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Law for the Seventies: A Manifesto for Law Reform *

Honourable John N. Turner **

It has been said that the greatest achievement of the Sixties is that we survived them. Things that were thought impossible not only happened but have been already forgotten. A decade which dawned with such hope, which spawned such expectation, and which had been heralded as the Age of Achievement, culminated in the Age of Confrontation.

Assassination became a fact of political life. President Kennedy proclaimed "that the torch has been passed to a new generation of Americans"; but some of that flame died with him. Martin Luther King had a bold vision for black and white together; but some of that dream died with him. Robert Kennedy held forth a promise of a newer world; but some of that promise died with him. Tom Mboya was charting a new hope for Africans; but some of that hope died with him.

The full impact of these assassinations is yet to be appreciated. The shock waves are still reverberating internationally. But it is clear that those most cruelly disinherited or orphaned were the young. The politics of hope became the politics of despair. The promise *of* values became the crisis *in* values.

It is not surprising, then, that some have even called the Sixties the Age of the Apocalypse. Nations stockpiled weapons in the name of peace. Political leaders yawned the rhetoric of brotherhood while waging war. Governments destroyed cities in order to save them.

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* This address was delivered as the Inaugural Lecture in the George M. Duck Lecture Series at the University of Windsor in 1970. This address is printed here with the hope that the points discussed therein will suggest to our readers, much more effectively and successfully than an editorial could have, the directions which legal thought and action should be taking at present and in the immediate future.

** Minister of Justice and Attorney-General of Canada.

Economies accumulated wealth and distributed poverty. Technology controlled man rather than released him. Corporate bureaucracies denied individuality while proclaiming it. The gross national product became Marcuse's One Dimensional Man.

And so the paradigm model for the relationship between man and society became the conflict between freedom and authority. Freud referred to this once as the major "discontent" of civilization. Indeed, authority and freedom seem now to be on a collision course everywhere. This conflict has become the brooding concern of the political commonweal. The law is caught in the crunch. For, on the one hand, the law represents itself as the symbol of authority. On the other hand, it holds out the promise of freedom. And so this discontent, haunting our civilization, disturbs the roots of the law.

We are witnessing today what has been called a "crisis of legitimacy", or as some would have it, a "crisis of authority". All our institutions — the state, the university, the family, and, of particular concern to us tonight, the law — are being challenged. The challenge reaches not ouly the laws but those who make the laws. It strikes at the very legitimacy of the legal order itself. In a revolutionary climate, the law is considered the antithesis of revolution. In a mood of alienation, the law is regarded as a false consciousness. In an impatient world, the law is perceived as the curator of reaction.

I believe, however, that the law is *still relevant* — and can be made more relevant in contemporary terms; that authority and freedom are not contradictory but complementary; that they need not be opposed but juxtaposed; that law is not the enemy of revolution, but that "revolution" can be made possible through law. Indeed, in an age of confrontation our social problems become our legal problems. The problems of the Sixties are now the legal challenges of the Seventies. Society itself has become the lawyer's client, and society will hold the law to account.

I — *Objectives for the Seventies:*

The faith that must move us, then, is the creative and even revolutionary role that law can play in the building and restructuring of a new society. For law is not just a "technical body of rules"; it is the organizing principle for the reconfiguration of society. Law is not just an agency of social control; it articulates the values by which men seek to live. The business of government, then, is the making of laws, and the process of law reform goes to the core of defining the kind of society we will have as a Canadian people and the kinds of rights which we will enjoy as individuals.

Here is the philosophic thrust and conceptual framework which I shall try to apply to what I understand to be the challenges and opportunities for the Seventies. As I see it, our objectives at the federal source of law must be four-fold:

1) *The Administrative Process — The Individual and the State*

First, we must redress the imbalance in the relationship between the individual and the state. The bigness and remoteness of government must not be allowed further to obscure or dwarf individual rights.

This is the rationale of the present Expropriation Bill now before Parliament. The Bill strikes a blow for individual rights against the arbitrariness of state power. It declares that the Canadian citizen will have the right to participate in the process by which he has been too often victimized. It provides that the expropriating authority must be a legal adversary rather than a clandestine arbiter. The Bill, with its guarantees of prior notice, of right to hearing, negotiation, appeal and fair compensation, enhances the scope of the individual. It is a citizen's bill.

But the administrative process still remains largely an unexplored labyrinth. We are concerned, for example, about the difficulty of challenging regulations that may well have gone beyond statutory limits or the scrutiny of Parliament; and we are concerned with controlling the breadth of the enabling powers that authorize these regulations.

