THE QUEST FOR JUSTICE AND THE ROLE OF GOVERNMENT: THE FOLK-LORE AND THE REALITY OF CONSTITUTIONAL RIGHTS

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I notice that I seem to be almost alone among those whom you have invited officially to celebrate the opening of your new Law building, in being neither a Dean nor an ex-Dean. I take it that this indicates one can get to Heaven in New Brunswick without being a Law Dean, if this is the sign of ultimate grace.

You asked me to talk on the Quest for Justice and the role of government, and I would be insensitive to events and people if I did not record my pleasure in being in a programme that includes people like Chief Justice McRuer. I travelled on the plane with him here to Fredericton, and I reminded him that I was the first person to give evidence before what will, I think, go on to become a classic, in the Western world, of the empirically-based, institutionally-grounded approach to civil liberties; that is to say, the McRuer Commission Report on Civil Rights.[1] Chief Justice McRuer sent a message to me, I believe. At least, one of my former students who was then acting as counsel assisting the Commission came to me and said, "The Chief Justice wants you to present a brief". And I said, "Why does he want a brief?". "Well", I was told, "he wants you to present the brief and he really wants poetry for the first brief; he'll get the law later". So I gave him my brief[2] and I hope it was poetry. I am sure it was prose at least and I have felt, on this account not least, a certain interest in the work of the McRuer Commission. There are, however, intellectually far weightier grounds for being interested in the Commission's final outcome: for Chief Justice McRuer arrived on the scene at a time when all Western society was beginning to be concerned—at least the thinking people in Western society—about problems of big government, problems of institutional reform; and the Province of Ontario decided, before this public concern reached tidal wave proportions, to do something concrete about it.

I will have a little bit more to say later about Chief Justice McRuer's Commission, and the Canadian approach to civil liberties

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1 Royal Commission Inquiry into Civil Rights, Province of Ontario, (the McRuer Commission), Report Number I, volumes 1-3 (1968).

2 The brief is re-published under title, *A new base for Civil Liberties*, Canadian Bar Journal, (February 1965), p. 28 *et seq.*

for the future. Let me now say something about constitutional theory and about philosophy of law in general, since this so largely conditions and controls particular national ventures in concrete institutional and procedural changes.

For the North American Law School at least, truth isn't an abstract quality inherent in an idea; truth is something that happens to ideas in the general unfolding of history. We do try to teach our students today that the good law is that which in certain measure reflects society, and therefore the good law in a very real sense is revolutionary law since Society itself is in a state of flux today—a state of revolution. I am not speaking here necessarily of the hippies, for they represent only one species of revolution. Surely, the greatest revolution of our times is the technological revolution, which includes now access to and control of nuclear energy and power. If you look at its impacts in societies as ideologically disparate as the Soviet Union and the United States, you can find common technical conditions producing common community problems and, increasingly, common informed technical legal responses.[3]

Now we are all of us believers in sociological jurisprudence and in the necessary and proximate relationship or symbiosis between law and society; and I think that this does give us a certain humility in our approach to problems, and a certain realization that the Sermon on the Mount and holistic, *a priori* formulae are not very much help in solving the concrete, practical problems of our times. So we are dedicated, instead, to pragmatic, empirical, problem-oriented methods. In opening this subject generally, I thought I might refer you to some concrete problems that I have been interested in, in various academic and professional capacities, because these problems reflect, in their concrete solutions, the pragmatic, empirical approach, and they also represent what is a new and important element in our general national approach to law, — that we have now become, perforce, intellectually eclectic and interested in comparative legal science. We are suddenly realising that what happens in Canada is not without interest to the rest of the world; and that what happens in the rest of the world may point up and illuminate the solution of our own legal problems in Canada.

There was reference during one of the earlier papers presented at these official celebrations, to Germany, and this will bring me to the first major *excursus* that I intend to make into comparative legal science—into the comparative quest for justice in the public law experience of other legal systems. There was reference, I believe, to the situation in Germany in the 1930's, and I think somebody said that the law schools were taken over then by the Nazi Party.

