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DEMOCRATIC LEGALITY*

M. SEABRA FAGUNDES*

THE SIGNIFICANCE OF THE LAWYER IN THE MODERN WORLD

The era in which Brazil and the entire world is living is characterized by a state of apprehension which spreads over a Europe, now subjugated, now uneasy; over an Africa torn by war, racism and violent disputes over power; over an Asia rent by bloody dissension between peoples and between nations; over a North America, which after losing the tranquility of its peaceful and prosperous days now suffers the vengeful aggressiveness of its black population and its youth; and over a Latin America violently shaken by bellicose opposition to legitimate regimes or to military governments. The dramatic era in which we live, by throwing legality into a state of crisis, intensifies and exalts the duty to fight for the preservation and improvement of the juridical order. This is a tremendous task that, going far beyond the demands of daily routine, measures its strength through the survival of the law as a permanent value in the life of man, along with peace, well-being and progress.

But this conflict, which spreads over all the continents even though possessing specific national traits has Pharisaism as its common factor. As Alçe de Amoroso Lima recently pointed out, each faction supposes itself to be completely in the right and is devoid of sufficient serenity or humanity to recognize any virtue in the opposing side. Each faction is master of the truth, the whole truth, and so sure of its verities that it cannot even be questioned, contesting any assumption of error and attempts to change. The dissenter is an adversary to the institutions, to the country, and is serving the foreigner. This happens in both the western and socialist camps. In the latter, the adversaries are always said to be in the service of economic imperialism; in the former, in the service of international communism. *This world of intolerance thus fosters the injustices which the passions of the intolerant cause to multiply.* This state of affairs enhances the significance of the lawyer. Thus it is inherent in his profession and in his ethical

*This article, translated from the Portuguese, is an extract of the remarks made by Dr. M. Seabra Fagundes of the Brazilian Lawyers Institute, at his inauguration as President of that Institute.

training to fight for everyone's rights against the rights of one or of all, for everyone's rights against the wielders of political or economic power, and against all forms of denial or injury. In doing so, to be sure, he is faced with misunderstandings, not the least of which is to attribute to him, out of either ignorance or bad faith, that he shares the oppressed client's political ideas, or even that he has been ensnared by the State's repressive machinery. His professional activity then becomes more than ever one of personal dignity, of silent and anonymous bravery. In this way, much more so than is apparent in the vicissitudes of forensic daily routine, he contributes to the preservation of what is best in the moral context of society, namely the nobility of justice which is, after all, the basic factor in the formation of the normal man.

THE RESISTANCE TO LAW

When it falls to our lot to make an important contribution to our great Fatherland in order to safeguard a patrimony which is that of the entire civilized world, more tenacity, valor and faith is increasingly demanded. It must not be overlooked that a mission of this nature, being characteristic of an entity such as ours should not be permitted to reach the paroxysm of polemic exaltation.

Will resistance through law be in vain? Will it be inconsequential? Will it not transcend the quixotic pretension of opposing the aspiration for justice and peace, to the predominance of material power in this juncture in the life of nations? It may be, but only in its immediate results since History, still and always the master in the life of people, shows us that the eclipses of legal nature endure only so long as the forcible submission of the people prevails.

The people may remain quiet submissively but they will not readily or gladly accept any type of paternalism. The precarious nature of governments of force cannot be measured by the number of years they remain in power, but rather by the apparatus of violence that guarantees their presence, in contrast with the periodic assumption of leadership resulting from elections in a system that requires only routine police supervision. Against governments of force there is a sort of tacit mobilization of opinion waiting its time to break forth. Nazism proposed to last for a thousand years, and fascism did not estimate that it would remain in power for only two decades. The communist dictatorships, despite their overwhelming police apparatus prove not to be exempt from rebellions, sometimes bloody ones.

MORAL PROGRESS IN PEOPLES LIVES

Unfortunately, the unbridled ambition for political power, sometimes more unbridled than the ambition for money because power also brings wealth, does not permit History's lesson to be learned quickly. G. B. Shaw was almost right when he said:

Experience shows that man learns nothing from experience.

