LAW AND SOCIAL POLICY: WHAT'S SO SPECIAL ABOUT THE TURN OF THE CENTURY?

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Introduction

Canadians want their law to embody justice, and their legal system to support this ideal. They expect legal institutions to be accessible and accountable. They want the law to respect and promote the values of their democratic political tradition. At the same time, they desire law that is responsive to the emerging needs of society.

These are themes that have been constantly brought home to me as I have travelled across Canada since becoming President of the Law Commission of Canada in July 1997. They are also, presumably, the themes that should be addressed in any discussion of the theme "Law and Social Policy at the Turn of the Century". Before I get to the heart of my comments, however, I should like to enter some preliminary caveats.

To begin, my presentation will not just be about law and social policy. Rather, I hope to restate some "self-evident" truths about law in a novel frame, using metaphors that take on some traditional assumptions about the relationship of law to contemporary society. Indeed, I have sub-titled my remarks "What's so special about the turn of the century?" in order to emphasize that the ideas I raise are not new. They have just been neglected in the profession and in the academy. If the millennium provides a good excuse for us to examine them more closely, so much the better.

Second, what I say does not pretend to any absolute truth. My remarks are rooted in my own experiences in non-mainstream legal activities, albeit within a mainstream institution — a law faculty. Pubic legal education, poverty law, legal aid, access to

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justice, multiculturalism, Alternative Dispute Resolution and legal pluralism were my scholarly extroversions as a law teacher. In my new role as President of the recently re-established federal law reform agency — the Law Commission of Canada — these remain preoccupations. I speak, therefore, from and to these experiences.

Finally, and this is the key point, your own experiences may differ significantly from mine; and your own interpretation of the world around you may diverge sharply from mine. My view is necessarily partial, but so too is everyone's. What matters, finally, is not that I am right or that any of you are right. What matters is that we each find a morally satisfying way to recognize and to confront the challenges and opportunities that our training as lawyers offers, in a way the justifies the personal and social investment that has been made in this training.

I have organized my comments around two ideas. I begin by describing what I conceive to be the primary late-20th century image of law in Canada and the social policy that attends to it. I do so to illustrate some of the central themes that drive our contemporary practices and institutions. While I am critical of these images, I do not seek a return to some long-lost legal arcadia. I merely want to suggest that current views of law have a historical contingency, and to argue that they are already in the process of being overtaken by other images of the legal enterprise.

I then attempt to illustrate how the thoughtful lawyer may embrace the millennium by re-imagining not only law, but also her and his lawyering role. Over the next few decades lawyers will gradually disengage from an overweening preoccupation with the artifacts and institutions of the official law generated by the political State, and assume a much more important vocation — a vocation that might be cast as "the lawyer as an architect of non-State legal structures". Here again, my point is not so much to disparage the law and its practice as we now know it, as it is to trace out an alternative, legal pluralistic picture of what law and lawyering can become.

Part One: In Search of Law

Much thinking about law and society today rests on the view that the big-brother State, acting through legislation, regulations and the courts, is needed to achieve (and alone is capable of achieving) social justice. In this conception, all law is made law and all law is explicit. Underlying this image of the scope and purposes of law are two highly questionable assumptions about the motives and capacities of human beings.

The first is that human beings are generally incapable of arranging and pursuing their affairs without the assistance (or censure) of public officials. Specialized agencies of regulation or allocation (public trustees, consumer protection and landlord/tenant agencies), and specialized agencies of dispute settlement and adjudication (courts and administrative tribunals) are believed to be necessary to daily life. On this view, legal

practice is simply the business of deploying legal expertise to optimal effect in obtaining satisfaction from these various State agencies.

The second assumption is that human beings are generally incapable of creating and remaining faithful to non-exploitative interpersonal relationships. People will not seek justice but will try to extract disproportionate contractual advantage, will not temper volition with reciprocity in reconciling conflicts that arise and, in their continuing interaction with others, will neglect to nurture the strands of social solidarity necessary for the maintenance of a just society. On this view, legal practice is predicated upon serving client interests in arenas where only zero-sum games are played.

