] *Crofter Harris Tweed* case, [1942] A.C. 435.
[23] *Searle* v. *Wallbank*, [1947] A.C. 341.
[24] *Hughes* v. *Williams*, [1943] K.B. 574.
[25] *Read* v. *Lyons*, [1947] A.C. 156.
[26] *London Graving Dock* v. *Horton*, [1951] 2 All E.R. 1,
[27] *Cf.* below, p. 833.

distinctions, however artificial and unintelligible to the layman.[28] It has emphatically repudiated the attempt of the Court of Appeal to use the doctrine of frustration as an instrument for the judicial adjustment of contract.[29] Some will prefer the approach of the present House, some that of their predecessors. What needs emphasis is that the choice is not one of logic, it is not between "correct" and "false" but between conflicting conceptions of the social function of the judiciary.

The history of the common law has been a constant give and take between consolidation and progress, between the legal technicians and the creative jurists. In the past the tempo of social change was very much less rapid than it is to-day and it cannot be assumed that the "lawyer's law" will always remain a prerogative of the professional lawyer, a backwater removed from urgent social and political problems. The present House of Lords — together with a majority of the Supreme Court of Canada — obviously takes the view that there is still a difference, not only of degree but of kind, between the making of the law — which is the legislator's field — and the application of the law, which is the judge's field. This view was recently put in blunt terms by Lord Jowitt L.C. (as he then was), on the occasion of the Seventh Legal Convention of the Law Council of Australia:[29A]

> It is quite possible that the law has produced a result which does not accord with the requirements of today. If so, put it right by legislation, but do not expect every lawyer, in addition to all his other problems, to act as Lord Mansfield did, and decide what the law ought to be. He is far better employed if he puts himself to the much simpler task of deciding what the law is. . . . Please do not get yourself into the frame of mind of entrusting to the judges the working out of a whole new set of principles which does accord with the requirements of modern conditions. Leave that to the legislature, and leave us to confine ourselves to trying to find out what the law is.

These observations were occasioned by the discussion on a learned paper by a distinguished Australian judge, Mr. Justice Fullagar of the High Court of Australia, dealing with the problem of "Liability for Representations at Common Law", a problem recently underlined by the decision of the Court of Appeal in *Candler* v. *Crane, Christmas & Co.*[29B] The discussion showed up clearly the main weakness in Lord Jowitt's contention: the extreme difficulty, in many cases, for example in regard to the present scope

[28] *Jacobs* v. *L.C.C.*, [1950] 1 All E.R. 757; *London Graving Dock* v. *Horton*, [1951] 2 All E.R. 1.

[29] *London Cinemas* v. *Movietonews*, [1951] 2 All E.R. 617.

[29A] (1951), 25 Aust. L. J. at p. 296.

[29B] [1951] 1 All E.R. 426.

of the rule in *Donoghue* v. *Stevenson*, to discover what the law is. It is the uncertainties of the law which have compelled the courts to develop the law in some direction. As a result, the law of tort of today bears little resemblance to that of fifty years ago. The clear-cut division between the law as it is and the law as it ought to be does not exist. The problem of choice between alternative solutions is often disguised but not eliminated by the adoption of a conservative instead of a progressive interpretation, or perhaps even more by a tradition far more characteristic of British than of American judges: to pretend that they only apply existing law, when in fact they are making new law.

The examples quoted earlier have shown that, if this strict division had always been observed, the common law would not to-day be the living and vigorous system it still is. The work of great jurists like Holmes, Cardozo, Pound, Gény, Ehrlich and many others has shown that the choice between alternative solutions is, in critical cases, not a matter determined solely, or even predominantly, by legal logic, but by the balancing of a multitude of factors. It would go beyond the scope of this article to demonstrate in detail the ways by which law courts have been able to choose between conflicting valuations, often under the cover of logical, or seemingly logical, and technical categories.[30]

Those who oppose the notion that law courts should take an active part in the adaptation of law to social problems usually argue that to do so would sacrifice certainty, the primary virtue of the law, to utility. If adhesion to legal technique and the inclusion of value judgments had achieved certainty, the contention would have force. Certainty is one of the paramount objectives of law. It is usually achieved in the thousands of routine decisions which quantitatively make up the bulk of the law. But, in the relatively small number of leading cases which give direction to hundreds of others, stability and certainty have seldom been either aimed at or achieved. The distinction between ratio decidendi and obiter dictum, the differentiation of cases on facts, the reliance on one or the other judgment in a decision by a higher court, and many other factors give a choice vastly wider than is apparent on the surface. The divergences outlined in the cases mentioned earlier cannot be accounted for by technical arguments or legal logic. These are the façade.

[30] Cf. Stone, Province and Function of Law, pp. 171 ff. On the difficulties of discovering the ratio decidendi and the consequent opportunities of choice between different solutions, see Paton and Sawer (1947), 63 L.Q. Rev. 461; on the problem in general, see Friedmann, Legal Theory (2nd ed.) chaps. 23, 24.

