What Legal Culture for the Twenty-First Century?*

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Introduction

Like all other social institutions, the Supreme Court of Canada aspires to longevity and independence. For this reason, the Court cultivates an image of itself, a perception of its environment, an understanding of its history—in other words an institutional culture—that all find expression through its collective judgments yet, at the same time, remaining distinct from this aspect of the Court's formal work. This is similar to the way in which an individual's set of actions are a reflection of his or her personality without giving an entirely transparent view of it.

One can turn to the case reports as a means of understanding how the Court's set of decisions in one field or another has developed and to identify the challenges associated with continuity or change that await the Court in the twenty-first century. But the same does not hold for knowledge of the Court's institutional culture—not only because the Supreme Court keeps no registry of the images that guide its way of seeing problems and solutions, but also because the culture of an institution is not an entirely impersonal assemblage that can be separated from the men and women who live it day by day, nor is it a fixed entity that can be studied like an inert thing.

The culture of an institution already exists when the people chosen to act in its name arrive. Yet it makes a difference that this culture is received by people who bring to it certain world views rather than others. In the same way, institutional culture maintains a two-way relationship with action. It can serve as a more or less conscious preconception which guides action; it can also be asserted after the fact, as in the case of courses of action or

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events which had to be experienced before one found a meaning for them. Culture guides action or confers a meaning upon it by remaining at a mid-point between realism and idealism. Among all the available information and all the ideals imaginable, culture selects and forgets, enhances and undervalues, chooses and abandons.[1] This is the price at which the actors who ally themselves with a culture or who are pervaded by it can believe in something rather than sliding into nihilism, or can make decisions and engage in actions without being paralysed by scepticism. Institutional culture is, in the final analysis, a dynamic process rather than a finished product, an ongoing project just as much as a legacy, a view looking both backwards and forwards more than an assemblage of disparate and disorganized images.

Given these characteristics of institutional culture, it seems impossible to me that anyone could arrive at this symposium with the conceit of setting out, whether by appealing to the sociology of law or to any other branch of learning, what the culture of the Supreme Court truly was in 1875, what it has become objectively today, and what challenges it will necessarily have to take on in the course of the twenty-first century. Instead, the concept of institutional culture, as a reflexive process closely tied to action, encourages the external observer to enter into dialogue with the actors of the institution, in order to ascertain with them how plausible an analysis might be which necessarily harbours a subjective element that its author acknowledges from the start.[2]

In the spirit of this shared dialogue, I will sketch two different ways of seeing society and law, which I will call the legal culture of 1875 and the legal culture of 2000. In so doing, I make no claims based on historical truth or sociological truth but appeal instead to likelihood and usefulness has a basis for reflection. I will then say why we should adhere to the second world view and what challenges it brings to the fore, for the Supreme Court and for the legal community as a whole, from among other challenges which might come to mind.

1. The Legal Culture of 1875

I take it to be a highly likely premise that the Supreme Court would have been created in an atmosphere of optimism, at least one that prevailed among the elites, even if it may not have been shared by the entire Canadian population. In 1875 there was no shortage of problems facing the country, but these problems were thought of as the inevitable difficulties associated with a vast collective enterprise which had clearly perceived goals and the means to overcome the obstacles that stood in its way. This optimistic view of the world was structured more particularly around three images: a dynamic society, a united society, and a strong legal order.

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1 M. Douglas, *How Institutions Think* (Syracuse, NY: Syracuse University Press, 1986).
2 F. Dubet, "Vraisemblance: entre les sociologues et les acteurs," *L'Année sociologique* 44 (1994): 83–107.

The economy was industrializing; the state was pushing back its borders; culture was turning to modernity. In this society characterized by movement and expansion, the dominant heroic figure was that of the risk-taking businessman, captain of industry, builder of the nation, self-taught inventor, or pioneer of scientific discovery. Faith in Progress meant that occasional setbacks were to be forgotten. The community had confidence in its ability to do better with its resources. The break with the past was desirable, since the future clearly held out a promise of prosperity and happiness.

This social dynamism was enticing to hearts and minds rather than frightening to them, since it seemed to be channelled and overseen by the institutions of a nation unified politically and legally. The state placed itself above local bodies. A displacement of the sense of belonging occurred. Beyond the community of one's place of birth lay the community of the nation, a Canadian entity in the eyes of its citizens and in the view of the other nations of the world. A distinctly Canadian legal order would be both the symbol and the preferred instrument for uniting society under the aegis of the state. Public law would find unity in the Constitution Act, which structured the federation. Private law would benefit from the unifying forces of the common law and the Civil Code, acting side by side, if not in combination, to stake out the legal parameters for a landscape where economic activity had to be able to unfold freely, without the obstruction of local difference.

