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THE SPIRIT OF LAW AND JUSTICE

THIS article is not planned so much to tell the mechanics or machinery of administering law as it is to seek some knowledge of what justice is and may become.

The search is perhaps not an idle one for people interested in learning the steps we should take if we are to realize in all its power that love of justice which is the central theme of human thought. From the earliest days of mankind, we have sought justice, and generation after generation has started the search anew.

What seems wholly just to us today is likely only the merest pinpoint of what we should see if we were to shift our point of view. Our justice would appear full of faults were we to climb a little higher so that we might compare it with what we shall call justice tomorrow.

But let us deal first with law. There is nothing in the prospect to alarm us, because there is nothing in the law which we cannot understand if we seriously desire to do so.

No answers will be given to legal problems, nor will this essay fit readers to be their own lawyers. There is a *Lawyer's Encyclopedia* which has 37 volumes containing 1,000 pages each, and it is only an introduction to law referring you for particulars to many thousands of statutes and reports.

Law seems to some people a tyrannical encumbrance on life. They move along their accustomed ways with a brash confidence in their ability to get along without these ancient restraints. But law is as needful today as it ever was, because men are still subject to passions. If all men were reasonable, perhaps law would be superfluous.

The law provides a way for people to live together. Wise settlements of disputes are necessary for the personal, community and national comfort of all of us.

A Free Way of Life

There have been irrational things done in the name of building a code of law, but one cherished theory running through all attempts is that law tries to achieve justice. The phrase "justice according to law" has become commonplace in the conversation of western democracies. Here, our judges give decisions according to prescribed rules. In some other parts of the world the potentate or the dictator administers "justice" according to his personal whim and ambition.

Freedom is a strong force in our way of life, and, strange though it may seem to some, our laws and customs are part of our liberty. This apparent anomaly is understood when we consider that if a citizen could do what the law forbids, all his fellow-citizens would have the same privilege, and then where would be his liberty? The result of living under the law is a peace of mind that arises from the knowledge every person has of his security.

So far as our law in Canada is concerned, most of it has to do with the rights and liberties of Canadians. There are duties imposed to refrain from acts that would be injurious to others, and there are duties imposed to do certain beneficial acts. Basic to a commonwealth like ours is the pledge, expressed or implied, by every citizen: "I give up my right of governing myself absolutely, on the condition that you give up your right similarly."

A free man should know how far his freedom extends, and this he can learn by gaining some acquaintance with the law. The freedoms we enjoy in Canada are many. Some were guaranteed by Magna Charta, and others have been built since then. Our political liberty consists in that liberty in which we as citizens live under shelter of the law.

Under the Law

"Under shelter of the law" are key words. Our greatest danger is crime, which is made up of breaches of law and order, offences against individuals, and

offences against Canada. If we have not security of life, liberty and property, built upon a firm national structure, we run the danger of our democracy falling in pieces.

To preserve these advantages we need government, and good government is built upon law. In some respects we Canadians are subjects, and in others we are monarchs. As subjects we obey the laws which men elected by us as monarchs have made for our preservation. It depends upon our wisdom in selecting the men who make our laws whether we can rest in the certainty that laws will be wisely made and impartially administered.

We have accepted the principle known as the rule of law. It came to us with the earliest British settlers, and it remains today our protection against the danger of autocracy in government officials. The principle goes back a long way in history. Roman law taught that the will of the sovereign had the force of law; British law advanced to the maturity of discerning a law above that, and laid down as a fact that those who exercised authority were to be held accountable.

In a technical sense, "rule of law" means that judicial bodies may pronounce upon the legal validity of the acts of the King's ministers and servants. As Professor Robert MacGregor Dawson said in his book *Democratic Government in Canada*: "A prime minister, or a customs inspector, or a policeman, is thus under the same legal compulsion to obey the law as the most humble citizen."