Even if resistance to arbitrariness, being practically impossible to control, were only a vain attempt, it still would be worthwhile because of its moral content. Someone must resist in the name of basic values for the security, tranquility, peace and decent well-being of human society. Because, as Gladstone warned his fellow countrymen when England had not yet matured into institutional life, "There is more in the world than political needs; there are moral needs. Remember that the sanctity of life in the villages of Afghanistan among the winter snows is as inviolable in the eyes of the Almighty as in our cities."

If the history of nations is frequently woven out of violence, guile and even shabby interest, it is nonetheless true that moral progress in the life of peoples is due to the sacrifices, so often anonymous, of persistent idealists who, reprobates today, are the artificers, or even the heroes, identified or not, of tomorrow.

HERITAGE OF THE ARCHITECTS OF NATIONALITY

Defense of the juridical order, while a duty of honor for us lawyers, is a welcome duty because in fulfilling it, we have a rendezvous with the glorious constitutional and legal tradition of Brazil, stereotyped but edifying over the course of its political life, first during the period of the Empire and later in the Republic.

Actually, a glance at history will show us that the pioneer architects of our nationality have bequeathed to the nation the love of constitutional order, which is tantamount to saying: limitation on power, with the necessary respect for individual rights. This concept was expressed, in impressive fashion when the Empire was still immature, in Peter I's reaction to the unusual acclaim with which the people received him in the Church of Saint Francis de Paula: "Long live the Emperor, so long as he is constitutional." Far from using the police to repress the daring cry, the young monarch serenely replied: "I am, always have been and will be constitutional." And because he was imbued with this spirit he could proudly say to Pontois, French Chargé d'Affaires, on the very day of the

abdication: "I renounce the crown with the glory of ending in the same way as I began—constitutionally."

Further, this belief of the admirable statesmen who consolidated the Empire permitted Joaquim Nabuco, referring to Diego Feijó who assumed command when the country was approaching a state of anarchy and its very territorial unity was endangered, to say that "a churchman was able to implant order without having to appeal to foreigners, without fortresses, without spies, without trapdoors where bodies disappear clandestinely, and without placing the whole society incommunicado."

The Revolution of 1817, in the fleeting months of its existence, had a constitutional act handed down by the governing council of Recife which, although having to tackle the uncertainties of armed conflict, limited its own powers and defined rights. The Ragamuffin Epic was distinguished by its appreciation of legality. When the Chamber of Jaguarão turned to Bento Gonçalves, elevating him to Chief of the Government and Protector of the Republic and liberty of Rio Grande, it did not fail to stipulate that they "were responsible for setting the day when deputies must be elected to the constitutional assembly, in whose hands is to be deposited the power now temporarily conferred on them, for transmission to such persons as it may deem proper." A similar restriction appears in the document that the Chamber of Piratinim subsequently issued. Therein it is written that it is a duty: "to convoke, whenever circumstances permit, a general and constitutional assembly of the Rio Grande Republic in order to create a Constitution of the Republic, in which it shall vest the powers at present delegated to him, and finally, shall govern this State by the laws in force, insofar as this may be compatible with our circumstances and the state of revolution in which we now find ourselves." Furthermore, the Constitution of the Empire was declared applicable insofar as it could be adjusted to the requirements of the Republic. It was this feeling of relationship between power and the legal order that caused Peter II to state in the Regent's Councils, referring to the criticism of his person in the press: "It is my intent that complete freedom should be allowed in these manifestations. The attacks on the Emperor, when they are made in a spirit of seeking to act for the general good, are not to be considered personal but simply as a partisan unburdening of the heart."

This spirit permitted the five years of the War of the Triple Alliance to pass without a suspension of constitutional guarantees. Even so, Caxias, the admirable architect of victory, already consecrated by his services to the territorial unity of the Fatherland, was the target of an intense and bitter political and press campaign.

This was the spirit, also, in the dramatic days of the Floriano Government, even under a state of siege and in the midst of so many instances of violence, that permitted the press to be spared from censorship. Something survived even amid the storm of passions.

In the glorious days of 1932, São Paulo sacrificed itself in demanding constitutional order as opposed to arbitrary power.

