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Dissatisfaction with Our Judges

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DISSATISFACTION WITH OUR JUDGES.

DISSATISFACTION with our judges is no new thing. It existed with the United States Supreme Court in the time of Chief Justice MARSHALL, the greatest of American jurists, after the *Dred Scott* decision, after the conflicting decisions on the power of Congress to make the government notes a legal tender, and at other times. Probably there is no one of the older states where dissatisfaction with the state courts has not been sometimes acute.

Some of the causes of complaint of the courts are plain: there is a natural restlessness in mankind, a love of change for its own sake. This is shown in the ever changing fashions in dress, in literature, in art. The thing which is popular today is not likely to be popular a few years hence. The fashionable residence district in our great cities is ever changing. This affects the government. Some people like to see their governors and their laws changed because of the excitement of the change. To many a great interest in life consists in watching the new events which are daily happening all over the world and in their own countries and cities. The newspapers flourish largely on this appetite. They are perpetually spreading before their readers every new and marvellous event which occurs or is imagined. A paper which is not full of extraordinary events, real or fictitious, is counted dull, and loses its subscribers, and, as a consequence, its advertising patronage. There is a constant movement in all things, organic and inorganic.

The judiciary has been less affected by this disposition to change, than any other part of government, but whenever it attracts general public attention by some far-reaching decision, it is subject to the universal restlessness and desire for something new.

This restlessness is likely to continue, and even to increase with the advancing knowledge of mankind. All things, sacred and profane, are subject to it. The best that can be hoped is that the change may be regulated and saved from the disastrous and bloody revolutions of the past.

Again, there is always going on, between nations, in every state, and among the classes and individuals of each state, a struggle for position and power. In these contests, our courts may exercise great influence. They administer rules of international law. They decide contests between classes of citizens. They interpret the unwritten law. They construe statutes, federal and state. They decide on the meaning of constitutional provisions limiting all the powers of government. In every case they have to decide against

some litigant. The defeated party is seldom satisfied. He does what he can to overcome the effect of defeat. If a private person, this is little. The public pays no attention to his complaints. But the courts may set aside some panacea proposed by earnest and numerous philanthropists, who will fill the papers with complaints of injustice and charges that the judges are reactionary and opposed to all progress. Again, some carefully prepared statute may be held as unconstitutional, or construed as not meaning what its supporters expected. The powers of executives may be limited, the schemes of great parties, political, industrial, and financial, may be set aside. No strong party in the state or nation submits to an adverse decision willingly. It will use every means in its power to accomplish its purpose in spite of the decision. The means used will depend on the character of the parties and of their leaders. In general, these leaders will use any means likely to be successful, and they may not hesitate to violate any customary moral rules, however old and venerable.

The uncertainty of human opinion among the wisest is often very great. No amount of argument convinces men whose interests or prejudices disagree. This is true of the greatest nations and of the great parties in nations. Hence the constant appeal from reason to power. The nations keep up their great armaments because they have no confidence in the rules of justice, or perhaps they wish to disregard them. So it is with the great parties in every nation. They all claim to be seeking only justice, but they disagree so fundamentally as to what justice requires, that their arguments have no effect on each other. There will be no end to the disagreement between parties and individuals, whose interests and prejudices are in conflict.

In the constant struggle for power going on between parties and individuals in every nation, those out of power are seeking to get in, and to this end they make every profession of seeking changes likely to be popular. They magnify the differences with their opponents. They have panaceas for all existing evils. Whenever the decisions of the courts offend a considerable class, politicians will make an appeal to that class by suggesting changes in the courts.

And there may be much reason in complaints about the courts. The judges are but men, with all the common infirmities. They may have deep, unconscious prejudices controlling their opinions; they may not be men of the highest fitness; they may be slothful or ignorant; possibly they may be corrupt; they may love to have their own way, to exercise their power. Then the wisest judges often disagree profoundly after the fullest discussion.

But, after admitting all just cause of complaint, the question is, What is to be done? It is plain that no civilized society can get along without courts. Questions between private parties and (where the governments are limited) questions between the government and individuals must be determined by courts, or anarchy results. And this leads to the question, What sort of men ought to be judges, and what rule should guide their decisions?

Our law is a vast subject, found in many volumes of statutes, federal, state and municipal, and in innumerable decisions. No man can master but a small portion. The wisest judge can carry in his mind but a trifle of the great body. The great essential is that he be able to find the law pertinent to any case before him and to administer it properly. Justice is what everyone demands of the law; justice is what every individual, every party, claims as its chief end. But on no subject is human opinion more variant than as to the requirements of justice in a given case. The greatest element of justice is its certainty, so that a man may know by what rule he may safely act, and this certainty can be obtained only by making the law a system of rules applicable to many cases, derived from the statutes and previous decisions, so far as possible, and when they fail, then by the establishment of a new rule which will be a certain guide in the future.