3 Some of these ideas are examined in greater detail in my *International Law and World Revolution* (1967), pp. 1-12.

I don't think that is quite true, and I wonder if I might spend some comments on this particular problem. I think the tragedy in Germany was not that the law schools were taken over by the Nazi Party, but that they went on very much as before. There were perhaps a few German legal scholars, if you think of Carl Schmitt and one or two others who deservedly should be forgotten today, who did take up the Nazi régime and become, if you wish, its legal apologists. But, by and large, the academic lawyers and the judiciary in Germany took no part in the Nazi movement. What the legal establishment did, in effect, was to isolate itself from the problem. I think I can illustrate this very dramatically to you by saying that the Civil Code of Germany, the *Bürgerliches Gesetzbuch* of 1900, was the same in 1933, essentially, as in 1900; and the same in 1945 essentially as in 1933; and it is much the same today, in 1968, in West Germany as in East Germany. What in effect happened, in this situation, was that a great and powerful profession confined its attentions to the Civil Code, and a great and powerful profession confined itself to applying the ordinary law in the ordinary courts. The perversions of justice, in the bigger sense, in Germany in the Hitler era, were accomplished, really, by special statutes and special courts removed from the ordinary processes. This thing can happen in a civilised society, of course, and I know my American friends here will not mind if I cite an American example. The 13th, 14th and 15th Amendments to the United States Constitution were certainly normative for a very large part of the American population from the period of their first enactment immediately after the Civil War, onwards. But for other, significant sections of the American population they were really not normative in the sense of creating legal norms that were actually operative in day-by-day conduct of citizens, — that is, they were not community living law, and were not really, I suppose, until Chief Justice Warren's decision in 1954, in the School-segregation case.[4] This sort of hiatus between Law and Society—the gap between the law-in-books (the positive law as written in texts and codes) and the law-in-action (the *de facto* community attitudes and practices) can happen, and one of the problems in the post-war quest for justice in Germany, which occurred under the impact of the allied military governments was: how do you achieve legal de-Nazification? Well you could have started by firing all the lawyers—all the professors and all the judges; but a superficial examination quickly indicated that while some of the judges might benefit by being de-Nazified, and some of the professors perhaps too, very few of these had been Nazis in the proper sense. You might have said that some of these were certainly timid people, or you might have said that they were people who had a conveniently short vision; but on the

4 *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

whole, as I have said, the ordinary Civil Law went on in the period after 1933, very much as before.

Now this era of Allied military occupation after 1945 is one of the really interesting periods in Western Law; and it contains the sort of problems that exercised me when I was a young professor of Jurisprudence. How do you really go about re-introducing justice in the defeated Axis countries—Germany, Italy, and Japan? Well, if we consider the case of Germany in particular, you will find, if you study the German legal literature of the immediate post-War period, that Natural Law was rediscovered. The great Heidelberg legal philosopher Gustav Radbruch, who had preached all his life the concept of legal relativism, suddenly conceded, in the first post-War edition of his *Rechtsphilosophie*, that, in some circumstances, relativist criteria of justice should yield to certain absolutist criteria of justice; though he was not terribly clear or specific about when this should occur or as to what these absolutist criteria were.

There were half a dozen or more court decisions in post-War Germany that reflected this neo-Natural Law influence. There were rather strange decisions, if one can use the term "strange" in a technical legal sense. There were, for example, the interesting cases of women who claimed to have taken seriously the Nazi régime's request to citizens to be activists and to denounce defeatists and enemies of the German people. Wives would suddenly appear to the secret police and say: "I believe my husband is disloyal and he is a bad man; for the future of the country, something should be done about him"; and something usually happened. The husbands would then usually be given the option of being tried for treason in Hitler's special tribunals or else of being sent to the Russian front, which usually amounted to the same result at that stage of the War. Unfortunately for some of these wives, but fortunately for the cause of legal philosophy, one or two of these husbands actually managed to survive the Russian front. They came back after the war and you had quite an interesting period in German law, with interesting legal actions under this neo-Natural Law impetus. One such husband brought an action against his wife under section 239 of the German Criminal Code of 1871—still in force in the Nazi era and also in the post-War period—for "unlawful deprivation of another's liberty". The husband also brought the same action against the special Judge who had heard the case against him. Well, in the end, the wife was given the mid-twentieth century equivalent of the ducking stool. She was convicted, but the special Judge was acquitted.

It was an interesting period in German constitutional and general legal history, and the legal philosophers wrote about it. But, on the whole, the main impact of that experience and the main concrete achievements in the post-war search for justice in Germany

were simple institutional ones. Now these particular institutional innovations are of considerable interest and value to constitutional lawyers in our own country; yet the fact remains that, after all the philosophical discussion—the *Sturm und Drang*, if we may use the German term, they seem relatively modest and un-poetic—essentially empirically-based changes. If one were looking at it solely in terms of the legal folk-lore, one might, in the sense of the Latin aphorism even say that the mountain laboured and produced a mouse. But that would be to miss the whole point in an important exercise in concrete, problem-oriented legal reform and change. For the two things that happened, really, in post-War Germany—West Germany—were a strong decentralisation in the German government—a decentralised type of federalism in comparison to the pre-war system—and a vastly strengthened Supreme Court.

I must say that in a study that I made some years ago of these particular constitutional innovations I came to the conclusion that the strengthened Supreme Court—in fact, a special constitutional court—was the most imaginative and hopeful feature of post-War German constitutionalism; and in some ways it seemed to me, with the reviving nationalist spirit in Germany, that perhaps it was the only really strong and effective institutional guarantee for maintaining and strengthening a democratic system of government in Germany. I became rather enthusiastic about it and so I wrote a book on the theme.[5] I noted, with great interest, that the most recent Yugoslav Constitutional Commission set up to clear away the last remnants of Stalinism and really to achieve an institutionally-based democratic socialism, decided upon a special constitutional court, as the main instrument for achieving those goals, and unashamedly adopted the post-War German court as their model. Even more recently, the same idea and the same model have been taken up by Quebec nationalists and by Quebec separatists, though for reasons not entirely related to what I was discussing in the book. But that is another story. It just shows you that if you write a book on a great political issue, it may end up serving as footnotes in rather strange contexts.

