THE REIGN OF LAW UNDER AN EXPANDING BUREAUCRACY *

No one can deny that we are in an era of rapid social change, vastly accelerated by two world wars within a quarter of a century, and by the catastrophic world-wide financial collapse that marked the years between them. One visible result has been the most intense searching of the reasons and causes that seemed to support and justify the social and political organization which some, I hope too hastily, are already describing as the "old order"—the regime under which most of us here today gleaned our education and *formation*, and under which we began and pursued our professional work.

It was an era of settled security and high financial reward for the comparative few, when a career and a financial programme could be planned with remarkable certainty. But that readily predicted success of the few rested, as it has always rested, on the shoulders of the many, the uncounted millions of the masses who on the whole knew not security, but did know a good deal of poverty, helpless old age, the unemployment that was seasonal in every year or universal in times of depression, the bleakness of the slums, the lack of education, the bitterness of feeling that they were exploited though helpless to redress the balance, the conviction that, because it was so expensive to obtain there was so-called justice for the rich but no justice for the poor.

That intense inquisition, which I have mentioned, into the reasons and causes supporting a society so unbalanced, has questioned its righteousness and denied the necessity and the justice of its continuance. Governments in the democracies, depending upon the popular vote, and conscious of the trend of thought of the masses, have tried by legislation to meet some of their demands for a wider distribution of the amenities of life—greater long-term security, old age pensions, unemployment insurance, workmen's compensation, prevention of industrial accidents, the socialization of medicine and hospitalization, minimum wages and maximum hours, better and free education, holidays with pay, greater if not absolute state control of all public services, utilities, banking, insurance, natural products and natural resources. The Beveridge Report in England, the Marsh Report in Canada, the outright socialism of the C.C.F. party, the organized strength of the labour unions which have

*An address delivered on September 3, 1943 at the Meeting of the Quebec Bar Convention at Murray Bay, Que.

threatened to become a government within a government, a spirit of revolt against the old disciplines, the clamour and bitterness of parties and of racial and religious groups—all these are indications of a universal ferment of ideas, of unrest, and of mighty changes in the making.

Nor can we, nor should we, condemn them outright. We cannot now rightly assess them, because of our prejudices or of our enthusiasms, for or against, according to our individual background and point of view. They will have their effect for good or ill, like all revolutions of feeling and opinion in the past. Viewed in the historical perspective of a hundred years from now, they will doubtless seem moderate and progressive, a step forward in the ceaseless march of humanity in its endless evolution. As Emerson once said, it is well to "look at the years in the light of the centuries."

A mere glance at the legislation in England and in Canada during the last twenty-five years will show to what extent Governments have tried to anticipate and to meet and control within reasonable bounds these criticisms of old established *laissez-faire*, and these demands for a new order based upon a wider justice and a more effective use of our national and individual wealth. So great has been the volume of this new and somewhat experimental legislation, that Governments have for one reason or another handed over to innumerable Boards and Commissions not only the detailed administration and enforcing of this legislation, but actually the right to implement it by law of their own making. Legislative concessions and improvements in one direction have suggested or made inevitable changes in other directions. One result has been a rapid increase of regimentation and disciplines by way of enforcement of the new laws which at first sit uneasily upon a public accustomed to great personal liberty. It may be said with some reason, that a well-organized society will avoid multiplying laws that restrain individual liberty. If that is a sound proposition, then ours is ceasing to be a well-organized society, but one in which a multiplicity of laws not only restrains individual liberty, but threatens to put us outside the protection of a reign of law administered by trained and impartial Courts.

What do we mean by the reign of law?

Some of you may have read my report on *The Lawyer and Administrative Boards*, which appeared in a recent issue of La Revue du Barreau. There the point was made that by long tradition, at least under our British constitutional system,

Legislatures made laws, complete in themselves, and impartial Judges, appointed by the State for life, interpreted them as between citizen and citizen, or as between the citizen and the State. Having made a law, the Legislature more or less stood aside, and left its enforcement to the individual complainant or plaintiff before the Courts criminal and civil, and necessary adjustments, economic and otherwise, to private enterprise, "without the direct intervention of governments. The principal function of political organization was to maintain a framework of general order in which this process could go on".