The image that accompanies the emergence of this national law (and which conferred upon it a potential for development of which we would witness the full realization in the twentieth century) is that of a strong legal order. If the law of the state then gives an impression of strength, it is because it lays claim to three qualities that the elites henceforth accept, wholeheartedly or with reluctance, as legitimate and desirable claims.

First, the law of the state is strong because it is considered to be independent. Henceforth, it alone set the frontier between the realms of law and of non-law, between lawfulness and illegality. It is permissible for it to leave a substantial place for individual and group initiative by attempting to be liberal, or to actively support moral standards by taking on a moral content, whether traditional or modern. But these concessions to economic actors or to the definers of prevailing morality never cease to depend on the will of a power which continues to be considered independent.

Second, the law of the state is strong because it equips itself with a methodology that allows it to aspire to the greatest possible clarity in its exposition and the greatest possible rigour in its application. Consigning rules to writing, formalizing procedures, and stabilizing the categories of legal science confer a distinctness and clarity upon the state's legal ordering which no previous version of the law could ever assert, a precision to which other ideologies never laid claim (the ideologies of liberalism and socialism, for example) or which they are increasingly hesitant to profess (the doctrines of Christianity, for example).

Third, the law of the state is strong because it stands apart from and above society, since it is developed and applied at a fair distance from the lives of individuals and groups, apart from and above the hurly-burly of society, in a symbolic universe to which one can gain access only at the cost of submitting to ways of behaving and of thinking which are purely those of the law.[3]

This distant and esoteric power of the law of the state is not offensive to the society of 1875 for at least one fundamental reason. In an economy that claims to be liberal and a culture that continues to give pride of place to traditional morality for everything that relates to private life, the state is not called upon to say what should be done or how. Instead, the state is to carry out an office that serves the economy to the highest degree, just as it serves morality: clearly stake out the lines of what is forbidden; what lies beyond rights, freedoms, and powers; and the outer limits of private and public authority. Society accepts and expresses the desire for state-made law to stand above and apart in this way because the law provides society with the formal structure within which individual and collective activity can have free play. The strength of this legal order, which sets out clearly and resolutely the limits of social dynamism, is thus thought of as, at the very least, a necessary evil.[4]

2. The Legal Culture of 2000

Even before the page was turned on the twentieth century, analysts invested no small amount of energy in identifying the century's leading features and sought to confer a meaning upon it as a whole, against the backdrop of the long history of humanity. Some set the true beginning of the twentieth century in 1914, at the beginning of World War I, and consider the fall of the Berlin Wall in 1989 as best symbolizing the end of a century that would pass into history as the time of large-scale wars and of totalitarian regimes.[5] Others have summed up the twentieth century from a more cultural perspective, seeing in it an increasingly generalized experience of disenchantment as modern hearts and minds gradually emptied themselves of their traditional certainties and placed their trust instead in promises of progress and happiness, which have now become uncertain or illusory.[6]

I take these interpretations of the twentieth century to be most probably correct and employ them as the backdrop for a hypothetical legal culture. The latter will be of service because of its contrast, point by point, with what I have presented as the legal culture of 1875. Anchored in a widespread atmosphere of pessimism, the legal culture of 2000 would rely more specifically on images

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3 W.T. Murphy, *The Oldest Social Science? Configurations of Law and Modernity* (Oxford: Clarendon Press, 1997), 8–36, 77–108.

4 P. Bourdieu, "La force du droit. Éléments pour une sociologie du champ juridique," *Actes de la recherche en sciences sociales* 64 (1986): 3–32.

5 A. Finkielkraut, *L'humanité perdue. Essai sur le XXe siècle* (Paris: Seuil, 1996); E.J. Hobsbawm, *Les enjeux du XXe siècle. Entretiens avec Antonia Polito* (Brussels: Éditions complètes, 2000).

6 M. Gauchet, Le *désenchantement du monde* (Paris: Gallimard, 1989).

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of a society in fatal decline than on one that is dynamic, a society which is fragmented rather than unified, and a legal order which is weak rather than strong.