The big constitutional innovation in post-War Germany then —the principal, concrete mode of institutionalisation of the quest for justice—was thus the system of the special constitutional court. There remains, also, the achievement of a far more decentralised federalism than had existed before in Germany—this to be effected, mainly, through a very strong Senate. If you read again some of the very interesting Quebec nationalist literature, you will find that the German Senate again is an ideal-type or model for the "new wave"

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5 *Constitutionalism in Germany and the Federal Constitutional Court* (1962).

Canadian constitutionalism—a reformed Senate, with thinking people in it, an idea that seems now to be accepted and sponsored also (though with rather different incidents and elements) by the federal Government's Senate majority leader, Senator Paul Martin.[6] I gather, however, that this particular proposal for constitutional change in Canada—imaginative and well-researched as it is—is running into difficulties with the federal government's own Party caucus in the lower House, which apparently fears that some of the special privileges of the lower House will thereby be whittled away.

Now this is an interesting conclusion to all that post-1945 legal excitement and all the pressures by the Allied Military Control forces. Somebody said: "Well, it's typical! The Germans had to become democratic to join the Western Alliance again, and the only way to become democratic in the eyes of the American Military government officials, was to adopt an American-style constitution. If you want to get rid of the American army (whether in Germany, or for that matter in post-1945 Japan) adopt an American-style constitution!" I think this is a little cynical because it has seemed to me that the German court in some ways, and I said this in my study of it, in some ways has been a more effective court even than its original model, the United States Supreme Court: — in the election cases and certain related matters, for example, that anticipated some of the major reversals made in the late 1950s by the United States Supreme Court of earlier decisions. Nevertheless, the quest for justice in Germany, after perhaps the most agonizing period of intellectual and moral crisis that any country can go through, has institutionalised itself finally in these two main elements of constitutional innovation—a special federal constitutional court; and a more substantially decentralised federal system than heretofore, achieved in part through a more powerful federal upper house. The legal *folklore*, the natural law element, has disappeared, for better or for worse, into history, and it is now just a footnote in various historical surveys or commentaries on legal philosophy.

Now, if I can cite another example before getting on to our Canadian discussion, I think you may know that a special Commission was constituted by the Japanese Cabinet some years ago to advise on, and if possible to devise, a new constitution for Japan. I think you may also possibly know that the present Japanese Constitution is not a very elegant one. I'm not sure if constitutions should be elegant; I was once at a diplomatic cocktail party where, at a certain stage of the evening, a very distinguished official began

6 See, in this regard, the recently published federal Government White Paper: — The Constitution and the People of Canada. An approach to the Objectives of Confederation, the Rights of People and the Institutions of Government (Ottawa, 1969), pp. 28-34.

to sing the Preamble of the United Nations Charter. It can be sung, of course. Indeed, it sings beautifully. It's pure poetry; and it ought to be, for it was written by a poet. President Franklin Roosevelt made Archibald MacLeish Assistant Secretary of State, on the understanding that he would tidy up the language at the San Francisco proceedings in 1945. And the result is that you can sing the U.N. Charter. You can't sing the present Japanese constitution however. It's really written in very bad Japanese, and that's very understandable, because it wasn't originally written in Japanese at all. It was written first in another language and only then translated into Japanese. And as for the other language, one would have to acknowledge that it was written in American English, and not English English before it was translated back into Japanese. Now when I spoke to the Japanese Chairman of the Japanese Cabinet Commission on the Constitution—a very distinguished and venerable legal scholar who, at the time, had 87 years—he asked me, as his first question: "What do you think of Wigmore?" Well, this was a strange question from a distinguished Japanese constitutional lawyer, even one 87 years old, and so I said, "Well, in my part of the world (this was then Toronto) all day long they talk of nothing else but Wigmore." This may have been a mild exaggeration, but it was undoubtedly an appropriate response, because Dr. Kenzo Takayanagi was very impressed and said: "In that case, there must be some ultimate grace in Toronto."[7] By comparison, of course, one can quite unashamedly tell visiting constitutional authorities: "Come to Montreal and we won't discuss Wigmore or any other doctrinal writer: we will simply introduce you to the constitutional 'living law'—our indigenous constitutional revolution."

The Japanese, as I have said, have certain problems with their first post-1945 constitution. First, it is written in rather inelegant Japanese, a bad translation of a rather badly drafted English document. And second, and this is part, again, of our introductory *excursus* on the quest for justice in post-War Germany, we had told the Japanese that theirs was an unjust society because it was a militarist society, and that the only way to get a just society in Japan was to demilitarise it; and this meant, really, preventing Japan from ever going to war again or having the capacity to make war. And so we insisted on having written into the post-War Japanese constitution provisions which, from the drafting viewpoint, are rather effective and foolproof, and which, if properly applied, would

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7 The late Dr. Takayanagi had in fact been Wigmore's student in Chicago, shortly after the turn of the century, when Wigmore was Dean of the Northwestern University Law School; and he had gone on, among other things, to become perhaps the foremost Japanese authority on the Anglo-American Common Law.

really prevent the Japanese from ever again developing a military presence.

