CANADA AND MODERN INTERNATIONAL LAW*

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We live in a revolutionary age. Scientists are making gigantic inroads into the realm of the unknown on all fronts. Horrendous weapons are being invented and produced; new means of energy are being developed for peaceful uses and otherwise; disease is being controlled; the population on our planet is increasing; swifter and cheaper methods of communication and travel are now with us. The horizons of discovery are limitless in the natural sciences and in technology but are we prepared for them? Do we have the necessary intellectual and moral fibre to absorb these innovations? Are our moral values and legal concepts keeping pace with these discoveries in making them work for our common good? An outstanding problem facing mankind is reassessing our international legal order and establishing an international Rule of Law. It is no longer only the concern of the diplomat or of the specialized lawyer, it is the concern of one and all.

My purpose here is threefold. First, I will explain the meaning and scope of the new international legal order. Second, I will point out, in accord with this meaning, areas of study that demand immediate attention. Third, I will make a few comments on Canada's role in it.

I

International law and institutions have come a long way since the end of World War Two. It is not surprising that the established legal order is coming under close scrutiny in every aspect and is found by many eminent scholars to be grossly out of step with modern needs.

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C. Wilfred Jenks, a foremost student in the field, in a recent book[1] expounds the view that modern international law is not now limited by the rules governing the relations between states. It has outgrown this stage of development and must now be conceived as the common law of mankind. He means by the expression "common law of mankind",

> The law of an organized world community, constituted on the basis of states but discharging its community functions increasingly through a complex of international and regional institutions, guaranteeing rights to, and placing obligations upon, the individual citizen, and confronted with a wide range of economic, social and technological problems calling for uniform regulation on an international basis which represents a growing proportion of the subject-matter of the law.[2]

He maintains that a universal system of law must extend beyond the purview of the civil law and common law systems (from which most of our traditional international legal rules have been derived). He states:

> We can no longer be content to assume that the law of the North Atlantic Community will be accepted without question by the world. We must learn to think instinctively in terms of a group of major legal systems including Latin American, Islamic, Hindu, Jewish, Chinese, Japanese, African and Soviet law. We must seek to develop from the common elements in these legal systems, all of which are still in process of evolution, a universal legal order which gives reasonable expression to our sense of right and justice.[3]

The esteemed American international lawyer, diplomat and teacher, Philip Jessup, would call the law relating to this new international legal order, transnational law.[4] He considers that the term "international law" is now inaccurate since it suggests that only the relations of states *inter se* are involved. Now, he points out most persuasively, the new order is concerned with such problems as nuclear weapons, the polar areas, outer space, universal economic problems, fundamental rights and the problems that emanate from international organizations—entities composed of many states which have separate personalities and separate rights and duties.

Professor W. Friedmann, formerly of the Faculty of Law, of the University of Toronto, and now of the Columbia University School of Law, emphasizes the "interpenetration of international and national law and the importance of incorporating into the

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[1] The Common Law of Mankind (1958).
[2] *Ibid.*, p. 8.
[3] *Ibid.*, p. 165.
[4] From the title of his book (1956).

study of international law the common law of mankind".[5] He writes:

> . . . international law, like municipal law, is increasingly concerned with the development and regulation of international collaboration in spheres formerly outside the field of international law . . . . International law is today actively and continuously concerned with such divergent and vital matters as human rights and crimes against peace and humanity, the international control of nuclear energy, trade organization, labour conventions, transport control or health regulation. This is not to say that in all or any of these fields international law prevails. But there is no doubt today that they are its legitimate concern.

The reasons for these and many other expressions of concern for a new international legal order are not difficult to find. Within the past fifty years the international community has undergone tremendous economic, social and political upheavals. In particular, two catastrophic world wars within living memory have accentuated the utter waste, misery and destruction attending them. Everyone in modern warfare is a casualty, everyone suffers; mankind does not want a third. Moreover, the very existence of life itself is now threatened by new weapons which leaves no alternative than the establishment of a strong, just international legal order and the settlement of disputes under an international Rule of Law.

Many other reasons exist for its urgent need today. One is that the conflicting ideologies of the East and the West demand an effective philosophical and economic basis for collaboration if peaceful coexistence is to prevail. Consequently, students are examining every facet of the democratic and communist systems in their attempt to find common denominators. Ideologies, production methods, technical know-how, social programs, legal devices, religious attitudes, and educational systems are among the many fields that are being explored. These comparative studies illustrate the insufficiency of present international law and institutions.