That was the reign of law. It left room for individual liberty of action and interpretation, subject only to judicial restraints. It left the Government free to carry on the public business of the country with the help of its permanent civil service. Under it we prospered increasingly, beyond anything accomplished in countries under a different system. It encouraged and rewarded the ambitious and the energetic person. If anything, it erred in so far as it too ruthlessly favoured the survival of the fittest—though as to that, I would only suggest that we would not have brought our civilization to its present brilliance and efficiency by coddling the unfit at the expense of the fittest. A levelling process would soon blot out any difference between them, and slow down the whole machinery of civilization to the pace of the unfit. There was always room at the top, we said, and on the whole those at the top earned their eminence and repaid society a thousand-fold, by their example and by their leadership.

What is now happening to that reign of law?

First, there was justifiable criticism. The reign of law was legalistic, in the sense that it rested largely on rigid rules rigidly applied, often without respect for the real equity of the case as between man and man. Such is the text of the law, we say—ignorance of the law is no excuse—you have had justice, not necessarily according to equity which the Court cannot consider unless it happens to fit within the rule, but according to the letter of the rule. *Lex dura, sed lex.* It is and always has been a system of express rules, of many subtle exceptions, of highly technical rules of evidence, of pitfalls for the uneducated masses who find it difficult and are slow to seek legal advice.

That was a workable system for many centuries during which the entrenched minority made and enforced the laws. It may be ceasing to be a workable system when the masses in their overwhelming majority, as the result of better education, of closer

and more militant organization, and of inspired leadership, demand a broader, cheaper, quicker, more humane justice based on equity which anyone can understand, rather than on a formal and abstruse rule as unknown to the layman as it is often open to sharply varying interpretations by lawyers and Judges. What is the law? It is what a Superior Court Judge may decide today, the Court of Appeal in six months, the Supreme Court in a year, and the Privy Council in two years. That is fine for the lawyers, say the masses—but it is not fine for us. Give us Boards and Commissions, administered by laymen like ourselves, who understand our problems, who know not and will not be bound by rules of evidence and the technicalities of procedure.

There was justifiable criticism, too, of the law's delays and of the law's expense—one law for the poor and another for the rich, or justice for the rich and none for the poor. The delays are seldom the fault of the public, but rather of the system, of many appeals, and of both Judges and lawyers. But the public pays, and is impatient, and the reign of law is in disrepute. And the law's expense—to the discouragement of the poor litigant, and often the enforced denial of his day in Court at the fount of justice. His one hope is the lawyer who, regardless of reward, and determined to see justice done, makes his case his own and gives freely his time and skill and money, in order that, so far as he can prevent it, the reign of law shall not be in disrepute.

But why multiply instances to justify a circumstance so well understood? If there is a remedy, let us seek and apply it, in our own interest, remembering that there are those who contend that ours is *une profession qui se meurt*, and that there are others who would welcome our extinction. In Wat Tyler's Rebellion in England, in 1381, the rebel mobs who invaded London sought out particularly the lawyers for massacre.

What else is happening to the traditional reign of law?

Actually, it is in danger of being replaced by a system operating without science, careless of tried legal principles, and outside the jurisdiction of our established Courts—the negation of a reign of law.

The process by which that replacement is taking place, has different aspects.

1. All our Governments are legislating more and more by Order-in-Council of Cabinets, and by Regulations made by Governmental Departments and by numerous Boards and Commissions. The familiar procedure is to pass a skeleton statute providing for this or that, and then enacting that the purpose and

administration of the statute shall be given effect from time to time, by Order-in-Council, or by Regulations approved by a Department, or by a particular Board or Commission, but in either case having the "same force and effect as if contained in the Act and enacted". By that means, the legislative function is delegated and largely abandoned—to the discretion or the policy of a Minister, or to the doubtful wisdom and experience of departmental functionaries, who become our actual legislators—and not only our legislators, but our inquisitors, policemen, judges and executioners. Their Order-in-Council or their Regulation has become *substantive law*, enforced by the blind and ruthless partisanship of bureaucratic red tape.