The last few years have, however, witnessed increased public scepticism about the validity of this pessimistic conception of social life and the Statist image of law that follows from it. Nevertheless, we generally remain unable to distance ourselves from the post-World War II logic of an impoverished civil society and the role of the lawyer given by that logic. There are three main features of law projected by this contemporary ideological consensus: legalization (or the use of law to name and frame conflict); judicialization (or the use of formal adjudication to resolve the conflicts so created); and law as a means of social control (the management of human interaction by detailed prescriptions as to how these conflicts are to be processed). I consider each in turn.

Legalization

The legalization of everyday life through the growth of the State is an acknowledged fact of late-20th century society. But an expanded role for the State is not what legalization means. Rather, what is really at stake is a change in the fundamental rationality of law. The dominant trends of modern law reflect a series of shifts in perspective: a shift from status to contract, from informal practice and usage to legislation, from organization by common ends to organization by reciprocity, from law as facilitation to law as social control, and from the negotiation of conflict to the adjudication of disputes.

A number of factors have contributed to de-centering the organic conception of civil society which the trends evidence. The scope and scale of the basic units of social organization have expanded. As the range of human interaction expands a greater diversity of actors and multiplicity of customary practices must be accommodated. Law becomes increasingly abstract, formalized, bureaucratized and characterized by external sanction. Present and fluid local law, serving as a mediating institution responsive either to the interests of local élites or to community expectations and understandings of ongoing problems, is progressively displaced by distant and fixed State law responsive to the interests of more non-local élites, managed by non-indigenous officials and providing after the fact readjustments to predetermined characterizations

of individual conflicts. Local law may reappear (indeed it never really disappears), but today it is perceived as present only in the negotiated interstices of contractual practice, rather than as a generalized social phenomenon.

As the significance of organized religion declines the State comes to assume a larger role in societal ordering. Many years ago in my childhood I remember the centrality of the church to virtually all daily activities, even in a community where half a dozen different sects — Roman Catholic, Anglican, United Church, Presbyterian, Baptist, Lutheran, Jewish — were visibly present. At that time, the panoply of public social service undertakings — education, hospitals, orphanages, senior citizens' foyers, family counselling — were explicitly provided through the church. Organized religion also played a dominant role in the enhancement of social solidarity and the management of economic redistribution through social activities, picnics, summer camps, bingos, pot-luck suppers, rummage sales, and barn-raisings. Today, by contrast, either state-run bureaucratic agencies — school boards, hospital boards — or truly voluntary mediating institutions — the United Way and affiliated agencies, boy scouts, Oxfam, and so on — have largely assumed the various social roles of the church. Concomitantly, the symbolic, community construction of societal order around the church and parish, has been replaced by an instrumental, atomistic construction of the societal order around specialized bureaucracies.

Economics and demographics have driven yet another major set of social changes over the past century. A consumer economy, a redefinition of sex roles implying greater participation of women in the paid workforce, changing perceptions of labour, and increased ethnic diversity have each promoted a regulatory response from the State. In modern society, social roles and relationships are no longer fixed in permanent form by tradition: they may be renegotiated, reordered, and rendered asunder by the stroke of a legislative pen.

These patterns trace themselves out in legislative developments. The laconic contractual forms of the Common law and the principles of civil liability it is thought to advance are no longer seen as adequate to deal with the complexity of contemporary human interaction. An agreement or an accident is no longer a nexus between persons implying a just ordering or reordering of the benefits and burdens of a common endeavour. It is, rather, an occasion for explicit arguments of reciprocity and conflict. Labour standards, labour relations and workers compensation regimes are required to define entitlement and duty in a world where labour is understood simply as a fungible commodity. Consumer protection and landlord/tenant agencies re-balance *désuet* social roles centred upon the hierarchical predominance of entrepreneur over client as legal entitlements and rights. Human rights codes seek to recast assumptions about class, ethnicity and gender. Workers, consumers and tenants may now each lay claim to a particular set of entitlements and a particular authority recognized by the State.

In sum, the rationality of contemporary State legislation is fundamentally different

from the rationality of the private law — the customary or negotiated norms of civil society. Law grounded in the pursuit of common ends and explicitly subject to appeals to justice which characterize private lived law, is progressively overtaken by norms grounded in entitlement based on the instrumental rationality of reciprocity and appeals to the letter of the law characteristic of public legislative ordering.