Further, we realize now that the peace of the world depends on more than a system of collective security or power alliances. We know that to a great extent it depends on the attainment of economic, social and political equality of the states of the international community and of the undeveloped areas in the world. Without "solving international problems of an economic, social,

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[5] Some Impacts of Social Organization on International Law (1956), 50 Am. J. Int'l. L. 475, at pp. 476-7.

cultural or humanitarian character",[6] I do not think we can seriously consider the establishment of an international Rule of Law. The massive effort required in this direction makes necessary a radical development in international legal concepts.

The rapid creation of new states is outmoding the prevailing rules of international law. Their rights and duties in the society of nations must be defined with more exactitude and more in accord with basic legal, moral and political concepts of the present. The traditional rules of international law for admission of new members, such as a defined territory, a permanent population, an organized government are now hardly sufficient. "Can they participate in the complex international life of today?" should be the governing question. Increases in the world population, particularly in Asia, will likewise necessitate new concepts. Food is becoming inadequate for the needs, boundaries are threatened; this will involve, first of all, reconsideration of moral values. New and various media of communication and travel are having their effects on international relations. The world is becoming smaller in this respect. Immigration rules, health regulations, the protection of aliens abroad are among legal matters that will demand closer attention and more precise definition. On the economic plane the changes in means of communication and travel will be considerable. New markets will be available and Canadian business will be more active in other countries and *vice versa*. More consciousness of economic laws in general, monetary commercial and tax laws in particular, will result.

Aiding our quest for a new international legal order is the revival, in some form, of natural law doctrines. As Professor McWhinney says:

> We live in an era ripe for international law .... We are looking for new orthodoxies to replace old, shattered faiths; positivism might serve as a philosophy of law in an age of serenity, but it is clearly wanting in a crisis age. We are agreed as to the need for a value-oriented jurisprudence — hence, *inter alia*, the revival of natural law thinking, in non-Catholic quite as much as in Catholic circles.[7]

Basically we must seek and find new values of right living. Since the turn of the century, man is becoming more and more subservient to the machine. He lives in a world of haste. He has lost touch with everything not "practical" which means, essentially,

[6] Charter of the United Nations, art. 1, s. 3.

[7] The Supreme Court and the Bill of Rights — The Lessons of Comparative Jurisprudence (1959), 37 Can. Bar Rev. 16, at p. 19. See also W. Friedmann, Legal Theory (3rd ed., 1953), Ch. 10, entitled "The Revival of Natural Law Theories".

the making of money. He is indoctrinated via mass communication media with common-place shows, sexy movies, blaring music and cheap drama. The finer things in life are now enjoyed by the peculiar few. Modern man is now concerned with security and luxury living whereas his quest for freedom and true values is subordinated. And if we prefer security to freedom, as Edith Hamilton tells us the Greeks did in the later period of their civilization,[8] we lose all.

There can be no solid foundation for world peace and security until international disputes can be settled by judicial and legislative processes. The urgency for such a solution is apparent. Much effort, experiment and collaboration is required from all of us. Statesmen, politicians, lawyers and teachers are perhaps particularly affected but industrialists, financiers and businessmen also have their part to play. Indeed, as all of us were recently engaged in the "prosecution of a war", similarly we must all be engaged in winning the peace.

What can we do? First, we must examine, rearrange and, where necessary, reformulate our present international legal rules and institutions. Thus we must continually appraise the constitutional framework and procedure of the United Nations and of our regional organizations. We must not stop there. We should critically examine our national constitutional laws and procedures and align them in accord with the new internationalism. Also we must regularly review the law of treaties to meet modern requirements—a point on which I will have more to say. Second, we must make a concerted effort to ascertain the general principles of law recognised by all nations and, as in the words of Mr. Jenks:

> . . . by analyzing in greater detail some of the fundamentals of a satisfactory legal order, how far we can legitimately hope, in the light of our present knowledge of the major legal systems of the world and the possibilities and prospects of future development which they present, to secure on a world-wide basis the essential elements of a legal order which gives reasonable expression to our sense of right and justice.[9]

This will require a comparative legal study never before attempted.

II

Our goal is the establishment of the international Rule of Law.

[8] History's Great Challenge To Our Civilization, Saturday Evening Post, September 27th, 1958.

[9] *Op. cit., supra,* footnote 1, p. 120.

What does this expression mean? Can we give it a precise working definition that will furnish a guide in its attainment and assist students of international law in its quest?