The analysis of recent trends in the common law thus underlines the theoretical observations made earlier in this article. The Swiss and Italian civil codes, the conclusions reached by Gény in France, by Holmes, Frankfurter or Cardozo in America, by Dicey, Lord Wright or Lord Justice Denning in England, express the same thought in different ways. In his application of precedent, as in the interpretation of statutes, the judge must take note of major shifts in public opinion and social policy, of developments sufficiently fundamental to be accepted by the consensus of public opinion and to be expressed by the general trend in legislative policy. The theoretical formulation of such an approach must always remain somewhat vague, for the ways in which changes in public opinion express themselves in democratic society are many, and it is not an easy task for a court to fix the borderline between accepted evolutions in public opinion, on the one hand, and personal philosophy or prejudice, on the other. The great judges of our time have always been conscious of this difficulty. Indeed, it is their greatness that they have faced it, made it articulate, and gone some way to solve it in their own judicial practice.

It is not difficult to illustrate by concrete examples the distinction between personal idiosyncracy and the incorporation of new social policies in the administration of the law. Any contemporary British or Canadian court must, for example, recognize collective bargaining and labour organization as a legitimate, and commonly accepted, instrument of social action. The Supreme Court of the United States denied this as late as 1935,[31] but fifteen years later such a denial would not be seriously contemplated. As one problem is solved, a new one opens up. To-day the problem of the closed shop shows the clash between two equally accepted legal principles: the right to bargain collectively and the freedom of the individual to choose his place of work and his associations. Similarly, contemporary British and American courts must base their decisions on the principle of the equality of races, religions and sexes. Practical expressions of this trend are the recent decisions of the United States Supreme Court prohibiting discrimination against negroes,[32] or the award of damages for violation of a common law right[33] to a coloured person who had been refused admittance to a public hotel. A corresponding

[31] In the majority decisions which declared New Deal legislation unconstitutional, *e.g.*, *Schlehter Poultry Corp.* v. *U.S.* (1934), 295 U.S. 495.

[32] *E.g.*, *Smith* v. *Allwright* (1944), 321 U.S. 649; *Shelley* v. *Kraemer* (1948), 334 U.S. 1.

[33] *Constantine* v. *Imperial Hotels Ltd.*, [1944] K.B. 693.

evolution in the field of public law is the increasing rejection of antiquated crown privileges in the field of civil liabilities, privileges which are incompatible both with the rule of law in democracy and the growing rôle of government in commercial and industrial enterprise.[34] The principles just outlined would find acceptance by all major political parties, and they are embodied in the legislative practice of all contemporary democracies.

Functions of Government and the Administration of the Law

Behind this development of legislative practice — the beginnings of which were clearly analyzed by Dicey[35] — lies a decisive change in the function of modern government, a development which is no longer a matter of serious controversy between the major parties in the British democracies. Yet the controversy over the *Canadian Wheat Board* v. *Nolan* seems to show a remarkable reluctance on the part of some lawyers to accept this change in the function of modern government.

The vast expansion of the function of modern government derives from three major causes, each one of which is beyond our individual likes and dislikes, and each one of which is too prominent a feature of modern society to be ignored by the lawyer. The first is the industrialization and urbanization of Western society. The sheer physical and technical conditions of life increase the need for control.

One of the best known of modern anti-planners, Professor Hayek, illustrates the difference between a planned state and a state governed by the rule of law by saying that the former "commands people which road to take, whereas the latter only provides sign-posts".[36] But in modern industrial society vast masses live together in close physical and economic interdependence. The traffic is so dense that many more policemen, beacons, sign-posts are necessary to avoid chaos. The traffic of London requires more regulation than the traffic of Much-Binding-in-the-Marsh.

The second reason is an evolution of social philosophy. In the last generation, a decisive shift has taken place in public opinion and in the legislative policy of all major parties. Conservatives and Liberals, as well as Socialists and Communists, all reject unmitigated economic individualism. They hold the State re-

[34] For a detailed discussion, see my Law and Social Change in Contemporary Britain (Stevens, 1951) Pt. III.
[35] Law and Public Opinion in England, especially chaps. VII-IX.
[36] Road to Serfdom (1944) p. 54.

sponsible for creating conditions of stable and full employment; they accept the responsibility of the community for minimum standards of living, housing, labour conditions and social insurance. The Beveridge Report put these demands in picturesque language when it spoke of the "giants of idleness, disease, squalor, and want". There is controversy on the degree of public controls and the socialisation of industries and public utilities. But some degree of socialisation and public operation of industries is recognized by all major parties. The nationalization of the British coal industry was accepted by all parties as necessary in the circumstances. In Britain, as in Australia or Canada, a number of important public utilities, such as electricity, forestry and transport, are run by the state, or by public corporations. And there is no more than a difference of degree between British and American developments. The federal government and other public authorities in the United States control a vast proportion of the generation of electric power, harbour facilities and other public utilities. Public housing programmes and social insurances, farm support and other subsidy schemes have been enacted to an increasing extent. The responsibility of the federal and state governments to cope with unemployment has not yet been severely tested, because of the post-war boom conditions and the re-armament drive which followed it almost immediately, but the machinery exists, and no political party would today disclaim responsibility for full employment.

