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## Law Reform in Quebec: A Cautionary Note

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1. *Civil and Common Law Reform*

Law reform is everywhere in Canada. On all sides substantial changes in diverse areas of the law are constantly being proposed by government organizations whose only purpose is to make such proposals. The reforms mooted by these bodies (these reforms are typically described as “long overdue”) are generally welcomed as correcting deficiencies in law and as signalling the legal system’s responsiveness to changing social and other standards.

Is the law reform pace, if not furious, too fast? What is the most appropriate forum for initiating change in law? Such questions seem reasonable enough, and yet a traditionalist might well argue that irrevocable answers are inherent in any legal system. Both civil and common law systems, so the argument would go, have their chosen instruments of change, and the nature of those instruments substantially determines the rate and extent of progress. If we accept a system, we must accept the way in which, and the extent to which, it responds to alleged needs for reform of its law.

There is some substance to this argument. With respect to common law jurisdictions, many consider that such jurisdictions favour change by the courts, change which is necessarily gradual, being restrained by *stare decisis* and other notional limitations on the law-making ability of judges. Lord Reid, for example, recently compared common law and statute law in these terms: “I am tempted to take as an analogy the difference between old-fashioned, hand-made, expensive, quality goods and the brash products of modern technology. If you think in months, want an instant solution for your problems and don’t mind that it won’t wear well, then go for legislation. If you think in decades, prefer orderly growth and believe in the old proverb more haste less speed, then stick to the common law.”<sup>1</sup> It is particularly interesting that these words come from a Scottish Law Lord.<sup>2</sup> An article of faith (particularly among

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1. Lord Reid, *The Judge as Law Maker* (1972), 12 J.S.P.T.L. 22, at p. 28.

2. And Lord Reid should not be considered a “vendu”. Blom-Cooper and Drewry write: “There is. . .no evidence to suggest that the Scottish Law Lords have themselves succumbed to the process of Anglicization and forsaken their legal

academics) is that there exists a profound difference in the role of the courts between civil law and common law jurisdictions. Contrast the words of Lord Reid with, for example, these of Ripert: "Il est. . . impossible de dégager des décisions des tribunaux une règle qui ait les caractères exigés de la loi par la technique fondamentale: la décision n'a pas un caractère général et permanent; elle ne comporte de sanction que pour le défendeur condamné. Etant rendue pour un cas particulier elle n'est pas convenable aux cas qui pourraient se présenter pour l'avenir."<sup>3</sup> This theory apparently calls for all change to come from the legislature; such change, unfettered by ideas about the limits of a judge's powers, can easily be sweeping. A side-effect of the theory is that it legitimates organizations that advise the legislature on law reform. It may even make such organizations necessary; to adopt Lord Reid's language, perhaps in a civil law system only a law reform commission or office gives any hope of "quality goods" rather than just another "brash product".

In this way, arguing strictly from classical notions about the common and civil law, one might conclude that if a system is to retain its integrity, the nature and pace of its law reform are preordained. And yet, as is so often the case, theory is only theory. I leave for another time description of the important role that statutory law reform has assumed in common law jurisdictions without doing violence to those systems. Looking at civilian jurisdictions we know, for example, that in France the courts have been responsible for dramatic changes.<sup>4</sup> In Quebec (putting aside arguments that the province really has a mixed common law-civil law system) courts have not been adverse to taking on a limited law-making function. To give one instance, in a recent case dealing with a *clause compromissoire* (an undertaking to arbitrate purporting to oust the jurisdiction of the court), the Quebec Court of Appeal had difficulty

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heritage. Indeed it might even be asserted, with some degree of confidence, that the English Law Lords have come under the compelling influence of Lord Reid. May it not be in fact that English law has become 'Scoticized'?" Louise Blom-Cooper, Q.C., and Gavin Drewry, *Final Appeal: A Study of the House of Lords in its Judicial Capacity*, (Oxford: Clarendon Press, 1972), at p. 386.

