

## NATIONALISM AND THE JUDICIARY

*This is the sixth of the series of editorials by Mr. Roosevelt on "Nationalism and Progress." This discussion of "Nationalism and the Judiciary" will be continued in following articles in the series.—THE EDITORS.*

An even more appropriate heading for this article would be "Nationalism; and Law, Order, and Justice." The first requisite for the welfare of any community is justice; not merely legal justice, but ethical justice, moral justice, the kind of justice meant by the ordinary man when he says that he wishes fair play or a square deal. In order to get this justice it is absolutely necessary that there should be order; and there can be no order unless there is law, and unless the law is rigidly and honestly enforced. Crimes of greed and violence and crimes of greed and cunning must alike be repressed, for it makes no difference what form wrong-doing takes so long as it is wrong-doing; and important though it is to have good legislative and executive officers, it is even more important to have an upright, fearless, and independent judiciary, bent with whole-hearted and intelligent zeal upon serving the interests of all the people.

Justice is based upon law and order, and without law and order there can be no justice. The triumph of disorder and lawlessness is certain in the end to mean not only the undoing of the reputable rich but the undoing of the reputable poor; and indeed the undoing of everybody, reputable or disreputable, for not even scoundrels can permanently flourish in a society in which the conditions have passed a certain degree of anarchy. But it must never be forgotten that law and order are not in themselves ends, but means toward obtaining justice. When order reigned in Warsaw, it meant not justice but the negation of justice. The terrible atrocities of Kishenev were due, primarily, not to lawlessness, but to the fact that those who had the power used it for the destruction of the helpless. The Jew in Russia and the Armenian in Turkey have had to dread cruel oppression at the hands of the exponents of the law quite as much

as from violent lawbreakers. Without law and order there can be no permanent justice; but law and order are good only when used to bring about such justice.

Now, the above is an elementary proposition. It is so elementary that it is difficult to controvert. Nevertheless, in practice here in our own country there are multitudes of men who wholly ignore it, and who persist in making a fetish of the instrumentalities for obtaining justice through law and order, instead of treating them on their merits as instruments of greater or less worth. For instance, when a big corporation gets involved in a strike with a big labor union, the corporation at once demands that order be maintained, while the union is apt to protest against any practical steps to maintain order. As a matter of fact, the duty of the Government is clear. It should first restore order. So far, the corporation is heartily in favor of Government interference, of the use of the collective power of the people. But as soon as order has been restored—that is, as soon as the collective power of the people has been exerted to suppress violence directed against the property or persons of certain members of the community—the heads of the corporation are apt to insist (as in the 1902 coal strike, for instance) that the whole duty of the Government is at an end, and that any inquiry into the rights and wrongs of the controversy is an outrage on private initiative, private right and judgment. As a matter of fact, in many such cases the duty of the Government has only begun. It should not refrain from restoring and enforcing order because of any protest of the labor people, but neither should it refrain from full inquiry into the facts, and from acting so as to bring about justice, because of any protest on the part of the capitalists. In every such conflict of labor and capital there is a third party in interest, the public; and when the public, through the Governmental authorities, has to use the collective power of the people to restore order, that fact is of itself full and complete proof that, even if only for preventing recurrence of disorder, it is its further duty to use the collective power of the people for the purpose of finding out the facts and enforcing justice. Yet the very

men who, when the general proposition is enunciated as above, say that it is a mere truism, a mere platitude, violently oppose its application in concrete instances, such as that of the coal strike in 1902.

So it is with the judiciary. In the abstract, very few people will deny that the judge should be the servant of the people, and that in order to be a good servant of the people he must be wise, upright, and independent. But in practice, and when concrete instances are involved, the proposition is apt to be indignantly repudiated, now by people actuated by one set of reasons, now by people actuated by a directly opposite set of reasons; and, moreover, the same men sometimes on successive occasions take both of these two diametrically opposed positions. A judge cannot be a good judge, and therefore he cannot be a good public servant, if he is required to render every decision in accordance with what popular opinion at the moment, with or without reason, may desire. Too often the very men who most loudly praise a judge for being independent so far as pressure by the great special interests is concerned are furious in their denunciation of him when he shows the slightest independence in the face of a gust of mob feeling, or of popular feeling which, though it does not take the mob form, is equally unwise and unjust. And the converse is no less true. That portion of the daily press which is controlled by the special interests, and particularly that portion of the New York City daily press which is responsive to Wall Street sentiment, has come to regard the judiciary as in a special sense the bulwark of property; and inasmuch as the special interests naturally put property rights above popular rights, their representatives in the press make it their particular concern to extol those judges who take the same view. They are therefore very severe in their denunciations of any man who has anything to say in criticism of a judicial decision which favors property rights and is against popular rights. But if the decision is the other way, the same papers and individuals immediately reverse their former attitude and themselves become the most violent and bitter critics of the judge. The very New York papers, for instance, which on