The origin of the famous phrase, Rule of Law, is generally attributed to Professor Dicey who maintained that, as applied to England, it included three distinct though similar conceptions:[10]

> First, no man is punishable . . . except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land.
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> Second, . . . no man is above the law but . . . every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.
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> Third, the general principles of our Constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts . . . .

Although Dicey's interpretation of the Rule of Law has been outdated in England for some time[11] (if indeed it was ever a truly accurate expression), and one that would be hardly acceptable internationally because of its omission to refer to some curtailment on the power of the legislature,[12] it has had and still has considerable influence in the Commonwealth and the common-law world today. The canons of Diceys' Rule of Law represent ideals which all branches of government strive to attain. Thus Professor Hood Phillips says that Dicey's doctrines today influence legislators; "its principles provide canons of interpretation which express the individualistic attitude of English Courts and of those Courts which have followed the English tradition"; and, "the Rule of Law is a rule of evidence: everyone is *prima facie* equal before the law".[13]

With this influence and the effect that Dicey's enumerated three propositions has had in political and legal doctrines in mind, the general acceptance of these propositions by the Commonwealth countries and the need for a general definition of the international Rule of Law, I submit that, with slight alterations, they form the basis of such a definition. Slightly recast these propositions can be expressed sufficiently general so as to be acceptable

[10] Law and the Constitution (1st ed., 1885), quoted in Hood Phillips, Constitutional Law (2nd ed., 1957), pp. 30-35.

[11] Due mainly to the rapid growth of legislative and judicial powers of the executive arm of government.

[12] On this point, see the Conclusions of the International Congress of Jurists, New Delhi, India, January, 1959 (1959), 2 J. of the Int'l. Comm. of Jur. 8.

[13] *Op. cit., supra*, footnote 10, pp. 34-35.

by and sufficiently particular to be of value as a goal to be attained by all freedom-loving states.

The first proposition is that every man, high and low, is subject to the ordinary law of the land and answerable for his conduct in the ordinary courts. A basic element of this concept is an independent judiciary—an indispensable requirement in a society existing under a Rule of Law. If the judiciary is truly independent, it will forbid arbitrary action on the part of the government and uphold individual freedom. Kings, presidents, prime ministers and executive officials are responsible in the ordinary courts under regular judicial processes. I will note in due course the problem of how the functions and powers of the great variety of administrative agencies are troubling us in the common-law world.

The second proposition is that in accord with generally accepted moral standards, right, not might is the true foundation of our society. This is the general assertion of the idea of justice, its attainment in our law and is mainly applied, (but not exclusively, of course) to the judicial process. In order to effectuate this objective, we are led to observe, study and improve all aspects of our substantive and procedural laws. Is the law sufficiently certain? Does the law of precedent give the necessary degree of certainty? Should some or all areas of our law be codified? Is the law sufficiently promulgated? Are the rules of procedure—adjectival only in the sense as providing a means to justice—adequate to effectuate the substantive right? Is justice too expensive, too dilatory? Are there sufficient vehicles of analysis (and leeway to use them) by which the courts can accord the law with changed moral, social, economic and political circumstances?

The third proposition is that the powers of government must not interfere with the liberty of the individual except in extreme cases justified by the common good. Our basic freedoms must not be interfered with by an omnipotent legislature. The basic freedoms of speech, assembly and association are necessary in order to protect our political institutions and our fundamental beliefs. Of course, we recognize that some governmental restraint is necessary for our own good. A consciousness of this aspect of the Rule of Law will assist in observing, studying and, where necessary, altering our governmental institutions. In Canada, for example, we have such problems now as reconciling the doctrine of the supremacy of the legislature in our federal system and the Canadian Bill of Rights Act. I will return to these items subsequently. More particularly, this concept entails study of such questions as

our two-party system, parliamentary procedure, the whole franchise system itself in order to effectuate the best possible type of government that is more and more entering into our daily life. Most important perhaps, under this proposition, our system of education must be continuously examined and brought up to date. We must be educated to freedom on which depends, in the final analysis, the success of our present governmental structure.

I realize that the establishment of the Rule of Law among the states of the international community will not be accomplished in a short time and, as I have said, not without substantial effort. But in the past fifteen years we can see progress towards it in the United Nations, in the growth of regional organizations and in functional collaboration. In the United Nations, for the first time in history, we have an international organization which is world-wide in character. Not only is it a means of promoting collective security, it is also a device to create a political and economic climate under which the Rule of Law may be instituted and maintained. I think it is fair to say that the United Nations is here to stay. Its prestige has never been higher; newly created states immediately apply for admission; Red China is desperately trying to get in. The great desire for peace throughout the world and the general realization that peoples and sovereign states cannot alone perform all the tasks to be done have much to do with strengthening its foundations.

