THE NECESSITY OF LAW REFORM *

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In the light of today's research, modern scientists look upon much of the work of past experimenters as a matter of historical curiosity. Without underrating the past usefulness of such theories as those of the body humours and of the phlogiston, today's scientists would not dream of trying to abstract from them the principles to be used in their experiments. Jurists, on the other hand, seek in thousand-year old maxims the solution of disputes. In Quebec such a deep respect is paid to the principles of the Civil Code and of the *Coutume de Paris* that they are revered by many as sacred maxims. Is this traditional veneration justified?

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The laws of any state are the basis of its structure; they are deeply rooted therefore in its national characteristics. They cannot be dissociated from the traditions that shape up the soul of the nation and link it with its past. Nations, however, are living entities just like the human beings of which they are constituted; they cannot live of the past exclusively. Without repudiating their forefathers, vigorous peoples are always in process of evolution towards their ideal. In the struggle for life, indeed, those who are satisfied to remain at the stage to which their ancestors brought them are invariably surpassed by those who strive always for ever greater progress. The countries in which traditional methods still govern agriculture and industry are today backward by comparison with those whose methods have been renovated by the application of scientific discoveries.

Are legal principles exempt from this necessity of revision in the light of scientific progress? Should they be looked upon as permanent axioms, as perennial truths?

Obviously we must exclude from any possibility of change certain legal principles which are nothing but a statement of natural law or of precepts strictly deducible from it, such as the indissolubility of marriage. Provisions of this nature are few in number, because natural law is of limited content.

But where else are we to find perennial truths in our laws? A number of legal rules are but methods of applying certain precepts of natural law, which methods are made indispensable by

* A free translation prepared by M. Pigeon of an address delivered by him at a luncheon of the Société Saint-Jean-Baptiste de Québec on February 7th, 1945. The French version, under the title, Nécessité d'une évolution du Droit civil, has been published in the Cahiers de la Faculté des Sciences Sociales de l'Université Laval. — *Editor.*

the imperfection of our knowledge. Such for instance are the presumptions by which paternity is determined. Is it not apparent that scientific improvements in our methods of investigation might justify important alterations, if not fundamental changes, in these presumptions, which, as already explained, are made necessary not by the very nature of things, but by the imperfect facilities for investigation available to human judges.

Other provisions of the Civil Code must be classified as arbitrary rules, not in the sense that they are the result of the legislators' capricious will, but in the sense that they proceed from their own conception of what is just. In themselves such rules are in no way immutable, because they are not necessary deductions from the eternal principles of natural law. They are determinations based on human prudence[1] which is about contingent things and must take account, accordingly, of various and changing circumstances of time, place, and so on.

Natural law demands, not that such human laws be forever kept inviolate, but that they be progressively adapted to the changing conditions of human life. "Human law," says St. Thomas,[2] "is a dictate of reason whereby human actions are directed. Thus there may be two causes for a just change of human law: one on the part of reason, the other on the part of the men whose acts are regulated by law.

"The cause on the part of reason is that it seems natural to human reason to advance gradually from the imperfect to the perfect. Hence, in the speculative sciences, we see that the teaching of the early philosophers was imperfect, and that it was afterwards perfected by those who succeeded them. So also in practical matters, for those who first endeavoured to discover something useful for the human community, not being able by themselves to take everything into consideration, set up certain institutions which were deficient in many ways; and that these were changed by subsequent law-givers who made institutions that might prove less frequently deficient in relation to the common welfare.

"On the part of men, whose acts are regulated by law, the law can be rightfully changed because of changed conditions among men, to whom different things are expedient according to the difference of their condition."