most occasions when they treat of this subject insist that any criticism of a judicial decision is subversive of the foundations of law and order and destructive of republican institutions, were the most violent critics of Judge Landis when he inflicted what they regarded as an excessive fine on the Standard Oil Company, and of Judge (now Mayor) Gaynor when they disapproved of his attitude on the five-cent fare bill. Criticism, entirely temperate, of a decision which deprived the United States Government of its Constitutional right to control and regulate interstate commerce, or which deprived the people of the State of New York of the right to regulate the hours of workingmen engaged in unhygienic occupations, was treated as an assault on the foundations of the Republic by the same men who exhausted the resources of vituperation in assailing Judges Landis and Gaynor.

These same men and papers are always prompt to speak with horror of the utterances of labor leaders against the courts. As to certain tirades of labor leaders against the courts, I most cordially agree with them. But the worth of their protests from the standpoint of principle may be gauged by the fact that they pass over in silence utterances such as that of a great railway president, one of the half-dozen biggest financial men in this country, when, a few years ago, in speaking of a court decision, he said: "Decision or no decision, the men who own this stock will do with it as they please. The courts decide a great many things about which they know nothing. This is one of them. No court can run our property." Now capitalist and labor leader alike should be held to the same course of conduct. Both must obey the law; and, on the other hand, each has the right temperately and truthfully to point out where a given interpretation of the law by a given man works injustice.

Of course the trouble in these cases is not in securing theoretical acquiescence in statements of general principles of morality, but in securing practical acquiescence in the attempt to apply these principles to concrete cases. Very few politicians or business men, very few newspaper or magazine editors, would publicly announce their disbelief in the Decalogue; and yet,



while it is undoubtedly true that there are plenty of politicians, business men, and newspaper and magazine editors who try their honest best to live up to the Decalogue, it is equally true that there are plenty of all classes who treat either the Eighth or the Ninth Commandments, or both of them, as having no practical application to the facts of daily life. So it is when we come to deal with law, order, and justice. So it is when we come to deal with our judicial system and with the judges themselves. On the one hand, the very men who by their actions seek to degrade the judiciary into the position of a servile register of the popular whim of the moment will cheerfully render lip loyalty to the theory that a judge should be upright and independent. On the other hand, the very men who strive hardest to prevent the judge from being a real popular servant, and who wish, on the contrary, to make him an instrument for defeating the popular will in the interests of a special class, are always loudest in their assertion that they are really championing the cause of popular rights. The men whose patriotism is really rational and sincere, the men who really believe in the just rule of the people, and neither in the selfish rule of a plutocracy nor the selfish rule of a mob, stand as equally opposed to the extremists of both classes. Here, again, the wise men to-day are those who on this question stood as Lincoln stood toward the questions of his day. It is simple and easy to take a place among extreme fanatics, either of radical reaction or of radical advance, just as it was easy enough in Lincoln's day to be either a Copperhead who demanded that slavery should not be disturbed and declared the war a failure, or an Abolitionist who took the view that John Brown was morally justified in endeavoring to start a slave insurrection and that Lincoln was a time-server whose timidity and indecision were ruining the cause of freedom. But it was an immensely difficult thing actually to work as Lincoln worked, as Oliver P. Morton worked, as the Union men in Kentucky worked, so as ultimately to bring about both the preservation of the Union and the abolition of slavery. We who believe in popular rule, who hold that this Govern-

ment has no justification for its existence unless the well-considered and deliberate purpose of the people is ultimately to prevail, are no less bound to insist that unless the people themselves in the long run desire justice and act with wisdom and self-restraint and self-mastery they will bring themselves to ruin; and therefore we feel that, so far as the wisdom of man can avail, the system should be such as to make the judge ever keep in mind his duty to the public, his duty to act as a representative of the permanent popular will; while it is even more important that the public in its turn should realize that it cannot in the long run receive the highest service unless its servants are independent and fearless and deeply conscientious, no less than possessed of understanding of and sympathy with popular needs and desires.

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