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From Realities to Abstraction

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From Realities to Abstraction*

In 1914, the man who was to become Lord Sankey, was appointed to the Trial Court. Fourteen years later, he was promoted to the Court of Appeal. On that occasion, he wrote to a friend "I leave the realities of the King's Bench for the abstractions of the Court of Appeal". These two words, realities — abstractions, constitute a focus point for my journey with you to-night.

In 1935, when I entered the Law School of McGill University, the week was divided roughly between ten hours in the Lecture Room, fifteen hours in the Library and the rest, which could extend into twenty hours or more, in an office downtown. If the student was lucky enough to find one where he was put to work, and that was my fortunate experience, the mix of principles and facts on a daily basis was fruitful indeed. Of course, a carbon copy of that system is not possible nowadays in view of the large number of students involved. In my class, we were nine.

When I graduated, the insertion of the Bar in the social fabric of the time was not perfect — nothing ever is — but it was more than adequate. The relations between the lawyers and the population were not strained to any appreciable degree. Which does not mean that lawyers were always treated gently by all. Voltaire and Shakespeare are only two out of hundreds of writers who have exercised their wit at their expense. More recently, Chesterton had this to say:

> The horrible thing about all legal officials is not that they are wicked.... not that they are stupid.... it is simply that they have got used to it.

Such remarks were not taken too seriously. They were even considered good fun. Those were relatively simple times where the lawyer was usually both solicitor and barrister in the English sense of the terms. My own training was before the courts and my remarks must be understood in that context. That training was basically in one province, even if over the years I have had the privilege of practising in others parts of Canada.

A few other points. In the thirties, the partnerships were small. Lawyers and citizens alike believed in a personal relationship. Only a handful of lawyers were in the service of the various Governments, doing mostly solicitor's work. In the same fashion, legal departments of even large corporations were kept to a minimum. Practically all Court work from Governments and corporations was entrusted to outside counsel.

Qui était donc cet avocat au sens que j'appelle classique? C'est celui dont Jacques Hamelin disait dans la préface de son Abrégé des règles de la profession:

> qu'il est à mi-chemin entre le plaideur et le magistrat, qu'il a été créé pour dépouiller les discussions judiciaires de ce qui les encombre inutilement, des passions qui provoquent et animent les conflits humains, qu'il doit s'appliquer à apporter au tribunal les éléments de vérité qu'en toute conscience et loyauté il a systématiquement recherchés....

Le caractère que je dirais essentiel de cette profession est son indépendance totale à l'égard de tous: tribunaux, pouvoirs politiques, client même. J'ajouterais que c'est à l'égard du client que cette indépendance est la plus nécessaire. Sauf certains cas prévus par les règles de l'éthique, l'avocat doit pouvoir refuser un dossier. S'il l'accepte, il doit être maître de sa présentation. C'est parce qu'il défend les intérêts de son client *contre* tous, même contre le client à l'occasion, que l'avocat doit être tenu pour exercer une profession essentiellement différente de toutes les autres. Je vous invite à relire deux pages de Roscoe Pound dans *The Lawyer from Antiquity to Modern Times* (pages 24 à 26).

L'avocat est-il un être au-dessus de la loi? Non, bien au contraire. D'après Goethe, il existe pour lutter à la fois contre l'injustice et contre le désordre. Sa vie doit donc être faite de justice et d'ordre.

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* A public lecture to the University of Ottawa Law School, Thursday, February 24, 1977.

Élément essentiel de la société, il se doit de se discipliner lui-même, de s'imposer des standards de compétence et d'honnêteté, qui satisfont les plus difficiles de ses concitoyens. En des temps paisibles, ces standards suffisent; ils tendent à une relation de plus en plus étroite avec les standards de la collectivité. D'où une acceptation générale des privilèges de l'avocat parce que ses services à la collectivité sont facilement identifiables.