Laws governing relations between owners of adjacent property, the devolution of estates, evidence, contracts and limita-

[1] In the Aristotelian sense, corresponding to Webster's first meaning.
[2] Summa Theologica, Ia IIae, q. 97, a.1. (translation from Random House edition).

tion of actions are almost universally of such a variable nature. Why is it that in Quebec a space of six clear feet, and not ten feet, is required before a window may overlook a neighbouring property? Why is the widow's share in the estate of a deceased leaving issue one third and not one half? Why are substitutions limited to two degrees and not to one only? Why is parol evidence admissible to prove a commercial contract in which the sum involved is fifty dollars or less and not one hundred? Why are common carriers contractually responsible for loss of goods and not for damages to the person of passengers? Why are actions for damages to property barred by prescription after two years, while actions for personal injuries are barred by one year or, in the case of sidewalk accidents, by six months?

This enumeration should indicate sufficiently the extent to which such provisions of law are linked up with current customs, methods of construction, industrial and commercial techniques, in a word with social conditions. It need scarcely be added that social conditions, in the forties of the twentieth century, differ radically from those that prevailed in the sixteenth century. But what a large part of our Code is but a reproduction, in slightly modernized language, of articles of the *Coutume de Paris*.

This venerable *Coutume* is assuredly deserving of our respect and admiration. But one should never forget that since the *Coutume* was "reformed" in 1580 our civilization has undergone extensive changes. For instance, although our notions of hygiene and of town-planning have been completely revised, the old texts of law relating to such things as party walls, enclosure walls and retaining walls, have been retained intact. In cities and towns of the Province of Quebec, any property owner may still compel his neighbour to share the cost of a masonry enclosing wall ten feet high and eighteen inches thick. What would become of the finest residential sections of our cities if this mediaeval law were enforced generally?

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The fact of keeping in force legal principles that are no longer in harmony with social conditions has grave and deplorable consequences. Too often, by applying these obsolete principles to present-day situations, the law and the legal mind are the cause of inequities. Let us consider a few typical cases.

The owner of two adjoining lots builds a house on each. One of the two houses has windows in a wall less than six feet from the line dividing the two lots. Both lots are then mortgaged and a few years later sold, at a sheriff's sale, to different purchasers.

The new owner of the house with windows less than six feet from the dividing line is condemned to wall them in because "No servitude can be established without a title".[3]

A man walking in the street is seriously injured by a car driven at reckless speed. In spite of the legal presumption against the owner, the action against him is dismissed because, at the time of the accident, his chauffeur had taken the car for a joy ride and, therefore, was not "in the performance of his duties".[4]

The owner of a store has the business registered in the name of his manager. The latter explains the situation to an insurance agent and obtains a fire insurance policy in his own name. The store burns down and the insurance company is relieved from any responsibility, because the manager is not the true owner of the insured property.[5]

In law, none of these judgments is open to criticism: they are correct applications of the law and *in this sense* they are just. But the outcome of these cases is neither equitable nor just according to our innate sense of justice. Because it has not grown to suit modern conditions, our law does not, in such cases, permit true justice being done; no longer does it attain its end. Is anything more required to discredit the legal mind with many people?

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As a result, another set of laws is growing up beside the traditional laws. Not surprisingly, lawyers are almost completely excluded from the application of these new laws, which are commonly referred to as "social legislation", as if to underline the fact that they are in keeping with present social conditions. (In truth, of course, every law of society is "social" by definition.)

Almost invariably, in this "social legislation", all the commonly accepted principles of law are brushed aside. Together with procedural rules, those of evidence, of civil responsibility, even of the capacity of persons, are entirely discarded. In their stead, wide discretionary powers are granted to a board of some kind set up to take the place of the traditional courts of law.

Does this mean that henceforth everything within the scope of such new laws will be governed by the whim or fancy of the members of a board? No, because a new factor intervenes: bureaucracy, without which no board could ever operate. This bureaucracy, acting with the members of the board, issues regulations, ordinances, rules of practice, instructions, directions,

[3] *Pépin* v. *Dupré et al.* (1939), 67 K.B. 152.
[4] *Curley* v. *Latreille* (1920), 60 S.C.R. 131.
[5] *North Empire Fire Ins. Co.* v. *Vermette*, [1943] S.C.R. 189.

forms, which, usually without binding the board, in practice govern its business and control the exercise of the wide discretion conferred on it by the Legislature. Thus social legislation is made up not only of a primary statute, but of a great number of administrative orders, unceasingly modified, renewed, revised and reenacted.