The effect of membership in the United Nations is worth brief mention. The Honourable Mr. Howard Greene, Secretary of State for External Affairs, recently remarked:[14]

> The mere act of admission to the United Nations involves each member state in the most complex of all its external relations. Membership entails legal duties and rights that have profoundly altered the traditional concepts of sovereignty and independence. It involves on the one hand obligations with respect to "neutrality", resort to force, collective security, human rights, peaceful settlement of disputes, all of which limit the exercise of sovereign rights . . . .

Thus, international actions and policies have been altered within the general framework of the system of rights and duties established by the Charter. Within the past few years, examples may be found in Great Britain's action in the Suez Canal crisis, the American action in Lebanon and, not so clearly perhaps, Soviet action in various parts of the globe.

There is definite evidence that the International Court of

[14] Speaking at the inaugural meeting of the Ottawa Section of the International Law Association in November, 1959.

Justice will have a more prominent role in the future. For example, President Eisenhower said at India's Delhi University in December, 1959:[15]

> A world of swift economic transformation and growth must also be a world of law. The time has come for mankind to make the role of law in international affairs as normal as it is now in domestic affairs .... Plainly, one foundation stone in this structure is the International Court of Justice. It is heartening to note that a strong movement is afoot in many parts of the world to increase acceptance of the obligatory jurisdiction of that court.[16]

Regional military, political and economic organizations are rapidly springing up. Canadians know about Canada's membership in and contribution to the North Atlantic Treaty Organization. Although not as directly concerned, we are also aware of such organizations as the alliances within the Soviet orbit, the South-East Asia Treaty Organization and the Organization of American States. In the economic sphere, it is in Western Europe that the most prolific arrangements for economic and social action have been taken. Space will not permit a discussion of the purposes of such organizations as the European Coal and Steel Community, the Organization for European Economic Cooperation, the Western European Union and other bodies. However, it might be mentioned that the European Economic Community (the Common Market — the "inner six") and the European Free Trade Association (the "outer seven") are the most recent steps in the trend towards integration in western Europe. The effect of these economic associations on the trade of Canada is now and will be more so in the future a matter of grave concern to us.

Regional organizations, wisely arranged, are a means by which the member states can develop a common outlook, common interests, a general understanding of each other and a contractual solidarity supported by common moral ideals, in our quest for the international Rule of Law. Any or all of our efforts in regulating such social and economic matters as labour and health, transport and currency—to mention a few—will bear their mark on our national laws, customs and ideals to supply the necessary

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[15] Reported in Time Magazine, Dec. 21st, 1959.

[16] Judge John E. Read, formerly Canada's representative on the International Court of Justice, gave a most interesting and instructive talk on the Court's jurisdiction to the Ottawa Section of the International Law Association (Can. Branch) in March, 1960. He concluded with these words: "Without resorting to wishful thinking, and relying solely on the signs of the times, I suggest that we are justified in hoping, and even expecting, that the years to come will bring about an easing of international tension and a strengthening of international justice."

common factors which are a *sine qua non* to the establishment of our international Rule of Law.

Functional collaboration between the states has greatly increased. To a great extent this can be attributed to the specialized agencies, operating under the aegis of the United Nations, created to institute and advance work in particular fields. We are all familiar with the goals and work of the International Labour Organization, the Food and Agricultural Organization, the United Nations Educational, Scientific and Cultural Organization and the International Civil Aviation Organization, to mention perhaps the better known ones. The Honourable Mr. Howard Greene, in his speech, referred to their work in these words:[17]

> These specialized agencies are engaged in the all-important task of producing a great flood of conventions and supporting material designed to provide a pattern of conduct between states which also has a direct effect on developments within states themselves.

Much more work needs to be done in these three major fields of internationalism which have been just outlined. But, I submit, we can feel the germ, and a mighty strong one, of the institutions of the new international legal order.

III

To date, since the international community knows as yet no supreme law-making body or law enforcement agency comparable to that of the modern state, the treaty remains the principal method by which states maintain relations among themselves. It is by this method that most rules of international law are formulated and it will continue to be for sometime in the future. The states of the international community have utilized the treaty device in a variety of situations. Political treaties define boundaries, create alliances and end wars. Commercial treaties relate to consular privileges, navigation, fisheries and other commercial arrangements. The Charter of the United Nations is itself a treaty—likewise the conventions creating the agencies. Particularly important is the "law-making" treaty, more popularly known as the international convention or the multilateral treaty. It is being increasingly employed in all phases of social and economic conduct.

