A FRESH APPROACH TO CONSTITUTIONAL LAW: USE OF A POLICY-SCIENCE MODEL

J. NOEL LYON*
Vancouver

I. *The Problem.*

It is perhaps not overstating the case to say that Canada has failed to achieve a judicial interpretation of its constitution that is responsive to the needs and hopes of the Canadian people. It would be unfair to blame the Judicial Committee of the Privy Council for this. They were given an impossible task, that of adapting the British North America Act[1] to the needs and aspirations of a sprawling young nation from whose daily life they were almost totally isolated.

Moreover, they brought to that impossible task an impossible view of the world which saw the Canadian federation as a collection of watertight compartments in which all activities ultimately broke down into a fragmented mass of matters of property and civil rights in the provinces or simply local matters. Finally they were captives of an impossible view of law, a view that led them to believe that the goals and values of a society can be projected into a body of formal rules, there to be kept alive indefinitely as the world around them changes rapidly.

The eighteen years since appeals to the Privy Council were ended have made it clear that Canadian judges do not suffer from the first two handicaps described above. However, their capacity to respond to the forces they feel around them is limited by the heavy hand of legal positivism and the inhibiting attitudes it has imposed on them. In the rigid meaning given the doctrine of *stare decisis* we see a demand for order for the sake of order, oblivious to the fact that within the ordered structure are embodied goals and values whose promotion is the only justification for the struc-

*J. Noel Lyon, of the Faculty of Law, University of British Columbia, Vancouver.

[1] (1867), 30 & 31 Vict. c.3.

ture itself. So inadequate is this theory that we tolerate transparent manipulation of legal concepts and superficial distinctions to avoid its unthinkable but logical consequences. But these devices work only up to a point. When we meet the really important issues head on, we are rendered impotent by our own theory. Such is our failure to evolve a commerce power adequate to the demands of a modern national economy, our inability to find a way to provide adequate protection of basic human rights, and our growing tendency to substitute the expediency of cooperative federalism for constitutional government under law.

We impose these limitations on ourselves through acceptance of the notion that judges must not look at what they are really doing if their decisions are to remain objective, all the while knowing that as human beings they cannot help but see the consequences of their choices and be affected by them. But so demanding is the task of manoeuvring around the artificial obstacles created by positivist theory that judges have little time or energy to analyze thoroughly the real factors relevant to decision, and no systematic guidance for the purpose.

We are forcing our judges to work with archaic tools in making decisions in a modern society that is changing rapidly. We require new tools expressly designed for goal-thinking, and those to be proposed here are the intellectual tools of the policy-scientist.

Before examining those tools, it may be useful to illustrate the inhibiting effect of the old ones. In *McKay* v. *The Queen*[2] the Supreme Court of Canada heard the appeals of persons convicted under a municipal zoning by-law regulating signs, in that during a federal election campaign they attached to their verandah a sign saying "Vote David Middelton, New Democratic Party". That the sign was forbidden by the by-law was not in dispute, but the defence raised was that a provincial legislature has no authority to regulate federal electioneering activities and therefore the by-law could not apply to this sign.

The choice facing the judges was whether, in the circumstances of the case, it was more consistent with our constitution to give priority to the protection of the interest in protecting property values and an attractive living environment in the municipality or to the interest in ensuring that all political parties be free to exploit the resources available to them to promote their candidates in a federal election. This calls for examination of all relevant facts and

[2] (1966), 53 D.L.R. (2d) 532.

assessment of the relative importance of the values for which protection is being sought. For guidance on the latter, the judges should look to the British North America Act, judicial decisions interpreting that Act, and any other authoritative source indicating what community expectations exist with respect to the relative importance of the interests involved.

How did the Supreme Court of Canada approach this decision?

Mr. Justice Cartwright, speaking for the majority, characterized the issue as follows:[3]

> In the case at bar, the learned Justice of the Peace and the Court of Appeal have given effect to the by-law as if it provided:
> During an election to Parliament no owner of property in an R. 2 zone in Etobicoke shall display on his property any signs soliciting votes for a candidate at such election.

This statement of the issue contains its own answer, and rather than stating the considerations of authoritative policy that led them to this choice, the majority simply asserted that the field was occupied by an obscure provision of the Canada Elections Act[4] which, it is submitted, is unrelated to the issue in this case.

Mr. Justice Martland, delivering the minority judgment, characterized the issue in the following passage:[5]

> Undoubtedly the Federal Parliament can legislate and has legislated respecting federal elections. To the extent that it has legislated, such legislation governs and would override any provincial enactment which ran counter to it. The point which I make is that there is no general field of legislation on this subject assigned to the Federal Parliament under an enumerated class in section 91 to which the proviso at the conclusion of that section can attach.
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> That being so, in my opinion, provincial legislation in relation to the use of property, which, in its pith and substance, is in relation to property and civil rights in the province, and which is of general application, is not only valid, but can apply even though, incidentally, it may affect the means of propaganda used by an individual or political party during a federal election campaign.