There are two essentially different methods of administering the law. One has been most frequent in the Asiatic nations. In this, the judge decides in accordance with his feeling of justice at the moment. Decisions of this kind often receive popular approval, when the judge's sense of justice agrees with that of the public. But among the western nations, justice is the administering of rules of law, depending not in the main on the opinions of the judge making the decision, but on rules established in the past. If new rules have to be established, they must be such as will work well in many cases. A judge of this kind must be a man of great legal learning, free from prejudice, free from self-will, a patient listener to both sides, feeling bound by the law on which men have acted, having a profound sense of justice, but not the justice of the mob or even the temporary feeling of the people, but a justice based on wise rules applicable in many cases, a justice which shows itself in the laws and in the permanent feelings of the people.

The highest conception of a judge is that of one who stands up for the rights of every suitor, as shown by the law, against the popular feeling, against the denunciations of parties and newspapers. The judge must also stand up firmly against the lawyers who, in the interests of their clients, seek every possible advantage. He

must be fearless alike of the lawyer and of the crowd. In such judges alone is there security for liberty.

Such has been the ideal English and American judge for centuries.

Imperfect as our judges are, as they are human, England and the United States have prospered under this system. In them, if anywhere in the world, has there been freedom from the arbitrary power of the one or of the many.

Can our courts be improved by new legislation?

Complaints have been made of the inadequacy of the impeachment by which judges can be removed. I see no objection to the trial of judges who are accused of corruption by tribunals chosen for that purpose. And the system in use in England and in Massachusetts, by which judges can be removed by the action of the legislatures, appears to have worked well.

Another change suggested is that our courts be deprived of the power of holding void acts of the legislature which are in conflict with our written constitution.

No doubt the power has sometimes been misused. The judges, in common with all other officers, like to exercise their power, like to stretch it, especially when their decisions are final. But the existence of this power appears necessary to the continuance of constitutional government. It is but a part of the universal doctrine that, where agents act under limited powers, their acts, in excess of their authority, are void. It is illustrated in the invalidity of acts of corporations, municipal and private, transcending the law of their existence, and in the acts of agents of individuals. Our written constitutions would be of little value if each branch of the government, the executive, the legislative, and the judicial, could decide on the meaning and such decision should be binding on the other departments. The executive must construe the constitution, but his construction is made on his own judgment, and may be controlled by personal or party necessities. Legislative decisions may be made under party pressure, or in response to the influence of temporary feeling. The judges alone have to decide such questions after full argument; presumably they are best fitted to make wise decisions, and they can enforce their judgment as no other department can. The general acquiescence in the decisions of the courts has grown out of a belief that this is for the public good.

It is not only in constitutional questions that the decisions of the courts may antagonize popular feeling. The construction of statutes, or of the law as found in previous decisions, or in the dictates of reason, may meet with a great opposition. The decisions of the

United States Supreme Court as to the meaning of the Sherman Act, are illustrations of this.

The question is not as to the perfection of the courts. All admit their liability to error, or what amounts to the same thing, their disagreement with public opinion. The question is, whether there is any remedy for such disagreement, whether it is best to submit to judicial decisions as final, or appeal to some other tribunal. That these decisions in most cases, are final, will not be disputed. But it is contended that in some cases, whose limits are not defined, there should be an appeal to the will of the majority. There is no doubt that, under our present system, there is always an appeal from the rules found in the decisions of the courts. When the decisions are based on statutes or the common law, that law may be changed by the legislatures. And where the decisions are based on constitutions, all the constitutions may be changed in the ways therein provided. And nobody advocates taking away this power from the people. Having no kings or aristocracies or privileged classes of any kind, we are compelled to place final power in the voters.

But heretofore this power has been generally exercised through their representatives. The people have governed through their agents; legislators, executive officers and judges. And it is obvious that in our states, and especially in the nation, as to the overwhelming majority of governmental acts, this representative government must continue. The acts of national, state and municipal governments are innumerable, and even the wisest constituents of such governments can know little, perhaps nothing, of what is done. How impossible it would be for a corporation of even a few stockholders to act save through its officers. Still, some states have provided for a more direct participation of the people in the government. Statutes may be enacted through a vote of the people. Executive and judicial officers may be recalled. It has been proposed that a rule laid down by the judges of the state courts may be changed by a direct popular vote. So far as the recall of executive officers is concerned, this is but an extension of our present practice. The people elect their executive officers, and at the end of their term, may refuse to re-elect them. The recall enables the people to change their minds and shorten the established terms. The enactment of statutes by direct vote is like the established custom of thus enacting constitutional changes. Even the recall of judges is but an extension of the doctrine that they are best selected by a popular vote.

The only reasonable basis of all these proposed changes is that the majority of the people are wiser or more trustworthy than the

representatives whom they elect, that they are the best judges of the acts of executives, of legislatures, and of judges. This is a doctrine which needs the most serious consideration. It is flattering to the people, and hence it is popular. This will lead to its adoption by most politicians. Their aim is immediate success, just as it is the aim of most lawyers to win their cases by any proper means, and of most business men to get rich at all necessary hazards. But in every stable community there must be a class of persons who are able to look beyond the immediate effect of any given measure, to its ultimate consequences. It is this class who ought to consider this question candidly, and try to convince the people, against the flatteries of politicians, as to what is their real interest.

