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Book Reviews

JUSTICE ACCORDING TO LAW, by Roscoe Pound. Yale University Press, New Haven, 1951. Pp. iii, 98. $2.50.

What is justice? Since the fifth century before Christ this has been the subject of debate by philosophers, but neither they nor jurists of ancient or modern times have been able to agree upon an answer. Dean Pound finds at least five theories concerning its essence: an individual virtue, a moral idea, a regime of social control, the end or purpose of social control, the ideal relation among men toward which social control is directed. He explains the modifications and qualifications which inhere in or surround each theory. Probably the end of social control, and so of law, is the maintenance of an ideal relation among men, but the content of that ideal has been variable and is likely to continue to be so. "It has been thought of as peace and order, as a secured stable social status quo, as liberty, i.e., a maximum of free individual self-assertion appropriate to a world of opportunities awaiting exploration and exploitation, of a maximum of economic production (Dugiut), as a maximum satisfaction of individual expectations, and as a maximum of development of human control over external or physical nature made possible by a maximum control over internal or human nature—in other words, of civilization. Today with the rise of the service state we get a new meaning of 'security' and an ideal of using the power of politically organized society to deliver mankind from want and fear and frustration." [1]

But lawyers are not to be frustrated by the failure of philosophers or jurists to agree. "Experience developed by reason and reason tested by experience have taught us how to go far toward achieving a practical task of enabling men to live together in politically organized communities in civilized society with the guidance of a working idea even if that working idea is not metaphysically or logically or ethically convincingly ideal.

"What the law has been trying to do is to adjust relations and order conduct so as to give the most effect to the whole scheme of expectations of men in civilized society with a minimum of friction and waste." [2]

1. Pp. 28-29.
2. Page 29.

In the search for a continually more inclusive end of law, we have come to the "idea of a maximum satisfaction of human wants or expectations. What we have to do in social control, and so in law, is to reconcile and adjust these desires or wants or expectations, so far as we can, so as to secure as much of the totality of them as we can." [3]

Law, as Dean Pound conceives it, is a body of authoritative grounds or patterns of decision, a body of authoritative precepts which has grown and continues to grow out of experience and tradition of adjudication of dispute. It is to be distinguished from "a law," which is a "precept set authoritatively by the law-making organ of the state." Law connotes the Latin "jus" rather than "lex." For the courts it is a guide to decision, for the citizen a rule of conduct carrying a threat for its violation, for the counsellor a basis of prediction. Law does not comprehend all social control but that specialized and organized form, "control through systematic application of the pressure, or if you will the force, of a politically organized society." [4] Law in this sense has been said by jurists to be "(1) the legal order, (2) the body of authoritative guides to or models or patterns of decision, whether judicial or administrative, and (3) the judicial process to which today we must add the administrative process." [5]

Dean Pound rejects the third meaning, particularly as interpreted by so-called realists who say that whatever is done officially is law. He accepts the second but explains that law, so defined, consists of "authoritative precepts, developed and applied by an authoritative technique in the light of authoritative traditional ideals." [6] The importance of the technique is demonstrated by contrasting that used by common lawyers in developing and applying the precepts with that used by the Roman or civil lawyer. The influence of the ideal is illustrated by the varying views of what the social order should be as reflected in conflicting solutions of the same legal problem in different common law jurisdictions, and in the same common law jurisdiction when changed social conditions have created changed standards of judgment.

The precepts so developed and applied include rules, principles, legal conceptions and prescriptions of standards. A rule

3. Page 31.
4. Page 47.
5. Page 48.
6. Page 50.

attaches "a definite detailed legal consequence to a definite detailed state of facts;" [7] a "principle is an authoritative starting point for legal reasoning;" [8] a legal conception "is an authoritative category into which cases may be fitted" and in which "a series of rules, principles and standards become applicable," [9] for example, sale, bailment, trust; a "standard is a measure of conduct prescribed by law from which one departs at his peril of answering for resulting damage." [10]

This detailed analysis of the content of law, with instructive illustrations, is presented because much of the fault found with the administration of justice has been due to the mistaken notion that law has one simple meaning, that it is in effect a mere aggregate of rules. A rule almost necessarily has a short life and is the least important constituent of law, although it may and usually does have most important temporary consequences. The truth is that in law, as distinguished from a law or laws, "we have a taught tradition of experience developed by reason and reason tested by experience. . . . Both of the great legal systems of the modern world [the common and the civil law] are taught traditions and so have proved resistant to forces that destroy political institutions. . . . The last of the Caesars fell three decades or more ago. The work of the jurisconsult contemporaries of the first Caesar still helps guide the administration of justice in half the world." [11]

By what organ of the state is justice to be administered? Is there to be a separation of powers or is the same body to perform all legislative, executive, and judicial functions? There was much legislative administration of justice in England and in the colonies. Remnants of it still exist in the United States in impeachment proceedings and, to a less extent, in dealing with claims against the government. But experience has shown it to be unsatisfactory in all its applications. It tends to be discretionary justice, justice without law, where the result depends not so much upon the merits of the controversy as disclosed by the evidence but upon political or partisan or personal considerations, and may be determined by the votes of persons who have heard little or none of the material evidence or arguments. Legislative justice has almost disappeared from the American scene.