The third cause of this transformation of the social pattern is the state of mobilization, or semi-mobilization, which is unfortunately too permanent a feature of modern Western society to be regarded as a passing emergency. For the last thirty-five years the conduct or aftermath of war has alternated with preparations for new wars, or, as at present, a state of high military and industrial mobilization, which may or may not avert war, but certainly leaves its impact on society. It entails an increasing measure of state control over the nation's manpower and resources, over scientific research and the location of industries, over priorities in employment, and a multitude of other activities implied in the preparation for modern war.

Such a transformation of society cannot but have a profound— though still largely unnoticed — effect on legal concepts and relations. The notion of a government which concerns itself exclusively with military defence, foreign affairs, police and legal justice is now a thing of the past. Modern government, whatever its political complexion, must discharge certain social protective

functions, through factory and health legislation, or through social insurance provisions which may range from elementary unemployment assistance to the comprehensiveness of the British National Insurance Act of 1946. It must further concern itself with the conservation of vital national assets, such as forests or water-ways or roads. Every state has to exercise a varying degree of control over scarce resources, both raw materials and consumer goods, and to ensure their equitable distribution through rationing, price control or other means. Moreover, control of certain national resources is often required for the fulfilment of international obligations, of which the European Recovery Programme and the International Wheat Agreement provide recent examples. Such control often means active measures of state supervision, as for example the prescription of agricultural minimum standards and the power to dispossess bad farmers under the British Agriculture Act of 1947. Further, the control of investments and employment, in order to mitigate violent fluctuations between boom and depression, implies credit control, public works and other regulative measures. Finally, public corporations control and manage such vital industries as coal, transport, electricity and gas.

All these functions entail the making of public contracts, the interpolation of compulsory conditions in private contracts, the imposition of statutory duties, restrictions on property use, and a host of acts of interference by public authorities with the free and unrestricted exercise of private rights. The sum total of these different state activities is sufficient to transform the free economic society in which state government is a glorified policeman, but otherwise a disinterested spectator, into a controlled society in which the government is an active participant in the economic and social life of the citizen.

To take all these factors into account in a redefinition of the rule of law is not only permissible but indispensable. Lawyers are frequently under the illusion that the continued acceptance of definitions and rules formulated a century ago means being "non-political". In truth, it means the intrusion of yesterday's politics into today's law. Living as we do in a planned society, we have to accept it for purposes of legal analysis and, in particular, for the redefinition of the rule of law. The acceptance of the realities of present day society has been greatly obscured by ideological prejudices as well as by inaccurate terminology. The price control power which the Canadian government exercised in the *Canadian Wheat Board* case is a regulating power which is held in reserve

by every modern democratic government, a power which none of these governments can abandon in principle, though it may not choose to exercise it often. But it is not a "socialistic" power in any strict sense of the word. It does not imply public ownership of industry or any other of the tenets of socialist doctrine. Contemporary democratic society is "socialistic" only in a relative sense. It is as far removed from the social conditions as it is from the philosophy which predominated in the nineteenth century. But whatever terminology we affix to the mixture of private enterprise, public enterprise, collective bargaining, social security legislation and regulating powers which characterize modern western democracies, it is absurd to pretend that this society does not exist, and to base our legal analysis upon the realities of a past era. To do so means introducing politics into law with a vengeance.

Statutory Interpretation and the Conflict of Values

The problem of statutory interpretation, though of some significance in the sixteenth century,[37] is on the whole both newer and more articulate than that of the development of common law through judicial precedent. On the face of it the interpretation of a text deliberately formulated by the legislator, for a special and usually articulate purpose, seems to be a much more straightforward affair than the problem of building up the law on an endless string of precedents stretching over centuries. Yet the clash of values and interests, the conflict between different judicial approaches, is no less marked in the interpretation of statutes than it is in the common law. Indeed, the *Wheat Board* case,[38] and the controversy following it, shows clearly that the technical rules of interpretation conceal but thinly the deeper problem of balancing conflicting values, philosophies and interests in the context of a statute. In the *Wheat Board* case, the conflict between the right to exploit the fortuitous profits of private trading clash with the claim of government — a non-socialist government — to redistribute profits caused by governmental price regulation in the interest of the community. This conflict was barely hidden by the grammatical controversy about the meaning of a clause in the National Emergency Transitional Powers Act. Similar problems appear under different guises in many recent decisions. Thus recently the Court of Appeal[39]

[37] The rules of interpretation as formulated in *Heydon's* case (1584) have a very modern ring.

[38] *Canadian Wheat Board* v. *Nolan et al.*, [1951] S.C.R. 81; [1951] 1 D.L.R. 466.

[39] *Ransom & Luck* v. *Surbiton*, [1949] Ch. 180.

had to decide whether ministerial powers under a new Town and Country Planning Act superseded the terms of an agreement between a local authority and a private company concerning the development of an estate. A number of recent decisions have wrestled with the increasingly important problem how far an authority undertaking certain works enters into contractual commitments and is thus liable in damages.[40] Several decisions by the Divisional Court of the King's Bench have been concerned with the question of the extent of the powers of the rent tribunal to interfere with private tenancy agreements.[41] But, most important of all, the supreme federal courts in the United States, Canada and Australia are constantly concerned with the conflict of public power and private rights, of the clashing powers of federation and states. This conflict may appear in the interpretation of the "property and civil rights" clause in the B.N.A. Act, of the "due process" clauses of the American Constitution, or of the "freedom of trade, commerce, and intercourse" clause in the Australian constitution; the basic social problems which appear in different legal forms are essentially the same.

