

SYMPOSIUM: THE QUEST FOR JUSTICE*

THE QUEST FOR JUSTICE

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When the Dean extended to me an invitation to participate in the proceedings to mark the formal opening of the Faculty of Law of this University in its new accommodation, he told me that the key note of these proceedings would be the "Quest for Justice". May this Faculty of Law in this building be dedicated to that end as long as it continues to exist.

On the opening of the restored buildings housing the House of Commons in England, which were partially destroyed during the Second World War, Sir Winston Churchill said, "We fashion our buildings and after that they fashion us." The programme of these two days is part of the fashioning process of this building and this Faculty, which we hope will direct and chart the course of all the staff and students that will have the privilege of sharing its passage through the uncertain horizons of time.

The "Quest for Justice—what is it that you seek or shall seek?" Philosophers, writers, statesmen, orators, and babblers in the parks have spent volumes of words trying to define justice, and have ended in wide disagreement. But the humblest citizen passing along the highways of life—the artisan in the workshop, the fisherman at his nets and the farmer at his plough—has a fairly clear idea of what injustice is in relation to a particular circumstance. But a mere negative sense of injustice is not enough for those that have a part in the making and the administration of the laws that are made. It is essential to have a positive philosophy of justice.

What is the nature of justice? Three theories have been advanced: the "positive law theory", the "social good theory" and the "natural right theory". Otto A. Bird in his book *The Idea of Justice* has characterized the "positive law theory" by the following six propositions:

- (1) Justice and injustice are dependent on positive law.
- (2) Law itself is independent of justice.
- (3) Justice consists in conformity to positive law.

* A Symposium featuring opening statements by Hon. J. C. McRuer, S.M., LL.D., and Dr. Allan F. Smith, and addresses by Dean G. E. Le Dain, Q.C., Dr. Richard Gosse, Q.C., and Dr. Edward McWhinney, Q.C., delivered on the occasion of the opening of Ludlow Hall, Faculty of Law, University of New Brunswick, Oct. 8-9, 1968.

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- (4) Justice, apart from legality, is merely a subjective norm.
- (5) Justice is obligatory ultimately only because of legal and political sanctions.
- (6) The virtue of justice is identical with obedience.

This theory gives little meaning to justice as something more than mere obedience to law because it is law.

In the "social good theory" one finds little more to satisfy the mind. It rests mainly on the theory that justice derives exclusively from society, and consists ultimately in the improving of the social good. That is, the virtue of justice is to act for the social good. To me that philosophy leaves too much scope for a philosophy of the good of the herd and little for the good of the members of the herd, particularly the weaker ones who may be trampled under foot.

The "natural right theory," however it is propounded, is the theory of justice that seems to come most near to answering a craving for a concept of law that satisfies the soul. Bird lays down six propositions underlying the "natural right theory":

- (1) Justice and injustice are not exclusively dependent on positive law.
- (2) Justice provides a criterion for the goodness of law.
- (3) Justice is based on natural right and consists in rendering to each his due.
- (4) Justice is an objective norm for human actions.
- (5) Justice is obligatory in itself, apart from social and legal sanctions.
- (6) Justice, as a virtue, is distinct from all other virtues.

In support of the "natural right theory" one is comforted to be followers of a whole company of distinguished legal philosophers from Aristotle to Aquinas, to Blackstone and to Goodhart of our own time.

It may be that the "natural right theory" lacks precision and it may be characterized as vague but so is honour and faith and love and charity. The declarations of the *Magna Charta*, the Bill of Rights, and the Declaration of Independence of the United States of America all bear testimony that the concept of justice is something more than obedience to law and something more than answering the social demands of society. Justice is the living spirit in the law that gives it vitality and to the individual for whom laws are made, a meaningful purpose in the society in which he lives—a purpose that has been developing since man first commenced to make his way through history. It was this philosophy that gave to the common law its power and authority. It was in the name of natural justice that the great judges of England, in the exercise of their power of review over executive acts of government, erected timeless safeguards against state power and commanded that certain

basic rights of the individual be respected in the administration of all laws.