3. G. Ripert, *Les forces créatrices du droit*, (Paris: Librairie générale de droit et de jurisprudence, 1955), p. 383.

4. A favourite example is the case of *Vve. Jand'heur c. Soc. des Galeries belfortaises*, CASS.-reun. 13 fevr. 1930 (Sirey 1930 I.121), and the cases leading up to *Jand'heur*, reinterpreting article 1384 of the Civil Code. For an analysis of the significance of *Jand'heur*, see Rapport de M. le conseiller Le Marc'hadour, (Daloz 1930, pp. 57-64).

in interpreting article 951 of the Code of Procedure. Mr. Justice Owen said: "At this stage the courts could sit back and continue to express the pious hope that the legislature will, by clear and concordant texts, provide either that a true *clause compromissoire* is null or that it is valid. However under conditions as they exist today I am of the opinion that the courts should accept the responsibility of pronouncing on the validity of a true *clause compromissoire* in the light of existing texts. . . As the legislator has not provided a clear solution the courts should do so."<sup>5</sup>

Perhaps, then, general questions about the extent and modality of law reform are equally valid for both civil and common law systems. More particularly, perhaps it is as legitimate in Quebec as in Nova Scotia or Ontario to ask whether or not at least some change would be better left to the courts.

## 2. *The Civil Code Revision Office*

The revision of Quebec's Civil Code began in 1955 with the creation by statute of the Civil Code Revision Office. In 1965 impetus was given the work of the Office by the appointment of Professor Paul-André Crépeau as President. Almost thirty Committee Reports — the so-called "Yellow reports" — have now been published, setting forth proposals for change on an extremely wide range of subjects. Some legislation has already resulted — in 1969, for example, the matrimonial property regime was changed from community of property of moveables and acquests to a partnership of acquests. The Office's ambition is to write a new Code for adoption, hopefully in 1976, by the Quebec National Assembly.

Why is such large-scale revision thought necessary? Professor Crépeau has referred to "a tremendous gap between the basic policies as they are enshrined in the Civil Code and the social realities which the Civil Code purports to regulate."<sup>6</sup> One might remark in response that it is words, and not policies, that are enshrined in the Code. Why have the words of 1866 not been

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5. *Ville de Granby v. Dosourdy Construction Limitée* [1973] C.A. 971, at p. 983. I am indebted to Dean John E. C. Brierley, of the McGill Faculty of Law, for bringing this case to my attention.

6. Paul-A Crépeau, Q.C., *Civil Code Revision in Quebec*, (1974), 34 Louisiana L.R. 921, at P. 924. Another source of information about the work of the Civil Code Revision Office is Paul-A. Crépeau, *La réforme législative, Canada, droit civil*, in *Travaux du neuvième colloque international de droit comparé*, (Ottawa: University of Ottawa Press, 1972) p. 27.

reinterpreted to produce more suitable policies? Why have the courts not kept at least part of the law roughly in accord with policy needs, as they have done in some other civil law jurisdictions, such as France?

Whatever the reasons for the "tremendous gap", no doubt it now exists, and no doubt the "ultimate weapon" of Civil Code revision is now necessary. What can we say of this ambitious exercise? Is Civil Code revision all reform, or is some of it mere innovation? Has the Civil Code Revision Office shown itself to be the right vehicle for changing the civil law of Quebec? No proper answer can be given to these questions until the finished Code has been carefully studied. But I would like, for the moment, to indicate the importance of the questions by considering one of the most recent "Yellow reports" of the Civil Code Revision Office.

### 3. *Report on Registration, Part one: Of Persons*<sup>7</sup>

The first part of the Office of Civil Code Revision's Report on Registration is the product of an interdepartmental Special Committee on Registration created by the Quebec Cabinet in 1969. The Report makes recommendations concerning a central population register, a system of identity cards, a system of voters' cards, and the protection of privacy.

The Special Committee first recommends the creation of a central population register under the control of a "Population Registrar". Section 4 of the *Draft Population Register Act*, proposed by the Committee, provides that the register shall contain, for every resident of Quebec, his surname, given names and identification number (it was outside the Committee's mandate to determine the exact nature of this number); the place and date of his birth and his sex; the surname, given names and identification numbers of each of his parents, if they are alive; his marital status, and, where necessary, the surname, given names and identification number of his consort; the place and date of his death; the given names, sex, place and date of birth, and identification number of each of his children; if he is over sixteen years of age, his height and the colour of his eyes; his citizenship; and his address. The register shall also include, if applicable, any mention of a resident's interdiction; a

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7. *Report on Registration, Part one: Of Persons*, Civil Code Revision Office, Special Committee on Registration, XXV, (Montreal: 1974). Unless otherwise indicated, all subsequent page references are to this Report.

