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Justice—The Duty of the State to Submit to Legal Process*

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Micah gives the cardinal admonition to all men to "do justice, love mercy, and walk humbly with the Lord, thy God." To do justice is the chief concern of the lawyer, whether his field of activity be professorial, judicial, or in the forum. To do justice is the mandatory injunction to judges and lawyers who swear to uphold the law; for again Holy Writ tells us, "In righteousness shalt thou judge thy neighbor."[1]

Enduring law achieves justice. Entirely transitory are statutes, ordinances, decrees and fiats which signify only personal power not founded on reason. For if there is not indeed natural law, as I think there is, reason has that semblance in that it alone appears righteous to informed and impartial men at all times.

So I have been taught and so most civilians have been taught. For Domat said three centuries ago what he thought then had been too long acknowledged to be challenged: "We understand commonly by these words *laws* and *rules*, that which is just. . . . [T]he rules of the law of nature are those which God himself hath established, and which he communicates to mankind by the light of reason. These are the laws which have in them a justice that cannot be changed, which is the same at all times and in all places. . . . [A]rbitrary rules are all of those that have been established by men, and which are such, that, without offending natural equity, they may either prescribe one thing, or a thing quite different."[2]

Even the slightest observation impels the thought that justice flourishes where those who make and administer the laws proceed, not blindfolded, but in the firm conviction that neither personages nor pelf nor power may direct their conclusions.

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1. Leviticus XIX:15.

2. DOMAT, CIVIL LAW Preliminary Book, tit. I, §§ 1, 3, 4 (Cushing's ed., Strahan transl. 1850).

The concept of justice and the concept of democracy seem thus the most compatible. Subservience to a master, any master, would preclude justice. Vestiges of it remain, no doubt, in any society, however autocratic it may be. And while absolute and unfailing justice is not to be found in any society, surely the aim is to make persons secure in their actions, aspirations, and acquisitions, against the unreasonable claims of powerful members of society or those of the community as a whole.

It is to the last that I invite your attention briefly today. For in government itself resides the greatest power, and the greatest opportunity to do harm. "The most sacred of the duties of a government is to do equal and impartial justice to all its citizens."[3]

This duty is not fully met so long as it is applied only between citizens. The duty must, in reason, apply to relationships between a single citizen and the commonwealth or state itself. For the state is not our master.

The iteration of rights, privileges, and immunities, however pleasing, is of no value without assurance of procedural application; and the history of the law, so far as I understand it, is principally a recountal of our efforts to devise procedures to give reality to our hopes. The guarantee of the Magna Charta that no free man would be "taken or imprisoned . . . but by lawful judgment of his peers of the law of the land," that "we will sell to no man, we will not deny nor delay to any man, either right or justice" was not an invention of the moment but a restoration of procedural rights claimed by men at least a thousand years before Runnymede.

Not the least example of the appeal to those principles upon which the writ of habeas corpus is based appears in St. Paul's dealings with the Macedoneans, Acts 16. The recital there made shows this principle to have been deeply engrained in the people even then.

Security from wanton imprisonment is not enough. For temporal enjoyment involves things and activities, "the work of our hands." Interference with the activities of citizens by official action or inaction and injury to citizens by government and its agents is not new.

3. Jefferson's note in 6 TRACY, POLITICAL ECONOMY 574 (1816).

The seemingly inescapable multiplication of governmental agencies, functions and areas of regulation and activity immeasurably increases the incidence of dependence upon the action of officials and the need for effective procedure to restrain or command it and to remedy wrongs done. The praetor, the chancellor, the judge, have long since found the authority and power to stay the hand of the official whose ego or misunderstanding led to encroachments upon private rights. Less effective are other remedies, as we shall see.