There is only one major drawback in all this, and it might almost give rise to an axiom for future constitution makers; beware of trying to solve too many immediate problems in your constitutional charter, because the solution to immediate problems may involve the creation of insuperable constitutional barriers against the solving of later problems that you didn't anticipate in the first place. I suppose nobody anticipated, in the middle and late 1940's, that we might even think it might be good for the Japanese to become militaristic again. Yet the Japanese had no sooner obtained their new constitution than the Western Allies started putting pressure on them to rearm again. But we had also set up, in the post-War Japanese constitution, as in the post-War German constitution, a constitutional Supreme Court exercising judicial review on the American Supreme Court model; and this Japanese Supreme Court started taking these disarmament and demilitarization principles of the constitution seriously, as any decent and self-respecting, policy-making Supreme Court would; and some of the Japanese citizens started taking these constitutional principles seriously too. They had been told that the just society is composed of free-willing individuals, —citizen activists or legal militants in the sense envisaged by Dicey; grass-roots marching societies composed of Eugene McCarthy-type people, who do have a social conscience and who do get a bit upset and so, being legally sophisticated, proceed to rush to the nearest lawyer in order to file a constitutional complaint. Very soon, indeed, a lot of Japanese started doing just this. The Japanese government would grant a lease of a piece of land for purposes of a military base by the United States or any other of the Western Allies, and some citizen would come in and say, this is against the constitution. Or a nuclear submarine would come in and somebody would raise the issue that this is against the constitution. How do you resolve this basic legal dilemma? I would have to say that the Japanese still haven't resolved it; and Dr. Kenzo Takayanagi and his expert Commission, in drafting the blue-prints for the new constitution, recognized that perhaps it was an insoluble problem after all. Dr. Takayanagi's Commission in fact produced a beautiful set of constitutional blueprints; except that, when you came to these demilitarization or anti-War sections of the constitution, the Commission recommended absolutely nothing at all. They just sort of left these sections a blank, to be filled in later; and this has been the basic problem. They really don't know what to do on it. One group of constitutional thinkers in Japan says that the quest for the just society in Japan necessarily involves elimination of all the military caste, elimination of a military status for Japan: why can't Japan just be a heavy trading country without an army? Another group

says, "No; with an ideological struggle going on, we have got to make our moral commitment." In the result, the thing is still being fought out in Japan, and the whole beautiful new constitutional project is thus being kept on ice pending a resolution of the problem. No Japanese government is therefore prepared to bring the new constitutional project forward for political adoption; and the likelihood is that one will rest with the old, inelegant constitution simply because one can't solve the political problems inherent in any new one.

This, in a way, indicates how very complex and difficult it is to take a firm and inflexible position, in one's basic constitutional charter, on what the just society concretely amounts to, and it may also indicate the dangers of giving free advice from outside—the dangers, even more perhaps, of trying to impose a just society on anybody else. I suppose this takes us back to one of the basic issues of international law that we used to discuss in the immediate post-War years; might it have been better to have left the Germans to conduct the Nuremburg trials themselves, rather than having outsiders do it for them? The risk was, of course, there mightn't have been any trials at all, in that case; but it might have been worth the experiment anyway.

Now, if I can take you to a third example before getting back to the Canadian problems and the concrete and specific references I have promised to Chief Justice McRuer's work, the Soviet Union has an interesting constitution. Again I find, in this new comparative, eclectic, period in Canadian law, that footnotes are now being dropped in Canada to Soviet constitutional practice—sometimes eclectic, period in Canadian law, that footnotes are now being dropped in Canada to Soviet constitutional practice, — sometimes in the most unlikely areas. I have a great respect for the younger generation of French-speaking constitutional jurists in Canada, but I am very surprised to find some of them, with a straight face, dropping a footnote to the practice of the Soviet Union as a claimed precedent as to the conclusion of treaties by constituent republics of a federal system. There are, of course, some interesting legal formulae contained in Soviet federal constitutional basic arrangements; but they aren't the best legal footnotes, because not really law-in-action.