The tragedy of prevailing legal theory is that it leads our judges, through this kind of characterization, to make their choices or state their preferences before examining fully the nature of the choices they are being asked to make. That theory further leads them, through a narrow concept of law which defines as outside the realm of law most of the significant values and activities in the community, to decline to undertake meaningful inquiry into the implications of their choices in terms of community goals and

[3] *Ibid.*, at p. 537.
[4] R.S.C., 1952, c. 29, s. 71.
[5] *Supra*, footnote 2, at p. 544.

values. Instead, they grope with some vague feeling called an inarticulate major premise or judicial hunch, of whose basis they are only dimly aware, and about which legal scholars and lawyers who are expected to guide the judicial process know little or nothing beyond the observed biases and predispositions through which these unstated but central influences manifest themselves. Given this fact, we only deceive ourselves by believing that the particular rule or precedent is the sole, or even the critical, factor in decision. This suggests that the rule-bound view of law imposed by positivism, with its doctrine of *stare decisis,* is being observed only in theory, not in fact, and that it is time we equipped our legal system with an analytical framework and intellectual tools designed to serve the real decision process being carried on.

II. *The Proposed Approach.*

The legal mind seems to prefer to operate intuitively. It is gradually programmed with a complex body of facts, principles, and attitudes, which it organizes according to patterns of training and experience so that it can be brought to bear on specific problems. The narrower the problem, the more effective is the legal mind with its analytical skills. At the level of concrete problems the lawyer is an intuitive policy-scientist, and frequently a highly effective one. However, no matter how narrow the question before him, he must draw in the first place on a broader analysis of the body of authoritative policy within which the question falls. It is here that the intuitive approach breaks down, for the features of that larger context are too complex to be manageable without some systematic analysis that gives empirical reference to the principles from which concrete decisions must be derived.

What is proposed is the substitution of a policy-science model as the framework for legal analysis, in place of the existing practice of organizing analysis largely around abstract concepts. With such a model as a guide, that part of decision-making which can be performed through explicit, rational procedures can be separated from that which calls for intuitive response and made articulate.

The model suggested is that of the *social process,* an observational model which perceives man in society in terms of *participants* acting within *situations* in the pursuit of *goal-values,* employing *strategies* to manipulate *base values,* achieving *outcomes* and causing consequential *effects.* The model contains no answers. It simply offers a descriptive framework for human activities that is

comprehensive and subject to empirical reference. At some point we must link the conceptual to the empirical, and it is this capacity to relate law to life that existing legal theory lacks.

The exploitation of this model requires systematizing the distinct intellectual tasks facing the legal scholar. He cannot simultaneously direct his mind to what we are trying to achieve, what has occurred in the past, what factors have conditioned past trends, where the future will lead if past trends continue, and what alternatives exist for maximizing the realization of goals. The intellectual skills required can be identified and described.

Goal clarification.

What goals, or preferred patterns of value-sharing, are subscribed to within the process being examined? This task will generally call for articulation as well as observation.

Trend analysis.

What patterns of value sharing have in fact occurred as outcomes of the process being studied?

Conditioning factors.

What factors have been conditioning the trends identified?

Projection of trends.

What patterns of value sharing are likely to occur in the future if no influence is exerted on the process by the observer?

Policy promotion.

This calls for the invention, evaluation and promotion of policy alternatives for the maximization of clarified goals.

It will be noted that these skills follow an orderly sequence. Each depends upon the performance of the previous one, leading up to the final creative task with some hope that it will be performed on as rational a basis as the existing state of human knowledge will permit.

It is important to deal at this point with the common misconception that a full policy-oriented analysis is suggested as an appropriate approach to a specific question that has come up for decision. This is not the case. The policy-oriented analysis is offered in the first instance to the legal scholar for analysis of whole areas of law within our legal system, with a view to formulating a set of policy recommendations for the guidance of decision-makers. In doing so, the legal scholar will be able to re-interpret the existing body of authoritative decision in policy-oriented terms. The decision-maker facing a specific question may then locate that

question within the broader analysis to obtain guidance in making his decison, more systematic and rational guidance, it is suggested, than he now gets.

III. *Application to Constitutional Law.*

The particular social process to be analyzed is the constitutive process of authoritative decision, the decision process whereby community power is harnessed within a framework of decision whose features reflect fundamental community goals and values as perceived by those who participate in that process. This is an observational model rather than a definition, and the difference between the two is the whole point of the departure from the traditional approach to constitutional law. The term "constitutive process" is not just a linguistic substitute for "constitutional law". The latter term conveys a reference to a *body of materials.* Policy-oriented analysis focuses inquiry on a *process,* and seeks to promote systematic and comprehensive inquiry about that process. The question is, to borrow from Lewis Carroll, which is to be master, the process itself or the source of data about that process —that's all.[6]

Context.

Policy-oriented analysis is contextual. Human activities, including the formulation and application of specific rules of law, have meaning only in relation to the social processes of which they are parts. Therefore, we begin by observing the larger contextual background, in this case the total national process of effective power. Full detail is neither possible nor desirable here, but rather the demand is for a broad contextual map to provide perspective for the narrower decision process being examined, as well as a frame of reference for detailed inquiry as the need arises.

