

FUNCTIONS OF THE LEGISLATURE IN A DEMOCRACY.

SCOPE OF TALK.

Simply put a democracy is a form of government characterized by rule of the people; a Legislature is the law-making organ of government. There are various types of Democracy; and of Legislatures. I think it will conduce to clarity and concreteness if I confine myself to that type of Democracy which exists in Canada, namely, Parliamentary Democracy; and if I speak in terms of a typical Canadian Legislature and arbitrarily assume that such a Legislature takes the form of a single and elective assembly.

Since a Canadian Legislature functions in accordance with the characteristic principles upon which the governmental system as a whole is based, I shall first attempt to describe those characteristic principles. I shall then consider what manner of men constitute a Legislature; what they are supposed to do; and how they are supposed to do it.

Parliamentary Government.

In Canada we live in a Parliamentary democracy, wherein a constitutional monarch reigns, but the people rule themselves by representatives, selected by, and ultimately responsible to them; a system wherein government is carried on in accordance with the will of the people as to how, and by whom, they shall be governed.

Such a system assumes the ~~personal worth~~ ^{citizen} of every citizen and the equal right of each to a voice in the management of the State. It is predicated on the theory that the people will best know how to fashion and administer the laws, so as to give each individual the maximum liberty of expression and action, consistent with the good of all, and the assurance of impartial administration of those laws.

Since not all can engage directly in the management of the country there has arisen the idea of a government by representatives elected by the whole adult population or that portion of it which exercises the great privilege of the franchise.
chosen at elections whereby

In order that the exercise of the franchise may not result in the expression of a mere chaos of personal views we have developed the party system as a means of enabling the people to deliver an intelligible verdict as to the policies by which, and the men by whom, they desire to be governed and represented. The dominant Party in the elected Legislature selects from its members an Executive Committee, or Cabinet, to conduct the Departments of Government, ~~which~~ The Cabinet remains responsible to the elected representatives of the people and if it loses their support will be turned out of office; just as the representatives themselves will fail of re-election if their conduct runs counter to public opinion.

If we are to have government by opinion, each citizen must be able to think freely, speak freely, dissent from majority views freely, associate freely, and be free to seek to convert the majority.

In Canada all citizens have these great freedoms and in addition we have the machinery to make our views effective in selecting and controlling our government. Thus we have in truth a democratic system based on individual liberty secured by laws which are the expression of public opinion, freely formed and freely expressed

COMPOSITION OF LEGISLATURE.

Looking at the elected part of a Legislature in session we may classify the members of the body in various ways:

1. They represent territorial units or constituencies.

2. They are grouped in Parties - usually two but sometimes more.
3. One of these Parties is the Government party, a Committee of which (composed of the Prime Minister and the Ministers of the various Departments) constitutes the Executive Body or Cabinet. The members of the Cabinet thus discharge a dual function: they carry on the administrative functions of government and answer to the Legislature for their administrative acts; whilst as Legislators they lead the majority (or government) party and thereby assure the passage of their own measures.
4. The opposite Party, or one of the other Parties is the official Opposition Party having the recognized right to criticize the Government and to seek to replace it.
5. The members as a whole vary vastly as to occupation, education, intelligence, race, religion and social and economic points of view.

THE CABINET.

No account of Parliamentary Government or even of the strictly legislative aspects of government could be accurate if it did not refer to the peculiar inter-relationship of the Cabinet and the Legislature. The Cabinet is the result of that great step in the evolution of government whereby the constitutional convention arose that the Executive should be responsible to the elected representatives of the people.

This body in point of doctrine, merely advises the King in matters of administration; yet in point of fact it governs, whilst the King merely rules. In point of doctrine and of ultimate fact, it is the servant of the Legislature; yet in point of practice and normal fact, it leads and controls the Legislature, so long at least as it enjoys the confidence of the majority of the members. As Bagehot said, the peculiar essence of English Parliamentary Government is the almost complete fusion of executive and legislative powers through the connecting link of the Cabinet, which is "the hyphen which joins, the buckle which fastens, the legislative part to the executive part of the State."

FUNCTIONS.

A Legislature has four main functions:

- (1) to make laws regulating the relations of the State and citizens inter se, and of citizens to one another;
- (2) to control the public purse - by prescribing how money shall be raised and spent;
- (3) to examine and control the actual conduct of the business of the State by the Government of the day, and to reject or endorse the policy of that Government, and acts done pursuant to that policy.
- (4) to serve as a Forum of Debate, wherein the Government and the Community at large are informed of the grievances and needs of special sections of the public; wherein by the introduction of bills or resolutions the Government may test the state of public opinion; wherein the Opposition may seek to destroy public confidence in the Government policy, and seek to secure endorsement of its own contrary policy; and wherein the Private Member may seek to secure support for measures beneficial to his

own constituents or to the state at large. It is in respect of ~~this~~ fourth function that the principle of territorial representation and the diversity in character of the elected representatives combine in a great opportunity for the expression of all shades of public opinion on all sorts of questions affecting the welfare of the state; for the reconciliation of competing claims of conflicting interests; and for the translation into law or action of the dominant opinion. All of this stems from the fundamental fact that ours is a system of Government by discussion, government by public opinion. In the interval between elections it is the Legislature which affords the opportunity for the public (through its representatives) to meet; for the opinion of individuals and groups to be expressed; and for the dominant public opinion to be discovered.