Through this maze, none but a specialist will be able to find his way. No lawyer, however diligent, will be able to practise in the fields governed by such legislation unless chance circumstances allow him to become a specialist in one of its many branches. The privileges of the legal profession having been thrown overboard together with the traditional rules of law, the lawyer without special training will have to yield to others a place he now occupies by sufferance only. Already legal practice before special tribunals is made accessible to persons without legal training who have specialized in one field, in which they have the advantage of practical knowledge and experience. We are even witnessing attempts to exclude barristers from appearing before some labour boards!

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Can this situation be remedied? Undoubtedly, provided one does not attempt to restore an ancient and outworn legal order. Attempts to do so are the real cause of the unfruitfulness of so many sincere efforts to improve the well-being of the country in general and of the Bar in particular. The need for reform has not gone unnoticed, but it has often been assumed that the remedy for the situation lay in the reestablishment of the old principles of the ancient code.

This state of mind is easily explained by the professional deformation of legal practitioners. In the normal practice of his profession, the lawyer must, it is obvious, treat as certain and indisputable the current principles of law enacted in the statutes and applied by the courts. His function is to analyze these principles and to draw proper deductions from them. From a study of legal texts and of decided cases he has to deduce conclusions applicable to the special cases confronting him. Legal training in law schools is almost exclusively directed towards positive law and dispensed mainly by practitioners.

Without in any way belittling the importance and usefulness of statute and case law, the supreme importance of juridical research should be recognized. By this is meant research not into the principles presently found in our legislation but into the principles that ought to be enacted. Without claiming a monopoly

in this field, should not lawyers endeavour at least to keep in the forefront? True scientific research does not consist in tabulating what others have discovered before us, but in discovering what others have so far overlooked.

If we are to be successful in effecting needed reforms, we must first recognize the necessity of reconsidering, in the light of present circumstances and knowledge, all our accepted legal principles. When physicists found that the classical laws of mechanics were no longer adequate to explain observed phenomena, they resolutely scuttled the outworn hypotheses and substituted the theory of relativity. So must the jurists do when it becomes apparent that society is gradually rejecting the old maxims of law.

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Let me take as examples the theory of fault, or negligence, and the rules concerning costs. What complete change have they undergone in those important fields where the Civil Code has been displaced by social legislation! For simplicity let us consider the single case of workmen's compensation.

Under the Civil Code there is ordinarily no responsibility for damages without proof of negligence. In most cases the decision on this point turns upon a consideration of evidence as to facts which, in this machine age, occurred in a fraction of a second. Where more than one person is involved in the accident, the victim must, at his own risk and without any special facilities for investigation, find out who is at fault. If he makes a mistake, he will have to suffer the disastrous consequences of the principle that the loser must pay the costs of the action. This principle is said to be based on the assumption that the unsuccessful litigant should pay for the results of his own recklessness. What recklessness indeed for the pedestrian or passenger who, being the innocent victim of a motor vehicle collision and unable to discover which of the two drivers was to blame, sues them both, is successful in the trial court but is ruined by a well-reasoned decision in appeal dismissing the action against the one driver who happens to be financially responsible.[6]

Under workmen's compensation legislation the right to compensation no longer depends on the proof of a negligence so difficult to ascertain. The obligation of indemnifying the victim is imposed upon the person who has created the risk giving rise to the injury, that is, the employer in the case of industrial accidents. Instead of letting each employer bear the risk indi-

[6] In some provinces an "Unsatisfied Judgments Fund" ensures recovery.

vidually, so that he may be ruined by a single serious accident, it is spread over all the employers in a large group of similar industries, by means of assessments approximating a compulsory insurance premium. At the same time the victim's claim is effectively secured and can no longer be rendered illusory by the insolvency or improvidence of the employer. No longer does he run the risk of having to pay the costs of expensive litigation, including expert evidence, because the board adjudicating on claims has its own experts and does not condemn the unsuccessful claimant to pay costs.