Judicialization

It is, of course, not just legalization that is a central feature of late-20th century society. Today we are also living the judicialization of everyday life. Not only is more legal space taken up by State regulatory law, this tendency to legislative regulation is accompanied by an increasing resort to courts as *ex post facto* civil censors of private activity. The duality of *ex ante* private ordering completed by *ex post facto* judicial supervision of such agreements has essentially been abandoned in favour of an unlimited power of judicial revisionism. Several factors explain this tendency to judicialization. Many inherited institutions of the private law, and the assumptions about interpersonal relations upon which they rest, no longer have the same purchase in daily affairs. As judging and law become professionalised, the accretions of good sense and justice needed to keep *ex post facto* judicial supervision of *ex ante* private ordering vibrant and responsive have been shelved. *Stare decisis* runs amok.

In the past, balance was achieved because any relationships likely to be of a significant duration, or to have a high component of affect, were cast as agreements to be recorded through relatively public formalities. In these formal arrangements the constitutive role of the agreement was typically predominant: marriages and mortgages imply more than a passing nexus of parties. The most important contribution of formalities lies in their channelling function. They permit people to take the measure of each other, to discover more clearly what they are trying to do, and begin to construct the implicit normative order within which their relationship will unfold. The implication is, of course, that in a world where a contract is seen to be just a conjunctural written instrument and not an invitation to a relationship, neither the parties nor their lawyers will have the occasion to nurture this implicit order.

The recent notice that across wide fields of human interaction the contextual assumptions necessary to law are no longer present has contributed to a crisis of confidence in the facilitative capacities of law. One might speculate on how much modern-day, *ex ante*, administrative regulation in the fields of consumer protection, landlord-tenant, and labour standards is a consequence of the failure of parties and their advisers to balance the frame of contract. *Ex post facto* judicial controls through notions like unconscionability are further evidence that we have taken the idea of "freedom of contract" too literally. Paradoxically, in the one field of private law where courts are required to impose a measure of *ex post facto* fairness — tort liability — their

failure to develop alternatives to fault-based liability led governments to establish administrative regimes such as workers' compensation, automobile accident compensation, crime victims' compensation, and so on.

The past three decades have witnessed a profound shift in legal normativity. Courts no longer are called on to specify the requirements of corrective justice only when contextual novelty or plain obstreperousness blinds us to our duties. The devolution upon courts of responsibility for making judgments about distributive justice, which are by definition more difficult to weigh up in advance, has transformed private law and the judicial role. Where contract was once seen as the principal vehicle of societal order, *ex ante* administrative specification has overtaken traditional common law principles, and *ex post facto* judicial standards have proliferated to complement more general contextualized substantive controls. Where *ex post facto* judicial standards were traditionally the principal vehicle of normativity, *ex ante* regimes of administrative allocation, complemented by bureaucratic quasi-judicial decision-making institutions have proliferated.

One distinctive component of contemporary legal culture promotes increased judicialization: the more attenuated distinction between public and private law combined with a fixation on the constitution. It is an easy intellectual shift from the conception of the court as exercising supervisory jurisdiction over delegates of public sovereignty, to one of the court also exercising supervisory jurisdiction over delegates of private sovereignty — namely, property holders and creditors. Recently, the notion of the courts as the general superintendents of public and private equity has been enhanced by the Charter of Rights and Freedoms.

Increasingly since the 1960s, private law has come to be viewed as subordinate to public law. People are no longer viewed as primordially located in civil society, but rather are conceived as citizens of the political State. Interpersonal relationships are less frequently conceived as constructed from ongoing mutual adjustments embedded within communities, neighbourhoods, institutions and practices. They are, rather, most often seen as a series of discrete encounters each grounded in a logic of transactional maximization. In such a perspective, not surprisingly, the allocation of justiciable claims among citizens in the form of rights capable of adjudication before courts has become the dominant form of social organization.