The Soviet Constitution of 1936 is an interesting document. If you are ever drafting a constitutional Bill of Rights and you want some nice phrases or a nice general model, you may want to go to this. It really is a beautiful Bill of Rights; I think perhaps it may be the most beautiful Bill of Rights in any modern constitution. It didn't of course ever work from the time of its first adoption in the Stalin Constitution of 1936 until at least the ending of the era of political terror with Stalin's death in 1953. The Stalin Constitution

of 1936 was a somewhat authoritarian constitution. It was drafted after Stalin had executed his principal Law Dean and legal pundit, Pashukanis. Pashukanis was a very great legal theorist. He had even read Marx, which is better than many modern Russian Law Deans and he had worked on the logical consequences, in concrete legal-institutional terms, of Marxist theory. He accepted earnestly and sincerely this business about the withering away of Law and the State as the Socialist society gives way in turn to the Communist society. Pashukanis took it all very seriously. One of the things he did, in his programme of law reform according to Marxist premises, was to re-examine the basic Law Faculty curriculum, in the University of Moscow and elsewhere. If Law and the State are progressively withering away, why do you need a law of Delicts, or a law of Property, or even a Civil Code as a whole? They are all historically dated—out-of-date. Pashukanis proposed, therefore, to abolish all these things and to set up, in their place, in the law curriculum in Moscow, the study of the administration of things. Away with the old-line, bourgeois-derived positive law, and in its place substitute the Administrative Process. Everything else must go! Well this offended a few people! There were, for example, some excellent old-line professors of the Civil Law who thus became supernumerary, and were unhappy in consequence. And it all worried Stalin because somebody told Stalin, "You've got to have security against the enemies within." Stalin asked his new legal pundit, Vyshinsky, "How do we get security within?" And Vyshinsky replied, "You've got to have a strong, authoritarian constitution" (that is, "a good Austinian positivist constitution is what you need"). And this is the 1936 Stalin Constitution, with the exception that it has this beautiful Bill of Rights in it. By the way, Pashukanis, as a fallen legal pundit, was put on trial for wrecking: (this was a great period when foreign engineers and early political associates of Lenin were on trial for sabotage). And the substance of the count against Pashukanis was that he had tried to wreck the Soviet legal system by modernizing it and sweeping away all the time-worn bourgeois-liberal survivals and encrustations. Pashukanis is, I believe, the first and, one hopes, the last Law Dean in history to be executed for his crimes. In one of the more recent issues of *Soviet State and Law*, I think you will all be happy to learn, thirty years or more after Pashukanis' execution, there's a very happy, posthumous, article[8] that concedes at last that Pashukanis was a man who had some ideas and was interested in society, and that in his own way, even if mistaken, he laboured for the improvement of Socialist mankind. Well this is very good—it's just a little bit late!

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8 L.P., Pamyati Evgeniya Bronislavovicha Pashukanis, *Sovetskoe Gosudarstvo i Pravo* (no. 8, 1968), p. 150.

Now I cite the Russian example because Russia itself went through a crisis in the middle 1950's, the period known as de-Stalinization. I think if any of you have met any members of the current Soviet legal establishment you will quickly become aware that, in certain areas—criminal law, procedural law—these people are extremely good. It is interesting but also quite embarrassing to go to the Academy of Arts and Sciences and meet the members of the special section, the Institute of State and Law, and to talk to the specialists, for example, on Canadian law. They have people who have spent a lot of time studying Canadian law. They are really very able people.

Now, in their quest for justice in this post-Stalin period, everybody had to concede that the Stalin era had been a period of police-state terrorism that was in force roughly from the end of the N.E.P. period in the Soviet Union, about 1928, until some years after Stalin's death in 1953. The dictator, as we all know, began to suffer a decline in personality—a tremendous psychological decline—and in the end was an extremely vicious old man, endowed with absolute power.

The emphasis of the Soviet law reformers, in the era of de-Stalinization that followed Stalin's death, very interestingly has been on criminal jurisdiction and criminal procedure. This recalls, of course, Maitland's basic teaching that you find your substantive constitutional law in the interstices of procedure. The emphasis of the Soviet reformers really has been in this area, and I commend to you, in this regard, the studies made by the Soviet Commission on reform of the Criminal Code and the draft principles of legislation that the Commission produced.

The Commission pressed for the abolition of the special courts, and I think this was right. They pressed for the abolition of retroactive crimes. Well you can cite a footnote here to the United States Constitution; and this they did as well as looking to other Western legal experience. They also pressed for a right to counsel, including such a right at the preliminary, pre-trial proceedings. This was a little bit more venturesome and innovatory, because the Soviet internal law system is Civil Law, and not Common Law at base—strongly influenced by German civil law and French civil law; and this emphasis on the right to counsel and the emphasis on the pre-trial proceedings is a little bit strange in Civil Law terms, in comparison with the Common Law. I remember when Gary Powers, the U-2 pilot, was on trial; many people said: "This is disgraceful; he has confessed his case away before he was even put on trial, in his pre-trial examination; this is the Communist system of law." It wasn't really; it was the Civil Law system in action in terms of the Continental European criminal pre-trial investigation; but it still, perhaps, in comparison to the Common Law system, leaves much

to be desired in terms of basic protections for the accused. And this was one of the areas in which the Soviet Commission on the reform of the Criminal Code pressed for changes.