We are concerned as well about the judicial powers exercised by administrative tribunals. We have introduced a Federal Court Bill to broaden the scope of judicial review of these powers by the courts, while making federal tribunals, boards and commissions more responsive to citizen's rights. This Bill is the beginning — and only the beginning — of the "civilizing" of the administrative process in the service of the individual. We will have to inquire into the complete workings of the public administrative law process, including the organization, administration, operation and procedure of these federal tribunals, boards and commissions. Also, we will have to probe the vast area of administrative discretion, or "discretionary justice" as Professor Kenneth Culp Davis has called it — that amorphous minefield of administrative decision-making which falls neither under the head of regulation-making nor within the scope of judicial review.

The federal Department of Justice will continue to define and create new remedies and new processes of review for the average Canadian against the state.

2) *Towards a Humanistic Criminal Law*

Secondly, Canada needs a more contemporary criminal law — credible, enforceable, flexible and compassionate. If we are to have a just society, we must begin with just laws; and nowhere is this more important than in the realm of criminal law; for it is here that the most fundamental values of life, liberty, property and dignity are to be protected and sanctioned, and it is here that the measure of our commitment to these values will be tested.

It is with this in mind that the Department of Justice will be submitting legislation in the form of a Right to Privacy Bill (to be part of the Criminal Code) to restrict electronic eavesdropping and wiretapping. The right to privacy, as Louis Brandeis once observed, is the most comprehensive of all the human freedoms, and the right most valued by civilized men.

We intend to introduce a Bail Reform Bill (also to be part of the Criminal Code) which will eliminate the criterion of money as the prerequisite for release. The practical result of the present system is that persons with money, or access to money, are often able to obtain release on bail, while poor people, who often cannot even meet the bondsman's fee, remain incarcerated. Empirical studies have demonstrated that persons released on bail are less likely to be convicted, and if convicted, are more likely to receive shorter or suspended sentences than are those who are preventively detained.

The Criminal Code amendments last year were predicated on the principle that private morality is the concern of the individual and not the province of a country's criminal law. Not everything that is immoral will be made illegal, just as not everything that is illegal is immoral. The circles may at times intersect, but they need not inevitably be entwined.

We must also recognize that the criminal law sanction is the paradigm case of the controlled use of power in society. As Professor Herbert Packer of the Stanford Law School has remarked, it is both uniquely coercive as well as uniquely hazardous. There are limits to the use of the criminal sanction.

Accordingly, if we are to have any appreciation of the impact on society of the criminal law and the administration of criminal justice, we must begin by disabusing ourselves of some of the time-worn mythology that has served as a kind of self-protective mechanism for the perpetuation of the myths themselves:

(i) We must disabuse ourselves of the myth that the criminal law process can be understood within the contours of the

adversary system; for the criminal law process can only be understood by threading its impact from the initial phase of the "low visibility" discretionary decisions to invoke the criminal law process to the final disposition at time of sentencing.

(ii) We must disabuse ourselves of the myth that there is indeed an adversary system of criminal justice at all; for the criminal justice system is more administrative than adversarial; and at times more non-system than system.

(iii) We must disabuse ourselves of the myth that the criminal law sanction falls with equal impact on all segments of society. Indeed, it may well be — as some studies have pointed out — that our laws, such as vagrancy and public drunkenness — and our courts that administer them — have made it virtually a crime to be poor in public. And so it is that the *condition* of poverty may become the rationale for criminalization.

(iv) As a corollary, it may well be necessary for us to begin to question our self-appointed role as "moral entrepreneurs" of criminality, particularly where the decision to criminalize may be one of aesthetics — i.e., "the unattractive public poor" — rather than actual criminality.

(v) Finally, it may well be that our decision-making about the orbit and impact of the criminal sanction is predicated on certain assumptions about man and the social order which may not be demonstrable empirically or even valid scientifically.

3) *Law and Poverty: Justice for the Poor*

Third, we must promote equality of access and equality of treatment before the law for rich and poor, young and old, alike. The adversary process before the courts must become a more meaningful, and less of a mythical, operation, particularly as it relates to the young, the dispossessed, the disenchanted, and the urban poor.