Social Control

Legalization and judicialization are at one with a pessimistic view of human capacities. Sadly, much Canadian law today presumes that people will always seek to abuse and take advantage of each other and, when confronted with plurality and difference, will be driven to homogenize or, when that is impossible, to discriminate. The law proclaims that role, relationship and community can neither nurture the bonds of social

solidarity nor constrain self-interest in the name of shared purposes and the common good. Given such a premise it is easy to understand the desire for increased social control through more State law. The scientistic mentality that has dominated intellectual life in the law for half a century has little place for implicit law and the institutions of civil society. It thrives on explicit law and the agency of its creation — the State.

This mentality is consonant with other presumed values: that society is composed exclusively of rights-bearing individuals, that justice is unrealizable without official law, that conflict is a necessary product of life in society, that rational actors pursuing their own ends generate economic efficiency, and that third-party adjudication is an inescapable institution of dispute settlement. The consonance of belief is so intense that when it is challenged, the challenge usually provokes the legally trained to cries of heresy, rather than a rational response.

Enumerating these structures of belief as I have done reveals that what is typically presented as a pure textbook description of Canadian law is in fact a complex prescriptive elaboration by mainstream legal thought of how such a system should be constructed and understood. At each stage in the intellectual construction of the elements of an official legal system jurists could conceive the endeavour differently.

What is more, the problems with the accepted model of law arise not just at the level of prescription. Recent sociological studies suggest that it is also descriptively flawed and is not all that coherent with the actual practice of law and justice in contemporary Canadian society. State law often fails to penetrate into the daily lives of citizens — a failure that is usually (and wrongly) characterized by lawyers as a problem of access to justice.

No doubt, there are cost and time barriers to access to justice which limit the ability of citizens who do know that they have a problem cognizable in law and who do want to take steps to resolve it by resorting to the official institutions of the State system of legal justice. But a far greater defect afflicts State law. Words like disenchantment, disenfranchisement and disempowerment best capture how many citizens view the official justice system. Making law and its dispute-resolution institutions more objectively accessible will not overcome the main failings of official law simply because the legal system of the State is, itself, the main cause of the failure. To overcome the true causes of a failure of access, it is necessary to jettison the legal monist beliefs that the State has a monopoly on the production of law and that courts are indispensable to solving inter-personal conflict.

Rediscovering Law

Implicitly, the above paragraphs have argued that the traditional image of law just

presented no longer resonates with the Canadian public. Its dirigisme through public law and public agencies is dépassée; the balance it strikes between *ex ante* and *ex post facto* controls on the justice of human interactions is misconceived; and its faith in accessible justice through accessible State law is naive.

But there is more. Because our conception of law has been so captured by modernism, we have been unable to recognize the reasons for this disjuncture between the law and contemporary society. Our commitment as jurists to a Statist and conflictual model of interpersonal and social relationships has deflected us from critical reflection about how we should best pursue our vocation of promoting social justice through law. The most troubling structural features of the law today can, that is, only be overcome through a general re-orientation in the way we think about conflicts, rights, adjudication and all-or-nothing judicial remedies.

Recognizing how the quest for legal definition has served to marginalize traditional social institutions such as family, community, and church, has prevented them from evolving to meet newer understandings of patterns of deep human affect, and has transformed rich social roles into narrowly cast legal relationships permits us to see just how pluralistic law always has been. This pluralism has heretofore usually been cast in terms of the relative importance of different non-legal spheres of social ordering and not as competing *loci* of law. But the failure of State law to legitimate diversity argues for recasting these normative orders as legal orders which are in open contest with the State legal order. Recovering pluralism is, I believe, is the key to true empowerment and to a more just law.

Part Two: Lawyering as Agency

I should like now to address my second theme: imagining an alternative to the legalized and judicialized timbre of contemporary lawyering. My examples are hardly new. The framing I give them, however, is intended to suggest the occasions where changing social policy is likely to have a recognizable consequence on the development of tomorrow's legal artifacts and the elements of tomorrow's legal practice. The most pervasive themes in this reconception are pluralism, particularity and consensus in the recognition and valorizing of institutions and processes of civil society.