Tout, ou presque tout, a changé avec la guerre de 1939 et les bouleversements économiques et sociaux qui l'ont suivie. Relativement peu nombreux jusqu'alors, les avocats ont vu leur nombre doubler et tripler en quelques années. Dès lors, il devenait impossible de transmettre oralement les traditions du Barreau, de les vivre de jour en jour avec un patron; ces traditions, et l'éthique qu'elles portent, ont dû être enseignées comme matière théorique et non vécue dans la réalité quotidienne. D'où une première rupture dans cet équilibre entre société et avocat.

Une deuxième rupture devint vite apparente. La complexité du monde née de la guerre entraîna l'adoption d'une législation à la fois abondante et complexe. Celle-ci fut reçue par une population de plus en plus urbaine, à une époque où les comparaisons avec les autres parties du monde devenaient plus faciles. Furent ainsi multipliés les besoins de consultations juridiques. À quoi, il faut ajouter un autre facteur de grande importance: un climat de revendications dans tous les domaines.

In the fifties, we saw a tremendous growth of the Law Departments of the various Governments and of the commercial corporations. At the same time, the partnerships in the private field multiplied in size by two, three and four; in these new partnerships, because of the buoyant economy of the period, the solicitor was decidedly more important than the barrister.

All of these developments created strains within and without the Bar and the adjustment of the lawyer to this new world is far from completed. It is not my intention to review here all of the solutions that might be adopted to bring the advocate and society to a better equilibrium. In my days, I have offered my grain of salt and I leave to younger and better persons the task of keeping alive and well an independent Bar well attuned to the new society.

One fruit of this recent history is the birth and development in Canada of Legal Aid. Until the last war, the need for free legal services was practically non-existent. As already noted, life was much less complicated and whenever advice was requested by persons not in a position to pay a considerable fee, legal aid was in fact given on that basis. Advice in that context included pleading before the Courts.

But Legal Aid was now needed. And it was at first organized and paid for by the Bar alone. This was in the mid-fifties. Soon, however, the demand outran the possibilities of the Bar and gradually the provinces and Ottawa adopted the system with which we are all familiar. It was not an easy time for the Bar: many Governments, and I should rather say many technocrats advising Governments, felt that it would be neater and easier to create a large group of salaried lawyers who would provide the legal services needed by those below a certain income level. Neat it was. But precisely because it was created by persons having no idea of what a lawyer is, it was altogether too simple and too sophisticated. It failed to realize that because the person in need of legal aid is very often opposed to the State, be it in criminal matters or in other fields, it was not satisfactory in principle to have the lawyer defending those citizens paid by the State and thus under its control. A long battle made it possible to convince the Governments to provide at least a choice for the citizens between the salaried lawyer and the lawyer in private practice. If I am to believe recent new items, the battle may yet have to be fought anew.

Before closing the door on my days at the Bar, I would like to mention one subject matter that retained the attention of the lawyers in those years. My purpose is to illustrate further my profound belief that by and large the Bar is attuned to the problems of the times.

Dès le début de l'enquête sur le crime organisé à Montréal, la question suivante fut posée:

> Le combat contre le crime organisé doit-il se livrer sur la place publique et, dans l'affirmative, doit-il être mené sans que la moindre règle de droit ne protège qui que ce soit, particulièrement les innocents?

Et cette question fut suivie d'un examen des règles de la preuve en matière criminelle, examen fondé en grande partie sur le rapport présenté au Parlement du Royaume-Uni, en 1972, par la Commission de Refonte du Droit criminel. La conclusion préliminaire fut la suivante: nos règles de preuve sont trop complexes. D'une part, elles rendent plus difficile la poursuite du crime organisé alors que, d'autre part, le citoyen ordinaire n'en reçoit pas la protection que lui offriraient d'autres règles beaucoup plus simples et tout aussi efficaces. En forçant un peu la pensée de Bentham, on pourrait presque lui faire dire: si tous les criminels assemblés avaient créé une loi de la preuve adaptée à leurs besoins, ils n'auraient pas pu faire mieux. Ici encore, si je dois croire les échos que rapportent les média d'information, cette conclusion préliminaire n'était pas dénuée de fondement.