LAW-MAKING.

I have not time to discuss further the executive aspects of government nor the various specific duties which the elected Legislators annually discharge - but I do wish to dwell for a space on the fact that a primary function is that of making laws. Many of these laws - though important - are of a routine or recurrent nature; and many of them are of a private or local nature.

I wish to concentrate on laws of a public nature which involve great matters of policy, as to things social or economic on the one hand, and things legal on the other.

PHILOSOPHY OF GOVERNMENT.

Perhaps I can make my points best by a brief discussion of the main characteristics of modern legislation. These proceed from the fact that the extent and variety of legislative enactment are always the expression of the current philosophy of the function of Government, and this in turn is conditioned by the then state of the nation, and its conceived needs.

A century ago the prevailing philosophy was that there should be as little government as possible - that the government should interfere to the minimum extent in the affairs of men, or with the principles of the ordinary law. Beginning with the vast consequences of the Industrial Revolution there came an increasing recognition that this "hands-off" conception must be replaced by the conception that government had a positive duty to provide for the welfare and security of the state and its citizens, by the enactment of laws for the provision of needed public services in economic and social matters, and for the modernization of the ordinary law.

SOCIAL AND ECONOMIC LAWS.

In the field of social and economic matters Canadian Legislatures have enacted numerous measures under which Governments have themselves gone into business, such as running railways, selling liquor and power, conducting banks, and so on. More often they have provided aid to particular classes, by way of Poor Relief, Unemployment relief, Old Age Pensions, family allowances, workmens compensation, price floors for farmers and fishermen, and so on. They have regulated competition and business generally, by laws relating to public utilities, combinations in restraint of trade, marketing and grading, sales of securities and so on. They have regulated the relations between labour and capital, by laws relating to minimum wages, industrial standards, industrial disputes, collective bargaining and so on.

DELEGATED POWERS.

The increasing extent to which governments have sought to ameliorate social conditions, and to participate in, or regulate, economic activities has produced a very significant development in the technique of government. This is the great use which is now being made of the device of creating administrative and regulative bodies, and delegating to them the capacity to make rules having the force of law, and to make decisions as to the application of laws to particular cases.

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FUTURE DEVELOPMENTS.

Both of these great modern trends in the law-making and executive branches of government have been strengthened and accelerated during the ~~post-war world.~~ Indeed one need only recall the nature of the programmes of social and economic reforms proposed by the great National Parties to realize how much use of legislation will be made in the endeavor to attain to a brave new world, by planned government action in matters social and economic. ~~All of this is in~~ accordance with, or in response to, a new conception of the affirmative duty of governments, actively to promote human welfare and to regulate business activities in the interests of all citizens.

Hand in hand with this development it seems inevitable that the technique of creating numerous subordinate agencies of government will continue - and that the number and variety of Boards exercising delegated law-making and decision-making powers will exceed that of the pre-war years.

There are many who view this latter development with alarm as involving the creation or perpetuation of a great Bureaucracy - of officials making laws in the manner of legislature but with little direct control over their activities, and of others determining legal rights as if they were Courts - but without the safeguards afforded to individuals by the rules, the traditions and the independent personnel of the established courts of Justice.

Certain it is that these subordinate bodies do offend against certain fundamental notions of plain citizens who feel, instinctively, that laws should be made by legislatures composed of the people's representatives and after due debate, and that human rights should be declared, openly by men following the principles and processes of the ordinary law. Certainly there are dangers in this expanding bureaucracy which may well counter-balance any merely technical advantages it may possess over the functioning of legislatures and Courts. How far this tendency should be allowed to go is a question which well merits great study by all citizens; but it is well to remember that it is simply a technique of government and one which flourishes in direct proportion to the people's demand on government for more paternalistic legislation, and that to a great degree it will be part of the price we will pay for our desired New Social Order, for a Planned Economy or for Cradle to the Grave Security.

CONSTITUTIONAL MATTERS.