I have organized this section by reference to three moments for imaginative lawyering in civil society. Three distinct moments of opportunity are present: (1) contrasting with the recourse to legalization we may imagine those situations where lawyers are invited to participate in the constitution of institutions of civil society; (2) contrasting with the conception of law as social control is a conception of law where lawyers participate in the ongoing stewardship of the institutions of civil society; and (3) contrasting with the reflex to judicialization, we may conceive of a panoply of situations where lawyers become actively involved in the resolution of difficulties or

repair of pathologies within civil society.

Constituting the Institutions of Civil Society

To suggest that the lawyer has a role to play in constituting the institutions and processes of civil society requires an imagination beyond that needed simply to locate and complete a standard form contract. Lawyers must become no less than experts in institutional design: an expert in tailoring legal vehicles with which a diverse citizenry may pursue its multiple interests. This involves much more than questioning parties as to their desired purposes and then settling these purposes in the most handy legal form. Social structures are not infinitely pliable.

The creative lawyer must always ask questions such as: In what general circumstances is the contract an efficient or effective process for managing reciprocity? In what particular circumstances ought one to avoid reducing a complex pattern of human interaction to written form? Are there, conversely, circumstances where one ought simply to adopt the models of standard-form contracts, by preference to the creation of novel contractual forms, the consequences of which cannot be fully predicted? How does one counter the effects of disparities in social power?

As good a place as any to begin this inquiry is the realm of affective relationships, such as those associated with what, with increasing looseness of language, is called the family. Traditionally in Canada, the most important such relationship is that of the couple, and its most institutionally stabilized form is that constituted by marriage. Marriage was, long before it became a legal structure, a socio-religious rite — its definition culturally framed. It still is. But the law has appropriated one version of private affect and erected an entire regulatory superstructure upon it. Today, that superstructure is crumbling, and not just because other types of affective relationship are emerging. These have always been present. Contemporary law is only just coming to realize the wisdom of the pre-nineteenth century policy that the State should have no business in the hearths (as well as the bedrooms) of the nation.

This realization should produce a double movement in legal regulation. On the one hand, the law of the State should no longer seek to advance policies related to the legitimate goals of promoting the economic, physical, emotional and psychological security of persons involved in mature, adult affective relationships by attaching its prescriptions to a concept that no longer reflects the diversity of domestic life. On the other hand, this means that an increasingly important role will devolve to lawyers in the design and structuring of the various elements of these diverse life situations. Let me elaborate.

Affective relationships do not exclusively arise in a traditional marriage. Many couples are not married — whether because the law of the State prohibits marriage, as

in the case of same-sex couples, or previously married persons who have not obtained a divorce, or whether because they simply choose not to do so. Whether one considers the situation of State-defined wife and husband or of cohabitation, the relationship between a couple and between a couple and their dependents is a relationship of affect which is intended to last for an indeterminate period. Its normative force is that of a private constitution that provides, usually implicitly, for its processes of governance, for the attribution of jurisdictional competence, for a mechanism of dispute-resolution, for an amending formula, and for a division of assets and liabilities when the relationship which grounds it ends. Counselling the design of this non-State implicit legal order of a couple is a privileged occasion for the exercise of lawyerly imagination and insight.

In many other situations lawyers routinely assist clients in constituting their own normative framework of inter-personal affect. Living wills, ordinary testamentary dispositions, inter vivos gifts and a wide variety of trust arrangements are only the most visible of these. The point here is not to explore the social function of the gift or will, but rather to emphasize the dialogue that is established between client and lawyer at the moment the document drafted. This requires developing exactly the same diagnostic expertise as the practitioner of family medicine in order to design and deploy the appropriate normative instruments and processes of non-State legal ordering.

The choice between diverse institutions of affect planning often involves adopting a trust arrangement. But the trust can also be a valuable institution in organizing property and commercial relationships. These include, for example, community land trust, trusts in the administration of a business, a shareholder's trust, a trust for the administration of property held under a joint tenancy, and a trust as a security device. Indeed, the credit union is essentially a complex investment trust. In each of these situations the trust may be used to establish a longer-term relationship between several parties that responds to the particularities of their situation. The trust serves precisely to permit parties to overcome the impersonality of the corporate form and to build relationships defined more by role than by simple obligation and entitlement.