The customary and conventional legal rules of the treaty form a most important branch of international law. The rules relative to a treaty's conclusion, its ratification, validity and reservations are now well established and are ripe for codification. The law

[17] *Supra*, footnote 14.

relative to the effect of international agreements is perhaps more discursive. It involves such questions as the legal consequences for states not parties, of most-favoured nation clauses and of the rights of individuals under treaties. There are many questions to be agreed upon concerning the termination and modifications of treaties. For instance, what are the legal effects of a violation by one party and of changed circumstances? There are problems with respect to the rules to be applied in the interpretation of treaties. They are generally found in the national laws but the work of the International Court of Justice has been especially valuable in this field.[18]

The acceptance and administration of treaties, I submit, must demand equal attention. These aspects of treaty law obviously involve national and constitutional considerations. They are particularly important in federal states, such as Canada, where the legislative power to implement treaty provisions is divided between the federal and provincial law-making bodies. In federal states it is imperative that an answer be found to the question of how far the federal system of government can exist in view of the demands of the multilateral treaty and the requirements of modern international law.

A critical examination of the administration of treaties will first involve a reconsideration of an aspect of the hallowed rule of the sovereignty of states. It is a well-established principle of international law that each state is responsible for its internal governmental machinery. It may burden itself with any type of government or system of regulation that it chooses and this is of no concern in international law. Thus, such limitations as that found in the American Constitution which places the control of finances in the Congress or, in Canada, that which reserves certain legislative powers in the provinces, are of internal concern only. They are not subject to international interference. Personally, I have no doubt that treaty relations will acquire a new meaning when they become entirely dependent on the principles of international law and not on those of national law.

IV

Canada has an important role to play in the new international legal order. To explain it, first, I will refer to Canada's participation in the United Nations, in regional organizations and in func-

[18] See C. G. Fitzmaurice, The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points. (1951), 27 Br. Y.B. Int'l. L. 1; (1957), 33 Br. Y.B. Int'l. L. 203.

tional collaboration. Second, I will point out the importance of Canada's example to the world; how the settlement of her internal affairs can project an international influence. Third, I will conclude with a few remarks on education and research in the field in Canada.

The keystone of Canada's foreign policy is co-operation and the firm belief that the peace of the world is dependent on such co-operation. As a nation so greatly depending on its export trade, Canadians realize that Canada's security and prosperity are dependent on it. From our political and legal heritage of British institutions and laws, we value political liberty and recognize the danger to it when freedom is attacked in other parts of the world. As a predominantly Christian nation, Canadians wish to see the international Rule of Law established and based on entrenched moral values. For these reasons—and others, such as its geographical situation and political connections—Canada has played and must continue to play a major part in the establishment of the new international legal order.

In the United Nations our role has been that of a leading middle power and as a "middleman" or mediator, not only between the United States and the other western powers but between the East and the West. Although there is evidence that we are now attempting to assume a grander role, we have gathered much respect from the other ninety-six member states of the United Nations as a "middle-man". Even if circumstances warrant a more assertive leadership on the part of Canada, we should not eschew the part which we so admirably have played to date.

Canada is a member of all the specialized agencies and has tried to encourage and develop their programmes—in accord with the basic idea of our foreign policy. As will be noted shortly, functionally Canada's cooperation has been hindered by its constitutional set-up. For example, it has signed less than one-fifth of the international labour conventions now in force. Under Canada's present constitutional arrangement we may ponder, for example, whether it would be possible or feasible for Canada to become a party to the proposed Covenant on Human Rights and Fundamental Freedoms.

Canada has accepted the optional clause of the statute of the International Court of Justice but reserves disputes *inter se* between the members of the Commonwealth. Although the community sense of the Commonwealth might appear to give this reservation some substance, on the other hand, reservations are to be deplored

(and, in particular, because of dangerous tensions between Commonwealth members).

Considering the contribution of Canada in the support of regional organizations, our efforts in the North Atlantic Treaty Organization and the Colombo Plan are well known. I will comment only on her membership in the Commonwealth. What is it? Many prominent students have attempted to define it but it seems to defy definition. At the least, it is a foremost example of how different cultures, economies, religions and peoples can utilize essentially the same ideals of government and political structure for collaboration and co-operation.[19] At the most the concept of the Commonwealth might well be the embodiment of the international Rule of Law.