7. Page 56.
8. Ibid.
9. Page 58.
10. Ibid.
11. Pp. 60, 61.

Until the present century the development of Anglo-American law reflected the theory of the historical jurists of the nineteenth century that separation of powers is a corollary of the evolution of the idea of liberty in human institutions. The notion that the King administered justice was destroyed in England in the seventeenth century. In the eighteenth a system of courts was gradually established in the colonies. "Executive justice" disappeared upon our separation from England by the Revolution. The ideal of a government of laws and not of men, which in truth means a government by men according to law, seemed to have been firmly established. Indeed, in the nineteenth century there was a marked tendency to extend unduly the power of the courts over executive action, and to commit to them administrative duties that properly belonged to the executive.

The inevitable reaction "was accelerated by the demands of an expanding law of public utilities and the requirements of social legislation and the service state. The result in the present century was a rapid development of administrative boards and agencies of all kinds and incidental recurrence to official discretion rather than authoritative precepts and legal reasoning, which has brought back to our policy the long obsolete and supposedly defunct executive justice and has been making it an ordinary feature of our government." [12]

Judicial review of the action of administrative agencies in the early years of this century exhibited two serious faults: (1) since they were treated as courts not of record, their proceedings were held to be subject to trial de novo in the courts; and (2) they were required to apply the common law rules of evidence. Gradual correction of these faults by judicial decision was too slow, and as legislation created new agencies, it freed them from the common law rules of evidence and strictly limited judicial review of their decisions. The result has been a dangerous approach to administrative absolutism. And this not only in the imposition of regulations to be observed in the future but also in the adjudication of private rights and duties.

Dean Pound is not impressed by the arguments that the administrative process is subject to various checks and secures men of special skills, and therefore produces better reasoned and more satisfactory results than does the judicial process. He finds considerations of policy affecting the fact-finding process

12. Page 72.

where policy has no proper function; too much tendency to decide without a hearing other than a mere appearance of a hearing; too great inclination to reach a desired result without evidence of rational probative value; and even when framing regulations of a legislative character, too great a zeal to promote social ends which the legislature has not authorized and to which it might not agree.

The setting off of the judicial function has been a slow process. The independence of the courts and the supremacy of the law are a part of our inheritance, and we have preserved them in our constitutions. At the end of the last century objections to the mechanical reduction of everything to rule, excluding the influence of relevant non-legal factors, were valid and applicable to legislation, administration, and, indeed, to all the social sciences as well as to the judicial process. This defect was not inherent in judicial justice and has been eliminated. More recent complaints concern the failure and refusal of the courts to do the work that properly belongs to the legislatures. To be sure, the court legislates whenever it expands or restricts the operation of a rule of law or applies a principle to a new situation, but judicial legislation operates retroactively; it should be confined within narrow limits, be interstitial, as Mr. Justice Holmes described it. Adjudication, not legislation, is the proper function of the judiciary.

The advantages of judicial justice include these:

1. It combines possibilities of certainty and flexibility better than any other form.

2. It furnishes checks upon judges which are ineffective upon legislators and executives: (a) the judge is impelled to conform his actions to known principles and standards; (b) his decision is subject to criticism by a trained profession; (c) his decision and the circumstances of each case appear in public records; (d) the decision of the trial judge is reviewable by a bench of judges where the effect of individual prejudices and idiosyncrasies is eliminated.

3. Judges, because of their training and habits and knowledge that their decisions will be preserved, uphold settled principles against excitement and clamor, and protect the rights of minorities.

Of course the judicial process does not at all times and places conform to the ideal which these advantages should produce.

But the striving for the ideal goes far towards realizing it. "It is the approximation to our ideal of it which is significant, not the fallings short, which we seek continuously to control and reduce to a minimum. If a theory of social control through the force of politically organized society is made from the fallings short rather than from the achievements, we shall undo what has made increasingly for civilization since the beginnings of modern law in the later Middle Ages.