Why elect at vast expense our representatives to sit in Parliament and make laws—to legislate within the limits of the mandate we tacitly give them, and only under a great emergency to exceed that mandate, if their real function is to delegate their legislative power and responsibility into the hands of an arbitrary Cabinet and a host of arbitrary Departments, Boards and Commissions?

I make all allowances for the necessities of the war—any reasonable method making for speed and efficiency had to be adopted. I note only that at Ottawa since the war began, about 16,000 Orders-in-Council have been passed, and Regulations filling many thousands of pages. But prior to the war, when there was no such compelling pressure, the process was well advanced; and, if not curbed and controlled, will, with the impetus and fixation of war-time habits, become a most serious matter when the war is over. Democratic institutions cannot survive the abandonment by a freely elected people's Legislature of its exclusive legislative power to hordes of functionaries. A bureaucratic dictatorship is not democracy. It is dictatorship.

Statutes of this kind, in their words of delegation, frequently contain no words limiting the definition of the powers delegated. On the contrary, they leave all power under the Act to the absolute discretion of the Cabinet or of a Department, or of a Board or Commission—by giving them power "to carry out this Act"; or "to give effect to the provisions of this Act"; or "for the purpose of fully carrying out the true intent, purpose and object of this Chapter and of any contract made under it"; or "as he (the Governor in Council) may deem necessary for carrying out the provisions of the Act"; or "for any other purpose which may be deemed expedient for carrying out this Chapter whether such Regulations are of the kind enumerated by (the Act) or not", and so on.

If Cabinets and Departments, Boards and Commissions, can thus at discretion enact substantive law today, and amend it to-morrow and as often as they like, to suit pressure groups or changes of policy, what protection has the public in this maze of "laws"?

What protection has the individual before the Courts against this delegated legislation—for the protection of his rights of personal liberty and property? There is no possibility of public discussion before it is made operative. It has not had three readings in open Parliament, nor any consideration in the Senate. Its text has been under no scrutiny by the public's chosen representatives. It has had no publicity in the press. It is concocted frequently in vague language of doubtful meaning. In the result, the Courts are faced with Regulations and Orders which, if there is a constitutional right of delegation, they cannot restrain on the ground of lack of jurisdiction, but which are binding as being substantive law. And that raises the whole question of what, as a matter of strict constitutional law, are the powers of Ministers, and of Boards and Commissions, to legislate under delegated authority, or of Legislatures, which are the people's mandatories, to delegate to others the powers by first intention vested in them exclusively—a question already seriously studied in England. The reign of delegated legislative power is the negation of a reign of law. It is a system which threatens to deny the individual even his traditional and most sacred right of "liberty within the law"; for it is legislation touching and regulating, limiting and policing, at the will of bureaucrats, and changeable from day to day, the daily life and the normal activities of millions of individual citizens—confused in its labyrinthine mazes.

What becomes of our Civil Code, of our carefully elaborated jurisprudence, of *la doctrine*, of the common law of the other Provinces—engulfed and overwhelmed by such a mass of undigested and occasional legislation, forced upon the public, by the consent of our parliamentary representatives, it is true, under the phrasing of the statutes in question, but apparently in complete ignorance of their offence against the democratic spirit and conscience?

2. Added to this assumption of judicial and legislative power by Governments and Departments, in addition to their normal administrative functions, is the privileged immunity which the Crown, in the right of the Dominion or of the Provinces, has always retained under the general law.

I have already suggested the extreme extension of the activities of the Crown into spheres normally occupied by private enterprise. Yet far from yielding any of its immunity from legal process, it has repeatedly extended that immunity to cover all the acts of its servants in these expanding fields of interference. But while the traditional immunity of the Crown was doubtless at one time justified on historical grounds, it is not justified in our times. Still less is it justified for the protection of administrative Boards and Commissions. Why should the public suffer at their hands, for their mistakes and poor judgment or lack of impartiality and be without recourse against their principal, the Crown?

That, we may well agree, is not a reign of law.