Few problems are more menacing than the presence of pervasive, life-long, grinding poverty. That we should have poverty in Canada is, as the Economic Council has reported, a disgrace. You don't have to tell the poor what poverty is; they know. They *feel* — very painfully — the sense of hopelessness and helplessness. They *understand* the deprivation of denial. They *know* what it is like to live in decrepit housing, to have the cracked pavements of the streets as their only parks, and to share their space with rodents

— the only wildlife they see. The poor know what it means to live lives blighted by poor health, broken families, interrupted schooling, and frequent joblessness. They know what it means to be prey to debt, despair, dependence and crime.

And it is the poor who suffer most from society masked in the trappings of the law. For it is they who are victimized when urban renewal arbitrarily disrupts a neighbourhood; it is the poor who are hurt when creditors garnishee wages or repossess furniture; it is the poor who are deprived when welfare agencies deny, reduce or terminate welfare benefits on vague, unarticulated or clearly illegal grounds; it is the poor who are penalized when Draconian clauses permit landlords to withhold repairs or capriciously evict them into the street; it is the poor who are hit by bail procedures linked to financial means; it is the poor whose privacy is invaded and whose dignity is denied.

The poor do not use lawyers. They are often thought of as having no need of lawyers. Too many of us think of lawyers as counsellors to corporations, drafters of estate plans or wills, advisors on creditors' rights. But if the poor are rarely plaintiffs they are often defendants. They are bewildered and bemused by legalities they face daily as parents, consumers, tenants, recipients of public assistance and accused offenders. Too often the poor see the law not as a friend but as an enemy, not as an aid but as an adversary, not as a remedy but as an obstacle.

Justice in a society such as ours, a society marked by wide differences in wealth and power, demands a legal system that compensates for these differences. The law is above all a means of creating and protecting rights. What is so necessary is an enlarged conception of the rights of the poor and a changing conception of the role of law in establishing, protecting and implementing these rights. We must disabuse ourselves of the myth that poverty is somehow caused by the poor. We must recognize that the law itself often contributes to poverty. We must understand that, whereas the law for most of us is a source of rights, for the poor the law appears always to be taking something away. That we have to change.

And in this connection, I have been exploring for some time now the availability of the right to counsel and the alternative mechanisms for guaranteeing it in our law. As you know, one of the proposals has been to entrench it in a constitutional Charter of Human Rights. It is clear to me that the fundamental principle of due process must somehow be recognized in our law and before our courts. Those of us who have been given the temporary custody

of our laws by the people must ensure that those laws and our courts treat all equally — rich and poor alike.

4) *Technology and Environment: Ecology and the Law*

We will have to harness technology in the service of the law rather than leave law at the mercy of technology. It will be necessary, then, to explore initiatives in the whole area of environmental control and probe the questions of interactive dynamics between science, technology and the law. For while technology races, the law lags; and once again the scientists are beating the lawyers.

Pollution is a good example of this. Rachel Carson's "Fable for Tomorrow" in *The Silent Spring* has now become today's painful reality. The Fifth Horseman of the Apocalypse — pollution — is riding towards us. We are choking our environment and being choked in return.

Water, as you know, is our greatest national resource; yet one hundred yards from the House of Commons the Ottawa River — one of the largest in the world — is dying. The Quebec Water Board has described this stretch of the river from the Rideau Rapids near Ottawa to Lake of Two Mountains fifty miles downstream as "nothing but a vast bubbling swamp". A few years ago — nobody was paying close enough attention to know exactly when — Lake Erie died. Acidic wastes have strained its water of virtually every form of life except a mutant of the carp that has adjusted to living off poison.

Clean air is a precious, indispensable, life-giving nutriment; but it has all but disappeared. Recent air pollution readings in our major cities have approached critical health hazard. Scientists at the "Atmospheric Sciences Research Centre" in Scotia, New York, have predicted that in ten to fifteen years from now every man, woman and child in the Northern Hemisphere will have to wear a breathing helmet to survive outdoors. Streets for the most part will be deserted, and most animals and plant life already dead.

Unspoiled land ought to abound in Canada; but it is becoming an increasingly rare resource; and land, unlike air or water, has no "antibodies" to dillute pollutants. Soil once polluted stays polluted. Canadian women will carry in their breasts — and may already be carrying — milk that has anywhere from three to ten times more of the pesticide DDT than the government allows in dairy milk meant for human consumption.

The threshold of noise safety is 85 decibels. Yet the level is regularly exceeded in all major cities in Canada. Nor is deafness

the only danger. Empirical studies have already shown noise to cause physiological changes of a cardiovascular, glandular and respiratory nature.