"We must bear in mind that theories of the impossibility of justice according to law and of the disappearance of law have largely gone along with, have developed side by side with, absolute theories in politics. The two are concomitants of the movement toward absolute government which has been going on in every part of the world. The theories of law in terms of threat and force are part of a general cult of force. The real foe of absolutism is law. It presupposes a life measured by reason, a legal order measured by reason, and a judicial process carried on by applying a reasoned technique to experience developed by reason and reason tested by experience." [13]

I have attempted only to make a summary of the summary in the ninety-one pages in which Dean Pound has set forth his "impression of the purpose, methods and problems of the administration of justice according to law," the "impression derived from sixty years of practice and teaching of law." He submits it "quantum valeat." There are no footnotes to divert the reader's attention or to guide him to fuller expositions or discussions which one as unlearned as I would need for an adequate comprehension of some portions of the text. But the results of the author's great learning are for the most part stated in such simple language that the lay reader, if he be interested enough to read with care, can get a sufficient appreciation of the development of the concepts of justice and law and of the American tradition of justice according to law as administered by Anglo-American courts to understand the Dean's distrust of administrative tribunals not subject to reasonable judicial control. He fully recognizes the need of such tribunals in our complicated society. As early as 1928 in his foreword to the pageant drama, *Magna Carta*, he sounded a warning but was optimistic.

"Moreover, the need of checks and legal limitations did not come to an end when we gave over kings and set up popular

13. Page 91.

governments. Majorities, legislators, executives, administrative boards, and commissions, each within the sphere of their capacities for interference with our individual, free self-assertion, may exercise their will to power after the manner of Henry II, or after the manner of John, or sometimes the one and sometimes the other. Vastly more complicated in detail, it is at bottom the old, simple problem of Magna Carta, and the solution, legal limitations a part of the law of the land and given effect as such by the ordinary processes of the law, maintains itself today. Indeed, I doubt whether the unwonted rule of boards and commissions, and activity of inspectors, and the scrutinizing of all enterprise and all activity through administrative investigations would be tolerable in a people so near in spirit to the pioneers, so accustomed to spontaneous private initiative, so filled with faith in the power of any man to do anything, were it not for legal restraint in the background of administrative government and the ultimate supremacy of the law of the land." [14]

Today his tone is pessimistic. The present trend toward administrative absolutism revealed in what he sees in the exercise of administrative discretionary justice grieves and dismays him. In so short a space it was impossible to present all the data which have led him to his conclusion. Protagonists of administrative tribunals will insist that he has based his generalizations upon inadequate evidence, has selected decisions, articles and speeches that represent extremes and are not characteristic. The wiser of them will point out that the modern, wide-spread use of the administrative in place of the judicial process must be expected to exhibit the faults of any new system, that only time and patience and constructive criticism are needed to cure them; that as judicial justice according to law slowly displaced discretionary justice, so will administrative justice according to law evolve from discretionary administrative justice; that already the pendulum has stopped swinging to the left and may be starting to return to normal position. Of course, the less wise, not to say the foolish, enthusiasts, will find *expertise* in judgment where it ought to be but is not, will clamor for more discretion and fewer restraints, will substitute conclusions based on wishful inexperience for experienced judgment and, ignoring the Dean's vast learning and experience, may even attribute his impressions

14. Magna Carta, A Pageant Drama, by Thomas Wood Stevens, 20 (1930).

to his advanced age. To these I strongly recommend a prayerful reading of Cicero's *De Senectute*—particularly chapters six and seven with the quotation from the poet, Naevius.

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THE COURT AND THE CONSTITUTION, by Owen J. Roberts. Harvard University Press, Cambridge, 1951. Pp. 102. $2.00.

Whatever Justice Roberts has to say about the Supreme Court is to be heard with attention, because of who he is and of what he has been. The little volume here reviewed preserves his Holmes Lectures for 1951.[1]

In our dual form of government it belongs to the Court to pass upon "the alleged transgressions by one government upon the authority of the other." In performing this function the Court has been obliged "to announce propositions nowhere expressly stated in the Constitution." [2] How wise has been its work in this regard? That is the framework of the lectures. Three fields are considered: taxation, regulation, and due process.

Marshall, as we now see it, got us off to a bad start in that portion of *McCulloch v. Maryland* wherein he analyzed the problem of federal immunity from state taxation. Thereafter the history of intergovernmental immunities abounds in shifting doctrine, and in exorbitant exemptions. "Most of the immunities so carefully built up on *McCulloch v. Maryland* have subsequently been swept away. In any practical view of the subject, more should go," [3] is the conclusion. "My own view is that the steady progress toward abolition of the reciprocal immunities has been beneficial." [4]

Chapter II deals with Conflicts of Police Power—a consideration chiefly of commerce clause law, but also of the congressional power to regulate by taxing and spending. In the argument of the AAA case, *United States v. Butler*,[5] Justice Roberts recalls, "The government disavowed any support for the statute under the commerce power." "The exaction was

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1. A prefatory note records that Justice Holmes left a legacy for the Harvard Law School, the income whereof is "devoted to paying the honorarium of a lecturer to be known as the Holmes Lecturer," an appointment made "not oftener than once in three years."

2. P. 2.

3. P. 32.

4. P. 35.

5. 297 U.S. 1 (1936).