Our tradition of reverence for law acquired projection into the sphere of international relations when the First Republic Constitution, ahead of the whole civilized world by many years, stipulated that Brazil "would not engage in any war of conquest, either direct or indirect, alone or in alliance with another nation" (Art. 88), and when the Political Charter of 1934, in Art. 4 added that Brazil "will declare war only if recourse to arbitration is impossible or should prove to be fruitless."

CONTINUITY OF THE NATION

At times it has been denied that this liberal past was a valid contribution in view of the actual situation in Brazil and of the realism required to organize the Nation's constitutional life. This criticism is based sometimes on sincere motives, at other times it originates more from opportunism and unbridled greed for political power. However, what actual state of affairs would this lead to? For some, that of a present in which infiltrations from the outside, with arms of resources lead them to believe that the national traditions are menaced by international communism; for others, that the country's independence is threatened by economic imperialism. But the past, in a Nation's life, also constitutes a datum of reality. And not one to be despised, either, since the Nation is a continuum, not an episode. Today we, the Brazilian people, are continuing it. We are the same ones who sanctified with our blood the pre-Independence epics; the same people who, at a slow pace, as is always the pace of political life, abandoned, in the atrocities of the Federalist Revolution, the last traces of hatred between brothers and attained, in less than fifty years, the ideal stage, which many might envy, of harmonious settlement of controversies.

If this is the contribution of the past, strengthened with the passage of time, then it should not be ignored when it is sought to mold political institutions consonant with the actual state of affairs in Brazil. These institutions must be in keeping with the imperatives of our era where the aggressiveness of ideological action is a phenomenon in all countries. But, not to the extent that they fail to take heed of the special structures

in accordance with inspirations originating elsewhere and of foreign adaptations.

This truth is recorded by José Bezerra Câmara, in the *Subsídios para a História do Direito Pátrio*: "A false notion of the problems relating to the social order was the supposition that new legal conceptions preclude the lessons furnished by the past, all the more so as historical factors are not improvised, nor do they reside entirely in a subjective element. Even when they are not assimilated, they do not for that reason cease to afford indispensable suggestions and lessons."

THE PEOPLE'S DEMOCRATIC PENCHANT

Fidelity to the democratic ideal of peoples is considered to be spontaneously revealed in the length of time that the advanced countries have existed.

The United States, although needing to control the youth revolt and vindictive black power, as well as organized crime, does not even think of suppressing the fundamental freedoms, whose respect honor its past, nor does it even think of mutilating the representative system, whose purity so exalts the fatherland of Washington, Lincoln and Kennedy. If it had done so, the American Union would have become just another nation, deprived of its fundamental characteristics under the outer cloak of policies alien to its traditions. And instead of earning world admiration, which its love of freedom of expression and thought and the democratic interplay of the representative system inspires, it would have remained on a plane of mediocrity unworthy of the great pioneers of Virginia and Philadelphia. But far from that, the nation at war in exemplary fashion, allows a faction hostile to the government's war policy to parade with its placards of accusation and ridicule. It was out of fidelity to the democratic sentiment peculiar to its people that Chile, not many months ago, suspended constitutional guarantees for only three days, the time necessary to contain, in the acute phase, a barracks movement. Out of the consideration that man's fundamental rights were integrated into its institutions as a national patrimony, could the French Constitution of 1958 afford not to state them? These fundamental rights are incorporated in the people's juridical conscience, already expressed in the preamble of the 1946 Charter, to which the former document refers. Thus, a government empowered to contain by excessive force the Parisian uprising of 1968 preferred to discredit it through an appeal to the enlightened vote of the nation, which reaffirmed its democratic sentiment against the disorder.

The government's behaviour is an outgrowth of the country's beliefs and constitutional tradition.