To think about the trust as a vehicle of affect and community is a sharp reminder that helping people shape their futures by way of imaginative normative planning is a central contribution of lawyers to creating the institutions of civil society. Structuring and nourishing normative relationships, foreseeing and forestalling unhelpful conflict, and providing the means by which conflict may be expressed and resolved non-pathologically is, fundamentally, the object of any constitutive effort.

Stewarding the Institutions of Civil Society

The lawyer's role is not only defined by the vocation to design and constitute institutions for the pursuit of meaningful interpersonal relationships. Most relationships are ongoing, so that the legal institutions that give them (at least partial) expression

require ongoing attention. In this latter endeavour the vocation of the lawyer as the steward of the institutions of civil society comes to prominence. This role has complementary dimensions. Most obviously, all continuing affective relationships change over time. It follows that the legal arrangements that the lawyer has put into place must be periodically reviewed to assess their current appropriateness.

It is hardly novel to suggest that the lawyer, like a priest, family counsellor, psychologist, financial adviser or stock broker, should constantly be on the lookout for a client's affairs. Simply because considerable effort has been expended in drafting a serviceable domestic agreement, living will, trust deed, community organization constitution, land trust, security agreement or business association does not mean that these documents can immutably control the future. The life circumstances of human beings, the character of interpersonal relationships and the external events of social living are constantly changing. Illness, death, new interests and employment, and the evolving social and physical environment challenge even the best-laid of plans.

More than this, the law of the political State itself does not stand still. Be it through changes to tax law, to pension regimes or to the Common law itself, previously attractive and effective arrangements may be rendered onerous, odious or ineffective. From the perspective of the lawyer as steward of the institutions of civil society, the State is usually not a salvation, but rather, is an unpredictable obstacle. Again there are two lessons about legal regulation that should follow. On the one hand, the law of the State should no longer seek to control *ex ante* and in detail the life projects of citizens, but should be content to provide moral guidance to signal for each of us our duties to others, while announcing default regimes that backstop this guidance when we either ignore or consciously neglect these duties. On the other hand, this means that an increasingly important role will devolve to lawyers in the stewardship of the ongoing institutions by which we seek to organize our diverse life situations. Again I should like to elaborate.

Few would contest the legitimacy of a social policy that seeks to ensure, upon death or the dislocation of a previously stable domestic situation, the economic security of survivors or those previously implicated in a relationship of dependence and inter-dependence. Over the past decades, we have sought to effect this policy primarily by a series of *ex ante* regulatory measures — typically by designating a portion of property as jointly owned or by designating certain kinds of assets as jointly owned. And yet, given the inevitable diversity of relationships and human situations, *ex ante* regulation will always be a crude measure or morality. How much better the strategy adopted in dependants' relief legislation: an inventory of property, persons and considerations that announce a morality of aspiration to which we ought to aspire in arranging our estates, while nonetheless leaving the particular configuration in particular situations to the judgement of the testatrix or testator. In this endeavour one sees the occasion for a lawyer to assist in the ongoing planning and management of the economic and affective lives of citizens understood as moral agents, rather than as automatons.

To cast the lawyer's vocation in terms of the general administration of the institutions of civil society requires an imaginative leap. For if it has traditionally been the lawyer's role to participate in the stewardship of family arrangements — to administer successions and to assist families with the inventorizing and management of the property of minors and those lacking legal capacity — they have not typically become actively involved in the administrative aspects of ordinary contractual arrangements that they have drafted. And yet, as the institutions such as the trust so clearly illustrate, the ongoing mediation of interpersonal relationships is an essential task of those who would steward the institutions of civil society — whether in the realms of personal affect, of community, or of commerce.

Therapists of Civil Society

The careful design, constitution and stewardship of the institutions of civil society does not, however, mean that social and individual conflict will be obviated. Quite the contrary. One of the most important functions that a well-designed and well-tempered agreement can serve is to help parties better understand and formulate their disagreements. Where undifferentiated hurt or resentment finds no adequate channel for its expression, it is likely to simmer unresolved until it becomes so powerful that it explodes unpredictably and uncontrollably in a conflict that defies easy settlement.