But justice, no matter how it is defined, is a term relative to a changing society—a sense of justice is a developing thing. It takes on new dimensions of meaning as man moves forward and upward on his course of evolution.

Over 4,000 years ago Amraphel, King of Shinar, with a great flourish of self aggrandizement, proclaimed the Code of Hammurabi. The inscription at the head of the Code shows the Sun God, Shamash; seated on the right is the god of Law whose children are Justice and Right; and the King, Hammurabi, receiving the law from Shamash, declares that he the King has kept the strong from oppressing the weak, and has given safety to the orphan and the widow; and so to do justice in deciding lawsuits, the King has inscribed the law publicly that all may come and read it at the temple gate of the Sun God, Shamash, where justice is dispensed. But the King's pious declarations of a just society were not original by any means. Three hundred years earlier, Ur-Nammu, who had been selected by Nanna to rule over Sumer and Ur, declared his laws as laws to remove the "grabbers" of citizens' oxen, sheep and donkeys. He then established and regulated an honest and unchangeable weights and measures. He saw that the "orphan did not fall prey to the wealthy", "the widow did not fall prey to the powerful", "the man of one shekel did not fall prey to the man of one mina".

Over four millenniums ago justice was equated with the spiritual nature of man. Nanna's laws and Hammurabi's laws were designed to protect the weak from the strong and to give safety to the widow and orphan. These were idealistic declarations appropriate for the society in which Nanna and Hammurabi lived. In the same Codes there were elaborate provisions about the rights of the master concerning his slaves: "If a man aid a male or female slave of the palace or a male or female slave of a freeman to escape from the city gates he shall be put to death." "If a man harbour a slave in his house the owner of the house shall be put to death". But one finds not a word about the right of the slave with respect to his master.

Hammurabi had to wrestle with many social problems that differ only in their context from social problems we have today, but the justice of the solution of these problems does not satisfy our concept of justice in this half century.

The Babylonians had their troubles with jerry builders just as we have today. The laws that were designed to do justice at the temple gate provided:

229. If a builder build a house for a man and do not make its construction firm and the house which he has built collapse

and cause the death of the owner the builder shall be put to death.

230. If it cause the death of the son of the owner of the house they shall put to death the son of the builder.

The idea of justice was to subject the bad builder to the same grief as that which the owner had suffered through the loss of his son. There was no concept of justice to the innocent son of the careless builder. The same laws provided that a wife, a son and a daughter of a man could be bound over to work as security for a debt. An unfaithful wife must be drowned. A wife accused of unfaithfulness which could not be proved should "for the husband's sake" throw herself into the water.

Much of the Code of Hammurabi was perpetuated in the Mosaic Law, strong reflections of which are still to be seen in our laws of today. In the "Books of the Law" the spirit of "an eye for an eye"; "a tooth for a tooth", "a hand for a hand", "a foot for a foot", "burning for burning", "wounding for wounding", and "strike for strike" was perpetuated. But in the same books are found concepts of justice revolutionary at that time which formed a code of moral principles and spiritual values which have since governed the relationships of men with one another and with their God; a code which has been the foundation of western civilization and which has given to law and justice a developing majesty and authority.

Since Moses declared to his judges "Justice and only justice you shall follow", Socrates, Aristotle, Cicero, Coke, Blackstone, Austin, Lévey-Brul and Hobhouse have carried on profound discussions about law and justice but in these discussions one finds little or nothing about the injustice of buying and selling human-beings, the exploitation of child labour, the servitude of women, or the illiteracy of the poor. In fact it has not been lawyers but it has been laymen who have led the great quest for justice in these fields. The battle for the abolition of slavery was led by Wilberforce, a wealthy habitue of the fashionable drawing-rooms of London, while the crusade against industrial slavery in England was carried on by an hereditary earl, Shaftsbury—they had a quest for justice.