Present-day society is ontologically insecure because of its unprecedented awareness of the risk and uncertainty of collective and individual human action.[7] Whether imposed by nature or the result of human intervention, whether endured as a burden of fate or assumed as the price for a strategy of action or the choice of a way of life, risk and awareness of risk have become the everyday lot of communities and individuals who, willingly or not, are committed to a general and uninterrupted dynamic of change. Private insurance and the welfare state's compensation regimes developed in response to a massive sense of insecurity, of which they have brought heightened awareness. The heroes of the twentieth century are those who are ablest at foreseeing, avoiding where possible, and managing where necessary the risks inherent in projects pursued notwithstanding the uncertainty of their results.

However, insurance protection and trust in risk managers are ever more clearly called to prove themselves in practice. Collective insecurity has risen to new heights with the realization that the most substantial risks go hand in hand with the ongoing operations of contemporary society. Those risks cannot be subjected to reasonably accurate calculation. They present dangers that have consequences beyond adequate repair, being irreversible, too costly to remedy, or beyond compensation in money. They are risks whose oversight cannot be left to experts who are under suspicion of having dubious ethics, experts who in any case seek to draw legitimacy from the sciences, which have themselves reached the stage of uncertainty.

State institutions no longer offer remedies to counteract this contemporary insecurity. The political process is no longer credible as a central forum able to channel news and communications, organize public debate, clarify the stakes, and oversee decisions. Despite having grown to gigantic proportions, the state no longer embodies a reassuring symbol of unity in people's hearts and minds. An awareness of globalization renders unconvincing any policy which claims to control the ebbs and flows that take place within a state's borders, whether in the cultural or the economic realm, solely by recourse to the resources of state sovereignty. Even inside the national community, specialization according to function in the various fields of endeavour (the economy, heath care, education, communications, entertainment, etc.), and the substantial measure of independence that each field has achieved with respect to its activities and the criteria by which effectiveness is evaluated, render compelling the images of a fragmented society and of a fragmented culture.[8] The social system seems paralysed by the water-tight compartmentalization of its subsystems. Public communication has become a tower of Babel, where chaos reigns over clashes between the

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7 A. Giddens, "Risk and Responsibility," *Modern Law Review* 62 (1999): 1–10.

8 N. Luhmann, *The Differentiation of Society* (New York: Columbia University Press, 1982).

stock discourse of organizations and associations, the substitutes for scientific, religious, and magical thought, and the opinions of individuals that express all manner of dogmatism and fancy.

In this society with porous borders, characterized by neo-corporate ways and a shattered culture, the state is a major actor among others who cannot be ignored. Its decision-making bodies are sites of power among others. Its law is a language and a means of evaluation, among other rational and normative reference points. Paradoxically, as the state ceased to be seen as the centre and apex of the social system, it has developed and penetrated further and deeper into the heart of the social realm. The expansion of the legal order that came with this development made state law omnipresent but weak.[9]

Given that state-made law claims henceforth to regulate how civil society works on the inside and to intervene in the moral choices made by individuals, it is indeed no longer conceded the legitimate authority to set out independently what is legal and what is illegal. Since the state's legal ordering no longer merely draws the formal limits of rights, powers, and freedoms but also draws their substantive limits, it must contend with organizational rules and individual moral codes which attempt to fill the void left by the extinction of traditional values. As government bureaucracy forms networks with private bodies and links its actions to those of its partners, so law allows itself to be influenced by other social and normative rationalities. Law formulates itself in a manner flexible enough to suit the fluidity and diversity of social processes; it remains sufficiently indeterminate to allow for the reasonable and discretionary exercise of independent thought and action within civil society.

Directly involved as a social actor and accepting the mutual dependence of strategies, rationalities, and norms, the state itself no longer upholds the project of a legal order which would be formal and pure, and which would have the elevated but sole office of organizing social relations by deciding the conflicts arising between the neighbours. Through its policies and partnerships, the state infuses into its own law all the substantive rationalities of the numerous areas into which it intervenes. The state commands its legal order to contribute to all the new roles which call upon its particular skills and knowledge or its endorsement. The state abolishes the traditional separation between law and society. It focuses on re-examining the fundamental concepts of legal thought as it gives up the comfort of metaphysical abstractions and formal logic.[10] The state wagers on a legal ordering which is realistic and which is useful in terms of practical impact, but it runs

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9 G. Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism," *Cardozo Law Review* 13 (1992): 1443–62. See also M. Coutu, "Le pluralisme juridique chez Gunther Teubner : la nouvelle guerre des dieux ?" *Canadian Journal of Law and Society* 12 (1997): 93–113.