mention of any judicial declaration of his absence and of any change in his name; the fact that under law he is disqualified from voting in an election in Quebec; and his classification for school election purposes (Roman Catholic or Protestant). All this information is characterized by the Committee as information “of a public nature”, and s.10 of the *Draft Act* provides that any person may obtain information in the register (except for information regarding parents and children which is declared confidential to prevent, for example, the tracing of the status of a child born out of wedlock). The Special Committee offers these reasons for the creation of the central population registry: “The population register will help avoid duplication of registers and files, and above all it will do away with the many various means of identifying citizens; it will allow public bodies to save a considerable amount of money and will also smooth citizens’ relations with the various government bodies entrusted with providing health, education, welfare and other services.”<sup>8</sup> The reasons are the reasons of economy and efficiency. The government will save time and money; the registry will be “so much easier and cheaper. . .”<sup>9</sup>

The second recommendation of the Committee is a system of identity cards. The *Draft Act* (sections 14-15) provides that the Population Registrar shall make available to every person sixteen or over whose name is entered in the register, and to those under sixteen on request and subject to conditions prescribed by regulation, an identity card that will show the holder’s surname and given names; the date and place of his birth; his sex and height, and the colour of his eyes; his address; his identification number; and the expiry date of the card. The card will also bear the holder’s signature and photograph. Section 17 of the *Act* provides that “no person shall be obliged to carry an identity card,” but by section 18 the card *must* be presented in order to vote in any election governed by the *Election Act* R.S.Q. 1964, c.7. The Committee justifies this recommendation by referring, on the one hand, to the need for “improving methods for identifying persons who come in contact with public services”<sup>10</sup>, and, on the other hand, emphasizing the daily difficulties of self-identification experienced by individuals<sup>11</sup>,

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8. Ibid. 15.

9. Ibid. 21.

10. Ibid. 41.

11. Ibid. 39.

particularly when it comes to dealing with the government.<sup>12</sup> The Committee considers that the optional character of the card will protect the holder from abuse of the system; the report picturesquely says that “the issue of optional identity cards could never be associated with the establishment of a police state and the well-known ‘Your papers!’.”<sup>13</sup>

The Special Committee’s third recommendation is a system of voters’ cards. Under the proposed scheme, the Population Registrar would for every election send everyone on the voters’ list a card indicating his surname, given names, age, address and identification number; someone otherwise eligible could not vote unless this card was produced and surrendered at the polls. The report offers no explicit justification for this recommendation; one is left to presume that these cards will simply facilitate identification of voters.

Finally, the Special Committee presents four *Draft Articles on the Respect of Privacy* designed to introduce the concept of privacy into the Civil Code. Article 1 simply states that “every person has the right to privacy.” Article 2 elaborates the general principle of Article 1; it lists examples of prohibited conduct, for example, the interception of any private communication. Article 3 gives every person access to, and the right to correct, every file concerning him which the law prescribes be kept. Article 4 makes available injunctions, actual and exemplary damages to a person whose privacy has been unlawfully invaded.

Many specific criticisms can easily be made of the Special Committee’s Report and recommendations. It would, for example, have added to the Report’s credibility had the Committee justified one-by-one the need for each item of information proposed for the population register and identity card. The Report would have been more convincing had the Committee described in detail the actual duplication of information and identification problems, necessitating some new system, encountered by government and citizens. One might ask of identity cards whether they are really non-compulsory when they are needed to vote. One might suggest that voters’ cards are redundant if every adult citizen possesses an identity card which could easily reveal his voting status.

Much more significant than criticisms of this kind is consideration of the implicit assumptions of the Special Committee,

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12. *Ibid.* 43.

13. *Ibid.* 39.

assumptions evident only from the cumulative effect of the Committee's proposals. That effect is clear. The citizen will lose what anonymity he still possesses; comprehensive information concerning him will be available to even the casual inquirer. Such information could be put to improper use by civil servants; with such information accessible, it becomes easier to devise and implement policies with an eye for such considerations as ethnic origin. Identity cards, optional or not, unavoidably introduce the spectre of a police state. The Report recognizes at least some of these dangers; it states that "there is certainly a real danger that these records could be diverted from their primary purposes and used more or less openly for purposes which would no longer justify the confidence which individuals would have placed in the State in entrusting it with data on themselves."<sup>14</sup>

One searches in vain in the Report for considerations that would justify the running of such risks. The only reasons given in support of the recommendations are the reasons I have already described, vague reasons of efficiency and economy. The recommendations are made because the system they lead to would be "so much easier and cheaper. . ."<sup>15</sup> It is not overly dramatic to say that the Committee, after weighing in the balance unimpaired freedom and improved efficiency, chose the latter.