The Commission also pressed for the elimination of vague concepts of criminality—"rubber concepts", so called because you can stretch them to cover almost anything you want. The famous, or infamous, Parasite Law—the law under which the Soviet beatnik poets were tried recently—has a vague relationship to our own vagrancy law. You know you want to pick somebody up and you haven't got any real evidence, so you charge him with being without visible means of support. In terms of the Soviet Parasite Law, if you are a poet with long hair and a beard and you are sitting in coffee houses and not engaged in socially productive labour, you may end up being charged with parasitism. It's not actually a criminal charge, but it has what we would call criminal consequences. In the beatnik poets' cases, they were picked up from the coffee houses and in effect exiled to rural areas. One of them, I remember, ended up carrying manure in Archangel, right behind the Arctic circle. It was all very salutary, I believe; but many Russians felt (and still feel, if you have been following the protests now going on) that this isn't the sort of legal provision and remedy that a de-Stalinized legal system should permit.

Again we see the strong emphasis on the strengthening of institutional controls upon administrative process and upon the operation of the bureaucracy generally. The institution of the Soviet Procuracy has a root that goes back to the French *procureur du roi* and Continental Civil Law administrative law concepts. But I think the big impact of the changes, in the period of legal de-Stalinization in the Soviet Union, has been a strengthening of its independence; and a strengthening, if you wish, of the concept of a countervailing power against administrative arrogance and general governmental arbitrariness.

A final point that I would stress, in the case of the Soviet Union, is the de-centralization of policy-making along geographical lines—a new emphasis on federalism. I became aware of this, in a physical sense I suppose, when a Russian student landed in my office in Toronto several years ago and said he was there to study federalism. And in fact he stayed for a full academic year. I don't want to stress this point too much, and in any case I am certainly not raising it merely to provide some sort of comparative law footnotes purporting to demonstrate that because the Ukraine and Byelorussia can make international accords in their own right and actually sit in the United Nations General Assembly, Quebec or any other Canadian Province should have the same rights or privileges too. Such examples, rooted as they are in the law-in-books and not necessarily

corresponding to actual *de facto* power relationships within the legal system concerned, are neither very persuasive nor even very relevant in comparative law terms. I think we are beginning to see develop, however, a new pluralistic approach to law in the Soviet Union. It may be, in time, that you will be able to read books in Moscow that you could not read, or would not wish to read, in Ulan Bator: just as you read today freely in Montreal what you certainly would not approve of reading in Toronto. It may also be that you will be able to have plural marriages in Tashkent, where monogamy reigns supreme in Volgagrad: like the wide variation in family law as between the Canadian Provinces. This is what I mean by a new pluralistic approach to Soviet Law. I am stressing this, because the emphasis in the era of de-Stalinization on the part of the Soviet Law reformers—and I am sure they were correct in their choice—was never on the Constitutional Bill of Rights. That Bill of Rights, as proclaimed in the Stalin Constitution of 1936 and still in force today, is a beautiful piece of work in a purely literary, law-in-books sense; yet nobody ever bothers about it. The emphasis of the Soviet Law reformers, instead, has been on institutional changes and procedurally-based remedies; and I think in this sense Chief Justice McRuer and earlier speakers have been right to remind us that this emphasis is part of the general Common Law tradition; and while it may be peculiar to us in one sense, maybe there are elements in it that can be exported usefully to other countries; just as, of course, the institution of a policy-making constitutional Supreme Court has been exported to Germany and Japan; and we have seen it work in those countries.

Now, I was recently re-reading what I had said to Chief Justice McRuer's Commission on Civil Rights in the Province of Ontario when I gave evidence before it several years ago. One is aware that the late Mr. Justice Jackson—Robert Jackson, you probably know, was the last lawyer in the United States to go to the Supreme Court without a law degree, growing up through the law office system—was once reminded by counsel, when he was sitting on a case in the United States Supreme Court, of an official opinion that he had given to the United States Government on some point of law, in the period immediately prior to his appointment to the Court. Counsel said, "Look, Mr. Justice Jackson, I now cite Robert Jackson, Solicitor-General of the United States." And Mr. Justice Jackson replied in effect: "That was then and this is now: why should I be influenced by earlier partisan advocacy in a lost cause? What's the next point?", and on he went. Well, I would have to say, on re-reading what I said to Chief Justice McRuer several years ago, that I'm not sure I would necessarily say all the same things, the same way, today. One gets more cautious even in the space of a few years. But I did make certain suggestions in the Ontario context in which

I was then speaking, that I think make sense today in more general, Canadian terms.

It seems to me again that the main emphasis in the quest for justice in our own society in the foreseeable future, is probably going to have to be procedural and institutional. What I suggested then, in the Ontario context, was that we should take advantage of the fact that we are a racially plural society; that we are no longer monolithic in an ethnic-cultural sense, if we ever were; and that we must try to take in some of the best ideas from other systems. One of the concrete suggestions that I made, then, for Ontario was for introduction of an administrative procedure code.

A further suggestion that I made then was for a special administrative review and appeals tribunal. I think any of us who have seen the French *Conseil d'État* in operation are aware of the great virtues of that body as a specialized tribunal, as a tribunal of experts, and as a tribunal that has the confidence of the general public.