Can we — as is so often contended — dismiss these social issues from our legal conscience by adhering to a "strict" or "technical" interpretation of statutes? This problem divides itself into two. First, is it correct to speak of statutes as a genus for purposes of interpretation? Do the same rules of interpretation apply to a written constitution and to a bankruptcy act, a taxation act or a criminal statute? Second, if one set of rules is to be applied to all statutes, are they sufficiently clear and certain to eliminate conflicting interpretations? The assumption that, for purposes of interpretation, statutes are all of one kind is clearly implicit in the following observations recently made by Mr. A. N. Carter, K.C.:[42]

> We have been fortunate in Canada, too, in the establishment of a tradition which has looked in the main to the legislatures rather than to the courts for the development of the law to meet novel conditions. Inevitably, under our federal constitution uncertainty has arisen on many occasions as to the competent legislative authority to deal with a particular subject matter, but the courts have interpreted the statute which allocates legislative authority, the British North America Act, as a statute and have thus given certainty to our basic law at the sacrifice, of course, of elasticity. To lawyers who must advise clients certainty is the great virtue.

[40] *Kent* v. *East Suffolk Catchment Board*, [1941] A.C. 74; *Smith* v. *River Douglas Catchment Board*, [1949] 2 K.B. 456.

[41] Cf. in particular *Rex* v. *Paddington & St. Marylebone Rent Tribunal*, [1949] 1 K.B. 666.

[42] (1950), 28 Can. Bar Rev. at p. 946.

This problem has been repeatedly discussed in this review.[43] In a previous article on this subject, I have shown that statutes are by no means all of one kind and that both judicial practice and principle indicate important differences between the rules of interpretation appropriate to different types of statutes. An eminently political and general document, such as a constitution, is not and cannot be treated in the same way as a statute concerned with the registration of land or with criminal procedure. Lord Jowitt, Lord Wright, Lord Greene, Mr. Justice Dixon and Mr. Justice Frankfurter are among the eminent judges whose views I there quoted for confirmation of such a differentiation. The belief that the Privy Council and the Canadian courts have avoided the political problems and tensions of the United States Supreme Court by interpreting the B.N.A. Act as a "statute" is in conflict with the views of many eminent Canadian constitutional authorities. Thus Mr. Justice MacDonald in his survey of the "Constitution in a Changing World" had this to say:

> The impact of external change upon judicial decision, however, has not been as great as the character of that change might suggest or require; for, in the main, the Constitution has been approached as if it were — what it palpably is not — an ordinary statute; and one, moreover, to be interpreted by the evidences of the intention of its makers collectible from its own terms and scheme, rather than from authoritative guides to that intention known to every educated Canadian. Thus, in but few cases has the Privy Council sought for the meaning of terms rather than intention; and in still fewer has it allowed to such terms a meaning other than that which they bore in 1867.[44]

The latter comment is supported not only by Mr. Justice MacDonald's own careful survey of the decisions on the British North America Act from 1923 to 1947, but also by many other eminent constitutional lawyers, some of whom are quoted in Mr. Justice MacDonald's survey. Thus Mr. W. F. O'Connor, K.C., found that "many pronouncements of the Judicial Committee . . . are materially in conflict . . . with a scheme of distribution provided by the Act", and that there has been "most serious persistent deviation on the part of the Judicial Committee from the actual text of the Act".[45]

The interpretation of the B.N.A. Act, especially by the Privy Council, has been as political as that of the American Constitu-

[43] *E.g.*, by Willis, Statute Interpretation in a Nutshell (1938), 16 Can. Bar Rev. 1, and by the present writer in (1948), 26 Can. Bar Rev. 1277. For an excellent collection of cases and materials on statutory interpretations see Read and MacDonald, Cases and Materials on Legislation (1948) ch. 7.

[44] (1948), 26 Can. Bar Rev. 21, at p. 23.

[45] Report to the Senate of Canada on the B.N.A. Act (1939), pp. 11-13.

tion by the Supreme Court of the United States, and as far-reaching in its social consequences. The Privy Council has in effect whittled down the residuary legislative power of the Dominion in section 91 for "peace, order and good government" to practical insignificance, and has elevated the "property and civil rights" clause of section 92 into something approaching a guarantee of private rights. It has, in its decisions on the Canadian "New Deal" legislation, invalidated Dominion attempts to legislate on unemployment and social insurance, on grounds which have been condemned by jurists and historians alike.[46] And this approach has not ensured certainty either of principle or of precedent. The decisions on such matters as the Dominion's residuary power, the treaty-performing power and the regulation of trade and commerce are neither more consistent nor more certain than those of any other court which interprets a document of a political or social character.