LIBERALISM AND THE LIBERAL STATE

A legal order is called liberal when it is based on a tradition of respect for a body of individual rights. But, even if it should be called by any other name, the fact is that it is increasingly in man's aspiration, that a State should accomplish its mission without oppression. In this train of thought, political liberalism can be said to be mistaken for democracy itself, since it is manifested in the existence of a list of basic rights for mankind, by dint of which political power is limited in its expansion. There, it rests with the citizens to choose and to voice their opinions concerning their rulers and the composition of their governments. Present-day constitutional texts confirm this. There is today no constitution that fails to list and guarantee, as rights, the free expression of thought, freedom of the press and information, inviolability of the home, full defense for the accused, freedom of movement, the right to vote, imprisonment only upon judicial verdict, etc. Over and above all, the presence of political liberalism in the lives of peoples is documented by the Universal Declaration of Human Rights, voted by all the member states of the United Nations, which is the repository, updated and expanded, of the precepts originally inspiring the liberal idea. If practice disavows liberalism, it does not disavow it more than in other ages, since it arose as the fruit of oppressed man's demands (*Declaration of Rights of 1789*) or of the spontaneous wisdom of the political sense (*Virginia Bill of Rights*). History reveals that force alternates with reason in the government of peoples, and this alternation is manifested in negative or affirmative views with respect to the idea of liberty. However, what places liberalism in the tableau of the political life of peoples is that its basic concepts are an abiding and sustaining aspiration for which people will fight when they see them frustrated. That is why even in those countries whose political police see, control and repress everything, the infernal machine of pressure and repression is occasionally stymied. What is needed is not to regard the suppression of public liberties by the force of the dictatorial state as the obsolescence of political liberalism.

What is now transcended, as noted by Burdeau, is not political liberalism. The freedom to criticize and the opportunity to influence the composition of governmental bodies are aspirations that are increasingly rooted in man's spirit. What has been transcended is the liberal state, the state of "let it happen; let it go." "If the liberal state is a thing of

the past this does not mean," he said, "that liberalism disappears with it in the ashes of history. The liberal state was a cohesive system of political institutions, economic concepts and social relations whose context imparted an original style to both public and private collective life. Liberalism, conversely, is a state of mind. Its vitality is not subordinated to the existence of a single type of political regime that would enjoy a sort of exclusivity to serve its aspirations." And he adduced that a distinction had to be drawn "between the liberal state, a historical event, and liberalism, a political philosophy."

PRESERVATION OF FREEDOM

State intervention in the economic order, which under the generalized circumstances of the contemporary world (international competition, influence of technology, capitalist versus socialist imperialism) has become necessary, although to a variable extent from country to country, along with state interference designed to attenuate social injustices, denatures the power of the liberal democratic state's power, a mere spectator of economic and labor relations. State intervention did not, however, bring about the restriction or denial of rights outside these spheres, i.e., individual rights, the heart of political liberalism.

What is necessary is that there be no confusion between the essential and traditional liberties, including that of free expression of political thought through divergency and criticism, not measured and consented, but free in incisiveness, with freedom to destroy the democratic state itself, that is to say, the essential and traditional liberties. "True liberty," writes Sartori, "respects authority, in the same way as genuine authority recognizes liberty. Liberty that does not recognize authority is arbitrary, *licentia* (license) and not *libertas* (liberty). Conversely, authority that does not acknowledge liberty is authoritarianism."

The juridical order is not an artful formalism contrived by idle chatterers. It is, above all, the imperium of the Constitution in its structural whole and plenitude of its dynamism. Whoever speaks of constitution speaks of limitation of powers, since that is the paramount objective of constitutional charters. When power is limited it is precisely to safeguard rights against the misuse of force; and whoever speaks of preservation of individual rights means respect for the human being, in his aspirations, his words, his life, and his physical, intellectual and moral integrity, since it is these elements that comprise the heart of individual rights. The juridical order is the imperium of all laws that complete

the basic organization of the State. It is the imperium of the law which acts as an impersonal rule limiting the power of those who govern and the freedom of the governed, as a disciplinary code of principles for people living together, and as a primary instrument for peace in day-to-day collective human relationships. It is indispensable for all those desiring security and well-being for all in the community.

That the task of governing with the concomitant right to dissent, to express oneself in controversies, in interpellations, and to voice criticisms and protests is very difficult, cannot be gainsaid. Only the superiority of spirit of the great statesmen and true patriots can bear, with democratic resignation, the criticism and protests, the invective, often unjust, in order to avoid the greater evil of his fellowman's submission through violence. It is possible that someone may reply to this paraphrasing Lord Melbourne, for whom the damned moralism of the Victorian age would end up by ruining everything: this damned juridical order will wind up ruining everything!