Now in Poland and Yugoslavia, also, the Communist lawyers are very interesting people. When you meet them, you soon become aware that being a lawyer in their countries—and I mean here a socially effective lawyer—is, in effect, to become a specialist in the art of the possible, the politically possible. If you say: "Here I am, a decent man with some ideas and some training and a position from which to make or influence policy", it's not much use producing an abstract, ivory-tower document. You want to see your legal ideas in action and really concretized as community "living law"; and I notice, here, that the Polish Law Reform Commission that's advising Prime Minister Cyrankiewics and trying effectively to operate within the limits of the politically possible, is also pressing the *Conseil d'État* idea. In terms of the strict Principle of Socialist Legality, it may seem a rather strange institutional form for socialist law to take. But there is one big advantage in Poland, in comparison to some other Communist countries: the pre-war Polish lawyers used to study in Paris, and they think in the French way. This is true of the circle of legally-trained persons immediately around the Prime Minister.

The same thing is true also in Yugoslavia. The *Conseil d'État* becomes a particular institutional method for achieving a just society, within the politically possible limits imposed by the fact that you're part of a larger ideologically-based association that may also carry over, as we were reminded in recent weeks, into the internal law system. I think they will get away with these institutional reforms in Poland; and I think they may even spread from Poland back to the Soviet Union, because one of the problems, of course, in the Soviet Union is administrative arbitrariness, administrative arro-

gance, the problem of big government. You can run a big government by force, of course; but it's a very inefficient and uneconomical use of power. And ultimately, as lawyers interested in social control, you are interested in what Mr. Justice Frankfurter used to call the achievement and application of the more moderate controls, forms of social control that require less expenditure of force and naked power, and that inflict less deprivations upon other, widely held community interests and aspirations.

The Soviet response has been limited to the particular measures I have mentioned, with perhaps the strongest emphasis being on the institution of the Procuracy. But I think that their court structure will need some substantial strengthening and reform too.

Before the Ombudsman had become as fashionable a legal institution as he now is today, I had myself counselled his merits to Ontario. I suppose, if we get an office of Ombudsman here, it will go eventually the way of Equity. It will start out as something great, pure, and noble and unfettered; and in the end it will become bogged down in its own precedents and its own decisions. But within that life cycle, it might be interesting and it might be challenging.

A further major measure that I suggested for Ontario had recollections of the *Roncarelli* decision,[9] and of the fact that *Roncarelli* could be achieved very easily in Quebec (although this isn't necessarily part of the Supreme Court rationale) because of the Quebec Civil Code, but that it might not be achieved so easily in the Common Law provinces. There is a principle of the public responsibility of the public official. It is a common-place, of course, of Continental European Civil Law jurisprudence. I think perhaps we ought to have a statute of this sort. It will breed a lot of litigation; there isn't any question of that. It may also add an extra harassment to over-worked, over-burdened governmental officials: they are certainly under fire these days on every count. But I think it would be an important, institutionally-based step in the path to justice.

This brings me, now, to the issue of a constitutional Bill of Rights, whether specially entrenched in the constitution or otherwise. You will remember that the federal government of Canada, in its approach to constitutional reform and rewriting in Canada, has placed its main emphasis up to date—indeed, a well-nigh exclusive emphasis—on achieving an entrenched federal Bill of Rights as part of the constitution, and has given it the top priority in all its constitutional talks and discussions. My own opinion, in contrast, is that the project for a federal Bill of Rights is not the top priority in terms

9 *Roncarelli v. Duplessis* (1959), 16 D.L.R. (2d) 689; analysed by the present writer in 37 Canadian Bar Review 503 (1959).

of the quest for justice in Canada, today, and is not likely to become so in the foreseeable future.

Now, if you read my brief to the McRuer Commission in Ontario, you might feel that there is an inconsistency here; because I did make the case, there, for a Provincial Bill of Rights in the Province of Ontario.[10] Such action, at the Provincial level, seems to me, in contrast to any action at the federal level at this time, to offer immediate prospects of being helpful and educational, and of really operating as norms of community "living law"—of really being law-in-action, and not just law-in-books or legal folk-lore. I commented, in some of my publications in recent years, on the differing positions taken, in civil liberties matters, between different sections in Canada. What one Province feels to be obscene, another Province may feel to be merely titillating or even boring; and what one Province feels to be an unwarranted trampling on the liberties of expression of the individual citizen, another Province may feel to be the imposition of necessary minimum community controls on insulting and provocative behaviour on the part of an aggressive or reckless minority, directed against other citizens.

We are looking, here, to a striking of the balance between differing, and sometimes directly competing or conflicting, community interests. This is the modern, interests-oriented approach to law, where the beginning of wisdom is to recognize, as Mr. Justice Holmes himself recognized in the speech and communication area, that there are no absolute interests; and that you have got to strike the balance, among the competing interests, against a background of societal facts. And in different periods, of course, communities may choose to strike the balance in rather different ways.