Federal states are generally deficient in functional collaboration. Of the major federations in the world, only Switzerland and India have so arranged their constitutional systems to demonstrate characteristics of a unitary state in external relations. However, by judicial interpretation, the federations of the United States and Australia also manifest the supremacy of the federal treaty-making and federal performing powers.

The constitutional position of Canada is not clear. During the crises of two World Wars Canada has lived up to its commitments irrespective of its peacetime constitutional processes and has, in result, displayed its homogeneity and national spirit. Now, in time of peace, a means must be found to bestow on Canada the necessary powers to enter into and fulfill her international agreements and to maintain her position as a great state of the world. Of course, we are not at war now but the problems of peace and the question of her place in the new international legal order does seem to demand a complete centralization of her constitutional powers in foreign affairs.

This may be done by judicial interpretation or, preferably in my opinion, by constitutional amendment. The more likely solution in the near future is the former. It is encouraging to note that we have an indication of it in a 1952 Supreme Court of Canada decision[20] by which it is indicated that the Privy Council's decision in the *Radio Communications* case[21] may be restored. In this case it was generally considered that the Privy Council upheld certain

[19] In more detail, note the opinion of Dr. Eugene Forsey in Encyclopedia Canadiana (1958), vol. 3, p. 49 *et seq.*

[20] *Johannesson* v. *Rural Municipality of West St. Paul*, [1952] S.C.R. 292.

[21] *In re Regulation and Control of Radio Communication*, [1932] A.C. 304.

federal legislation to implement treaties under the "Peace, Order and Good Government" clause of the British North America Act. A few years later, this explanation of the holding was repudiated by the same court in the *Labour Conventions* case,[22] which held that federal legislation implementing treaties was only valid if it fell within the powers available for domestic legislation. The authority of the *Labour Conventions* case is now doubtful. In this respect, I will only endorse the words of Professor Frank Scott.

> One can only hope that Canada's return to normal judicial procedures through the abolition of the appeal will enable our Constitution to grow steadily in response to new and pressing national and international needs. If world peace is to be maintained, nations must be able to carry out world decisions, and every constitution is an international as well as a national document. It is encouraging to note that in the *Johannesson* case . . . the Supreme Court of Canada induced a view of Canadian treaties which approaches that of Lord Wright, and appears willing to place them, where they belong, in the "Peace, Order and Good Government" clause.[23]

Canada can serve as an example in the establishment of the new international legal order. Politically, Canadians live under a democratic form of government, believing in and, for the most part, practising the Rule of Law. Economically, we uphold the principles of freedom of enterprise and freedom of competition. But we no longer deserve the appellation "capitalist society". For roughly the past fifty years we have been attempting, in accord with the spirit of the times and with no little success, to balance these democratic principles with governmental control in the interests of the common good. Socially, we present a picture to the world of two peoples with different backgrounds, religions, cultures and languages, adjusting our differences very satisfactorily. How we settle our problems and arrange our affairs, and the substantive and procedural methods of settlement we employ, can, I submit, have a profound influence on the laws and institutions of the new international legal order.

Canadians have a system of government evolved and tried by experience and often declared the best yet devised by man. It has been adapted from the British model and most of us are aware of its history. We have essentially the same Parliamentary system as the British. We have the three major organs of government, the legislative, the executive and the judiciary. We have the same basic

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[22] *A. G. for Canada* v. *A. G. for Ontario*, [1937] A.C. 326.

[23] Correspondence, (1956), 34 Can. Bar Rev. 115, remarking on Lord Wright's explanation of the holding of the Privy Council in the *Labour Conventions* case, (1955), 33 Can. Bar Rev. 1123.

principles that the legislature makes the law, the executive executes the law, the judiciary interprets and applies it. But the powers of, functions of and relationship between these organs of government need closer examination at the present time. What was good in the past may not be adequate to sustain the Rule of Law under which we wish to live today, nationally or internationally. By way of example, I think that the place of the judiciary now needs redefinition.

A cardinal doctrine of British constitutional law is the supremacy of Parliament. In Canada, because we have a written constitution which confines the federal Parliament and the provincial legislatures to enumerated subject matters of legislative power, the doctrine is only partially true. Although the British judiciary has shaped, in no small measure, our present constitution and has a very high place in the governmental system, it plays a subordinate role to the other branches of government. In examining and defining the position of the judiciary in our Canadian system, I feel that study in three major aspects would be beneficial.