3. In some instances, that immunity takes the form of denying any right of recourse to the Courts of first instance, or even of denying a right of appeal, from decisions of various Boards and Commissions. Absolute power cannot go further than that—to deny the citizen his right of recourse to justice administered in the Courts, civil and criminal; and his right of appeal from arbitrary decisions of Boards interpreting often their own substantive law in the form of Regulations made by them. If we abolish such recourse and appeals, we abolish the Courts; if we abolish the Courts, we abolish the lawyer. And if we abolish the Courts and lawyers, we abolish the machinery by which, through centuries, the British citizen won his way to personal liberty and the right to have his cause heard in open Court before the King's Judges.

I need not cite to this learned audience instances of such legislation. You know of statutes in this Province prohibiting any question, review, or restraint by injunction, prohibition or mandamus or by any other process or proceeding in any Court, of or against any action, decision or order of the particular Board. You know that the Workmen's Compensation Board renders final decisions on all questions of law and of fact, without right of appeal. I can cite you similar statutes in practically every Province of Canada. And we lawyers know how often workmen come to us with bitter complaints of what they consider the injustice of decisions affecting them—and you know our helplessness to advise, since there is no recourse in law.

Need it be pointed out here, that if we are to maintain a sound system of law, there must be a right of recourse to the Courts by way of appeal from the decisions of Government Departments, Boards and Commissions, on any point of law, including the jurisdiction of the body in question.

Without it, I suggest to you, that there is not a reign of law; and that without a reign of law there grows up chaos on one hand, and on the other naked and arbitrary power.

4. There is another serious aspect of this whole matter. Not only are numerous Regulations drawn up by laymen, and by persons without special skill in draughtsmanship, designed to control and interfere with our liberties as individuals, and having the force of substantive law, but actually administered and interpreted largely by laymen, both on law and fact—and often, as we know, without right of appeal.

You and I know even of Boards before which a lawyer, sworn as a minister of justice, sworn to defend his client and to defend the right and to defend justice, is absolutely prohibited from appearing on behalf of a client.

Not long ago, I had to appear before a "Court of Referees". The question was one of law and fact. The Board consisted of three laymen—of no special aptitude. The Chairman was in ordinary life a small merchant.

The Chairman had absolute discretion under the Act to say whether a hearing by his "Court" should be allowed or not. He had absolute discretion to determine the procedure. He insisted that all my questions, even to my own witnesses, should be first put to him—he put them to the witness if he thought fit, and only then. I was refused permission to produce certain witnesses, after first being forced to declare what their evidence would be.

The Act did not in terms exclude my appearing. But in effect, the Chairman, by his absolute control of so-called "procedure", was able to limit my activity, and he could have effectively excluded me. He went out of his way several times, when the meaning of plain words in the statute was discussed, to tell me that he was "not a smart lawyer like you", but that his interpretation was the correct one.

Under the Act, the Minister was empowered to "revoke, cancel or vary any instruction, order, direction or form made or prescribed pursuant to" the Regulations, and though I appealed to the Minister, he replied that he could not interfere. The Act provided no right of appeal to the civil Courts from what seemed an injustice and illegality.

I suggest to you that this is not a reign of law—where a trained lawyer does not preside over a quasi-judicial body such as this, and many others like it; where the principles of legal science are ignored; where the ordinary rules of procedure and evidence, sanctified by centuries of experience, are left to the ignorance,

prejudice and inferiority complexes of laymen of no education or no special training; where the lawyer is either excluded entirely, or limited in his function of defender of the people against their oppressors; and where there is no right of appeal to the fount of justice in His Majesty's duly constituted Courts of Law.