Thus, we would observe broad classes of participants: governmental (electorate, legislature, executive, judiciary, administration), party organizations, pressure groups, private associations, class groups, and culture groups. We would observe the degree of

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[6] Through the Looking Glass (1872), Ch. 6:
"When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean, neither more nor less."
"The question is," said Alice, "whether you can make words mean so many different things."
"The question is," said Humpty Dumpty, "Which is to be master—that's all."

organization and other important features of the arenas within which these participants exercise power; the goals, or value impacts, they are pursuing; the base values they bring to bear on decision and the strategies through which they do so; the effective decision outcomes and their consequential effects.

Having sketched this larger map of all effective decision-making in the community, we would narrow our focus within it, for not all decisions are law. There are two essential ingredients of law: formal authority and effective control. Decisions which are backed by formal authority but which are not controlling are not law but illusion; decisions which are controlling but which are not made from perspectives of authority are not law but naked power. Authoritative decisions are decisions made in accordance with community expectations as to who shall make decisions, for what purposes, within what arenas, according to what procedures, and by what criteria. Thus, authority is an index which is conditioned by community goals and values, imposing limits on the choices made by decision-makers and giving direction to the choices made within those limits.

Using the contextual background as a guide, we could now attempt to apply the five intellectual skills of the policy-scientist to the constitutive process of authoritative decision.

Goal clarification.

What patterns of value sharing are preferred by the Canadian people? The question is not an easy one to answer but the attempt must be made if our constitutive process is to receive intelligent policy guidance. Some clues will be found in the words of the British North America Act of 1867 and judicial decisions interpreting it. Of great contemporary significance is the Canadian Bill of Rights,[7] in which an attempt has been made to articulate fundamental community goals and values.

But these are traditional sources, and the real value of an analysis uninhibited by notions that judicial limitations on sources of evidence apply also to scholarly inquiry is that it can exploit many less conventional but valuable sources such as customs, practices, and even the attitudes of people. What, for example, are the shared subjectivities of the Canadian people about the sharing of power. Do they expect wide participation in the public decision process through an effective representative system or do they pre-

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

fer an authoritarian basis of government? Is there a shared expectation that all citizens will enjoy a minimum level of wealth and well-being as essential to a condition of human dignity? Is there a general conviction that respect should not be a special privilege of the wealthy and powerful or of particular culture groups, but rather an incident of citizenship? These questions are basic and extremely important, for constitutive policies adopted in ignorance of or indifference to their answers will necessarily fail to achieve community goals.

This does not mean that we can expect to arrive at some definitive and categorical statement of fundamental goals. Such is clearly beyond our knowledge and in any case assumes unanimity to an extent which may be inconsistent with our fundamental values themselves. However, inquiries made in these terms will enable us to observe, and thus give empirical reference to, certain minimum shared goals and values of the Canadian people. To assert that there can be no such shared goals and values is to deny that we have a constitution at all.

Since we can observe the phenomenon of leadership, it is obvious that this inquiry cannot be conducted in the manner of a Gallup poll. As always, the matter is complex, but we can begin by examining those authoritative decisions and declarations in which the Canadian people have openly committed themselves to certain fundamental goals and values. If we cannot take these commitments seriously, our constitutive process becomes an exercise in self-deception on a national scale.

Although we are primarily concerned with *observing* fundamental goals and values, it is necessary for each scholarly observer to articulate the kind of optimum public order to which he is committed and for which he is prepared to take a stand. This is the leadership phenomenon again, and a policy-oriented approach insists that the creative legal scholar, who seeks to influence decision, has an affirmative responsibility to articulate goals and values and to urge, openly and honestly, their adoption by the community.

Tussman makes this point nicely in dealing with what he calls the paradox of interpretation:[8]

> An architect is called in by a family to design their house. They tell him what they need or want. He produces the plan. Is that it? Exactly! (Some architect! Some family!) How should we describe this process? The architect was told what to do, and he did it. But, on the other hand,

[8] Obligation and the Body Politic (1960), p. 96.

> he was not told what to do. He did something, and the product was greeted with recognition. Recognition? Is this the plan you had in mind? Yes, of course not! You have discovered exactly what I wanted. Or rather you have created exactly what I want. The dream house never quite seen in my dreams. The architect is an "interpreter". Did he create or discover? Yes and no.

Fundamental values have traditionally been expressed in such terms as the rule of law, the supremacy of parliament, the independence of judiciary, due process of law, the liberty of the subject, freedom of speech and of the press, and so on. Such statements of goals at an abstract level lack explicit empirical reference to the values for which the highest protection is sought, and lend themselves to manipulation to serve a variety of passing purposes which may be unrelated to, or even destructive of, under-lying values. If we can re-interpret these and other community expectations held with high intensity into preferred patterns of sharing of power, wealth, respect, enlightenment, skill, affection, well-being, and rectitude, we will improve our own understanding of what we are trying to achieve through the constitutive process. That is, we will achieve goal clarification.

Trend analysis.

The analysis of past trends in decision is the lawyer's *forte*. However, for want of an observational model, the analysis has been without systematic organization in terms of integral *processes*. Abstract legal concepts and convenient groupings of apparently related activities have served as focal points for inquiry. The sensed world is replaced by a wonderland of so-called doctrines—aspect, ancillary, trenching, paramountcy—and integral value processes are fragmented into Procrustean bits and pieces to fit the pigeon-holes of sections 91 and 92 of the British North America Act.