The writ of mandamus has long been used in our state. Our Code of Practice says quite simply that the writ "may be directed to public officers to compel them to fulfill any of the duties attached to their office, or which may be legally required of them."[4]

In 1842, a stockholder undertook to use the writ to require the officers of a bank to give him access to the records of stockholders of the bank. The judges agreed that the articles of our Code of Practice "extended the doctrine and application of the writ of mandamus further than is allowed by the common law Courts." Judge Martin, agreeing with the trial judge, said that the plaintiff's object "was to remedy a denial of justice," and added "there is not any difference, in my opinion, between a case in which no remedy is provided and that in which the remedy is absolutely useless or extremely inadequate."[5] The same view was announced when, in an election case in 1880, the writ was applied to the Secretary of State.[6] The test then applied was to distinguish between the "discretionary" and the "ministerial" powers of the official.

The writ has been made to apply to the Governor himself when he exercises powers conferred by the Legislature rather than by the Constitution.[7] In the *Noe* case, the Governor had not complied with what the court correctly concluded was the law respecting the granting of oil leases on state property. The court held the Governor amenable to state statutes, but the court found a statutory difficulty in the way of speedy justice in that mandamus, being an extraordinary remedy, could not be combined with a suit to cancel a lease wrongfully executed, as this is an ordinary action. Inasmuch as the right to obtain the lease showed the special interest of the plaintiff which justified his

4. LA. CODE OF PRACTICE art. 834 (1870).
5. Hatch v. The City Bank of New Orleans, 1 Rob. 470, 496, 503 (La. 1842).
6. State *ex rel.* Barbin v. Secretary of State, 32 La. Ann. 579, 585 (1880).
7. State *ex rel.* Brenner v. Noe, 186 La. 102, 171 So. 708 (1936).

suit to cancel the first, and inasmuch as an earlier court, hereafter cited, had held that mandamus would not issue unless all interested parties were before the court, the need of statutory reform is indicated by this decision.

A digression here may be justified. The ultimate test of statutes is their application by the courts. No one can properly expect the courts to supply all the deficiencies of legislation. Indeed, we should not want the courts to attempt to do so. In our tripartite system, designed to prevent autocratic government, a harsh result in a particular case is to be preferred to the uncertainty which would result from the action of courts which did not respect the clear directions of the coordinate legislative branch.[8] As the great Edward Livingston said, judicial decisions should sharpen legislation and not become a substitute for it. If then the court feels impelled to reach a conclusion which does not agree with the court's sense of justice, nor with ours, the remedy is at hand by legislation and not by criticism of the court, which also is bound by the law.

Sometimes, however, the misapplication of existing statutory law is the problem. Let me now refer to the *McEnery* litigation[9] which occurred before most of us were born, to illustrate my point.

In 1880 the Legislature authorized the Governor to employ an attorney to assert the rights of Louisiana to lands donated to the states by the federal government. The Governor did so and John McEnery, once Governor of Louisiana, was the attorney so employed. He obtained swamp land certificates, internal improvement, and school indemnity lands for Louisiana which were divided by the Register of State Lands and a partition duly made, but the Governor refused to issue the patents. So a mandamus proceeding was filed. The defense, among other things, denied that the Register or the Governor had legal authority or capacity to pass upon the contract and to decide whether it was justified by the statute. The court found that the contract was justified. It was further argued that neither the Governor nor the Register could stand in judgment for the state. The court had first to utilize the necessary fiction that this was not a suit against the state and then said:

"In stipulating with the relator the Governor was merely the

8. LA. CIVIL CODE art. 13 (1870).
9. State *ex rel.* McEnery v. Nicholls, 42 La. Ann. 209 (1890).

agent of the General Assembly as the contracting party, and in whose stead it could with equal propriety have selected another person. Hence the relief herein prayed for is simply the execution of the legislative will, and for which in respect — to the Register of the State Land Office — mandamus is an appropriate remedy. For it is elementary that he is charged with the performance of *all duties* which precede and are prerequisite to the sale of public lands and the issuance of patents therefor."[10]

State ex rel. *Ecuyer v. Burke*,[11] was cited as saying: "While fully recognizing the independence and all the rights of coordinate branches of the government, it is only necessary to say that it is the province of the judiciary, whenever the question is properly brought before it in judicial proceedings, to decide whether duties sought to be enforced at the hands of officers are or are not ministerial, and that it is of the essence of the judicial power to adjudge such questions."

The mandamus against the Register was made peremptory by the trial judge and his judgment was affirmed. This was decided in March of 1890.