The War is over and we now face the Reconstruction and Post-War Period, pregnant with vital problems arising out of the aftermath of war, and the clamorous desires of the public for great measures of social and economic adjustment. During the war years Governmental powers have been exercised chiefly by the Dominion Parliament-with Provincial Legislatures playing a very subordinate part. Now has come - or will shortly come - the stage at which we return to our

normal federalism. In our attempts to solve ^{current problems} and to make great social adjustments we shall encounter the inescapable fact that being a federal country all law-making and executive power is sharply divided as between the Central and Provincial Legislatures and Governments. We shall be forced to recur to the half-forgotten fact that every Legislature in Canada is impotent outside of limits prescribed by the Constitution; whilst there are inherent difficulties in attempting to bridge the lines of division by merely co-operative action, however whole-hearted. Even in our zeal to solve problems and improve conditions we must never be impatient with these restrictive - and sometimes retarding - effects of a federal constitution; they cannot be dismissed as mere legal technicalities, for they are at once the products of our system of government, and the very conditions which maintain it.

We have recently elected a Dominion Cabinet which quickly called a Dominion-Provincial Conference and submitted proposals to the Provincial Governments calling for great changes in the legal and traditional relations between them (particularly in fiscal matters) thought to be necessary to put the total governmental machinery in gear to meet immediate necessities. I shall express no opinion as to the character of these proposals; but I do wish to say that when the Conference re-convenes its conclusions will determine much of the future of Canada.

It is the imminency of such grave decisions which gives such special importance to Provincial elections to be held in the interim. The Provincial Legislatures to be elected directly - and Provincial Cabinets to be selected indirectly - by the electors in such Provinces, will become participants in momentous decisions affecting the happiness and prosperity of every great group and territorial unit in Canada; it behooves us to choose them well. In this selection each of us

can contribute his own quota to the formation of that public opinion which - expressed in the casting of votes on election day - will determine the personalities and attitudes of those who will speak for the groups and units to which we belong. This opportunity - this cherished privilege - carries with it the duty to exercise it, and thus to influence the shape of things to come. Belief in democracy however loudly proclaimed will prove a sham if not translated into action on election day; for it is as true in politics as in theology, that "Faith without Works is Dead".

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Such a development was inevitable; for the truth is that great schemes of social betterment and economic control cannot be worked without the invention of detailed rules and their application to multitudes of individual cases. Since legislatures have not the time to devise such detailed rules nor government departments always the equipment for their daily application, the Legislatures have had perforce to content themselves with enactments laying down the basic rules, and creating subordinate boards and commissions empowered to fill-in the skeleton rules, and to decide the particular cases arising under them. By these means Governments and Legislatures have been left free to concentrate on the formation and enactment of general principles of economic and social policy.

IMPROVEMENT OF ORDINARY LAW.

To the layman conscious of the torrent of newly-made laws which affect his liberty of action in so many ways it may come as a shock to realize how few of these affect the great mass of the ordinary law, by which his fundamental rights as a citizen or as a litigant are governed.

"It is comparatively rarely that the Legislature interferes in this domain, except to gather up loose ends, resolve a doubt or to abrogate a principle which has become inconvenient; it seldom lays hands on any of those principles (of contract, tort or property law) which lawyers have come to regard as fundamental. The great bulk of legislation is for the most part of a social or administrative character, defining the reciprocal duties of State and individuals, rather than the duties of individuals *intar se*."

This is the more remarkable in that it is one of the great functions of the Legislature to reform and adapt the ordinary law to changing conditions to the extent that the Courts are powerless to do so. It is the function of the Judiciary to declare and apply the law as it exists in the principles enunciated in previous decisions. The Judiciary has a capacity to adapt the ordinary law to new conditions - to make new law under the guise of declaring the old. This capacity, however, is strictly limited; and hence it happens - all too frequently - that the law the Courts must apply is out of date, or inexpedient, or even unjust, in particular cases.

It is one of the paradoxes of today that in the midst of rapidly-changing conditions requiring the constant adaptation of the ordinary law, the Legislatures remain relatively indifferent to their great function of reforming the common law. The reason for this indifference is two-fold:

1. the absence of any permanent body of lawyers and citizens charged with the duty of constant scrutiny of the law and the duty of recommending reforms in it.
2. the lack of any organized pressure by citizens generally on governments, calling for a response in the enactment of law-reform measures.

The first is curable by the creation - as in a few jurisdictions - of Law Revision Commissions. The second is curable by citizens, individually or in groups, urging on governments the necessity of removing discovered inadequacies in the law.

Both with regard to this latter point, and to the great fact that legislation, in the last analysis, is the product of public opinion, I wish to conclude with this pertinent quotation:

"The process of making law is not exclusively the work of Legislative bodies. The most important element in the entire process of law formation, is that silent working of a million individual minds each forming and expressing opinions, beliefs and feelings; setting up ideas, analyzing and judging the myriad facts of daily life; having all the time no conscious purpose of helping in any task of making laws, yet creating by their combined influence that environment which molds the minds, and shapes the purposes of those who act as legislators, and also creating that condition of popular opinion which itself will decide the destiny and effect of any enacted law".