A very recent decision of the Supreme Court of the United States illustrates well the conflict of judicial approaches to a problem of constitutional interpretation which involves social and economic issues. Under the Agriculture and Markets Law of the State of New York, the Commissioner had refused a licence for an additional milk distribution plant on the ground that the proposed expansion of the petitioner's milk distribution facilities would reduce the supply of milk for local markets and result in destructive competition in a market already adequately served. As so frequently in recent years, the Court split five to four. The approach to the problem revealed, however, three distinct philosophies. Mr. Justice Jackson, on behalf of the majority, regarded the New York law as a violation of the principle of free trade embodied in the commerce clause of the federal Constitution:

> This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law.[47]
>
> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home em-

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[46] Cf., apart from the authorities already mentioned, Richard (1940), 18 Can. Bar Rev. 243; Kennedy (1937), 15 Can. Bar Rev. 393; Laskin (1947), 25 Can. Bar Rev. 1054, and Canadian Constitutional Law (1951) pp. 24-5; also McInnis, Canada: Political and Social History (1947) pp. 461-463.

[47] *Hood* v. *Du Mond* (1948), 336 U.S. 525, at p. 533.

bargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.[48]

Mr. Justice Black, with whom Mr. Justice Murphy concurred, regarded this view as an improper judicial interference with the legitimate regulating functions of government, and as a revival of antiquated philosophies:

It is always a serious thing for this Court to strike down a statewide law. It is more serious when the state law falls under a new rule which will inescapably narrow the area in which states can regulate and control local business practices found inimical to the public welfare. The gravity of striking down state regulations is immeasurably increased when it results as here in leaving a no-man's land immune from any effective regulation whatever. It is dangerous to assume that the aggressive cupidity of some need never be checked by government in the interest of all.

The judicially directed march of the due process philosophy as an emancipator of business from regulation appeared arrested a few years ago. That appearance was illusory. That philosophy continues its march. The due process clause and commerce clause have been used like Siamese twins in a never-ending stream of challenges to government regulation.[49]

Both the commerce and due process clauses serve high purposes when confined within their proper scope. But a stretching of either outside its sphere can paralyze the legislative process, rendering the people's legislative representatives impotent to perform their duty of providing appropriate rules to govern this dynamic civilization. Both clauses easily lend themselves to inordinate expansions of this Court's power at the expense of legislative power. For under the prevailing due process rule, appeals can be made to the 'fundamental principles of liberty and justice' which our 'fathers' wished to preserve. In commerce clause cases reference can appropriately be made to the far-seeing wisdom of the 'fathers' in guarding against commercial and even shooting wars among the states. Such arguments have strong emotional appeals and when skillfully utilized they sometimes obscure the vision.[50]

Mr. Justice Frankfurter, with whom Mr. Justice Rutledge concurred, preferred to remand the case to the Supreme Court of Albany County for further fact investigation. His view was midway between the conflicting idealisms. "I feel constrained to dissent because I cannot agree in treating what is essentially a problem of striking a balance between competing interests as an exercise in absolutes."[51]

As I see the central issue, therefore, it is whether the difference in degree between denying access to a market for failure to comply with

[48] *Ibid.* at p. 539.
[49] *Ibid.* at p. 562.
[50] *Ibid.* at p. 563.
[51] *Ibid.* at p. 564.

> sanitary or book-keeping regulations and denying it for the sake of preventing destructive competition from disrupting the market is great enough to justify a difference in result.[52]

He thought that the facts before the court were insufficient to decide whether the action of the Commissioner had been on one side of the line or the other.

The three opinions in this case express, at either extreme, the conflicting interpretations of state power and individual economic freedom, as reflected in the American Constitution, and, between the extremes, a pragmatic approach in which the conflicting interests, policies and purposes of regulatory action are carefully weighed. Such conflicts are inevitable where independent judges have to interpret static clauses in a dynamic society. Indeed, such tensions are the life blood of democracy. Subservience to the dictates of government would be the price at which unanimity could be bought. For it is not only the conflict of values and philosophies in a free society which produces such clashes but also the frequent divergence in the application of general principles to concrete issues. Where the power of government is divided between a federation and its member states, advocacy of planning or laissez-faire alone cannot resolve the conflict; for the further constitutional question arises whether in a federation there is an inviolable minimum of state powers which a federation cannot infringe by an expansive interpretation of taxing power, inter-state commerce and of other powers to which modern social conditions give a meaning vastly different from the one it had at the time of the founding fathers. Moreover, judges in a free society will often deliberately check their own preferences because they regard even the appearance of a biased decision as more harmful than a result which they personally disapprove.[53] Even when the issue of principle is clear, the question remains, as in *Hood's* case, how the exercise of a specific power should be classified. The discussion of principles can lead to a clarification of issues. It cannot eliminate the responsibility of decision in a given issue.

The Supreme Court of the United States has been often attacked in recent years. It has been criticized for its readiness to overrule its own earlier decisions, for the frequent divisions among

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[52] *Ibid.* at p. 570.