A brief excursion into a trend analysis organized around the social process model will indicate its potential value.

a. *Participants.*

Traditional analysis suggests that the judges are the main participants in the constitutive process, subject to occasional amending decisions of the United Kingdom Parliament, the Canadian Parliament, or provincial legislatures, within their respective spheres of authority. To so limit the scope of inquiry is to treat as comprehensive what are merely the focal points of concentrations of power in a highly complex process.

If we observe the constitutive process as a continuous flow of interrelated decisions rather than an episodic mosaic of isolated events, we can discern a number of distinct decision functions. These functions have no regard for institutional boundaries, and for analytical purposes seven categories of decision function are suggested. The flow of decision involves the gathering of facts; promotion of policy alternatives; prescription of policy, invocation, or tentative application, of policy in concrete situations; final application of policy; appraisal of the effectiveness of policy; and the termination of ineffective or obsolete policy.

A much wider range of participants in the constitutive process is suggested immediately: as to fact-finding, departments of government and parliamentary committees, the Dominion Bureau of Statistics, special commissions of inquiry, the news media and the universities; as to promotion, political parties, pressure groups, culture groups, the executive and the legislature, lawyers and scholars; as to prescription of policy, legislatures, judges, political parties (by way of conventional usage), Dominion-provincial conferences, constitutional conferences; as to invocation, the executives and administrations, individual citizens and private associations such as civil liberties unions; as to application, the judiciary, the executives and legislatures; as to appraising, there exists a revealing gap subject to periodic efforts such as the O'Connor *Report*[9] and, more recently, Professor Porter's analysis of social class and power in Canada, *The Vertical Mosaic;*[10] as to termination, again the legislatures, executives, departments of government, and the judiciary.

This outline is not intended to be conclusive, but simply suggestive of the potential scope of any serious inquiry about participation in the whole constitutive process of authoritative decision.

b. *Arenas.*

The arenas within which the many participants interact vary in organization and concentration from the electorate at one extreme to the federal cabinet or the Supreme Court of Canada at the other. Political parties, legislative assemblies, centres for research, departments of government, and numerous others may have features which, although not answering particular questions, will provide fresh insights into the constitutive process. In any case, these arenas are integral features of the process, without which the process cannot be fully understood.

[9] Report to the Senate of Canada on the British North America Act, 1867 (1939).

[10] (1965).

c. *Goal-values.*

Inquiry about goals made with reference to the constitutive process has been anticipated in the clarification of goals, but here we are concerned with observing the patterns of value-sharing in fact being pursued, rather than observing and articulating goals to which the community subscribes. It should concern legal scholars that the one really significant inquiry in this area, Porter's *Vertical Mosaic*, was made not by a lawyer but by a sociologist.

The basic demand for minimum public order shows clearly in the structure of government establishment by the British North America Act, and is reflected in the Criminal Code,[11] Part II (Offences against Public Order) and Part III (Offences against the Administration of Law and Justice).

As to optimum public order, we would pursue detailed inquiry with reference to each of the eight values: what are the patterns of sharing of power, wealth, well-being, respect, enlightenment, affection, skill and rectitude actually being pursued by decision-makers. The words "actually being pursued" in the preceding sentence are important, for they distinguish trend analysis from goal clarification. Failure to separate these distinct intellectual skills leads us to attempt to rationalize disparities between so-called theory and practice rather than seeking rational procedures for removing those disparities.

As was suggested earlier, we tend to formulate goals in conceptual terms such as the rule of law or freedom of speech, leaving it to decision-makers to pour whatever meaning into them they consider appropriate. If we can succeed in analyzing these concepts in terms of what basic values and patterns of value-sharing we are trying to promote and protect, we should be able to offer our judges some systematic guidance as to the value outcomes likely to flow from the various choices open to them, all the time preserving the objective framework we consider essential to judicial decision. We know that judges concern themselves with value outcomes, but at present they are forced to do it secretly, outside the objective framework we have built for them, because of the sterility of that framework.

d. *Strategies.*

When questions are asked about strategies with reference to the constitutive process, some large blocks of apparently unrelated

[11] S.C., 1953-54, c.51, as am.

material are given empirical reference. Some of the more obvious examples are the rule of law, separation of powers, conventions and practices of the constitution, allocation of resources between the Dominion and the provinces, Dominion-provincial agreements, the colonial principle of importation of legal systems, and the very important judicial principles of interpretation. Identification of all these as strategies, or techniques, whereby various participants in the constitutive process seek to organize base values for the pursuit of the goal-values of that process is just the prelude to a systematic inquiry into each of them.

e. *Base values.*

Inquiry about base values (that is values used in the pursuit of scope values, the latter being sought for their own sake rather than as means to ends) leads to such areas as the doctrine of parliamentary supremacy, parliamentary privileges, reservation and disallowance, and the independence of the judiciary, to name only a few, all of which call for detailed examination to identify trends in decision. By locating these matters within the constitutive process we hope to see them in perspective and understand more clearly their significance. Constitutional law, as traditionally presented, has been too much a collection of bits and pieces without any organizing framework that shows how the parts relate to the whole. In the absence of any model for inquiry and any notion of process, such a result is inevitable. Legal minds may react to the policy-oriented framework of analysis, but it is preferable to no framework at all. Intuition has its place, but it cannot provide a comprehensive basis for a system of legal analysis.

f. *Outcomes.*

We are examining a power process, the outcomes of which are allocations of competence to a wide range of decision-makers to participate in the public decision process. Collectively, these allocations of public power establish the whole complex structure of public decision, and it is therefore important that some meaningful organization be given to the analysis of outcomes. The seven decision functions offer the best basic framework. Thus, we would begin by looking for constitutive decisions allocating competence to exercise each of the successive functions—fact-finding; policy-promotion; prescription; invocation, then application of prescriptions; appraisal; termination—and then use the social process model to organize a detailed inquiry within each decision function.