This principle is today going through a crisis. Authorities believe it cannot maintain itself in the complete form it assumed in the last century. Under our present conditions, greater discretionary power is being given year by year to government officials. Acts of Parliament frequently cover only the broad sweep of legislation, and leave policies and administrative details to departmental heads and other appointees. But the principle is still sound as a bulwark against abuse of power.

A basic charter of our law, though sometimes scoffed at because it dealt mostly with nobles and not the common people, is Magna Charta. Some parts of the charter are outdated, it is true, but it contains the essence of rules that are as vital in today's living as are the Ten Commandments. Above all, it set out to say that government must be according to law.

Another milestone in our journey toward justice through law was establishment of the writ of *habeas corpus*, guaranteeing the citizen against arbitrary imprisonment. This writ provides a procedure by which a prisoner may at once be brought before a court so that the legality of his imprisonment may be determined without delay.

The Making of Law

To make a law is a serious business. Even the best laws may have unthought-of results. We recall the Greek playwright's line: "O bitter consequence of seeming-wise decree!"

People make the law. There is scarcely any community in which the sense of right of the majority of the people differs materially on the major principles which make life possible and decent. No law is worth the paper it is written on unless the people are ready to do their part in observing it. As one writer put it: Nobody should forget that when a man hangs from a tree it doesn't spell justice unless he helped to write the law that hanged him.

Not all of us love justice with the same ardour. We do not have the same scruples, the same sensitiveness, or the same depth of conviction. There are some persons of high intellectual development in whom readiness to advance the law is less clear than in others whose intellectual development is far lower.

To these conflicting factors attention must be given by governments. The object of good government is to promote the richest life possible for all its people. And good government is government by the people. It is they who decide what laws to add or subtract.

The three principal functions of government are to make laws, to administer public affairs and to dispense justice. In a democracy, the force of public opinion is the real check upon the worthiness of government in all three spheres; to make sure that the laws are good and that the country is run efficiently, and to safeguard the right of every citizen to protection by the courts. This involves the judgment of the individual voter as to what is right and wrong, good and bad: a judgment which can only be given rightly when informed and inspired by a sense of justice.

International Law

Law transcends national boundaries, but everything said about the virtues of law in Canada applies to international law. Every state has the moral duties to other states that citizens have to citizens.

International law as we know it drove the Captain Kidds from the seas. Today, in our search for security, we are not greatly troubled by pirates. We are now apprehensive about jet-propelled rockets carrying atomic war heads, and radioactive clouds and invisible armies of deadly bacteria. Never before in history has the elimination of strife between nations been as gravely important as it is today.

Yet, in this crucial period, international law seems to have reached a low ebb, with many nations doing it lip-service but violating it when prompted by self-interest. There is no international agency to compel obedience to its rules, and law is meaningless unless it can be promptly and decisively enforced.

What is standing in the way of peace through international law? (1) Is it the veto provision of the United Nations? (2) Is it the failure to establish an international police force with which to enforce international law? (3) Is it the fear of losing some of our sovereignty if we gave final jurisdiction to the world court over all disputes? Or (4) Is it true that man by nature can't live in peace, and in this atomic age is set on self-destruction?

People in all walks of life, the Roman Catholic, Jewish and Protestant leaders, statesmen and philosophers: all these have said that enduring peace requires the organization of international institutions which will develop a body of international law, guarantee the faithful fulfillment of international obligations, and assure collective security by control of armaments, compulsory arbitration, and the use of sanctions when necessary to enforce the law.

There are United Nations commissions and study groups which have considered and labeled the problems that await solution, but at present the United Nations Assembly can only make recommendations; it cannot write and enforce laws.

And where laws end, there tyranny begins. "When I can punch your nose with impunity because you are weaker than I am," says Ronald Rubinstein in his book *John Citizen and the Law*, "and when a felon can break into a house and steal without risk, it follows that the thugs will do exactly as they please."

What IS Law?