And now for the present. I am now a judge. The Devil's dictionary defines a judge as a person who is always interfering in disputes in which he has no personal interest. There are, of course, less charitable definitions. Fortunately, the positive side has been asserted more often, for example by Bacon when he wrote that judges "must be lions but yet lions under the throne". Please note: under the throne, not under the Executive Branch of Government.

The life of a judge in the Supreme Court is very secluded, probably too much so. In a recent article by Marcel Cadieux, the head of the Canadian Mission to the European Communities, I was struck by the first paragraph:

> One of the problems of diplomats is that they live abroad — and for long periods. Often they find it difficult to keep in touch with developments at home. Certainly, they read news bulletins and national publications, but they miss the atmosphere, the moods, that condition public opinion and go a long way to explain national decisions or reactions within the country.

This is the situation which judges of the Supreme Court have been describing for a long time. Some fifty years ago, Chief Justice Anglin underlined the distinct advantages for us "to be brought more frequently into direct and local contacts with members of the Bar of the several provinces". And I would add: with other groups and persons. There is no other method if we want to keep abreast of the realities of our times.

Even such regular contacts with the outside world will not protect us from all dangers inherent to a life in a ivory tower. Without attempting to give a full list of my sins and, of course, I am not suggesting that my brethren are sinners, allow me to mention four:

1) to erect a question of fact into a question of law;
2) to treat the words of a previous judgment as if they were the bible;
3) to read a statute as if the legislator could have foreseen all the situations of fact to arise in the future;
4) to legislate in the quiet of one's chambers.

Let me say a few words about each one of these.

To transform a question of fact into a question of law is the easiest thing in the world. Realities have the bad habit of sabotaging pure reasoning so that the temptation is ever present to push them to the side and to move on to the perfect logical conclusion that the mind has seen from the beginning. The only trouble is that, as judges, we are dealing with an actual case between two litigants who are submitting to the Court the facts of their very real dispute. And it is a conclusion to that dispute that the parties are expecting from us. They are making theirs the saying of Oliver Wendell Holmes: "The life of the law has not been logic; it has been experience".

And to ward off this danger, too often we cannot rely on counsel. Many of them have neglected to learn the art of advocacy and appear before the court as if they were before the jury of a debating society. Earlier this month, the media quoted Chief Justice Evans:

> Sometimes, I think students go into Law School pretty good and come out pretty bad.

He is strong enough to defend himself but I suggest that his message was simply what we are examining together, namely that too many lawyers are long on law and short on facts. Could that situation be in part the result of the type of teaching received in the Law Schools? There, I am told, the

great verities of the law are contemplated at a quiet pace far removed from the difficulties of debating and contesting about the facts. But facts there are, and they cannot be bended to suit the law. With the help of the Bar, the judge will examine the facts and the law, not only the latter remembering with Louis Brandeis that

> a judge rarely performs his functions adequately unless the case before him is adequately presented.

Les juges de toutes les juridictions sont sujets à la tentation de voir dans les jugements antérieurs la réponse à toutes les questions. Mais il m'apparaît que la tentation est encore plus insidieuse pour les juges d'une Cour d'appel; plus le magistrat est éloigné de la contestation des faits, plus il est porté à donner de l'importance au mot écrit. Et pourtant il ne faut pas oublier que ce mot a été écrit dans un cadre factuel bien précis et que, sauf le cas très rare où les circonstances de la deuxième affaire sont identiques à celle de la première, le mot écrit n'a qu'une importance relative. C'est le devoir du juge, aidé par l'avocat, de rétablir le contexte hors duquel le texte perd de son poids. Cette démarche essentielle n'est pas particulièrement passionnante et il est tentant de l'écourter, sinon de l'écarter, pour le plus grand dommage et des parties et du droit. C'est ce que Lord Halsbury (*Quinn* c. *Leathem* (1901) A.C. 496 à 506) écrivait:

> ....every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found.