There are few among us who have not been exposed to noxious doses of chemicals, wastes, fumes, noise, sewage and heat. In the words of Tom Lehrer:

> "Just go out for a breath of air,
> And you will be ready for medicare.
> Fish gotta swim and birds gotta fly,
> But they won't last long if they try.
> Pollution! Pollution! You can use the latest toothpaste,
> And then rinse your mouth with industrial waste."

Pollution, then, haunts us everywhere; and suddenly in this cause-conscious world everyone is against pollution. But as Mark Twain used to complain, everyone talked about the weather but nobody did anything about it; and so it is with pollution. Rhetoric is a blind alley. Indeed, we could do without a smog of words. And there is where the law comes in. For if the War on Pollution is to be won — indeed, if it is to be fought at all — a comprehensive national and international legal regime will have to be developed and applied. For what is needed is a hybrid "prevention-control" strategy. It would reflect the following imperatives:

(a) We must create new regulatory institutions with alternative regulatory controls, i.e., penal, taxing, injunctive, etc. The Canada Water Bill is but a beginning.

(b) We must deal with vested economic and community interests and the pressures they generate.

(c) We may have to re-analyze the legal notion of the right of a person to use his own property as he sees fit.

(d) We must translate our strategy for the War On Pollution into recognition of the individual and collective rights of ordinary citizens to a clean environment. These rights should be made actionable against polluters before the courts.

(e) We must co-operate in developing an international legal regime to deal with pollution on a global scale.

Also, if the War on Pollution is to be won, we must abandon our "vandal ideology" which has permitted us to ravage our environment:

(a) We must recognize that man is not the source of all value.

(b) We must recognize that the universe does not exist for exploitation solely by man.

(c) We must recognize that finite earth does not have infinite resources.

(d) We must recognize that we cannot always remake the natural environment to suit a special interest.

(e) Man must realize that his *actions* on the environment result in ecological *reactions*. He cannot punish the environment without being punished in return.

Ecology is the relationship between man and his environment; and law is the ordering of the relationships between man and his environment — the organizing principle of society. Pollution, then, is not only a problem of ecology; it is a problem for the law. Environment cannot only be the concern of ecologists; it must be the concern of lawyers and legislators and of ordinary citizens everywhere.

Give earth a chance. If we do, we may find that the environment will give us a chance.

II — *Implementation of Objectives:*

1) *National Law Reform Commission*

It is somewhat commonplace to say that legislatures are continually engaged in law reform; indeed, the very business of government is the making of laws. However, such law-making tends to be organized around reports of Parliamentary Committees, Task Forces or Royal Commission reports, and Bills which have come forward as a result of work in government departments. What is needed, however, is an institution uniquely dedicated to the process of law reform. In the words of Judge Cardozo, one of the early prime movers for the creation of a law reform commission in the United States:

> "The inn that shelters for the night is not the journey's end. The law, like the traveller, must be ready for the morrow. It must have the principle of growth."

Accordingly, with this in mind, we have introduced a Bill establishing a federal Law Reform Commission, to give us a continuous, rather than episodic, review and reform of the law and the administration of justice in our country. This review will embrace the removal of anachronisms and anomalies in the law; relate and reconcile in our federal statutes the distinctive concepts and institutions of our civil and common law systems; eliminate obsolete laws; and develop and explore new approaches to, and new concepts of, the law to keep it alive and moving in a changing society. The law must never stand still again.

2) *Research Planning Section in the Department of Justice:*

The creation of a Law Reform Commission for Canada in no way implies that the Department of Justice is abdicating its role in legal reform. There are changes that cannot await the critical and reasoned judgments of a Law Reform Commission. The federal Department of Justice has recently established a Research Planning Section. This section will serve as an investigative mechanism for short and long-run planning to ensure that the necessary data is gathered for the development of new legislation and the appraisal of present legislation. Hopefully, too, it will allow the Department of Justice to function more from the "justice" side as well as from the law enforcement or "attorney general" side. We want to act as counsel to the people, not just as lawyer to the Government.

Conclusion:

This, then, is our manifesto for the law as we enter the Seventies. This is the nature of the advocacy we shall attempt to exercise to meet the challenges of the decade ahead.

For we are witnessing what has been described as a "new search for human values and relationships — relationships between man, and between men and government — that have meaning in the technological and psychological context of our age".

"What this search and the accompanying changes demand is not a law and order that freezes man into predetermined patterns, but a law and order of change, of movement, of options. Yesterday's order, if it is unresponsive, becomes tomorrow's oppression." We want a law in motion — a law that will never stand still again.