Law is not quite as easily defined as we in this democratic country might think. Thousands of definitions have been offered, and not one has been found wholly satisfactory. They range from Cicero's: "Law is nothing but right reason, calling us imperiously to our duty" to that in *Black's Law Dictionary*: "That which is laid down, ordained or established." We may prefer to say that we regard the law of Canada as control of ourselves through each other, which is good democratic law.

Whatever we call it, we in Canada mean when we say "law" the kind of life in which every man is free to do what he wills, provided he does not infringe the equal freedom of any other man. And we demand of our law that it shall be impartial, using the same language to all ranks and conditions.

Within our western civilization, two systems of law have grown up, one based on the Roman law and the other on the common law of England. Most modern codes embodying the Roman law are founded on the French Civil Code of 1804, of which Napoleon said in his exile: "My glory is not to have won forty battles; for Waterloo's defeat will destroy the memory of as many victories. But what nothing will destroy, what will live eternally, is my Civil Code."

On this continent, Quebec and Louisiana adopted French law, and today France's monument of law in Canada is the Quebec Civil Code and Code of Civil Procedure. The rest of Canada adopted the common law of England. Those who wish to read in interesting detail about the law systems of Canada cannot do better than obtain from the King's Printer, Ottawa, copies of *Law and Order in Canadian Democracy*. This book of 227 pages, prepared as a series of 20 lectures by the Royal Canadian Mounted Police, costs 50 cents.

Kinds of Law

The earliest source of law was custom, and this grew, through the British method of gentle change, into the

common law. Today the common law rights of Britain have become the natural rights of man.

Much of this common law was never passed by any legislature or imposed by any king, but grew out of accepted traditions and customs and trade practices. It was distilled out of thousands of court decisions which in turn became the basis of new decisions.

For six or seven hundred years it has been the history of the common law to follow precedent. Where no exact precedent exists, similar ones will be followed, and so precedents are extended, modified and broadened down to new situations until a question rarely arises for which there are not some at least strongly parallel precedents. The law thus reflects, conservatively, the social ideas of its time, tempered by those of the immediate past.

It should be noted, however, that a precedent may be disregarded if it has become obsolete through lapse of time and changed conditions. In this respect precedent law differs from statute law, which remains operative until repealed. Also, a precedent may be over-ruled when a subsequent court is convinced that it was founded upon wrong reasoning. The common law is not, therefore, the hide-bound thing it is sometimes pictured as being.

The British people pride themselves on the way they "muddle through", and, says René A. Wormser in his great survey *The Law*: "it is a fact that they have attained practical results with less planning and less forethought than any people with the possible exception of the Romans. They share one other characteristic with the Romans: the tendency sometimes to solve a difficult problem by indirection instead of by attacking it head-on."

It was in this way that the entirely new system of law, called "equity", came to stand alongside the common law. The early courts had limited powers, which were exercised according to fixed rules. To get over some of the difficulties, it became the practice to petition the king praying justice for the complaint. When this came to the judges, they could not deprive the king of his prerogative of doing "equity" to his subjects, and the Lord Chancellor was given power to remedy grievances. An interesting sidelight is that the king, through his chancellors, demanded that the plaintiff in equity come with "clean hands." The maxim has also been put: "he who seeks equity must do equity."

Eventually both kinds of court were merged by statute which provided that the principles of "equity" were to be given effect.

Changing Law

While one of the virtues of law is that it shall be constant, so that what was right yesterday shall be right today, there are great numbers of jurists giving attention not only to what the law is but also to what the law should be. Law must be considered in relation to the circumstances within which it operates.

Our social progress, due to many factors such as technology, increased population, and rising standards of living, demands that the law shall not lag too far behind the changing conditions that accompany it. Our law represents what we consider proper at this moment, and a half-century from now the law of Canada will likely be substantially different from what it is today. Perhaps we are like the Athenians of whom the great law-maker Solon said when asked if his laws were the best: "I have given them the best they were able to bear."

What About Justice?