This did not end the controversy. Francis T. Nicholls, defendant in the first case, replaced Bermudez as Chief Justice and Henry C. Miller replaced Charles E. Fenner. John McEnery died and his widow brought a similar mandamus proceeding against John S. Lanier, Register. The decision was rendered in 1895 with Justice Miller as the organ of the court and with Chief Justice Nicholls recused. Justice Breaux was also recused and District Judge Monroe sat in the case. The district court, Judge Ellis, had followed the previous decision. On appeal the court noted that the first decision had not given consideration to Act 106 of 1888 which had repealed the 1880 act and had abrogated the contract between Governor Louis A. Wiltz and John McEnery. The court was urged by the relatrix to say that the act of 1888 violated the contract right of her late husband and so was void under State and Federal Constitutions, but refused to pass upon the point and denied the writ. The court, in this lawyer's opinion, mistakenly applied the rule in *Louisiana v. Jummel*.[12] In that case the Constitution had itself forbidden payment of interest on bonds. That action was correctly held to have made

10. *Id.* at 222.
11. 33 La. Ann. 969 (1881).
12. 107 U.S. 711 (1882).

the mandamus proceeding actually a suit against the state which could not be entertained in the face of that constitutional prohibition. Correct that was because the court also draws its powers from the Constitution. But in the *McEnery* case it was not the Constitution but the Legislature which had undertaken to vitiate the contract and the court surely had the authority to say whether or not its action was constitutional and effective or unconstitutional and void.

When it denied the writ, the court said: "It is not to be supposed the State will do injustice and close the door of relief to the widow and heirs of the late John McEnery who claims he rendered valuable services to the State for which compensation is sought in this suit."[13]

In the intervening sixty-two years that door has not been opened.

The same court in the same year decided the suit of *State* ex rel. *Goodloe v. Lanier*.[14] This involved an offer to buy public lands which was refused because Act 95 of 1890 provided for the transfer of such lands to the Pontchartrain Levee Board. The court chose to say: "Mandamus does not lie unless the character of the act is ministerial and imposed by law. . . . [T]he questions involved are disputed and require legal controversy for their settlement contradictorily with parties in interest. Courts will not, in a mandamus proceeding, undertake to decide collateral disputed questions without giving interested parties opportunity to be heard." I find fault with this as a denial of justice. "To fulfill any of the duties attached to their office" is the language of the Article 834 of the Code of Practice which authorizes the issuance of the writ.

"Any" is as inclusive an adjective as may be found in our language. How could there be some duty which an official is justified in refusing to perform?

"Ministerial" duty is to be distinguished from discretionary power, that is to say, where a choice is confided to the official. Ministerial does not at all mean "clear or certain" if by those terms we mean the individual's appreciation of the nature, extent or even existence of the duty *before* the court's finding. But the uncertainty of the official or of his counsel is of no con-

13. State *ex rel.* McEnery v. Lanier, 47 La. Ann. 110, 115 (1895).
14. 47 La. Ann. 568 (1895).

sequence once the court finds the duty to exist, because his oath and his purpose for being an official require performance of that duty once its nature is determined.

I quite agree that all who have an interest in the matter should be given an opportunity to be heard. My point is that the law should not remain abortive because of the summary nature of the action against the official whose duty it is to act, and the so-called ordinary nature of the action as concerns collaterally interested parties.

In our time the declaratory judgment procedure has been added to the list of legal remedies.[15] Its proponents claim the right to render such judgments is within the inherent powers of the courts without the need for legislation. Irrespective of its genesis, we and many other jurisdictions now have this procedure.

Section 2 of our Louisiana Declaratory Judgments Statute may have supplied the deficiency which I have discussed. For in so many words, it authorizes "any person interested" to "have determined any question of construction or validity arising under the . . . statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relation thereunder."

I do not look to this statute for a clarification of the situation. The federal courts, dealing with a less specific statute but one which, to me, seems as embracive, have said that the courts' lack of jurisdiction to entertain direct proceedings for relief in the nature of mandamus cannot be surmounted by filing a complaint for a declaratory judgment.[16]

In any case, I do not think the issue should be left in doubt or to be determined hastily and in the heat of battle where the facts of a specific case may seem to justify an otherwise unacceptable conclusion. The Legislature should make the remedy and rights of the citizen clear.