The fresh insights to be derived from this approach are apparent from even a preliminary sketch.

Intelligence function. The obtaining and processing of information.

Section 91(6) of the British North America Act[12] gives the federal legislature exclusive competence to make laws in relation to the "census and statistics". Although untroubled by case law, and therefore largely ignored by legal scholars, this head of section 91 leads to an extremely important participant in the national process of authoritative decision: The Dominion Bureau of Statistics. A useful study could be made of the impact of Dominion Bureau of Statistics on the decision process in Canada and it would reflect an inadequate and narrow view of law to assert that this kind of inquiry lies within the exclusive jurisdiction of political scientists.

An examination of statutes which establish departments of government, both Dominion and provincial, would reveal many uncontested, unilateral assertions of competence to have this fact-finding function performed as ancillary to the prescription of policy in relation to areas of competence allocated by sections 91 and 92 of the British North America Act. In other words, when the Act refers to making laws in relation to matters, it is taken to include all decision functions that are an integral part of making and maintaining a system of laws governing those matters. This would appear to include all seven decision functions, but an overriding constitutive policy relating to the application of prescribed policies has been incorporated into our constitution through judicial interpretation of section 96 of the British North America Act, limiting the competence of the provinces to determine how and by whom the applying function may be exercised.

Departmental statutes lead to a hierarchy of administrative decision-makers—commissioners, investigating officers, inspectors, agencies, boards, tribunals, and specialized advisers—all of whom participate in a significant way in the intelligence function. We would also examine public inquiries statutes, Dominion and provincial, providing for the appointment of Royal Commissions and judicial inquiries, whose terms of reference invariably include authority to obtain and process information about the matter to be inquired into. We would include a variety of special kinds of commissioners such as industrial inquiry commissioners under

[12] *Supra*, footnote 1.

federal and provincial labour legislation, and special agencies such as the National Research Council and the Canada Council.

If we consider for a moment that the highly organized decision-makers just described are simply the focal points of a complex system in which power is pyramided upward from less organized activities in the electorate, the bureaucracy, and the legal system, into organized arenas of decision, we observe at once the importance of a wide range of less obvious participants in this decision function, such as the press, the mass media (including in Canada, of course, the Canadian Broadcasting Corporation), party organizations, minor public officials and civil servants, and lawyers, all of whom interact with official decision-makers at a variety of levels and in a variety of ways. By way of comparative study, one might consider the impact of the Rand Corporation as a key participant in the intelligence function in the United States.

Since the formal documents of government ignore these non-official participants in the decision process, we must give up our obsession with the formal document and the written word, and exploit all available sources of evidence of community expectations as to who shall participate in the complex process of authoritative decision. Some assistance will be found in formal decisions, however, such as the *Alberta Press* case[13] and *McKay* v. *The Queen*,[14] which recognized the press and political parties respectively as participants in the intelligence function, entitled to the protection of public power.

Promoting function. The advocacy of general policy.

Anyone familiar with our political system will quickly identify the Cabinet as a key participant in this decision function, sitting as it does at the apex of an electoral system organized on party lines. We are concerned with community expectations as to who shall participate, and thus find no assistance in distinctions between laws and conventions, which relate to the strategies through which community expectations are crystallized and are relevant only to a view of law which begins from certain unproved assumptions.

We can readily observe that the whole electoral system, from party caucus down to the individual elector, is involved to some extent in the promoting function. Within the official arenas of decision, departments of government, from ministers down, play an important part in the formulation of policy proposals.[15]

[13] *Reference re Alberta Legislation*, [1938] S.C.R. 100.
[14] *Supra*, footnote 2.
[15] As to this, see Porter, *op cit.*, footnote 10, Ch. 14 (The Federal Bureaucracy).

Here again we must include Royal Commissions and other forms of public inquiry, since their terms of reference are generally "to inquire into and make recommendations concerning" the matters referred to them. Individual members of parliament and of legislative assemblies are important participants in this decision function, as they not only introduce private members' bills but also take part in the debate on community policies in the legislatures and in party caucuses.

Lawyers are prominent in the promotion of policies in courts of law, administrative tribunals, legislative committee hearings, public inquiries, and in many less organized arenas where the lawyer can be seen daily promoting some particular policy or policies. The legal profession and legal scholars are continually making policy recommendations to legislatures, administrators, judges, and a similarly wide range of decision-makers through resolutions of the organized bar and through legal literature.