10 G. Teubner, *Droit et réfléxivité. L'autoréférence en droit et dans l'organization*, trans. N. Boucquey and G. Maier (Diegem-Paris: Story-scientia/LGDJ, 1994), 3–98; see also G. Teuber, "How the Law Thinks: Towards a Constructivist Epistemology of Law," *Law and Society Review* 23 (1989): 727–57.

the risk that this will lead to law too specialized, too vague, and too caught up in the hurly-burly of the everyday to symbolize a united society.[11]

3. The Challenges of the Twenty-First Century

In the Introduction, I declared my firm belief that a legal culture articulated around images of a declining and fragmented society, pervaded by a weak legal order, should be preferred to one that brings to the fore the images of a dynamic society which is united on the foundation of a strong legal order. I will now say why this preference seems justified to me and what challenges it allows us to foresee for the twenty-first century.

3.1 A Society Which Has Reached the Stage of Advanced Modernity

There is undeniably some pessimism in the legal culture of 2000. This pessimism partakes of the fairly widely shared sense that there is a crisis of social cohesion, of politics, of culture, and of law. French sociologist Alain Touraine sees in it multiple and consistent signs of a historical period of "demodernization," that is, of decline, taking place in the minds, as well as in the concrete practices, of all the distinctive institutions of modernity.[12] Others feel entitled to pronounce that we are already in a new cultural era, that of postmodernity, making a radical and definitive break with the ideals of the Enlightenment, which aspired to rationality and universality.[13] The English sociologist Anthony Giddens is of the opinion that the twentieth century has not marked the end of Western modernity but, rather, has revealed the strengths and weaknesses of societies that have arrived at the stage of advanced modernity, societies in which modern values and technical methods are deployed within a social setting in which traditional values and technical methods are no longer effective.[14]

The latter analysis seems richer to me, since it expresses with greater subtlety the dynamics within society characteristic of the twentieth century, and above all because it encourages us to view the current pessimism as the counterpart to the immense optimism that sustained and can still validly inspire the societies of advanced modernity. It seems to us that contemporary society is dominated by disorder and a lack of cohesion because we value change, freedom, and diversity. We perceive the contemporary legal order as weak because we place our trust in the ability of individuals and groups to generate, in freedom and diversity, the system of norms that would suit their aspirations. The legal culture that has been emerging since the middle of the twentieth century often makes us more pessimistic than optimistic

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[11] H. Wilke, "Diriger la société par le droit," *Archives de philosophie du droit* 3 (1986): 182–214.

[12] A. Touraine, *Pourrions-nous vivre ensemble ? Égaux et différents* (Paris: Fayard, 1997), 39–93.

[13] See in particular the special issue titled *Lumières—Révolution—Postmodernisme, Droit et société* (1989): 313–86.

[14] A. Giddens, *The Consequences of Modernity* (Stanford, CA: Stanford University Press, 1990).

because of our nostalgia for the semi-modern, semi-traditional culture of the nineteenth century. This pessimism reflects our hesitation to approach new problems in a creative spirit rather than with an instinctive slide back to solutions out of the past, unsuited to the challenge which is our legacy from the twentieth century.

In my view, this challenge is a double learning process, one as thrilling as it is arduous, a learning process with respect to freedom and diversity, which I conceive of here as the acknowledged right of actors to participate voluntarily, and as they see fit, in social, economic, political, or legal interaction. These fundamental prerogatives can be exercised actively or held passively. Their exercise may be tactical (i.e., keeping with the set of choices made available by others) or strategic (i.e., taking advantage of tailored options created by the actor him- or herself). Their exercise may be occasional or sustained; it may be standardized (conformist) or diversified (original). When they are conceived of from this pragmatic perspective rather than a metaphysical one, the freedom and diversity exercised by social, economic, political, or legal actors vary in quality and quantity. They bear witness to a sophisticated learning process or to one still in the earliest stages.