This comparison is of course incomplete; there are quite a number of other equitable changes brought about by social legislation. Thus under the Civil Code of Quebec any claim for personal injuries is barred by prescription after one year. If, by any chance, a victim suffers after this delay an unforeseen aggravation of his injury, there is no remedy; the claim is outlawed: "Dura lex, sed lex". On the other hand, social legislation provides for a revision of the award in case of an aggravation of the injury. Again, under the Civil Code, the victim must await the final outcome of the suit; social legislation provides for immediate medical attention and a weekly allowance pending adjudication on the compensation for permanent disability. Yet again, the Civil Code does not provide for the payment of any compensation other than a lump sum of money, which is too easily wasted or lost; social legislation commonly provides for an inalienable life rent. Finally, if social legislation requires that notices be given or formalities be fulfilled, these are not made the indirect means of depriving of all recourse victims who acted in good faith but were ignorant of legal requirements, especially where no prejudice is suffered by the other party.

This does not mean that social legislation is perfect; it has many shortcomings and weaknesses. For instance, no provision has been made for legal assistance; medical assistance only is covered. As a usual result claimants do not seek the assistance of an attorney even in cases in which it is badly needed. Moreover the Board acts in the double capacity of judge and insurer, in spite of the obvious conflict between the two functions; it is, at the same time, debtor of the indemnities, creditor of the assessments and final judge of the amount payable in both cases, without any appeal from its decisions, and irrespective of the sum involved.

In spite of such imperfections, social legislation undoubtedly yields more satisfactory results than many time-honoured rules of law. This is proven by its rapid and continuous expansion;

one after the other, all governments are increasing the number of administrative boards. At the same time, and in spite of all criticisms, the number and importance of the cases decided by such boards is also increasing steadily.

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This movement is clear evidence of a trend towards juridical evolution. Because this development is an attempt to harmonize legal principles with present social conditions and aspirations, the duty of jurists is not to oppose it in a reactionary spirit but to enlighten, to orient and to integrate it by making first an analysis of its underlying principles and then revising legal theory so as to coordinate it with those principles.

This sadly neglected task has become urgent. It is absolutely necessary to remedy the legal shortcomings of the system of free enterprise if abuses and injustices are not to undermine it. As Hayek says in the "Road to Serfdom":[7]

> It is by no means sufficient that the law should recognize the principle of private property and freedom of contract; much depends on the precise definition of the right of property as applied to different things. The systematic study of the forms of legal institutions which will make the competitive system work efficiently has been sadly neglected; and strong arguments can be advanced that serious shortcomings here, particularly with regard to the law of corporations and patents, not only have made competition work much less effectively than it might have done but have even led to the destruction of competition in many spheres.

Legislative changes are imperative if the legitimate objectives inspiring social legislation are to be attained without destroying the system of free enterprise to which our present prosperity is due. While we must not forget that this system is based essentially on free competition, it would be a grave mistake to believe that such competition can be unlimited. It is absolutely necessary that its freedom should be adequately protected by a network of legal restrictions and institutions designed to prevent abuses and to preserve a fair equilibrium. Thus, while commercial monopolies must be restricted, trade unions should be encouraged within reasonable limits.

The greatest danger in any such course of action is direct government intervention in private business. The drafting of precise and certain rules appropriate to the complexity of present conditions is a task the difficulty of which can hardly be overstated; it is so very much easier to grant discretionary powers to some bureaucratic organization instead. But this method, so often resorted to, is the negation of the very notion of law, because

[7] Friedrich A. Hayek: The Road to Serfdom. Chicago: University of Chicago Press (1944), p. 38.

it is of the nature of law to be a definite and invariable command, not an arbitrary or capricious determination.