It must be apparent by now that the constitutive process, whereby effective power to participate in public decisions is allocated according to community expectations, is a far larger and more complex process than is indicated by the collection of formal material we describe as constitutional law. Moreover, it is submitted that that collection of formal material consists of fragmented parts of an interrelated whole, which have little meaning in isolation from the whole.

Prescribing function. The crystallization of general policy in continuing expectations.

The prescription of general policy tends to be highly formalized. We have a naive faith in the magic of the written word and the formal document. However, it is obvious that nothing more formal than custom conditions community expectations with respect to many forms of behaviour. Where custom is effective to produce outcomes consistent with community goals and values, more formal techniques are unnecessary.

With that suggestion of the potential scope of this inquiry, it will be convenient to limit the outline here to a survey of constitutive decisions allocating prescribing authority to the major institutions: legislature, executive and administrative, judges, and the Crown.

Allocation of prescribing competence to the legislatures is highly formalized, the important decisions being the British North

America Act and judicial decisions interpreting it. This is a large area, and some secondary organization is necessary. The approach suggested is an initial division into value processes, with the phases of the social process (participants, situations, and so on) serving as a detailed framework of inquiry within each value process.

An initial outline of inquiry into the distribution of legislative powers would be as follows:

POWER PROCESSES

a. *World arena.*

The treaty power.

b. *National arena.*

Regulation of the federal electoral system, including protection of participation in that system by individuals, the press, political parties, trade unions, and others.

c. *Provincial arena.*

Regulation of the provincial constitution, including the electoral system; exclusion from participation, protection of participation; limits on variations of strategies for formal prescription.

WEALTH PROCESSES

a. *Participation.*

Decisions as to who may participate, mainly relating to the creation and authorization of corporate entities.

b. *Markets.*

Regulation of markets, based on the nature of the market (for instance wheat) and its scope (local vs. interprovincial), all examined with a view to formulating criteria for drawing the line of appropriate division of Dominion and provincial regulation of markets; delegation to a common board as a strategy for achieving integral regulation of integral markets.

c. *Economic strategies.*

Regulation of economic strategies, particularly insurance, but also relating to securities, advertising, the credit system, collective bargaining, and combines.

d. *Resources.*

The allocation of resources themselves and of regulatory

power over them where the two are not necessarily co-incidental; allocation of taxing powers; the regulation of transportation and communication as special forms of resource use.

ENLIGHTENMENT PROCESSES

a. *Schools.*

Regulation of basic education and of universities.

b. *Public media.*

Regulation of broadcasting and of the press.

c. *Private activities.*

Regulation of the private pursuit of enlightenment.

RESPECT PROCESSES

a. Governmental activities designed for the promotion and sharing of respect.
b. Regulation of discriminatory activities.

WELL-BEING PROCESSES

a. *Institutions.*

Maintenance and regulation of hospitals, asylums, and so on.

b. *Enterprisory strategies.*

Unemployment insurance, pensions, medicare.

c. *Preventive strategies.*

Adulteration, highway safety, public morals (for instance obscenity), protection of the person.

AFFECTION PROCESSES

Regulation of marriage, divorce, child welfare.

SKILL PROCESSES

Regulation of patents and trademarks, professional associations, recreational and artistic activities.

RECTITUDE PROCESSES

Regulation of penitentiaries, prisons, reformatories, religious activities, standards of conduct (for instance criminal law).

Although some of the above groupings offer little in the way of new insights, at least in a preliminary sketch, it is essential to

relate the activities within our society to the value or values to which they are primarily directed. By doing so, we may hope to develop systematic guidance for judges and other decision-makers which will assist them in assessing the potential value outcomes of the choices open to them in constitutive decisions.

The executive and the administration participate in prescription through the practice known as delegated legislation. Their competence to do so is controlled not only by the federal distribution of legislative powers, but also by certain constitutive policies in the common law which now receive detailed treatment in the separate body of material called administrative law.

The common law is nothing more than a massive body of authoritative community policy which has been prescribed by judges over a period of centuries. It was only in the nineteenth century, after Bentham's vigorous attack on the law had taken effect, that the legislature succeeded the judiciary as the dominant policy-maker. In spite of this shift in power, the judges remain key participants in this function, especially at the appellate level. Our concern here is with decisions allocating this competence to judges, and here we would examine the inherent jurisdiction of judges as well as that conferred by statute.

Finally, the Crown's prerogative powers must be taken into account, and its source traced.

Invoking function. Initial application of prescribed policies to concrete situations.

Although the British North America Act designates the Queen or her representative as the executive authority, the authoritative practice is necessarily quite different and much more complex. The Minister of Justice and the Provincial Attorneys General are charged with the responsibility of ensuring that the administration of public affairs is in accordance with law. Other ministers of the Crown are charged with the administration of particular policies, and they discharge these responsibilities through an elaborate administrative hierarchy. The lawyer advising his client, the police officer arresting and charging a citizen, an examining officer under the Immigration Act[16] reporting a prospective immigrant to a special inquiry officer as being, in his opinion, not entitled to enter the country, are all invoking prescribed policy. We are here concerned with the constitutive decisions allocating power to so invoke prescribed policies.

[16] R.S.C., 1952, c. 148.

Applying function. Final application of prescribed policy to concrete situations.