Through the efforts of the Commission on Professional Interests, this whole subject was brought before the Meeting of the General Council of the Bar held on June 12, 1943, and the General Council unanimously adopted the following Resolution "concernant l'organization des commissions, régies, bureaux ou offices":

> Sur proposition de Me Maurice Tellier, c.r., appuyé par Me Auguste Boyer, c.r., et Me J. C. Samson, le Conseil, à l'unanimité, adopte la résolution qui suit:
>
> Le Conseil général du Barreau de la province de Québec considère qu'il est essentiel et recommande instamment, tant dans l'intérêt public que pour le bien des individus,
>
> Que les présidents des commissions, régies, offices ou bureaux ayant une compétence judiciaire soient des légistes qui seuls décident toutes les questions de droit, mais toujours sous réserve d'un droit d'appel à un tribunal de jurisdiction supérieure;
>
> Que les membres de ces organismes jouissent d'une indépendance absolue dans l'exercise de leurs fonctions, et que pour assurer cette indépendance nécessaire, ils soient nommés à vie et durant bonne conduite, ou pour une période déterminée de pas moins de dix ans;
>
> Que les avocats soient reconnus devant ces organismes au même titre et avec les mêmes prérogatives que devant les tribuneaux réguliers;
>
> Que le procédure y soit déterminée par des règles précises, et que les tarifs des honoraires y soient fixés suivant la loi.[1]

Subsequently, the Commission on Professional Interests sent copies of that Resolution to the Hon. Mr. St. Laurent, K.C., Minister of Justice, to the Premier of the Province, the Hon.

[1] "The General Council of the Bar of the Province of Quebec considers that it is essential and urgently recommends, in the public interest and for the advantage of individual citizens;

That the presidents of all Commissions, Boards of Administration or Departments having judicial power, be lawyers who alone shall decide all questions of law, but always under reserve of a right of appeal to a court of superior jurisdiction;

That the members of these Commissions, Boards of Administration or Departments, shall enjoy absolute independence in the exercise of their functions, and that in order to ensure this necessary independence, they be named for life and during good conduct, or for a fixed period of not less than ten years;

That advocates, as representing their clients, be recognized before these Commissions, Boards of Administration or Departments, with the same status and prerogatives as they have and exercise before the regular courts;

That the procedure before such bodies be determined by precise rules, and that the tariff of fees of advocates appearing before them, be fixed by law."

Mr. Godbout, and to the Attorney-General, the Hon. Léon Casgrain, K.C.

5. That absence of legal science of which we spoke, is a menace in another sense.

The reign of law which was evolved from the faithful application of legal science, and upon which our business enterprises and our institutions are founded, grew from precedent to precedent into a settled order which permits our civilization to function. It did so, because the trained legal mind, always under criticism from the Bar and the higher Courts, modelled and guided its evolution, became familiar with its philosophy and with its inevitable principles; there was always *precedent* or *la doctrine*—always a guide to the application of principles to new sets of facts. There were records of these precedents and principles, and of their application, in a multitude of instances.

What do we face, if administrative Boards and Commissions, Cabinets and Departments, continue to submerge general and well understood principles of law under thousands of Regulations administered and enforced by them—without special science, without professional draughtsmanship, without lawyers presiding over and appearing before them, without appeal to the Courts of His Majesty, without precedents, and without any ordered and scientific reporting of decisions? Each an independent quasi-judicial unit, independent of every other, administering its own particular brand of Regulations, imposing fines, interpreting the law, putting us to expense and loss and even in gaol, guided and controlled by no fundamental legal principles, and knowing no precedents except those of its own making—even assuming that it chooses to follow them.

If substantive law in the form of ephemeral and easily changed Regulations and Orders made by innumerable Boards and Commissions, is to replace our ancient reign of law, one peremptory task faces us—to record their decisions and orders, from every source in Canada, to evolve from them some philosophy, some predictable principles guiding adjudication, some adequate system of references to precedent. Otherwise, there looms the "reign of Chaos and old Night", to adapt the words of Milton in "Paradise Lost."

* * *

That is not to say that the whole system is necessarily bad. What is sought by the use of administrative Boards and Commissions is a means, as yet experimental and immature, of keeping order and giving more general satisfaction in a complex and

restless civilization. But if an administrative system is to become a settled policy, two vital conditions must be observed. The administrators must administer laws made in detail by Parliaments and Legislatures, after full debate—not laws made by themselves in their discretion. And we lawyers, and the Courts before which we have for centuries fought for the rights and the freedom of men, and the principles of judicial science which guide and inspire us, must somehow be allowed, and indeed required, to make of this new administrative system—in its turn, and in useful ways,—a reign of law.

WALTER S. JOHNSON.

Montreal.