The task of governing doubtless becomes simpler when the voices of some superior interest are stilled by force, whether overt or not. There is found government without greatness, but with peace, the peace of submission. But this is not peace worthy of the name since, as Pope Paul VI has just proclaimed, there is no peace where civil liberties and freedom of belief are not respected.

REAL, NOT FORMAL LEGALITY

But the juridical order, i.e., legality in its broad sense, is not manifested only in a body of rules. It also has a dynamism of its own.

When a juridical order is referred to, we assume non-arbitrary legality, one deriving from a legalistic representative system created with the consent of those whom it is intended to govern. This is the legality worthy of so illustrious a name because it is not a trick for whitewashing the exercise of power, vulnerable to each nod from those who command, as happens in the single-party states where manipulation of the written law occurs. This results from the self-interest of the ruling class or the group wielding power, and thus the legal rule is no defense against arbitrariness since it always conforms to their efforts to legalize it. Legality must be democratic in the sense that it emanates from the people by means of the representative system and is directed toward the people by virtue of the impersonality of its wording. It is an impersonal legality, drafted without being aimed at individuals. For only the general regula-

tion, abstracted from conduct, can properly be classed as a law. When legality is shaped today in order to legalize an act that is to be executed tomorrow, it is nothing more than a falsification of the juridical order, with the law that is supposed to limit human behaviour actually limiting nothing. This is the source of the theory of the separation of the powers, in which Montesquieu discovered an instrument for assuring liberty. This is true in spite of the willful efforts that have been made to discredit it, leveling at it the distorted allegation, so dear to the dictatorships, that the modern era requires that legislation be entrusted largely to the executive power because those exercising it do not need to share the necessary standard-setting with the lawmakers. As if that were all, as if the legislative debate could not be reduced to restricted dimensions without detriment to its merits! Let it be noted that this was done among us by Institutional Act No. 1 and repeated in the Charter of 1967. As if the legislative debate were not vital to the people, who are really concerned with the legal texts so that they may be able to find out beforehand what it is sought to be imposed on them. As if the law enacted by executive order, by dint of the surprise of its content, did not constitute a dangerous denial of a right, the right to express an opinion on the rules governing the activities of the people in general.

The Executive Decree is admissible, to a cautiously measured extent, consonant with the need for extremely urgent laws. This is a need that is extremely rare in the normal life of the State, and one that can be satisfied by a declaration of martial law when it occurs with unwonted frequency, characteristic of abnormal times. Of course, none of the State powers centralizes in its own domain, all the subject matter from which it takes its name. But the separation or division of powers never meant such an extravagance as conferring almost exclusively on one of the powers of the State the function for which it is named, leaving only a negligible residue to the other two branches.

The regulatory texts must function, in addition, through proper and privileged application, protecting the adversary and not favoring the coparty on a privileged basis. Otherwise, legality would exist on paper, but not in reality.

THE WORK OF PREPARING THE CODES

As the historical bearer of responsibility in the defense and perfecting of the country's legal order, this Institute is intimately concerned with lawmaking. Since one of the yardsticks for measuring any civiliza-

tion's progress is the substance and gist of its laws, it is incomprehensible that, when they are especially relevant to society, their elaboration should exclude the constructive and critical collaboration of that organization in Brazil which for over a century has been deeply committed to perfecting the legal order. And this becomes important when consideration is given — not, it is true, with any great prudence — to reforming, all at one time, the great codes. The greater the undertaking, and the more hastily planned its execution, the greater the need of allowing the lawyer, rich in so many ranges of individual professional experience, to have a constructive voice in the undertaking.

