

THE JUDGE AND DUE PROCESS¹

The distinction carries for me particular personal satisfaction. It has been conferred in the presence of a renowned judicial colleague, your Chairman of the Board, and on a presentment by a former academic confrere, your President. This Convocation ceremony is unique, therefore, in surrounding me with the approbation of two personal friends and with the aura of the two professions to which I have devoted my adult life, university teaching and judging.

My service on the Bench has confirmed an initial feeling that I would not find the transition from teaching to judging too severe. I was rash enough to tell some friends, who asked me almost seven years ago how I compared my work as a law teacher with my work as a judge, that the main difference was that as a judge I had fewer students to contend with. Jocular as the remark was, my experience has taught me how much of a teacher there is in the judge—or, if I may put it more broadly—how much teaching is connected with the adjudicative process.

It is not teaching in any such traditional sense as lecturing to a class, or conducting a seminar; it is not teaching to any immediately identifiable group of students; it is not teaching directed to a graduation ceremony or to bringing about some particular qualification in those who are taught. It is teaching at large, in two connected senses; first, in exhibiting a process of rational decision-making by independent public officers; and second, in the sense that all may listen to or read judicial expositions of private and public issues that arise in the cases that come before the courts for decision.

The judge cannot count on universal acceptance of his reasons for judgment any more than the professor can count on total student acquiescence in his views. Each exercises a control over those that are before them; the judge over the parties to the cases that he hears, and, indirectly, over persons unknown to him who may be affected by his decision; the professor in his authority to examine and test his students' competence. The judge, however, sets no examinations; he does not pose questions, except in the course of the hearing to clarify the issues; rather he tries to provide answers to questions that are posed for him. Indeed, he is compelled to answer because this is a duty associated with his office. It is not an invariable duty of a professor.

The judge as teacher — or, if I may extend this description, the judge as educator—provides instruction at two levels concurrently. His work is important as professional education for other judges, for the

1. A convocation address delivered upon the conferring of an honorary Doctor of Laws degree at the University of Manitoba on May 28, 1972.

legal profession and for the Legislature. I do not dwell on that here, speaking as I am not only to law students but also to students in the health sciences and to students in various fields of graduate study. What I would dwell upon is a second level at which the judge's work is instructive, and that is as a contribution to public education; in my view, very necessary education of the citizenry in the working of the judicial process and its importance to our sense of security as members of a complex society.

This is a matter that rises above our special individual interests as doctors, or biologists or physicists or economists or writers or trade unionists or manufacturers. We look to the institutions of our society to assure us of conditions in which we may pursue our respective interests in relative tranquility and have our conflicts resolved peacefully and certainly without periodic upheaval; and that means an assurance that those in authority from time to time will be as committed and as obedient to orderly processes as those who are not.

Our judges and our courts are, to a considerable degree, partners with Parliament and with the provincial Legislatures in governing our country. They govern, however, in a subordinate and in a more individual sense than in the general overarching sense in which our elected governors administer our affairs. The judges apply the law, which Parliament and the Legislatures have enacted, to individual cases; but there are also large areas of the law which have been left to the judges and courts to work out, as in the fields of contract and property and tort. What I am concerned to emphasize this afternoon is not the role of the judges in developing various branches of the law, but rather their role in establishing fair procedures through which decisions are reached. Our judges have had a historic association with the concept which we call "due process of law". The phrase, which has its roots in Magna Carta, sums up our attachment to civility no less than to legality. In popular terms, it means fair play; assuring a hearing on the pros and cons of an issue to those affected; apprising them of what they have to meet or, in a criminal case, of the charges against them; giving them an opportunity to produce witnesses and to counter evidence adduced against them; allowing them to present argument on the facts and legal issues raised in the litigation; and assuring them finally of a considered decision by an impartial judge.

What is important about due process is the fact that its rationale has taken hold beyond the court room and has been applied in administrative proceedings and to public affairs generally. It has, in short, become a social norm, implying both a right of individuals and groups in our society, who have grievances to air, or demands to press, or claims to litigate, to make themselves heard; and, correlatively, an ob-

ligation to advance their causes through rational procedures which, after painful experience, have displayed naked force as the means through which the case is made for change or for the redress of wrongs.

Observance of due process of law is a seal of the right to dissent, to protest, to press for social change. It is no accident that the growth of liberty depended on procedural guarantees such as the writ of habeas corpus, through which a person detained is entitled to have the cause of his detention examined by a court. The history of the common law tradition shows how perceptively judges and theorists of the law saw the centrality of rational procedures as the safeguard of the liberty of those who were in opposition to the wielders of power. They came to realize that by subjecting all to due process of law, by prohibiting arbitrariness by those in positions of power, there would be a secure base for the espousal of divergent views, from whatever direction they came at any particular time.

In these days, when causes of all kinds abound and are pressed with the same indiscriminate zeal regardless of their relative weight in the social scale, there is every reason for us to insist that they be sifted through the cooling and civilizing procedures which have been time-tested in our courts and in our deliberative assemblies. This will not, of course, automatically ensure their attainment; but it will assure those of us whom the advocates of various causes must persuade, that their causes can stand rational examination and that in accepting due process for themselves they will accord it to those who oppose them.

There is an irony in our tradition of due process, among whose prominent elements are the right to be heard and to petition those in power to remedy alleged grievances. The irony lies in the fact that the very tolerance which due process supports is invoked in a manner which subverts it. Bringing home to those in authority, whether in university or in any of the various levels of government, alleged grievances appears to some, in all innocence perhaps, to entitle them to bring them home literally—by invasion and occupation. If there is no resistance—and it has been rare—absence of violence becomes for them the hall-mark of due process without pause to examine the contradiction that resides in a so-called peaceful sit-in.

I cannot escape reminiscence on this point. On December 9, 1964, your President, Dr. Sirluck, and I, who were on a university assignment together, stood in front of the graded steps of Sproul Hall, the administration building of the University of California at Berkeley, and watched the take-over of that building by an invading force of students. It marked the opening chapter in a book of events that spilled over into Canada. A beneficent providence took me out of university life in the

summer of 1965, and I cannot claim any personal knowledge of how the universities have balanced their accounts as between the goodness of ends sought and the badness of means used to achieve them. I should like to think that uncoerced due process brought the best results, not so much in their perfection, but in their general acceptability as long-run solutions to whatever ills were besetting our universities.

Nothing I have said is intended to still your cries against injustice or any desire you may have (and I hope you do have it) to improve the human condition. Whatever your particular calling, you have a common claim as citizens or residents of this country upon the continuing civility of life within it. That civility will be lost if we abandon our trust in due process, in rational debate and open discussion, as the best means of assessing the multifarious demands for social betterment that are being continually pressed by various interested groups in our society. We are bound to have our own priorities even as to causes of which we approve; and we cannot always be confident that our approval will attract general support, although we may think that it should. To seek to force surrender to our own preferences because we are so completely convinced of their social value is simply to invite others to do the same. And can we, ultimately, avoid defending by force what we have gained by force?

I realize that I speak from a haven of considerable security, but I also speak as one who was a student in the grim thirties and a professor in later years, and thus have been witness to vast and beneficial changes that have been wrought—not always as speedily as many might have wished—through orderly processes. Certainly, external as well as internal influences were associated with those changes, but we have held to due process in making them. I express a shared experience of judges and teachers of law that our best assurance that we can continue to make changes, and in orderly fashion, lies in retaining that hold.

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