But it is only in laws and in their administration that the concept of justice can take on a meaningful form. The concept of the injustice of slavery had no meaning for the slaves until Wilberforce got his Act through the British Parliament, nor did Shaftsbury's concept of the injustice of industrial slavery mean anything for the working men, women and children, until he got his ten-hour a day bill through Parliament—a bill that today does not symbolize our idea of justice to the working man.

However, laws and justice are not synonymous terms. Law may be nothing more than the manifestation of force through the exercise of power or it may be a protecting shield for the individual. The Austinian theory was that the science of jurisprudence was based on command; but Pollock, Goodhart and Pound have given us a philosophy of law not based on force but on moral obligation and a concept of human rights. Sir Frederick Pollock said, "Law is not law merely because it is enforced by the state." Professor Goodhart defined law as a rule of the human conduct which is recognized as being obligatory and stated, "It is essential to draw a clear definition between obedience to an order or rule and recognition that the rule or order is obligatory, that is that it ought to be obeyed . . . but obedience to an order merely because of fear of sanctions is nothing more than reaction to naked force and we will seek to avoid obedience wherever possible." Dean Pound in his introduction to Haynes book, *Selection and Tenure of Judges*, defined law as "experience developed by reason and reason tested by experience . . . Law is the arch enemy of autocracy . . ."

Laws there are in abundance in those countries where freedom under law has ceased to breathe but not law. Law recognizes that the individual human-being has moral rights, that he is something more than one of a common herd of animals to be controlled by the more powerful animals. He has a right to be free with a responsibility to recognize the same right in the other members of the society in which he lives. The individual cannot be left free to define that responsibility. This is the task of judges, lawyers and lawmakers. It is through law and law enforcement that the right of the freedom of the individual is safeguarded. It is to the law that an individual looks for protection against encroachments on his freedom by his fellow-members of society and by the state. In this process the evolution of the concept of justice and the "Quest for Justice" must be the directing force.

It is in the direction of the power of the state and how that power is exercised that we are most concerned today as the fires of freedom burn so low in so many countries of the world. It is the recognition of proper safeguards against the abuse of state power that gives to law a quality that commands respect, and gives to it dimensions of authority as it is recognized as something that ought to be obeyed.

In your quest for justice as teachers, students, and lawyers your task will be to keep under constant examination the laws of the nation and your province to determine how far there may be unjustified encroachments on the rights of the individual and how far proper safeguards are provided for the rights of the individual in the administration of those laws.

As you carry out that task it will be your duty to make a critical analysis of the power of the state as it exists and how that power is exercised. You will search for a philosophy of state power relevant to the social conditions in which we live. Edward H. Brooks in his book *Freedom, Faith and the Twenty-First Century* said: "It is a shattering thought that so much of the world which is living toward the twenty-first century has no coherent philosophy of the state and yet is willing to entrust so much power to it."

It is not only the substance of the law that should come under your critical and perpetual scrutiny but the procedures by which it is administered. Bad procedure can be just as effective to destroy justice as bad laws. And good procedure can do much to advance the cause of justice even with poor laws. Professor Davis in his *Administrative Law Treatise* has said with great force, "The essence of justice is largely procedural" and he quoted three distinguished judges of the Supreme Court of the United States:

Mr. Justice Douglas:

It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.

Mr. Justice Jackson:

Procedural fairness and regularity are of the indispensable essence of liberty.

Mr. Justice Frankfurter:

The history of liberty has largely been the history of procedural safeguards.

Notwithstanding these truths our whole administrative legal system is strangely barren of elementary procedural safeguards in the decision making processes. We have detailed procedural rules to guide and direct trained judges in the administration of justice in the courts but lay administrators with powers touching almost every avenue of human activity are left with few and in many cases no procedural rules to direct them or to safeguard the rights of those affected by their decisions. The law permits many boards and officers in the hierarchy of government to make decisions bad in law as long as they act within the jurisdiction conferred on them and they keep silent to conceal their mis-guided reasoning. The Judicial Committee of the Privy Council has decided that a tribunal once clothed with jurisdiction may make a binding decision even though there is no evidence of substance to support it, and relief against the decision cannot be granted on *certiorari* proceedings.