Now, having scanned the broad field of law, what about justice? The justice we mean is not the kind that refers merely to the treatment given a person who breaks the law. We are not going to look down a narrow corridor of legal thought to where a cold marble Justice sits blindfold, with a sword in her right hand and scales in her left.

"Is there nothing above this human justice, whose sanction is rarely other than the opinion, the confidence or mistrust, the approval or disapproval, of our fellows?" This was a question asked by Count Maurice Maeterlinck, Belgian essayist, dramatist and poet, who died two years ago after having enriched the literature of the world during his 86 years. And he answered himself: "That such a justice exists we all of us know, for we all have felt its irresistible power."

The justice we mean is an ideal; it is an essential prerequisite of freedom, happiness and comfort, and a social force beyond measure important.

This Monthly Letter started out with a search for justice, and this is the sort of justice we are seeking. Sometimes mankind has come near it, as he thought, but it faded away. And yet it reappeared, and perhaps at last we begin to realize that it is in the depths of our own hearts.

Justice is more than an instinct for preservation, more than a product of our reason, more than a sentimental force. Once in a while we startle ourselves when our unconscious thought brings us face to face with a revelation of justice.

Justice is obviously not happiness for everyone, says René Wormser, for a law which would make one man happy is very likely to make another unhappy. To say that justice is happiness for the majority will not appeal to people who believe that the minority should be considered too. The satisfaction of human interests is not the answer, because interests differ, and compromises are essential to the working of a democracy such as ours. Is satisfaction of human wants the answer? But whose wants are to be satisfied? To satisfy everyone's wants would be impossible, and it would not be just to satisfy some and ignore others.

It will be seen that there is some difficulty in deciding what is justice, whether thought of as an end or a means. There are some who would have us believe that only fear of the consequence of injustice per-

suades men to do justly. Others say we are made just by contemplation of the things for which we shall be accountable at the final Great Assize which most of us expect mankind to face in some form or other.

If we grant that within himself a man seeks to think justly, then it is easy to contemplate his dealing justly with his family, his neighbours, his associates. To look for refuge in thoughts of great, heroic renuncements and endeavours will effect but little. Justice is almost always simple, handy, and small.

Justice takes in all people, and is at the heart of our every ideal. It is at the centre of every truth we know. It includes kindness and pity, generosity and heroism, because all these are acts of justice. Justice goes far beyond the narrow circles of obligation that surround us, beyond the crimes of men, beyond duty. We have no virtue that is complete unless it can stand up under the fixed and keen regard of justice.

About Injustice

Opposed to justice is injustice, which has two aspects: the actual doing of an injury to another, and tamely looking on while he is injured and not helping him. We give away our freedom every time we are silent in the face of injustice.

Worst of all injustice is the causing of suffering to others whether or not it breaks a law. Injustice is shameful to those who are unjust, not those against whom the injustice is directed.

No man cares to look back upon his acts of weakness or injustice, and to have congregate in his mind the events of bygone days which he cannot contemplate calmly and peacefully and with satisfaction.

We should dislike very much to start our advance toward realization of the justice we seek in the midst of a sorrow we caused, even though without intention.

Justice exacts payment for injustice by destroying our personal happiness. As a writer of the Middle Ages said: "The man who suffers inwardly the pangs of remorse for unkindnesses he has inflicted suffers more grievously than he who is whipped for his sins." The suffering becomes more deadly, said Maeterlinck, in the degree of the man's greatness and knowledge.

But if old hopes lie shattered around us, shall we not pick up the fragments and piece together another ideal, less ambitious perhaps, but still resting upon our in-born sense of justice?

The precepts of legal justice are these: to live honourably, to injure no other man, to render to every man his due.

We have, now, a vague conception of the still higher ideal that we would approach. We press ourselves too hard if we seek to know what only time will disclose to future generations. But by seeking justice in ourselves, where it truly is, and listening to it, and putting it into our living, we shall profit greatly.