The question for discussion is as to the wisdom of appealing to the direct vote of the people from the decisions of the courts, either by recalling the judges, or by changing the rules of law which they have laid down.

The judges are of two kinds, trial judges and those of appellate courts. The chief duty of the former is in jury trials. Here their duty is to administer the rules of law by which lawyers are held in check who, in their struggles for success, are tempted to stretch these rules to their utmost limit. The judge must see that no improper evidence goes to the jury, that the examination of the witnesses is kept within the proper bounds, that the lawyers present only allowable arguments to the jury, that the latter are clearly told the questions for their consideration, and finally, when a case is to go to the appellate court, the judge must settle the questions which are to be taken to the higher court. The latter court is entrusted with the duty of revising the rules of law enforced by the lower court. It does this so that the parties may have their controversies decided by fixed rules, and not by the temporary feelings or prejudices of a judge. The chief duty of the higher court is to announce the rules of its decision so clearly as to prevent future suits. To this end, the opinions are in writing, and are published.

There is no security for the life, liberty, or property of the best man in the community except through independent judges who will protect even the worst criminals in their rights.

Is it wisdom to re-try, by a vote of the majority, the rules of law laid down by the judges? What arguments will be likely to influence such majority? Are they capable of looking at both sides of a question and of appreciating the wisdom of a general rule, though it may work hardly in some cases? Can they understand and follow the course of reasoning which has led a wise judge to his conclusions? Are not the people likely to be controlled by their

emotions and by appeals to their prejudices? If the people are not wiser than the judges, are they likely to be more honest? The judges do they work in public, responsible legally for their acts, and to public opinion. The people vote by secret ballot. No one can be made responsible for his vote. And there is abundant evidence that many voters may be bought. If not, why so many laws against bribery and regarding the amount of money that may be spent in elections?

What would be the effect on the judges if they knew that their decisions were subject to review by the voters? In cases attracting popular attention, would they not seek to be guided by popular feeling rather than by rules of law or justice? Would not the lawyers, ever seeking immediate success, base their arguments on public feeling rather than on the statutes or the common law? Would anyone think it wise that our military commanders should be displaced by the vote of the soldiers? Is not the judicial art as difficult as the military?

How do great business enterprises succeed? It is not by getting skilful men at their head? Would any wise man take stock in a business enterprise which was under the direct control of a large number of stockholders?

How has science grown more and more? Is it not because it is controlled by wise leaders? Government is the most extensive business. The judicial art is one of its most important branches. Is it possible that it can flourish if its final decisions depend on the popular vote? There has been of late an effort to take many offices out of politics. The feeling is that the people often choose officers, not because of their fitness, but because of their political work. Hence Civil Service Reform. Is it best to increase political control over judges when it is taken away from officers far less important?

But some will say that the direct popular control of the judiciary, and all other branches of government is bound to come, however unwise, and resistance is in vain. The men who say this are the worst pessimists. They have the most complete distrust of popular government. They say the people will not put limits on their temporary passions and prejudices, and this is said after one hundred twenty-five years of successful constitutional government, national and state. The Constitution of 1787, which delivered the country from threatened anarchy, was established not because the majority understood its wisdom, but because they trusted the great leaders, WASHINGTON, HAMILTON, MADISON, and others. And these men worked for better than they knew. They could not have foreseen the gradual adaptation of that Constitution through the wise leadership

of the Supreme Court from a population of less than four millions to one of one hundred millions. And the experience of the great majority, if not of all the states, justifies the view that the law is best developed through the wisdom of the courts. But if the people cannot see this, they are less wise than many absolute monarchies have been. The Roman law, the greatest blessing Rome left to posterity, was developed chiefly under monarchs whose will was law. Justinian was wise enough to establish a code wrought out by the leading lawyers of his day and based on the opinions of the great lawyers of the past. Napoleon, the absolute master of France, was wise enough through the aid of great lawyers, to establish a code which has been the law there ever since. Must we say that our people are less wise than absolute monarchs? I think not. Government, like every other business or science, prospers only under wise leadership. The great necessity of the people, like the necessity of every individual, is that they find out their own ignorance, and submit to the guidance of those who will tell them the truth. The flatterers who profess their confidence in the wisdom of the majority are seeking power through this profession. When defeated, they believe in the wisdom of the majority as little as any one. There is an enormous good in ending controversies between individuals by court decisions, even though they seem unjust. Expensive as are lawsuits, they cost much less than would appeals to the people.

Men will seldom argue where their interests or their passions are different. The wisdom of the ages is to have controversies between nations and between classes and individuals settled by arbitration, and not by mere power, whether military or that of a majority.

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