[53] The High Court of Australia, in March 1951, by a majority of six to one invalidated the government Act outlawing the Australian Communist Party. None of the judges representing the majority could be suspected of any sympathy for the Communist Party and some of them quite probably approved the political objectives of the Act. Cf. Beasley, Australia's Communist Party Dissolution Act (1951), 29 Can. Bar Rev. 490.

its members, for subservience to the policies of Government or Congress. Nobody would deny that the Court, like any other court faced with the insoluble task of interpreting an old Constitution in a changing world, displays many weaknesses. But its judgments, whether unanimous or divided, reflect and interpret a real world, a world of conflict and tensions, of uncertainties and divided opinions. They do not pretend that the application of the general formulas of the Constitution to the complexities of a concrete problem is a simple task. True to the tradition of Holmes, Brandeis, Cardozo, Stone, the Court does not often confuse the duty to be as impartial and detached as the conflicts of human minds permit with the illusion that political problems are not political problems, an illusion to which British courts are so often prone. A Constitution full of general political principles has perhaps helped this awareness. But it is only fairly recently that the Court has moved from the twilight of inarticulate political prejudices into the daylight of open and frank discussion of conflicting views and values. At least one result of this has surely been most fortunate: The Court has largely abandoned the distortion of the democratic process which followed from the all too successful attempt of its predecessors to sit in judgment over the policies of the legislator. Instead it has directed its attention to the enforcement of the principles of the Constitution dealing with racial and civic equality, provisions which had been mocked for many years by the legislation of some southern states.

Instead of looking upon the struggles of the United States Supreme Court with complacency, we might well make more use of the abundant material it provides, and reconsider critically whether the oblique method of dealing with political problems under the cover of legal logic — the method preferred by the Privy Council — has been of as great benefit to Canada as is often alleged — by lawyers more frequently than by historians or political scientists.

Under a democratic system, of which the independence of the judiciary is one of the most precious guarantees, constitutional judges must and do strive for an interpretation untainted by political prejudices and based, so far as is humanly possible, on an impartial consideration of the many factors, of history, logic and political values, which go into a constitutional document. This is a very different thing from the pretence, long abandoned by the greatest of contemporary judges, that the legal interpretation of constitutional texts or of other statutory instruments is devoid of and remote from political and social issues. Such escapism does not help either democracy or judicial independence.

But, even if it were assumed that there are uniform rules of interpretation for all types of statutes, the further question remains whether these rules are so clear, so technical and so unpolitical in their character as to avoid any conflict of values. As my earlier article has attempted to show,[54] the technical rules are to a large extent self-contradictory, and in decisions of fundamental importance the issue has seldom turned on technical legal rules. The House of Lords has not hesitated to depart from literal interpretation or established canons of construction when the problem at issue appeared sufficiently important to justify it.

In *Roberts* v. *Hopwood*,[55] a London borough council had fixed a minimum wage of £4 a week for all its employees, male and female. This, one should have thought, it had a clear power to do under a statute which empowered local authorities to allow such wages "as [they] may think fit". Yet the House of Lords added the word "reasonably" to this phrase, and then proceeded to quash the action of the Council as unreasonable. All the Lords agreed in substance, though not in the violence of their language, with Lord Atkinson, who thought that the council "allowed themselves to be guided in preference by some eccentric principles of socialist philanthropy or by a feminist ambition to secure the equality of the sexes in the matter of wages in the world of labour". On the other hand, in *Liversidge* v. *Anderson*[56] the House was concerned with the interpretation of Defence Regulation 18B, which gave the Home Secretary certain powers of detention, where he had "reasonable cause to believe" certain persons to be of hostile associations. This formulation had been adopted, after a parliamentary debate, in order to provide some check on the Home Secretary's discretion. But the majority, anxious this time to help the Executive in a time of great emergency, refused to examine whether the Home Secretary had, in fact, had reasonable cause. In effect, "where . . . he *thinks* he has reasonable cause to believe" was substituted for "had reasonable cause", a construction which Lord Atkin had little difficulty in showing was contrary to all precedent and to the usual canons of interpretation. The Privy Council recently[57] confirmed Lord Atkin's view when, in a clause virtually identical with 18B, it affirmed the right of judicial scrutiny as to whether an administrative authority had, in fact, acted reasonably, and all but dissented from *Liversidge* v. *Anderson*. The presumption in favour of

[54] See footnote 43 *supra*.
[55] [1925] A.C. 578.
[56] [1942] A.C. 206.
[57] *Nakkuda Ali* v. *Jayaratne* (1950), 66 T.L.R. 214 (pt. 2) 214.

private property has been of particular importance in tax cases. It is supported in *Partington* v. *Attorney-General*,[58] in *Levene* v. *Inland Revenue*[59] (though only by a dictum), and in other cases. One or two very recent decisions of the House of Lords seem to incline towards this rule again.[60] But in a number of war and post-war decisions both the House of Lords and the Court of Appeal have contemptuously brushed aside the contention that the taxpayer ought to get away with an attempt to evade a tax, at the expense of the community, which he should, in justice, pay. Both Lord Simon, in *Latilla* v. *I.R.C.*,[61] and Lord Greene, in *Howard de Walden* v. *I.R.C.*[62] expressed themselves forcefully. Again, in a case concerned with the conflict between the post-war planning powers given to the Minister for Town and Country Planning by the Act of 1947 and a pre-war agreement between a local authority and a private company permitting development of a piece of land, the Court of Appeal had no hesitation in affirming the priority over a private contract of the planning power bestowed by Parliament.[63] Similarly, the Court of Appeal, in *Cory* v. *City of London*,[64] decided that a by-law passed by the City of London as sanitary authority, which imposed stricter sanitary standards for the removal of refuse, was not a breach of

[58] (1869), L.R. 4 H. L.100, at p. 122.