The experience of the twentieth century has shown us the capacities for development and the difficulties of these two ideals. Among all the useful lessons which can be drawn from this century, a century that emphasized the practical power and moral value of independent action, I personally give decisive importance to the following lesson: the experience of freedom and diversity in real life has been vastly different for natural persons than for legal persons (corporations). If I were asked to state my firm belief without entering into too much detail, I would say that the great majority of natural persons have tried freedom and diversity only within a quite narrow range, particularly with respect to the spheres of the economy, of politics, and of the law.[15] On the other hand, organizations have been, to a very great extent, the principal beneficiaries of the liberalism to which we have adhered in practice and politically.[16] Given that the legal order, weak as it

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[15] For a theoretical analysis of the potential of game theory offered by the legal system, see M. van de Kerchove and F. Ost, *Le droit ou les paradoxes du jeu* (Paris: Presses universitaires de France, 1992). For empirical studies showing the unequal ability of legal actors to participate in the game of law by taking advantage of the freedom and diversity afforded them, see, *e.g.*, M. Galanter, "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change," *Law and Society Review* 9 (1974): 95–160; H.M. Kritzer and S.S. Silbey, eds., *Do the 'Haves' Still Come Out Ahead?* special issue of *Law and Society Review* 33 (1999): 795–1124; J.-G. Belley, "Stratégie du fort et tactique du faible en matière contractuelle : une étude de cas," *Cahiers de Droit* 37 (1996): 37–50; J.-G. Belley, "Une philosophie de l'aspiration juridique : l'art de bien se contraindre," *Archives de philosophie du droit* 44 (2000): 337–50.

[16] On the ideology of "corporate liberalism" and the decisive role played by legal institutions in its triumph through the twentieth century see S.R. Bowman, *The Modern Corporation and American Political Thought: Law, Power and Ideology* (University Park: Penn State University Press, 1996), 1–34, 125–83. On the metaphor of the "corporate person," see D. Greschner, "The Supreme Court, Federalism and Metaphors of Moderation," *Canadian Bar Review* 79 (2000): 47–56, 51.

may be, can still usefully contribute to the necessary learning processes, this lesson drawn from the twentieth century confers priority on having a policy for the law that takes a different approach to the problems raised by loosening restrictions with respect to the actions of individuals, on the one hand, and by loosening them with respect to the actions of organizations, on the other hand.

The fear of freedom felt by individuals in a society that heightens awareness of risk does more to cultivate instincts oriented toward security than to cultivate aspirations toward authenticity. It often leads to a turning in on the self, even a giving in to totalitarian power.[17] Individuals' fear of difference in a fragmented society leads to conformism in the assertion of identity, the obsessive search for consensus, sectarian instincts, and a fundamentalist defence of identities.[18] In a democratic political culture that claims to guarantee to everyone, not only to members of the elite, the right to choose his or her lifestyle,[19] these displays of fear bear witness to an individual soul which is tragically unsuited, in particular, to the requirements of liberty of action in the economic, political, and legal spheres.

The corporate soul that made twentieth-century society an "organizational society"[20] does not share this lack of confidence, nor does it face the same challenges in taking up in an active way the prerogatives to which liberalism allows us to aspire. The legal persons' manner of putting into practice this freedom of action and this right to individuality in identity was parasitic excess rather than lucid restraint. Their way is strategic action, appealing to a one-dimensional logic whose systematic application expels from the areas where they are engaged in their activities any rationality or normativity that they have not managed to convert to the service of their ends.[21] Committed to a warlike mindset, in which the enemy is called an "obstacle to growth" and the principal weapon is called "focused action," organizations play to the fullest the card of a strategic policy that imposes on others (employees, suppliers, clients, partners, competitors, and even the state) the standardization that they need in order to conquer what has become, for them, the "market" of material resources, ideas, persons, powers, and norms. In the present state of affairs, the power of organizations marginalizes individual aspirations in the public sphere. That power compels individuals to confine

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17 E. Fromm, *Escape from Freedom* (1941; reprint, New York: Holt, Rinehart & Winston, 1969).

18 G. Lipovetky, *L'empire de l'éphémère. La mode et son destin dans les sociétés modernes* (Paris: Gallimard, 1987); G. Lipovetky, *L'ère du vide. Essais sur l'individualisme contemporain* (Paris: Gallimard, 1983). More generally, see J.-F. Côté, ed., *Individualisme et individualité* (Sillery, QC: Septentrion, 1995).