Why would a law reform body make such a choice? Some critics point to supposed differences of ideology and temperament between English and French-speaking Canadians; English-speaking Canadians, it is said, are biased in favour of personal freedom, while French-speaking Canadians readily defer to a powerful organization, be it church or state. This facile explanation is unsupported by the evidence. Indeed, much of the French-Canadian response to the Special Committee's proposals, particularly the recommendation of a system of identity cards, was decidedly negative. Claude Ryan, Editor of *Le Devoir*, concluded an editorial on the subject in this way:

. . . le rapport. . . définit clairement la direction dans laquelle le Comité spécial de l'enregistrement veut engager le gouvernement et la société québécoise. Cette direction impressionne pour la logique et la symétrie de ses perspectives, mais elle inquiète aussi par les redoutables dangers de manipulation auxquelles elle pourrait ouvrir la porte. En cette matière, il ne faudra admettre que les innovations dont la nécessité aura été rigoureusement démontrée. Partout où subsistera un doute

14. Ibid. 61.

15. Ibid. 21.



raisonnable, il faudra le trancher en faveur des libertés des citoyens, c'est-à-dire contre les vœux des technocrates.<sup>16</sup>

The Liberal Party of Quebec, at its 1974 annual meeting, rejected the proposal for identity cards by a two-thirds majority. *Le Devoir* described the debate on the subject as follows: "La plupart des intervenants y voyaient plutôt la porte ouverte à toutes sortes d'abus, l'annonce d'un régime policier et une menace sérieuse aux libertés individuelles."<sup>17</sup>

If we must reject the theory that differences of ideology and temperament underly law reform proposals of the kind under consideration, then how do we explain the Special Committee's Report? The answer may well lie in a particular attitude and approach *towards law reform*, an attitude and approach that many would consider typically "civilian", but which, as I have suggested, does not necessarily inhere in a civil law system.

#### 4. *Law Reform and the Report on Registration*

Earlier in this note I quoted a passage from Ripert and suggested that if one adopts a traditional view of the dynamics of a civil law system one is led naturally to think in terms of sweeping change. That is so because gradual change by the courts is in theory precluded. Reform is likely to be comprehensive legislative reform, more likely than not prompted by perception of a "tremendous gap" of the kind described by Professor Crépeau. Arguably, then, the very nature of a civil law system encourages dramatic, across-the-board, comprehensive solutions that display the logic and symmetry referred to by Claude Ryan. The danger is that "solutions" will be adopted for their own sake, that mere innovation, because of its attractiveness to the purist, will be presented as reform. It is, perhaps, something of this sort that is responsible for the alarming recommendations of the Special Committee on Registration. Perhaps the members of the Committee were misled by a desire for comprehensive "solutions". Perhaps they were beguiled by the aesthetic qualities of the "solution" they produced.

No doubt in Quebec tendencies of this kind have been encouraged by the existence of a genuine "gap" which has gone far towards

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16. Claude Ryan, *Vers la carte d'identité universelle? Le Devoir*, September 25, 1974, p. 4.

17. *Le Devoir*, November 25, 1974, p. 6.

justifying a global approach to legal problems. This gap may be in part attributable to courts which have not used a law-making ability, an ability which, even as courts in a civil law system, they possess in some measure. This judicial reticence, exacerbated by a weak tradition of legal scholarship common to the rest of Canada, has allowed the law to fall seriously out-of-step with social reality. The tendency of the civilian law reformer to think in grand terms has been reinforced.

If thinking of this kind persists, the cycle will repeat itself. Following the current revision of the Civil Code, in time, a new "gap" will develop. Big solutions to big problems will again become necessary. Sometimes solutions may be presented for problems that do not exist. The alternative seems clear. It is for the courts in Quebec to take on what would be, in effect, a law reform role, to take on the job of interpreting the Code so as to ensure its relevance to modern conditions.

The first part of the Report on Registration raises serious questions about the assumptions underlying law reform in Quebec. In that province the present pace may indeed be too fast, and the best mix of change-producing bodies may yet to be discovered.