[59] [1928] A.C. 217.

[60] Notably *Vestey's (Lord) Executors* v. *I.R.C.*, [1949] 1 All E.R. 1108; *Potts Executors* v. *I.R.C.*, [1951] 1 All E.R. 76.

[61] [1943] 1 All E.R. 265, at p. 266: "My Lords, of recent years much ingenuity has been expended in certain quarters in attempting to devise methods of disposition of income by which those who were prepared to adopt them might enjoy the benefits of residence in this country while receiving the equivalent of such income without sharing in the appropriate burden of British taxation. Judicial *dicta* may be cited which point out that, however elaborate and artificial such methods may be, those who adopted them are 'entitled' to do so. There is, of course, no doubt that they are within their legal rights, but that is no reason why their efforts, or those of the professional gentlemen who assist them in the matter, should be regarded as a commendable exercise of ingenuity or as a discharge of the duties of good citizenship. On the contrary, one result of such methods, if they succeed, is, of course, to increase *pro tanto* the load of tax on the shoulders of the great body of good citizens who do not desire, or do not know how, to adopt these manoeuvres."

[62] (1942), 25 Tax Cases 121, at p. 134: "The Section is a penal one and its consequences . . . are intended to be an effective deterrent which will put a stop to practices which the Legislature considers to be against the public interest. For years a battle of manoeuvre has been waged between the Legislature and those who are minded to throw the burden of taxation off their own shoulders on to those of their fellow subjects. . . . It would not shock us in the least to find that the Legislature has determined to put an end to the struggle by imposing the severest of penalties. It scarcely lies in the mouth of the taxpayer who plays with fire to complain of burnt fingers." See also *Congreve* v. *I.R.C.*, [1948] 1 All E.R. 948; *Hold* v. *I.R.C.*, [1947] 1 All E.R. 188.

[63] See above footnote 39.

[64] [1951] 1 All E.R. 85.

a contract previously concluded by the same authority with a firm of lightermen for the removal of refuse. On the other hand, a series of recent decisions by the Divisional Court of the King's Bench, presided over by Lord Goddard C.J., of which *Rex* v. *Paddington Rent Tribunal*[65] is the most famous, show a definite leaning in favour of individual property rights against the regulatory power of public authority (in this case a rent tribunal) even where it meant a restrictive interpretation of an apparently unrestricted power.

A careful examination of the relevant cases shows how superficially simple problems dissolve, on closer scrutiny, into a weighing of the many conflicting elements that, in Mr. Justice Cardozo's classical analysis, go into a judicial decision. It is not surprising that authorities should be conflicting; in modern democracy, where social welfare policies and individual freedom are both accepted and necessary foundations of government, the conflict can never be finally adjusted. It is a matter of constant struggle in which the deceptive simplicity of general and absolute rules bears about the same relation to the problems of actual decisions as do the generalities of platform politics to the realities of government.

Judicial Dilemmas in Modern Democratic Society

In modern democratic society, the judge must steer his way between the Scylla of subservience to government and the Charybdis of remoteness from constantly changing social pressures and economic needs. There is little need to point out the dangers of complete political subservience which the judiciary has experienced under both Fascism and Communism. The administration of law under these systems becomes an entirely political function and an instrument of government policy. Under Fascism and Communism certain spheres of social and commercial law are left relatively intact because the government does not consider them as sufficiently important to interfere or regards it as desirable that citizens should enjoy some security of rights in spheres not directly touching government policy.

In democracies, on the other hand, the illusion is still widespread, despite the warnings of great jurists, that the judge can ignore the social and political issues on which he is asked to adjudicate. Lord Wright's definition of law as an "instrument of government" has already been quoted. It was Lord Justice Scrutton, one of the most orthodox as well as the most learned of

[65] [1949] 1 K.B. 666.

English judges, who warned in the following terms against confusion of prejudices with objectivity:

> . . . the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgments as you would wish. . . . It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your class.[66]

Part of the illusion still current among many lawyers is an antiquated conception of the separation of powers. In its absolute and rigid formulation, the doctrine of the separation of powers has never been a correct reflection of politics. Even in the United States, where the doctrine has been developed to its utmost rigidity, the close links between the executive, the legislature and the judiciary are evident. The independence of the judiciary from both executive and legislature remains a cornerstone of democratic government, but it can not be absolute. The notion of "quasi-judicial" has been extended by a judiciary anxious to maintain some control over the executive, through the prerogative writs.[67] But when law courts have felt doubtful about the wisdom of bringing too many ministerial actions under judicial control, they have tended to narrow down the concept of quasi-judicial functions.[68] Certainly the problem of the proper scope of judicial control of the executive cannot be solved by categorical absolutes. It is futile to demand the abolition of government regulation in the kind of society in which we live. Discretion, and even arbitrariness, is no monopoly of the executive. Offenders as well as prison administratrators are keenly enough aware of the vast discrepancies in the scale of punishment inflicted upon motor car owners for speeding offences or for crimes committed under the influence of alcohol.