First is defining the constitutional position of the judiciary in Canada. Question has been raised as to the inherent jurisdiction and powers of superior courts in Canada. Dean Lederman, of the Faculty of Law of Queen's University, finds them as being necessarily implied from sections 96-100 of the British North America Act.[24] This is an elaborate and perhaps necessary explanation, but I submit the true explanation is expressed by Mr. Alpheus Todd, writing in 1880:[25]

> The power of interpreting colonial statutes, and of deciding upon their constitutional effect and validity, is *a common and inherent right*, appertaining to all Her Majesty's courts of law before which a question arising out of the same could be properly submitted for adjudication.

Second is to commend and find ways to sustain the present tendency of Canadian courts to unshackle themselves from the strict bonds of precedent and develop a truly national jurisprudence. We are told by such scholars as Professor Friedmann[26] and Dean Read, of the Faculty of Law of Dalhousie University,[27] that in the past ten years there is evidence of a renascence in Canadian courts,

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[24] The Independence of the Judiciary (1956), 34 Can. Bar Rev. 769, 1139.

[25] Parliamentary Government in the British Colonies (1880), p. 220, italics mine.

[26] Stare Decisis at Common Law and Under the Civil Code of Quebec (1953), 31 Can. Bar Rev. 723, particularly at p. 728.

[27] The Judicial Process in Common Law Canada (1959), 37 Can. Bar Rev. 265.

that they are no longer mechanically following English precedents, that there is a decided tendency to develop a Canadian jurisprudence with more attention being paid to ethical principles and to peculiar Canadian social, economic and cultural conditions.

The third aspect I will mention for critical examination and more precise definition is judicial review of administrative action. This question is of the utmost concern to the legal profession, particularly in the common-law states, and much research is necessary before its problems will be satisfactorily answered. I do not feel that we need or should adopt a system analogous to the *droit administratif* of France, commendable as it may be in its environment, but from our own peculiar experience develop means to satisfy the demands of the Rule of Law. To do so, there are four major difficulties that stand in the way and must be resolved. First is the concept of sovereign immunities in our courts. Second is the doctrine of the supremacy of Parliament. Third is the lack of precedents in our substantive law which provide our courts with principles in handling these situations involving individuals and executive action. Fourth is the procedure of the courts—particularly the procedure of getting into the regular courts—to contest alleged arbitrary action by the executive.

The recently enacted Canadian Bill of Rights[28] is an attempt by the present Government to codify, in the form of a statute of the federal Parliament, our basic civil liberties. As we all know, our civil liberties have been from time immemorial the result of judicial interpretation of such documents as the Magna Carta, the Petition of Right, the Bill of Rights, the Act of Settlement and the common-law rights of the individuals defined in the ordinary courts. Although opinions differed as to the necessity and even the desirability of a Canadian Bill of Rights,[29] I submit that its enactment will have a very desirable effect of enhancing the role and prestige of the Canadian judiciary in our system of government. In time, more general awareness of the importance of judicial interpretative powers, of the judicial role in developing a Canadian jurisprudence and of the judiciary as an integral and not subordinate arm of government, will probably result.

The place of the university in our society is under examination today. It has two basic and integrated purposes. The first is well expressed in the brief to the Royal Commission in Canada's

[28] S.C., 1960, c. 44.

[29] See, for example, the collection of articles in (1959), 37 Can. Bar Rev. 1, particularly the comprehensive one of Professor Laskin, An Inquiry Into the Diefenbaker Bill of Rights, at p. 77.

economic prospects of the Canadian Association of University Teachers.[30]

> The university has for centuries been the most important of the institutions concerned with the pursuit of knowledge. In terms of purpose the ideal university may be defined as a community of scholars. The ideas of community and of scholarship bear complementary emphasis. Individual scholars, separated by specialization and intensive application to the examination of limited areas of knowledge, communicating with each other with the utmost difficulty through the media of specialized language and conceptual terminology, are nevertheless united in mutual understanding and tolerance in pursuit of a single objective, *the discovery and comprehension of truth.*

The second basic purpose is to educate, that is, to instil in the minds of man concepts that will result in more creative lives for individuals and communities. Morally, we must search the true value of the individual and the role of government and other institutions in our society. Politically, we must compare and improve our governmental system. Socially, we must train the right use of intellect; we must interpret the unfolding of civilization; we must augment the place of culture. Economically, we must learn not to think in terms of personal interest but to attach goals of idealistic philosophy to the life of practical affairs. The late James Muir of the Royal Bank of Canada summed it up neatly and briefly when he said:

> The main purpose of education, as I see it, is to teach one to think. It is only by learning how to think, and by learning how to sift out things worth thinking about, that you can put yourself in the best position for a happy life.[31]