Here again we will examine the elaborate hierarchy of administrative decision-makers, and it will become apparent that the distinction between invocation and application is seldom clear and often confusing. This is because the two decision functions often merge in the same decision-maker. However, it is important to maintain the distinction for analytical purposes in those cases where there is in fact a division of these two functions.

In addition to administrative decision-makers, judges are clearly involved in the application of prescribed policy. Most judicial decision, at least at the appellate level, constitutes both an application of policy in the particular case before the court and a prescription, in the sense of the authoritative formulation of new policy or elaboration or alteration of existing policy, with respect to the body of authoritative policies we call the common law.

A particularly satisfying example of judges prescribing new policy outside the context of a particular case is the recent practice statement of the House of Lords putting an end to the strict doctrine of *stare decisis* in that court.[17] As the impact of this decision filters down through the judicial system, judges at all levels should be able to view precedents more as guides to rational principles based on certain value preferences, and less as verbal imperatives.

Empirical inquiry will probably reveal that lawyers, in giving advice based on their ability to predict outcomes in courts of law, effectively exercise the applying function in more cases than do judges. This observation may tell us something about the role of the lawyer in our society and the nature of his professional responsibility.

Appraising function. Assessing the effectiveness of prescribed policies.

Inquiries about this decision function lead to the preliminary observation that traditional legal analysis, which focusses on the organs of government, neglects this function. We stagger from Royal Commission to Royal Commission on an *ad hoc* basis. Lawyers have failed to appreciate what has long been known elsewhere, that a prompt and efficient feed-back mechanism is essential to the continuing effectiveness of any kind of decision process.

[17] Practice Statement (Judicial Precedent), [1966] 1 W. L. R. 1234.

We have no continuing, systematic procedure for assessing the effectiveness of the decision process in realizing perceived goals. As stated earlier, the only attempt to initiate a comprehensive study of this kind has been made by a sociologist rather than a legal scholar.

We rely on departments of government doing the best they can with limited time and resources, committees of the organized bar meeting periodically and subject to even greater limitations in terms of time and resources, and the able but unorganized efforts of legal scholars, whose energies are heavily drained trying to maintain order in the logical superstructure of existing legal analysis.

One could hazard a guess that inquiries about the appraising function would produce largely negative results, suggesting a need for early policy recommendations and action.

Terminating function. Ending of prescriptions and disposition of legitimate expectations created when it was in effect.

Obsolete or ineffective prescriptions detected through the appraising function cannot always be simply obliterated. Certain expectations will have been built around the prescriptions and more or less severe value deprivations could result. It is to the disposition of these expectations that the terminating function is directed.

The ending of the prescription will generally fall to the decision-maker who made it, although since the nineteenth century the legislature, with its doctrinal supremacy, has made a habit of terminating common law prescriptions. The legislature, with the assistance of its administration, is better equipped than are judges for disposing of legitimate expectations, which is probably one good reason for the reluctance of judges to alter common law policies. They prefer to assert that such unsettling changes are for the legislature, even though the predictability of judicial decisions on the basis of formal doctrine alone is practically nil.

An illustration of the terminating function is found in the introduction in British Columbia in 1961 of new personal property security legislation, providing for a central registry for documents to replace the scattered and confusing system of separate registries then in existence. Each of the substituted statutes contained a transition part which charged administrators with the task of effecting orderly transition to the new scheme of registration, a change which obviously could not be brought about instantaneously with-

out undermining legitimate expectations built on the repealed legislation.

g. *Effects.*

This final phase for inquiry would lead into sources like *The Vertical Mosaic,*[18] which provides a wealth of relevant information. Awareness of the ultimate patterns of value distribution which in fact result from the outcomes of constitutive decision is indispensable if we hope to formulate meaningful policy recommendations for the future guidance of decision-makers.

Conditioning factors.

This third intellectual skill demands inquiry beyond the analysis of legal justifications for decision into the whole range of factors that actually condition the trends in decision. The importance of the observer's standpoint is obvious here. The judge or legal scholar who views the intellectual straightjacket imposed by legal positivism as a natural phenomenon rather than a strategy of decision designed to effect only one of the policies of our legal system, abandons any hope of fully understanding the decision process with which he is dealing.

Central to this part of a policy-oriented analysis would be an examination of the perspectives and identifications of all participants in the constitutive process. In the case of judges, it is clear that their individual views of the nature of our society and its fundamental goal-values, the nature of law as a process of decision and the proper role of a judge in that process, will strongly influence the choices they make when faced with a constitutive decision whose outcome may have a profound effect on the community.

It is hard to believe that the division of our national Supreme Court in important constitutive decisions like *Roncarelli* v. *Duplessis*[19] is just a reflection of different "answers", arrived at by the application of settled doctrine to ascertained fact. Yet much of our legal literature is dedicated to the task of showing the consistency or otherwise of judicial decisions with legal doctrine or else collecting and organizing doctrine for the future guidance of decision makers. It is submitted that formal legal doctrine is only one of the factors conditioning decision and, at the trial level at least, not even the most important one. If this is so, our legal literature

[18] Porter, *op cit.*, footnote 10. [19] [1959] S.C.R. 121.

betrays an inadequate notion of law and a failure to provide systematic guidance, based on reality, to enable decision-makers to assess the value impacts of the choices open to them in terms of the community values embodied in legal doctrine.