It would be futile to attempt a solution of this problem by abolishing judicial discretion. It is an illusion of some non-lawyers, Hayek for example, that the abolition of discretion and equity would make the law certain and predictable. Codifications which, like the Prussian Code of 1788, attempted to give the most minute legal regulation of every conceivable problem, have soon fallen into oblivion, but the French Code Civil, which deals usually with legal problems in general and broad principles, sur-

[66] (1922), 1 Camb. L.J. 1, at p. 8.

[67] The high water mark is the decision of the Court of Appeal in *Rex* v. *Electricity Commissioners*, [1924] 1 K.B. 171.

[68] Cf. in particular *Franklin* v. *Minister of Town and Country Planning*, [1948] A.C. 87; *Robinson* v. *Minister of Town and Country Planning*, [1947] 1 All E.R. 851.

vives after a century and a half, thanks to its generality and to the wisdom of the judiciary, which saw its function in the adaptation of the code to new social wants and demands.

The infinite variety of social problems and legal situations makes discretion an inevitable element in the judicial process. The modern machinery of government blurs — although it does not obliterate — the distinction between legislative, administrative and judicial functions. To fine one man $50.00 and send another to prison for an identical offence is hardly less arbitrary than to refuse a building licence to one and to grant it to another applicant where the two applications have the same merits. But while there are no remedies against such judicial discrepancies in punishment, there are remedies against unjustified discrimination by administrative authorities.[69]

Whether in the interpretation of a constitution, in the development of the law of tort, in the interpretation of a taxation or price control statute, or in the delineation between administrative and judicial actions, there is no refuge in absolutes, tempting though the attempt to find it might be. Text-book rules on the construction of statutes are useful and indispensible, as tools to be used with discretion and discrimination. They are no substitutes for the appreciation of an individual situation and for the choice between conflicting values.

Even more dangerous than the escape into technicalities is the confusion of conservative beliefs with objectivity, or the description of the inescapable realities of contemporary society as undesirable and unworthy of consideration by the lawyer. To say, for example, that "freedom in thought and speech must go hand in hand with a free economy in which the citizen is at liberty to buy and sell with a view of profit" and that "these freedoms cannot co-exist with governmental regulation through order in council or otherwise"[70] is to substitute a dream picture of a past society for the minimum conditions of the modern state, without which no government, whether liberal, socialist or conservative, whether American, Canadian, British or French, could survive.

The danger of such escape into the past, or into personal prejudice, is not only that it divorces the law from social evolution, it is also at bottom at variance with the values and demands of modern democracy. The task of the modern judge is increasingly complex. Hardly any major decision can be made without a

[69] Cf. *Kruse* v. *Johnson*, [1898] 2 Q.B. 91; *Roberts* v. *Hopwood*, [1925] A.C. 578; *Middlesex County Council* v. *Miller*, [1948] 1 K.B. 438, and many other authorities.

[70] Fillmore (1951), 29 Can. Bar Rev. at p. 578.

careful evaluation of the conflicting values and interests of which some examples have been given in the preceeding pages. Totalitarian government eliminates much of the conflict, not only for its judges but for all its citizens, by dictating what should be done. It lays down absolute rules and enforces them by legal and extra-legal sanctions. It demands obedience in return for security.

The lot of a democratic judge is heavier and nobler. He cannot escape the burden of individual responsibility, and the great, as distinct from the competent, judges have, I submit, been those who have shouldered that burden and made their decisions as articulate a reflection of the conflicts before them as possible. They do not dismiss the techniques of law, but they are aware that alone and in themselves they provide no solution to the social conflicts of which the law is an inevitable reflection.

We live in an age of uncertainties and dangers, an age in which it is only too tempting to seek escape from the responsibility of decision in some kind of mythology. Millions have succumbed to Fascism, Communism or to emotional formulas of nationalism. Such needs or myths help to absolve the individual from decision and moral responsibility, and they afford an escape from the hard facts of life. In the administration of law it is also tempting to seek escape from the burden of decision in mythologies. The law must aspire at certainty, at justice, at progressiveness, but these objectives are constantly in conflict one with the other. What the great judges and jurists have taught us is not infallible knowledge, or a certain answer to all legal problems, but an awareness of the problems of contemporary society and an acceptance of the burden of decision which no amount of technical legal knowledge can take from us.

The Authority of Supreme Court Decisions

There is this to be added. It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced, including the interpretation by this Court of the decisions of the Judicial Committee, should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationship between the courts. If the rules in question are to be accorded any further examination or review, it must come either from this Court or from the Judicial Committee. (Rinfret C. J. in *Woods Manufacturing Co. Ltd.* v. *The King*, [1951] S.C.R. 504, at p. 515)