The power to refuse or to revoke a licence, to carry on an ordinary calling in life, in the absolute discretion of a licensing body,

and without the applicant having an opportunity to be heard and without an obligation to give reasons and with no right to appeal is a surrender of the rule of law to arbitrary state power. But many statutes give such powers and few voices are raised in protest.

We lawyers and judges may have done our share in complicating the legal processes that are designed to give some safeguards to the rights of the individual; nevertheless, in that area any real leadership that has been given has been that of the judges and lawyers rather than the legislators. The elementary right to be heard and the right to know the case against you have been doctrines developed by judges and lawyers without much legislative assistance and often in spite of legislative resistance. It is a blot on our legal processes in this country that we have no general statute laying down minimum rules of procedure to be observed by those tribunals and bodies other than the courts which are given power to make far reaching decisions affecting the rights of the individual. It is likewise a blot on our concept of the rule of law that statutes of our nation and our provinces are replete with provisions designed to deny an individual who has been wronged, access to the courts of justice where he may assert his right to have the wrong corrected.

When the state denies to the individual means of redress for wrongs done to him in the exercise of state power there is a surrender of the rule of reason to arbitrary power; roadblocks have been put in the way of freedom under law. The way of freedom under law is the way of reason, the way of reason leads to the way of justice. The advancements of science in this century have created new forces in an unprecedented struggle to control men's minds and men's means of free self-expression. For hundreds of millions of people not only freedom under law is denied but the right to develop any philosophy of freedom is suppressed by force of sanctions imposed by the state and reinforced by a full arsenal of weapons. There are countries that now claim not only the right to destroy freedom in their own country but to extinguish the embers of freedom wherever they commence to burn within the boundaries of their neighbours. In the power struggle now going on in the world the individual cries out to lawyers, law teachers, judges and legislators to safeguard and preserve for him his rightful place as a meaningful member of the society in which he lives.

We have inherited a broad and solid foundation on which to build for the future; a foundation well and truly laid by great legal architects, philosophers, scholars and judges. But there is much in the super-power structure of the law that has been built on that foundation that is not adequate for the demands of the justice of the future. In your quest for justice don't destroy the old just for the sake of change but don't hesitate to change the old when old

laws and old procedures obstruct the way to justice in an evolving and developing society: a society that gives to the individual his rightful place of dignity as a freeman equal to all his fellow men and where he shall have the right to live under a rule of law based on a sense of obligation. In that society respect for law must be the cohesive force holding it together and not mere obedience based on a surrender to the weapons of state power. That as I see it is the goal you seek in your quest for justice.

THE QUEST FOR JUSTICE

Allan F. Smith†

It is a great pleasure for me to participate in this symposium on "The Quest for Justice". As your chairman has indicated, I severed my direct association with legal education and with the legal profession some three years ago, to assume a position in general university administration. And, if there is one recurring element of nostalgia for the life that was, it is nostalgia for the association with lawyers, with legal educators, with law students. Accordingly, I welcome this chance to speak concerning, and to listen to a discussion of, a subject which occupied my time for so long a period.

The title of the symposium—The Quest for Justice—is an intriguing one. Somehow, in four words, those who chose the title have captured the essence of some fundamental notions of which lawyers and laymen need to be continually reminded. We are reminded, for example, of the fact that "justice," as a concept, is a goal which society must perennially seek. It is both a societal and a personal goal. The term invokes an image of behavioral patterns which run the gamut from close interpersonal relations (justice in the family) to the broadest relationships between the individual and society as a whole (justice in the courts). These daily relationships are simply a part of life, and the search for making them both tolerable and acceptable is a part of the quest for justice.

We are also reminded by the title that justice is never fully attained. It is always a goal which retreats in front of those who pursue it. We attain justice in a given area only to find that the view of justice from our new vantage point (the definition of justice if you will) has enlarged so that the quest is now even broader than

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