Providing occasions, processes and forms for the expression of disagreement, disappointment and disillusion is, consequently, a primordial role for the lawyer acting as architect of the institutions of civil society. In those situations where even the most thoughtfully conceived arrangements and most thoughtfully nurtured practices fail, a third dimension of the role of lawyering as agency comes to the fore: the lawyer as therapist of civil society.

There are generally four different kinds of situations where an established non-State legal order may reveal its pathologies. First of all, by the natural evolution of life it may become necessary to arrange for the dissolution and liquidation of a relationship or an economic unit. Most obviously, death, accident and incapacity are situations where such dissolution or rearrangement is necessary. Secondly, notwithstanding the best efforts of the lawyer to establish a stable regime for managing a long-term relationship, external circumstances may render its continuation impossible. The souring of an affective relationship, the insolvency or bankruptcy of a debtor, miscalculation of the economic possibilities of a commercial venture or franchise, unknowable defects and dangers in a product sold or leased, and so on, are typical examples. Thirdly, there are situations where, by common agreement, parties to a relationship or joint venture conclude that it should be terminated. Characteristic cases here would include the conversion of a joint-tenancy into a condominium, an uncontested divorce, the winding up of a partnership or a trust, or the termination of a long-term lease agreement. Finally there are situations of wilful or negligent causing of harm or hurt to others.

While the occasions for a lawyer acting to frame, manage and resolve conflict are practically limitless, the legal forms by which the therapeutic role is exercised are more restricted. I should like to address but one here: the vocation of the lawyer in managing a dispute resolution process standing surrogate to judicial adjudication. Much has recently been written about A.D.R. as a non-contentious mode of dispute resolution. I do not mean to contribute to this discussion further, except to note the perversity of calling the processes by which 99% of human conflicts are negotiated and resolved — the alternative. This is about as meaningful as saying that natural languages — English, French, Chinese, Hindi, Urdu — are the alternative to Esperanto. What is more, not all alternatives to adjudication participate in the harmony ideology that drives mediation and conciliation. Some, such as consensual arbitration, can even be organized as adversarial processes.

Recognizing the diversity of processes of social ordering in modern pluralistic societies once again suggests complementary lessons about contemporary legal regulation. On the one hand, the law of the State should no longer seek to monopolize the naming and framing of human interaction in the language of rights and entitlements conceived as exclusionary trumps that dominates conceptions of retributive and corrective justice. On the other hand, this means that an increasingly important role will devolve to lawyers in deploying the ideology of transformative and relational (sometimes mis-stated as restorative) justice in the dispute-resolution endeavour.

Let me explore briefly how the lawyer can play a role as therapist of the institutions of civil society in connection with arbitration agreements. An arbitration agreement normally has two functions: it serves as a privative clause excluding recourse to the courts to decide an existing or a future dispute and it serves to establish a process for the resolution of disputes between parties to it.

Once the courts have been excluded, there is no reason whatsoever for the process of dispute settlement to bear any resemblance to adversarial adjudication at all. Parties may agree to a mediation process, an arbitration ex aequo et bono, a reference to experts, an auction or reverse auction process, or even to simply "tossing for it". It requires no genius to design an arbitration clause that postpones or excludes judicial determination. Nothing less than a deep insight into the forms and limits of different processes of social ordering in civil society is required to conceive and implement the precise process of decision by which future disagreements are to be structured, managed and overcome.

Among the more common remedies clauses, in addition to those which envision the designation of a third party arbitrator or mediator, are those which provide for self-regulating dispute-settlement processes. Shot-gun clauses and other buy/sell arrangements are only the most well-known of these mechanisms for assisting those in conflict to achieve a better understanding of the conflict and how to define it. I remember the rule that my parents suggested my brother and I use to avoid arguments

about how to divide up a piece of cake or a chocolate bar: oldest cuts, youngest gets first choice. The wise lawyer will become an expert in each of these different models of conflict resolution, will come to know the kinds of situations in which each is more likely to be successful than the others, and will necessarily have an insight into the values and purposes being pursued by the parties in a relationship that has gone sour.