Law schools must refuse the pressure of a narrow, technical training. Not only is law a major social science but:

> It is through the legal profession that the role of the law is effected. The lawyer may be an advocate, a solicitor in general practice or specializing in a particular field, a government employee at every level from the city hall to the United Nations, legal advisor to corporations, politician, judge or law teacher.[32]

The work of the legal profession deals with human beings, human minds and human happiness. It affects all the affairs and experiences of men. Our legal training must of necesssity be broad and liberal to enable us to make the valued judgments that society so

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[30] Presented at Ottawa, March 5th, 1955; italics mine.
[31] Royal Bank of Canada, Monthly Letter, August 1956.
[32] A Statement on Objectives of Canadian Common Law Schools, (1958), 36 Can. Bar Rev. 342, prepared by Dean W. W. Bowker of the Faculty of Law of the University of Alberta.

vitally needs at the present time. Dean Wright of the Faculty of Law of the University of Toronto, has written:

> The university schools of law must stand out against the narrow professionalism .... Law should be concerned with the problems of human relations and society, with the ultimate object of enabling men to live in peace with neighbours, groups with groups and nations with nations.[33]

Most universities and most law schools have a course in international law and relations. But we need more interest, more qualified teachers, more facilities and more scholarships in the field. The need is urgent. Besides the urgency of evolving new and modernizing old concepts and rules relating to such situations that I have been discussing, the study of international law must be considered no longer to be a theoretical or jurisprudential part of legal training. Within the next decade, quite likely, it will be one of the most "practical" (that is "bread and butter") courses in a law school curriculum for several reasons. First, it has been noted that the growth of official relations between states has greatly increased the number of international agreements. Bilateral or multilateral treaties now affect most phases of our national economic, social and political life. Obviously, it is the lawyer who is mainly concerned with their formation, interpretation and application. Second, as the world is growing smaller by improved methods of travel, Canadian companies, armed forces, students, tourists and staff of governmental agencies are raising international legal questions concerning their rights and obligations at an increasing rate. Third, Canadian business is no longer confined to Canada. Contracts must be made with foreign agents, plants erected on foreign soil, taxes paid and financial obligations incurred in foreign countries. The type of problems to be studied and the immensity of the field are illustrated by a recent report by the Ontario Subsection of the Canadian Bar Association.[34] Fourth, traditionally the legal profession has been a pre-eminent source of local, provincial and national leaders. The lawyers hold a predominant place in the conduct of government and government is becoming more and more, in all phases, concerned with international problems. Finally, as the Honourable Mr. Howard Greene said:

> By virtue of his training, the lawyer is in a particularly advantageous position to foster the role and the rule of international law. He can

[33] The University Law Schools (1950), 2 J. of Legal Ed. 409, at p. 412.
[34] (1959), under the chairmanship of Professor Ian F. G. Baxter, of the Osgoode Hall Law School.

> encourage understanding of this need for law in international as in national affairs and fight prejudices concerning its role by himself becoming knowledgeable in it, by discussing it with his associates, and by giving his active support to such associations as yours. He can, by his intelligent interest in the current legal problems of the broader community of which Canada is a part, prepare the ground for an increasingly enlightened attitude on the part of nations. This may sound like idealistic exhortation. It is not meant to be such. In a democracy it is the sum total of the outlook of individuals which adds up to the outlook of the state.[35]

Research lags sadly behind in Canada. This is not only true in international law but in most of the social sciences. The recent Report of the Committee on Legal Research[36] contained the following remarks:

> Research has come to be a necessary activity in all civilized communities today. The increasing complexity of the problems facing mankind, the growth of scientific knowledge, the rapid changes forced by technological advances, confront us all, individually and collectively, with choices and decisions that cannot be made intelligently unless backed by investigation and analysis of the facts involved and the alternatives that present themselves . . . . The law is peculiarly a field in which this need for research should be carefully recognized, for law is responsive to every new human activity and enhances the whole of society.

Formal research in international law is, with one exception,[37] confined to the work of the Department of External Affairs. This is far from adequate. The problem of research must be bound up with that of university education in Canada. But before we will have adequate research in international law or in any social science, we must provide adequate salaries for professors, adequate scholarships for worthy students and adequate facilities to carry it on.

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[35] *Supra*, footnote 14.

[36] A Committee of the Canadian Bar Association under the chairmanship of Professor F. R. Scott (1956), 34 Can. Bar Rev. 999, at p. 1001.

[37] The Institute of Air and Space Law, McGill University.