19 L.M. Friedman, *The Republic of Choice: Law, Authority and Culture* (Cambridge, MA: Harvard University Press, 1990).

20 R. Presthus, *The Organizational Society* (New York: Random House, 1962).

21 H. Marcuse, *L'homme unidimensionnel. Essai sur l'idéologie de la société industrielle avancée*, trans. M. Wittig (Paris: Minuit, 1977), 145.

themselves to a private sphere that is increasingly limited to a flight into the imagination.[22]

3.2 A Differentiated Legal Order for Aspirations to Freedom

The twentieth century began with the optimistic guiding outlook of a society open to the aspirations of its members, breaking at least in part with the old model of a closed society that timidly retreats into imposing its traditions.[23] After an extremely bumpy ride, this century has left us with a pessimistic view of society as divided in two, a society characterized by a striking gap between the achievements of legal persons, which have greatly extended the reach of their aspirations, and the failures of natural persons living, in anxiety, distress, or passivity, through the widespread transition from a closed society to an open one. The image of a fragmented society has the practical merit of putting us into a favourable state to recognize this division. It makes it an urgent necessity that a legal order be devised which will be able to speak these conjoined tongues—to speak the language of an aspiration to solidarity when it addresses the heroes of organizational growth, and to speak the language of responsible freedom when it turns toward the timorous, those who have been lamed, and those who are fevered with existentialism.

Those who practise law are poorly prepared by the legal culture inherited from the nineteenth century to speak in these two voices. That culture organized itself around the ideal of a legal order applying generally, one whose principles were sufficiently abstract that they would suit all who are subject to it equally, whatever their differences in the realm of fact. This formal egalitarianism allowed the general law to treat natural and legal persons as the same as each other, in principle, including at the level of constitutionally guaranteed freedoms. The experience of the twentieth century has plainly showed that treating these two types of entities as the same is based on a naïvely anthropomorphic way of understanding which is increasingly grotesque with each passing day. Accordingly, the first cultural challenge for the legal community will be to uphold the ideal of a differentiated legal ordering that confers one treatment on the aspirations of natural persons to control their own lives, and another treatment on the aspirations of legal persons to control the lives of others.

Moreover, classic legal culture took shape in the context of a closed society in which the order of the day was to introduce more dynamism. The philosophy and the methodology guiding legal work sought at the time to measure determinately and to set out clearly the obligations that traditional society imposed generally and made known in a diffuse manner. Thus, generations of jurists learned to master a language more liberal and more precise than the traditional one but still dominated by a morality and a logic which were those of duties rather than of aspirations.

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[22] J.-G. Belley, "Gouvernance et démocratie dans la société neuronale," in *La démocratie à l'épreuve de la gouvernance*, ed. C. Andrew and L. Cardinal (Ottawa: University of Ottawa Press, 2001), 153.

[23] H. Bergson, *Les deux sources de la morale et de la religion* (1932; reprint, Paris: Presses universitaires de France, 1969), 1–103.

In 1964, the American legal scholar Lon L. Fuller anticipated the challenge which confronts the legal community in an open society, where law is seen against a backdrop made up of aspirations rather than of duties.[24] Fuller's sense was that law will always be more at ease in expressing the morality of duty when it comes to fixing the lowest common denominator of the obligations owed to society by way of enacted rules that are general in application, clear, and stable, as well as being applied in accordance with a fair procedure. By contrast, the legal order will always feel uncomfortable—it will feel weakened, because it would be developing outside its traditional realm—as soon as it becomes involved in the sphere of aspirations, where suitable norms can at best be benchmarks as varied as the fields in which individual personalities are expressed, standards as fluid as goals for optimal efficiency, substantive criteria applied through a subjective lens which is as recognizable as the one that inspires the practices of aesthetic judgment.

Forty years later, Fuller's intuition has become an obvious fact. However uncomfortable they may be about it, jurists are increasingly called upon to contend with issues and problems relating to the pursuit of aspirations that are, in principle, legitimate, rather than being called upon to act in relation to conduct that is presumed to be criminal or deviant. This fundamental reversal of perspective is nowhere more evident than in large firms of legal advisers who put their abilities at the service of legal persons, including the provision of legal support to the aspirations of the latter.[25] In these offices, where advanced modernity is lived out on a daily basis, the professional challenge is not limited to the knowledge of those minimal obligations imposed by the legal and social environment. The challenge is to devise, above and beyond the settled law, legal innovations that will confer on clients' aspirations the place in the legal order and the legitimacy that they need.[26] This is not a matter of ignoring the existence of law from the first phase of modernity, the general law set out and applied by the state. It is a matter of perfecting a law which would have the typical characteristics of the second phase of modernity, law for this second plane, a law tailored for the organizations which are the clients of these legal advisors, meeting the standards of efficiency and sometimes even the aesthetic concerns which prevail as the clients' aspirations are brought to fruition.[27]

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[24] L.L. Fuller, *The Morality of Law* (1964; reprint, New Haven, CT: Yale University Press, 1969), 3–32.