L'exemple qui me vient naturellement à l'esprit est tiré du droit criminel. L'adresse du juge au jury, même si au cours des années elle a acquis une certaine standardisation, reste un document profondément original qui tente d'épouser les contours de la cause à juger. Deux accusations fondées sur le même texte de loi mais portées contre deux personnes différentes, à quelques années d'intervalle, seront très rarement jugées sur des preuves identiques. Il est grandement probable que les tactiques des avocats dans chacune des causes ne seront pas les mêmes. À la fin de chacun des procès, chacune des adresses devra épouser les réalités de la cause avec le résultat qu'elles seront fort différentes, l'une soulignant des aspects que l'autre n'aura même pas à effleurer. Et pourtant si l'adresse dans le premier cas a été critiquée par un tribunal d'appel qui a eu l'imprudence d'exprimer ses vues en des termes généraux, la tentation est toujours là de considérer ceux-ci comme s'appliquant à la deuxième affaire avec toute la vigueur d'un théorème.

Les deux autres tentations que j'ai mentionnées tantôt sont vraiment les volets d'un diptyque: faut-il s'arrêter à une interprétation stricte et littérale ou, à l'autre extrême, est-il possible pour le juge de se transformer en législateur? Je veux voir la vérité entre ces deux pôles: comme dans beaucoup d'entreprises humaines, la vérité me semble au milieu. La première démarche, il va de soi, est de lire le texte de loi et s'il est récent et si les faits tombent carrément dans son cadre, il ne reste qu'à l'appliquer. S'il remonte à plusieurs années, une deuxième démarche s'impose: les mots avaient-ils à l'époque de son adoption le sens qu'ils ont maintenant; c'est là une recherche historique essentielle si l'on ne veut pas faire de contresens. L'interprétation créatrice du juge ne s'exerce à plein que dans le cas où la loi est silencieuse, où il n'est pas possible de prêter au législateur une prévision qui n'a pas été sienne. Dans ce cas, relativement rare, le juge peut se permettre de légiférer après avoir pris en considération toutes les données de base que le législateur, d'après la logique de ses autres interventions, aurait retenues s'il s'était penché sur le problème.

> Thus judicial legislation is the rare bird. Blackstone expresses the rule in these words:
>
> The judge is not delegated to pronounce a new law, but to maintain and expound the old one.

That there are exceptions is obvious, especially in the field of the pure common law which gets smaller and smaller every day. To my mind, the exceptions are not as numerous as at first sight would appear from a speech pronounced in 1956 by Lord Kilmuir, then Lord Chancellor:

> I believe that the law, although deeply rooted in the history of the institutions of our country, is not an heirloom which is to be taken down, dusted, reverently considered and placed back. I believe that the law is as effective a dynamic force in modern problems, as it is soundly

based on those historical roots. Therefore, I believe that the law should be brought in to help in the solution of the great problems of a modern state.

Read in its context, I do not believe that this speech goes any further than to state the right and, indeed, the duty of the judge to clarify the law and to adapt it to modern needs when the text is not clear or when the law is purely judge made.

And I certainly reject the suggestion that our courts have a fundamental role to play in settling disputes with a strong political element. Such a role is foreign to our political and legal systems. Of course, our courts cannot refuse to hear cases having political overtones but should not be asked to enter fields, the boundaries of which our political leaders refuse to cross. It is with realities inserted in a legal context that our courts are required to deal, not with broad questions of policy.

Et j'arrive ainsi à la fin des propos que m'a inspirés le mot de Lord Sankey. Ils peuvent se résumer dans cette phrase tirée des Mémoires de Jean Monnet, le père de l'Europe de la Communauté:

Je me méfie des idées générales et je ne les laisse jamais m'entraîner loin du concret.

Mr. Justice L.-P. DE GRANDPRÉ