I was giving some lectures at the Sorbonne last Spring, a few days only before the student irruptions; and one could see the trouble starting. But what the French students regarded as a vindication of their own personal interests in speech and communication, the French workers, unfortunately for the students, soon concluded was an unnecessary and irresponsible destruction of hard-gained economic assets. Workers' cars were burned, if you remember, in the student fracas; and the French automobile insurance policies simply don't cover such things. Well I suppose you could suggest that you could vindicate both groups of interests at the same time—the students' claimed speech interests and the workers' undoubted property interests—if the French government would only fill the gap in the automobile insurance contracts and assume responsibility for losses and damages resulting from students' riots and disorders. Most people in France, however, seemed fairly quickly to conclude

10 *A new base for Civil Liberties*, Canadian Bar Journal, (February, 1965), p. 28, at pp. 31-2.

that the speech interests asserted by the students were rather slight—the speech, perhaps by reason of the manner and mode of its exercise by the students, was of little social value—and so they quickly resolved the interests-conflicts by supporting the government crack-down on the students.

I made the comment in the Canadian context, though, that in the speech and communication *versus* public order range of cases, there had been differences between, for example, problems stemming from Quebec, and problems stemming from Ontario and the other English-speaking Provinces; and that these differences were sometimes directly reflected in concrete judicial attitudes and decisions in the Supreme Court of Canada.[11] A very distinguished jurist—one of the leading French-Canadian constitutional authorities of our time—commented on my thesis and suggested, in effect, that it was divisive, and not a service to national unity perhaps, to offer such an interpretation.[12] On the other hand, another French-speaking lawyer said, in a related context, that maybe it was constructive to have some English-speaking lawyer stating the constitutional facts-of-life for once.[13] Both of these French-speaking lawyers ran in the last elections, though on different sides, and with rather different results as we all know.

But my own feeling, in regard to the Bill of Rights or similar entrenched constitutional charter of fundamental rights, is that it might be best to start at the Provincial level. I hope that those of you who are from the Province of Ontario will press for an Ontario Bill of Rights. But I do feel that any action at the federal level could perhaps wait on, and certainly not attempt to anticipate, the action at the Provincial level.

Incidentally, if any of you who have been following the work of the Ontario Commission on Civil Rights, have also been following the work of its Quebec equivalent, you may have been surprised—I don't think, however, that you really should have been surprised, having regard to the quality of the Quebec legal tradition—by the richness of the discussion, and also the imagination, of the new bill of rights that has been worked out for insertion in the new draft revised Civil Code of the Province of Quebec.[14] Quebec today is producing a lot of worthwhile new legal ideas, its younger lawyers being in many ways far more eclectic in their approach to the solu-

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11 See, for example, *Comparative Federalism. States' Rights and National Power*, (2nd ed., 1965), pp. 76-7; *Federal Constitution-making for a Multi-national World* (1966), pp. 93-97; *Judicial Review* (4th ed., 1969), pp. 244-5.

12 See Book Review (Marcel Faribault) 26 La Revue du Barreau de la Province de Québec 325, at pp. 333-5 (May, 1966).

13 See Book Review (Pierre-Elliott Trudeau), Revue du Notariat (Québec), (April, 1963).

tion of legal problems than their counterparts in the English-speaking provinces.

I think I wouldn't properly complete our discussion if I didn't make some reference to the quest for justice in Canada in relation to the quest for justice in the wider context of the world community. We are aware that we live in an increasingly inter-dependent and inter-related world community. It is almost trite by now to say this; but I think that governments are becoming increasingly aware that individual citizens today recognize that problems don't stop with the national frontiers.

Many of the present audience have been involved in recent weeks in the public debate on the civil war in Nigeria and the Biafran problem. I was myself involved in the debate, in late August, in the Council of the International Law Association, meeting in Buenos Aires, on the legal aspects of the Czechoslovakian crisis.[15] I had great difficulty in persuading thoughtful colleagues from major countries in the West (and in the East, too, though we expected that), that what was done in Czechoslovakia wasn't particularly desirable and that it wasn't compatible with the rule of law on the world scale; and that it wasn't even good co-existence, contemporary post-Stalin style.

This is a position I wouldn't hesitate to repeat, and I think it is a position that Canadian citizens increasingly take. And it seems to me, therefore, that a good deal of the attention of governments in the future, in the quest for the just society, will involve the recognition of this: that we can no longer think of ourselves as an island to ourselves, and that we have to be concerned with what's going on in the rest of the world. It's going, of course, to be a limiting factor in our internal economic policies and in the quest for national economic well-being. And it's also going to be a limiting factor in the deployment of intellectual energies and resources to the matter of internal law reform. But I think it is worth the effort to try to take a more inclusive, comprehensive approach to the quest for justice in our own society, and to recognize that the just society is hardly likely to be attained and maintained at home, if it is not part of the achievement of a more comprehensive international law of human dignity throughout the World Community as a whole.

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14 Civil Code Revision Office, Report of the Civil Rights Committee. First Part: Draft Modifying the Civil Code relating to Civil Rights (Montreal, 1966).

15 International Law Association. Report of the Biennial Reunion, Buenos Aires, 1968 (1969).