Rediscovering Agency

The fundamental premise of this section has been that lawyers have always had a primary responsibility for ensuring the vitality of the institutions of civil society, even if for the past fifty years an alternative image has dominated the conception of lawyering. The pessimist will see in orthodox interpretations of contemporary State law a view of civil society quite at odds with this vision. After all, most legislation today seems to arrogate to Parliament alone the role of creator of societal order. These same statutes also erect courts into the final arbiter of societal pathologies.

Nonetheless, most law is still founded on institutions which can be deployed to accommodate and promote diversity. The meaning of lawyering at the millennium must lie in an understanding that the long-neglected institutions of civil society are in fact the foundation of social justice. The legal profession's half-century love affair with the State is running its course. Lawyers are discovering what most people have long known: that plural, local and consensual justice is to be preferred to monist, distant and conflictual justice.

The justice which is legislatively prescribed and judicially applied is necessarily an abstract and universal justice. Empirical research suggests that one reason why many citizens are reluctant to seek judicial redress flows from concerns such as a dislike of adversarial proceedings, and a suspicion of the ability of judges to appreciate the specificity of their situation. This reluctance is most obvious among multi-cultural communities, but it is also visible in any sub-group of the population — women, the elderly, unemployed, consumers — that does not feel that it is part of society's mainstream. Such perceptions of exclusion have also been expressed about various administrative agencies. By contrast with official justice, the justice generated through the institutions of civil society can be more particularized, more sensitive to the expectations of diverse milieu, and more differentiated.

In addition, justice within the institutions of civil society will necessarily be better attuned to prevention and to transformative justice. Once again, empirical research suggests that most citizens do not want remedial conflictual law, and even when they get to court, they prefer mediated solutions to adversarial decisions. It is the lawyer who practices in a neighbourhood, and not in an office-block next to the court house, who is closer to, and whose advice is understood as being more integrated with, the community. This type of legal practice involves the lawyer in constant interaction with

people who seek to maintain relationships, not to destroy them. The search for common goals and the achievement of shared purposes, not the headlong pursuit of the winning side of an all-or-nothing argument is the driving motif of lawyering as agency.

Of course, the State will not wither. Nor should it. It will continue to play an important symbolic role in the articulation, promotion and ultimate backstopping of the values of a liberal-democratic political tradition. But its institutions and processes will no longer monopolize the legal imagination.

Conclusion

It is time to conclude this peroration on "Law and Social Policy at the Turn of the Century". I should, however, like to close with one more a caveat. There is nothing inexorable about the alternative, non-hierarchical, non-authoritarian, pluralistic image of law that I have presented. Under the pressure of those whose vision of social justice can only be realized by calling on formal institutions to discipline supposed miscreants, the conflation of law and State may well continue as dominant imagery well into the next century.

Moreover, there is nothing inevitable about lawyers exploiting any of the three dimensions of the lawyer's vocation as architect of tacit legal structures that I have signalled. A lack of imagination among those who seek social justice over the next few decades may simply involve a marginal adjustment to the contemporary view of the profession's role in translating social policy into law over the next few decades.

But if the view of the Advisory Council and the community consultations of the Law Commission of Canada are a reasonably accurate reflection of public expectations, the endeavour of law will soon reveal several new elements and the role of the lawyer will embrace several new dimensions. Images of a vibrant and diverse civil society will overtake images of social control through State law; lawyering will no longer be conceived as being primarily the business of dealing with State institutions, but will be imagined creatively as the enterprise of facilitating the self-realization of people through the multiple processes and institutions of civil society.

Successfully playing the role of architect of these tacit institutions of civil society that the above reimagination implies will require lawyers to become specialists in the deployment of non-legislative forms of legal ordering (their creative role), in structuring and nurturing various institutions of civil society (their stewardship role), and in the use of diverse forms of non-adjudicative dispute settlement (their therapeutic role).

To respond to such a transformation of traditional images of law and to imagine lawyering differently will be a significant challenge for all of us as we approach the

millennium. The Law Commission of Canada hopes to contribute to finding the indicated responses: as set out in its Strategic Agenda, its mission is to engage Canadians in the renewal of the law, legal procedures and legal institutions to ensure that they are relevant, responsive, effective, equally accessible to all, and just.