[25] M. Galanter, "Mega-Law and Mega-Lawyering in the Contemporary United States," in *The Sociology of the Professions*, ed. R. Dingwall and P. Lewis, 152–75 (London: Macmillan, 1983); Y. Dezalay, "Multinationales de l'expertise et dépérissement de l'État," *Actes de la recherche en sciences sociales* 96/97 (1993): 3–20.

[26] Because organizations' strategic behaviour extends to the world stage, lawyers increasingly exercise their creative talents in a transnational legal setting, such that they themselves may be considered the veritable engines of an integrated comparative law: see H.P. Glenn, "Vers un droit comparé intégré ?" *Revue internationale de droit comparé* (1999): 841–52.

[27] There is a notaries' version and a lawyers' version for the adequate elaboration of this second-degree legal order. See A. Lapeyre, "L'ordre contractuel et les techniques des contrats," *Jurisclasseur périodique* (1967), Doctrine 2108; M.C. Suchman and M.L. Cahill, "The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley," *Law and Social Inquiry* 21 (1996): 679–712. There is also a more narrow

This autonomous and creative practice of law draws the interest of the entire legal community and the whole of society, not unlike an artistic avant-garde. This practice brings out more clearly the path to which we are committed by the dynamics of advanced modernity and by the domain of experimentation that will increasingly call our hearts and minds into action. It stands witness to the new knowledge and skills which will be needed. It demonstrates the latent capacities and dangers of innovations brought on by the dynamic of aspirations. It forces society to give itself a new legal order—to show a corresponding new legal creativity—by defining norms to form a third plane that will articulate the upper limit on legitimate aspirations. This is no longer a matter of imposing a basic level of conformity, as the classic law of general application currently does and will continue to do. It is a matter of identifying, in concert with free social actors, what is required for a development which bears in mind the objective solidarity that makes each of us a party to the actions of the others, whether in a positive way, as agents, representatives, or beneficiaries, or in a negative way, as victims of abuses and excess.

To my mind, the social production of a legal order which is different depending on whether it addresses aspirations or solidarity seems to sum up the challenge which awaits us. By resolutely employing the language proper to aspirations, the legal order which is to be created will concern itself with bringing natural persons up to the second plane of legal existence, the one on which the legal order is a support for aspirations rather than an obstacle to them. With a clear appeal to the requirements of solidarity, this new legal order will define for legal persons the parameters of the third plane of legal existence, the limits that free social actors, who are subject to the law, must impose on themselves when they aspire not to earthly happiness but rather, like the state itself, to the rational and normative regulation of social activity.

The state, the legal order, and the legal community will not have the exclusive or even the principal responsibility for this learning process, addressing differently freedom, diversity, and solidarity. They will not need to embody a united society. Instead they will have to participate, with their own particular knowledge and skills, in the workings and symbolic representation of a pluralistic society, a society that would be very difficult to live in without a strong individual ethical compass[28] and without the reconciliation of freedom and difference.[29] The legal community must adjust to the idea of a

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economists' version, as well as another, more ethical in orientation, for the professional practice to be developed in view of satisfying the requirements and challenges of productivity for this practice of law. See R.J. Gilson, "Value Creation by Business Lawyers: Legal Skills and Asset Pricing," *Yale Law Journal* 94 (1984): 239–323; R. Ashford, "Socio-economics: What Is Its Place in Law Practice?" *Wisconsin Law Review* (1997): 611–23; S.D. Carle, "Lawyers' Duty to Do Justice: A New Look at the 1908 Canons," *Law and Social Inquiry* 24 (1999): 1–43.

28 M. Canto-Sperber, "Éthique," in *Le savoir grec. Dictionnaire critique*, ed. J. Brunchwig and G. Lloyd with P. Pellerin, 133–60 (Paris: Flammarion, 1996).

29 P. Ricoeur, "Liberté," in *Encyclopaedia Universalis*, version 5 (1999), consulted online.

weak legal order because it accepts the challenge of interdependence, uncertainty, and an increasingly close relation to everyday life. At the second and third planes of legal activity, this very weakness is the necessary correlative to the freedom of others and a continuing relevance for law.