The unavoidable imperfection of all human legislation in no way justifies a recourse to this despotic method; perfection is not of this world. None but a totalitarian state may claim to control and direct every action of its citizens for the good of all, and to repress and correct every abuse on their part. To do so it must deprive them of their freedom and make them the slaves of an omnipotent dictator. Even at this price, the objective is never attained because its rulers — human nature being what it is — can never be exempt from errors and faults. The great need of our times is not a further increase of bureaucratic intervention in private business, but the enactment of legal principles that will make such intervention unnecessary and at the same time allow citizens complete freedom of action within well-defined limits.

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May I be allowed to point the way towards possible developments in certain fields of activity?

One of the acute problems today is housing. This also happens to be, as previously pointed out, one of the subjects governed by antiquated rules of law. From the technical viewpoint, namely the regulation of the structure of buildings, a remedy frequently suggested is the setting-up of town-planning boards armed with wide discretionary powers. Experience confirms theory in demonstrating that this is not a satisfactory solution. The building of a city is a slow process, of indefinite duration, in which the consequences of initial errors are felt over a prolonged period. Harmony of the whole may be obtained only through stable and firm rules; it is therefore imperative that administrative discretion be reduced to a minimum by giving due consideration to the legislative problem involved, that is, the elaboration of definite and appropriate regulations.

From the financial point of view, the easy solution is direct state intervention through a lending agency. However the removal of certain obstacles to private initiative might largely reduce, if not eliminate, the need for governmental intervention of this sort.

Credit on the security of real estate would no doubt be made easier if the exercise of the creditor's rights were not as expensive as it is presently in Quebec and if it were better protected against the adverse effects of many possible privileges of doubtful justification. In addition, titles could be simplified and made more

secure. The system of registering real rights in Quebec is not only antiquated but inconvenient and full of loopholes. It is not yet properly adapted to the civil-law principles of a Code that is positively disfigured by it.

The practical importance of such reforms is greater than most people realize. No doubt the biggest problem however is the burden of municipal taxation. In my view the only solution is to put this burden squarely on those who do, in fact, bear it: the occupants of property whether owners or tenants.[8] This is the British system. It is also the democratic system. Let it be observed that in no case should an attempt be made to ease the situation by discriminatory exemptions in favour of the owners of new buildings.

In the sphere of responsibility for damages, the great step forward that requires to be taken is a gradual substitution of liability based on risk for responsibility based on negligence. For the victim and his dependents, the consequences of an automobile or sidewalk accident are no different from those of an industrial accident. That the problem is more complex than this is not denied, but I fail to see why the risk of accidents to pedestrians should not be borne by the owners of motor vehicles just as the risk of industrial accidents is borne by the owners of industrial establishments. Would it not be better also if the risk of sidewalk accidents were borne by municipalities instead of making the right to compensation dependent upon negligence, which in turn depends on such considerations as climatic conditions? In the field of public transportation, a change is overdue. Is there now any logic in making a public carrier responsible, without proof of negligence, for damage to goods but not for damage to passengers?

I must emphasize that, in suggesting an extension of liability without negligence, I am in no way arguing for the method of adjudicating claims presently used in the case of industrial accidents. As previously pointed out, the practical denial of legal assistance to claimants before workmen's compensation boards and the absence of an appeal from their decisions are, in my view, the salient defects of this system: they should not be extended further.

The urgency of a reform of our Code of Procedure is generally recognized: recourse to the courts must be simplified and made less expensive. In so doing, the necessity of protecting litigants

[8] Legally, real property taxes are direct taxes, but in fact they are passed on to tenants in the form of increased rentals, as rent-control regulations expressly provide.

against arbitrary decisions and of preserving intact the independence of the Bar must not be overlooked. One of the most urgent improvements required in Quebec is a reversal of the old notion that those who seek redress before the courts should, through stamps and fees, defray the cost of the administration of justice. In the case of the attorney, whom the client must be free to choose and who must remain abolutely independent, it may be that there is no alternative method of remuneration, but it is by no means necessary that the services of the other officers of justice should be paid for by those who require them.