Suffice it to cite as an example, the Civil Code, whose sense of universality Ruy Cime Lima communicates to us in a page unrivaled for the stylistic beauty and splendid strength of its synthesis: "In the provisions of our Civil Code we are given, as in the Scriptures, the distinction between day and night, between dark and light; the separation between solid land and the seas; between the sterility of the earth and its natural fertility; the multiplication of the waters from the plains and mountains, whether from rainfall or from springs, widely dispersed through lakes, rivers and fluvial tributaries; the sequence of seasons of the year and the cyclical rounds of the crops and fruits; the variety of vegetation covering the soil: trees, forests, shrubs, and hedges; and the variety of animals peopling it and the waters, ranging from those of great weight through the wild and domestic animals to the fishes. In the midst of the whole creation, in the civil codes, as in the first book of the Bible, man, in his turn, emerges as the primordial figure among all the creatures, and the civil rules minutely describe and accompany his existence from conception through, successively, infancy, puberty, early maturity, full maturity, old age and death."

How can a law of so universal a content, the law of life par excellence, be voted on without extensive discussion throughout the country? How can it be processed in Congress without a breathing spell between the work of the learned commission in charge of preparing the bill and rapid action in the parliamentary area? What we are saying, as an example, is in no way intended to discredit the group drafting the bill, which is one of the most outstanding in the juridical history of Brazil, and one noted for its erudition and moral probity. The sole intent is to contribute to a broader view of all the subject in the process of recodification so as to afford the Congress suitable options in the work carried out by that body.

THE DIFFICULT TASK OF LAWMAKING

The practice of the lawyer's profession, regardless of the spheres in which it is projected, presupposes interpretation of the positive law and its application to a factual situation. The lawyer is, par excellence, an interpreter of legal regulations, whether in verbal counsel, in the handling of legal instruments or the formulation and judicial implementation of the claim or the defense. The practice of law presupposes the leafing through law books to analyze them painstakingly and thoroughly examine their meaning. On the attorney's exegetic labors will depend the well-being of the client who gives evidence or executes contracts, as well as that which is affirmed or denied by a subjective law. And since he is the interpreter par excellence of legal texts, he is particularly qualified to contribute to their preparation or revision. In full contradiction to what some people suppose, technological development does not diminish his value in the social context. Without detracting from the role he has always played, quite to the contrary, it offers him a new dimension for his activities. As the country's development evolves, economic relations increase and the more varied are their legal forms. As a result of new requests from the business sector, the more urgent becomes the lawyer's presence, whether in preliminary discussion and the transaction of legal affairs, or in the subsequent clearing up of the inevitable controversies arising from conflicts of interest.

The substitution — prevalent among us — of the lawyer by the economist in the drafting of laws did not turn out well. We are the ones who are to say no and they are the ones at whom the laws are directed.

Any lessee or lessor could find something to his liking in the tenancy laws, but today, with Law No. 4,494 of November 23, 1964, the subject passes the understanding of anyone not versed in the field to make out what is meant by factor K, values C and D, etc.

Just leaf through the Land Law and you will get an idea of the confusion in trying to understand — or not understand — the concepts of "rural real property", "family property", "rural module", "dwarf holding", "large landed estate", "rural enterprise", "sharecropper", "integral agrarian reform cooperative" and "land settlement." This is yet another example of what those laws are like that are drawn up by people unfamiliar with the techniques of lawmaking.

Examine Decree Law No. 43 of November 18, 1966, and it will be readily apparent that those were no law school graduates who empowered

the National Cinema Institute to grant a *certificate of Brazilian citizenship* to films produced in Brazil!

Let what we are saying not be construed as a slur on the merits of the professional economists, brilliant, courageous and indispensable collaborators in the social evolution of our times. What is sought is merely a reaffirmation of the theory, both dear and personal to them, of work specialization. Lawmaking, like it or not, is the work for experienced law school graduates, whether they be lawyers, jurists or politicians, just as the art of healing is the job of physicians, military strategy that of soldiers, and economic planning that of economists.

His Excellency the Minister of Justice, an attorney and jurist emeritus, cannot have failed to see how much there must be revised in the disorderly legislation of recent years in order to consolidate it and to purge it of technical defects. If political options do not always rest upon us, there is nothing to prevent us from fighting to see that the laws which embody them are drafted in accordance with sound legislative techniques, and that, far from being a confused, sometimes contradictory clutter of texts, they are a clear and simple expression of the legislators' intentions. The Institute cannot, I hope, abstain from fighting for this ideal.