4. Conclusion

The legal order is weak. There is no better reason than this one to hope for the development of a legal culture, among citizens and members of the legal professions, that would permit the most efficient use of the limited but not insignificant resources of the law. By virtue of its institutional status, its visibility in society, and its influence within the legal community, the Supreme Court of Canada is called upon to take up a role in the vanguard of the development of this legal culture suited to meet the challenges of advanced modernity.

I am not sufficiently familiar with the Supreme Court's decided cases to measure properly the needs for continuity and change to which the Court will have to respond so as to take on this role in producing a legal order differentiated for aspirations and for solidarity, which seems to me the leading challenge for the twenty-first century. I will just conclude with two very general remarks on what I gather to be the case.

When it speaks of natural persons, I believe the Court has preferred, in particular when interpreting the Canadian Charter of Rights and Freedoms, a discourse of freedom, responsible freedom which is shouldered with courage. In my opinion, this line of cases, boldly decided where appropriate, should be pursued in a spirit of continuity.

When it speaks of legal persons, the Court seems to me to have remained faithful to the discourse of formalism that is the legacy of the classic legal culture. Treating natural and legal persons as, in principle, the same confers upon legal persons characteristics in the law that have no intelligible connection to the real states of affairs relevant to contemporary organizations.[30] This treatment makes it impossible to have an adequate understanding of the problems raised by the internal and external regulation of impersonal entities whose effects extend today into every field and into all levels of social and political activity.[31] Accordingly, the experience of the twentieth century calls for a clear break with the general law's obsolete language of legal personality.

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[30] M. Dan-Cohen, *Rights, Persons and Organizations. A Legal Theory for Bureaucratic Society* (Berkeley: University of California Press, 1986); G. Teubner, "Enterprise Corporation: New Industrial Policy and the 'Essence' of the Legal Person," *American Journal of Comparative Law* 36 (1986): 130–55.

[31] In addition to Bowman, *The Modern Corporation*, see C.D. Stone, *Where the Law Ends: The Social Control of Corporate Behaviour* (New York: Harper & Row, 1975); K.J. Hopt and G. Teubner, eds., *Corporate Governance and Directors' Liabilities* (Berlin: de Gruyter, 1985); S. Wheeler, "Towards a Feminization of the Corporation," *Current Legal Problems* 52 (1999): 313–58; G. Wilson, "Business, State and Community: 'Responsible Risk Takers' New Labour and the Governance of Corporate Businesses," *Journal of Law and Society* 27 (2000): 151–77.

If these remarks are correct, the institutional culture of the Supreme Court should develop both in the direction of continuity and in the direction of change. The Supreme Court is at the vanguard of the production of a legal order which places its faith in a pluralist society, without losing hope of being able to discover what it requires to work in an optimal way. So the Court should be thought of as a symbolic site where a moral awareness identified with the values of freedom and diversity finds privileged expression.[32] The voice of this conscience will only appear as morbidly weak to citizens who persist in deluding themselves about the virtues of power that is abandoned or wrested away from others.[33]

Résumé

L'histoire des idées juridiques de la dernière génération au Canada devra faire une place importante au pluralisme juridique. Il existe un genre québécois dans la littérature juridique sur le pluralisme qui est, pour des raisons que l'on peut soupçonner, moins bien connu à l'extérieur du pays. Les travaux du professeur Jean-Guy Belley, un des maîtres dans la matière, méritent une meilleure diffusion auprès des non francophones. On offre ici une traduction d'un de ses grands textes, publié à un moment-clé dans son développement personnel comme chercheur, en vue de présenter ses idées à un nouveau lectorat.

Mots clés : pluralisme juridique, théorie du droit, Cour suprême du Canada, Jean-Guy Belley

Abstract

In history of legal ideas of the last generation in Canada, legal pluralism deserves an important place. There is a Quebec genre in the legal literature on pluralism that, for reasons one might well suspect, is less well-known elsewhere. The scholarship of Professor Jean-Guy Belley, one of the leading figures in the field, is deserving of a wider readership among non francophones. A translation on one of his most important papers, published at a critical moment in his personal development as a scholar, is presented here in the hope of introducing his work to new readers.

Keywords: legal pluralism, legal theory, Supreme Court of Canada, Jean-Guy Belley

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32 On the contemporary legal system conceived of as the "conscience of society," see Murphy, *The Oldest Social Science*, 186–210.

33 For a defence and an illustration of a new conception of republican democracy in which the control of abuse of corporate power is assured by weak sanctions and moral suasion, see J. Braithwaite, "On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Powers," *University of Toronto Law Journal* 47 (1997): 305–61.

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