Law courts do not benefit only those who have recourse to them. The strongest justification for the right to take legal action is that the very existence of the right usually makes its exercise unnecessary. This is the reason why it is important that litigation should not be so expensive as to become ineffectual. Everyone benefits from the legal remedies that guarantee the fulfilment of civil obligations; is it not fair that every one should be made to contribute to their cost? Is this not more equitable than saddling the unsuccessful litigant or the impecunious debtor with the burden?

Another field in which law reform is overdue is insurance. A great change has occurred in the business of insurance since the time when the legal rules governing it were first evolved. Insurance was then a gamble for the insurer. Traders seeking protection against certain special risks, such as those of the sea, were practically the only ones who resorted to it. In such circumstances it was reasonable to require the insured to describe accurately the nature of the risk and to notify his insurer of all subsequent changes. Nowadays insurance is a public service. No prudent man should be without it. Is it reasonable to retain in the law and in policies the same drastic conditions, which are no doubt seldom invoked but nevertheless strictly enforced by the courts when insurers see fit to rely on them?

The only object of insurance is to protect the insured against a risk which is not commensurate with his means. It therefore fails in its purpose to the extent that, by reason of some exception or condition, it no longer guarantees indemnification for the loss contemplated. Why should the insured be compelled to bear the risk of errors or omissions in the description of the thing insured or of subsequent changes in it? It is the function of the insurer to assume risks; more than that, he is in fact the one who inspects, classifies and rates them. Why then should he be allowed to saddle the insured with the risk of such errors? Because to do otherwise

might upset the computation of the premium? Not at all, the computation of the premium is based wholly on probabilities and averages and can readily provide for all contingencies. Save in the case of fraud properly so-called, the insurer can safely bear any risk because he can reinsure any excess liability. Rates are not apt to be increased substantially by eliminating restrictive conditions, for the reason that such conditions are seldom relied on; on the other hand the risk of not being indemnified may prove ruinous to the insured. The reform I suggest has already been largely effected in life insurance by means of incontestibility clauses; which indicates that it would be quite feasible.

The present classification of the various kinds of insurance is neither logical nor complete. This defect is made more serious by the fact that the application of some statutory conditions depends on the classification. The problem of rate making is far from being solved, especially for those categories of risks that may properly be rated only by a specialized rate-making organization. There is also room for improvement in the legislation designed to curb excessive solicitation. Such solicitation is prejudicial not only to those who are victimized but to all buyers of insurance, because of the consequent increase in acquisition costs. This difficulty is especially serious in the field of life insurance, where other incidental questions might also deserve further study, such as the rights of beneficiaries.

The problem of the rights of beneficiaries is intimately linked up with the law of succession. Do we fully appreciate in Quebec that the Statute of Westminster has conferred upon our legislature the power, already enjoyed by all other provinces, of restricting the freedom of disposing by will? This freedom was introduced by the Quebec Act of 1774 as a substantial alteration of the old French civil law. Up to 1931 the Colonial Laws Validity Act made it sacrosanct in Quebec while other provinces were free to restrict it. Would it not be a proper time for us to return to the old principles of the French law, by reestablishing the "légitime" in a modern form? Many other provinces and certain American states have adopted dependents relief acts, the principles of which would appear to be in complete harmony with those of a Code providing for alimentary allowances to dependents.

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It will be seen that a vast field, an unlimited field, remains open to juridical research. In exploring it, errors are inevitable; there are too many dangers and pitfalls. But if we fail to develop it others will do so, possibly by the road of revolution; man was not created to stand motionless but to struggle towards progress.