Nor am I satisfied that our state has yet made clear its duty to its citizens who suffer injury at its hands.

If, as Jefferson said, the most sacred duty of a government is to do equal justice to all its citizens, can it in reason be said

15. La. Acts 1948, No. 431; La. Acts 1948 (E.S.), No. 22; LA. R.S. 13:4232 (1950).

16. Doehler Metal Furniture Co. v. Warren, 129 F.2d 43 (D.C. Cir. 1942), cert. denied, 317 U.S. 663 (1942), rehearing denied, 317 U.S. 708 (1942); Marshall v. Wyman, 132 F. Supp. 169 (N.D. Calif. 1955).

to have performed this duty when it denies justice or at best permits justice only after long delay to a citizen who has suffered at its hands?

Reason denies this, however much the fiction that the king can do no wrong has found its way into our decisions, our statutes, or even our constitutional ordinances.

The government and its officers from time to time do cause injury and in a government by law, no justifiable basis exists for saying that a wrong cannot be done as a means of preventing inquiry as to whether a wrong has been done, or will be remedied.

Immunity from suit is said to be an attribute of sovereignty. Mr. Justice Wilson said in *Chisholm v. Georgia*[17] that "to the Constitution of the United States the term Sovereign is totally unknown."

Governmental immunity from suit based upon a maxim that the king can do no wrong is especially unjustifiable in a nation whose existence as such stems from the fact that the king not only could, but did do much wrong. The late great professor Edwin Borchard's pioneering work in this field will be here recalled.[18]

I should rather say, as Professor Borchard did, that the king — or better still — our Government — is not privileged to do wrong.

In this field, the Federal Government recognized the problem and proceeded to seek a solution so long ago that Franklin Pierce, a Democrat, was President. By an Act of February 24, 1855,[19] amended March 3, 1863,[20] when Mr. Lincoln was President, the Federal Court of Claims, wherein claims against the United States can be asserted, was brought into being to provide a forum.

The jurisdiction of the court is wide though claims for pensions or claims arising from the actions of military or naval forces were long barred.

When the great jurist, William Howard Taft, was President,

17. 2 U.S. (2 Dallas) 419, 454 (1792).
18. Borchard, *Government Responsibility in Tort*, 34 YALE L.J. 1, 129, 229 (1924-25); 36 YALE L.J. 1, 757, 1039 (1926-27).
19. 10 STAT. 612 (1855).
20. 12 STAT. 765 (1863).

the Tucker Act of March 3, 1911,[21] gave concurrent jurisdiction to the United States District Courts to the limited extent of $10,000 in cases not sounding in tort.[22]

The Federal Tort Claims Act of 1946[23] was a fitting recognition of the need so clearly expounded in Professor Borchard's work. The act authorizes suit against the government based on tort and arbitration and compromise by the Attorney General with the approval of the court in which the case is pending. Punitive damages and interest prior to judgment are precluded and attorneys' fees for recoveries of $500.00 or more are limited to 10%.

This, like the Court of Claims Statutes and the Tucker Act, is, I think, enlightened legislation which Louisiana could and should well emulate.

I should like to see unmistakable and unshakable pronouncements of our law that not even the least of us may be forced to bear alone injury caused by the government: ineluctible acknowledgment that the community submits itself to legal process and a clear demonstration that in Louisiana we accept Lord Macauly's pronouncement that "the primary end of Government is the protection of persons and property of men."

In short, I should like to see justice readily available to every man — not rewarding the poor because he is poor, not rewarding the rich because of his power, not taking from the state because it can afford the loss, and not sparing the state when its act has caused damage; but recognizing that in the performance of its most sacred duty our government is obliged to do justice to every individual.

21. 36 STAT. 1093 (1911).
22. See 28 U.S.C. § 1346 (1946).
23. 60 STAT. 843, 28 U.S.C. § 1346 (1946).