Thus, we would seek through systematic inquiry some understanding of why decisions are being made as they are in order to equip ourselves to recommend policies designed to effect desirable changes in these conditioning factors or, where change is considered not realistically possible, to make allowance for them in recommending policies for the achievement of constitutive goals.

Trend projection.

This is an unfamiliar skill to the legal scholar, although the practising counsel devotes much of his energy to a similar predictive task. It is not suggested that a policy-science approach will necessarily bring accuracy of prediction, but it will help. In any case, the attempt must be made, for unless we are able to anticipate probable future trends in the absence of influence by the observer, we have no rational basis for policy recommendations to decision-makers.

The truth is that we constantly engage in this task, but usually in an unorganized and unscientific manner. The suggestion here is that by making our efforts systematic and comprehensive we will maximize our capacity for anticipation.

An obvious area where this skill is needed is in the application of the Canadian Bill of Rights.[20] Our judges are uncertain about the ultimate consequences of accepting the Bill and giving it meaningful application. They have, therefore, preferred the security of the known and tried, however inadequate it may be as the basis for an articulated theory of human rights in a free society. It is submitted that as long as this situation exists Canadian society will bear strong authoritarian traces. Some may consider this a satisfactory arrangement, but there is considerable evidence available to us in this second half of the twentieth century to indicate that the authoritarian basis for controlling human behaviour is inconsistent with a public order of human dignity.

Invention, evaluation and promotion of policy alternatives.

We cannot begin to contemplate, without the benefit of a full application of the other four intellectual skills, what policy recommendations will come out of this final, creative task. However,

[20] *Supra,* footnote 7.

reference to some of the questions on which recommendations are needed in the constitutive process may indicate the immediacy of the challenge to contemporary legal scholars.

1. Improvement of the performance of our decision process, especially the legal system.
2. Protection of fundamental human rights.
3. Education of citizens in a free society.
4. Bureaucratic abuses of power.
5. Poverty, disease, and cultural deprivation.
6. Regulation and development of the Canadian economic system.
7. Industrial relations.
8. Relations between Canada and the United States.

Epilogue

This article will offer lawyers little or nothing new about "the law". My purpose has been to try to persuade lawyers in general and legal scholars in particular of the urgent need for some new theoretical framework which will revitalize the connection between "the law" and its ethical basis, and ensure a continuing contact between the two. I proceed from a conviction that the notion of law as a prevailing force, separate and apart from justice, tends to be destructive of human values. Whether the framework I suggest can effectively overcome this defect I do not know, but I think those who reject the theoretical basis of the *status quo* ought to propose an alternative. I think the exploration of a policy-science model with its essential contextual approach is a step in the right direction. If I succeed in sowing doubts in the minds of some true believers I will be satisfied.

It is well known, however, that there is a universal reaction among trained lawyers to the framework of enquiry outlined here and to some of its language. It may therefore be useful to deal briefly with two of the standard questions raised about the policy-oriented analysis, to wit:

1. Why does it have to be so complicated?

2. Why must it be dressed up in such obscure terminology rather than being stated in clear, simple English?

The framework of analysis *is* in fact simple. The problem is that it is unfamiliar to the legal mind because traditional legal training demands unscientific thinking. When a legal mind is confronted with a model based on an observational frame of reference

it tends to process that model through an analytical filter so that it enters the mind as a highly confused mass of logically unrelated categories. This is the inevitable result of looking for *logical* or *conceptual* relationships in a framework of inquiry whose basis of organization is *observational* and therefore capable of empirical reference.

The truth is that existing legal theory is not equipped to even formulate many of the important questions asked by a policy-oriented analysis, and no amount of substituting "clear", "simple" language for the operational language of that analysis will overcome this inherent limitation. Besides, the so-called clear, simple language is loaded with ambiguity because existing theory makes a habit of trying to use a single word for a variety of distinct purposes. If the ordinary language of the law were adequate to the needs of policy-oriented analysis, there would be no justification for introducing terminology which appears simply as offensive jargon to every legal scholar on first encounter. It is submitted however, that any attempt to translate the foregoing outline into legal terminology would destroy it by introducing assumptions which render the observer's standpoint untenable. If our legal system seeks fundamental improvement it must step outside itself and see itself objectively. The adoption of operational definitions free of its own assumptions is an essential part of that process of extrication and self-examinition.

One final word. The initial reaction of the lawyer's trained analytical mind is that a policy-oriented analysis ultimately leads to policies that are so vague and general as to be meaningless. This is a superficial assessment, resulting from an unconscious tendency to try to draw the policy-oriented analysis into existing legal analysis. The result of such an attempt is to take the *form* of the analysis for the analysis itself, thus mistaking guideposts for goal-posts. The analysis itself is incapable of being built into existing legal analysis because the former is based on a policy-science model that is incompatible with certain fundamental assumptions on which the latter is built, notably about the nature of law and the relationship between words and behaviour. That is why the observer's standpoint is so important.[21]

[21] My debt to Professors Myres McDougal and Harold Lasswell of the Yale Law School is so obvious that it hardly needs mention. So there will be no doubt, I hereby acknowledge that debt.