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Book Review

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The problem is that Raz's key analytical tools—individuation, internal relations, the concept of a norm, and the nature of legal powers—are all in the initial stages of development. Raz suggests but does not formulate principles of individuation. Regulative relations are either too limited in scope or constitute a catchall for relations which are not punitive or genetic. His concept of a norm vacillates between the traditional view and his innovative view. Power-legislating and power-regulating laws are not carefully distinguished and the concept of a power remains murky. Finally, his criticism of Austin and Kelsen, perhaps the finest feature of his book, could have been done with more humility, especially considering the fact that Raz's contributions are nothing more than the development of their insights.

But failure to sufficiently elaborate and develop all the elements of so complicated a concept as that of a legal system may certainly be forgiven. What cannot be forgiven, however, is the style in which the book is written. The Concept of a Legal System is basically unreadable. While Raz certainly has something to say, trying to find out what it is by reading his book is quite a trick. Raz's criticism of other theorists is elaborate and often persuasive; his contributions are terse and often bewildering. The structure of the sections on Austin, Bentham, and Kelsen is understandable, but when Raz steps out on his own, exactly where he is going and what he is doing become lost as a maze of new technical terms is added. Raz's twelve theses are popped in one by one without a general overview of their meaning or significance. Finally, there are eruptions from time to time of symbolic gobbledygook. In the analysis of Bentham's concept of a law and in Raz's introduction of what he calls an O-norm, the symbolic discourse takes over completely. Terms like S-law (sanction-imposing law) and MS-laws (a permission to impose a sanction) appear periodically. But since they are not used throughout the book, the reader must thumb back to find out exactly what the symbols mean. It is submitted that while symbolic logic adds precision to thinking about the law it detracts from one's ability to explain the perceptions achieved to the civilians. If ideas cannot be rendered into understandable prose, they still need some work. But for those with a participant's, as distinguished from a spectator's, interest in legal theory, Raz's book is a rewarding though taxing experience.

PERRY PICKERT


The author, a distinguished Justice of the California Court of Appeals, starts this revealing book by taking judicial notice of the fact that something is seriously wrong with our system of justice. "For example," he says, "in criminal prosecutions we find as long as five months spent in the selection of a jury; the same murder charge tried five different times; the same issues of search and seizure reviewed over and over again, conceivably as many as twenty-six different times; prosecutions pending a decade or more; accusations routinely side-stepped by an accused who makes the legal machinery the target instead of his own conduct." (p. 3.)

Justice Fleming believes that this pandemic situation has been produced by presently dominant legal theorists who, being impatient with human fallibility, have embarked on a quest for perfection in all aspects of the social order and particularly for perfection in legal procedure. "Let justice be done though the heavens fall" has apparently become our controlling judicial theme.

39 The discussion of Bentham is on pp. 55-57 and O-norms are introduced on pp. 159-161. With the concept of an O-norm Raz attempts to present a generalized definition of a norm which includes permission and optional choices as well as prescriptions and prohibitions.
Implicit in this critical evaluation of what is happening in our courts is the basic need to rediscover the fine but clear distinction between "justice" and "law." Circuit Judge Learned Hand is reported to have once ended a visit with Mr. Justice Holmes with these words, "So long, Judge. Go do justice now." Whereupon Holmes wheeled, vehemently to declare, "I do not do justice. I merely see that men follow the rules."

Judge Fleming's thesis is that in their quest for perfect justice, the judges of our courts, at all levels, are now effectively bending, amending, and supplementing the established rules, including those laid down in the Constitution of the United States. He recalls what Charles Evans Hughes, later justice, still later, Chief Justice, said more than sixty years ago:

We are under a Constitution, but the Constitution is what the judges say it is.

Justice Fleming's examination proves that the Hughes appraisal was never more accurate than it is today. He says:

Elitism is a delusion suffered by appellate judges, that courts are better equipped than other organs of government to devise solutions for the great problems of the times. Fortunately, all appellate courts in the United States are subject to higher authority, and hence, their tendencies toward elitism are correctable. All courts, that is except one—the United States Supreme Court. For all practical purposes that court can issue a ruling on any legal or political question that strikes its fancy, and in so doing, it becomes answerable to no one and subject to no review. Under the Constitution, the judges of the Supreme Court hold their offices during good behavior (Const. Art. III, Section 1), and the one constitutional limitation on their powers is that found in Article III, Section 2(2), which, after giving the Supreme Court original jurisdiction in a few classes of cases, provides that in other cases the Supreme Court shall have appellate jurisdiction—"with such Exceptions and under such Regulations as the Congress shall make." (Italics mine)

In the course of this country's constitutional development, the Supreme Court has acquired absolute power to control and invalidate any act of the President or of Congress, and absolute power to control virtually all acts of a state government, whether legislative, executive or judicial. This absolute power is exercisable by five of the nine members of the court, and is neither limited by precedent nor circumscribed by any requirement that the judgments of the court be accompanied by reasoned opinions.\(^2\)

The author points out that only when justices of the Supreme Court find themselves in a minority on a particular issue do they expressly deplore the exercise of this absolute power and warn against its use. He cites a half dozen such warnings in a variety of dissents from different justices, concluding:

A full analysis of the actions of the Supreme Court as super legislature would involve the entire spectrum of constitutional law, but two examples from cases previously discussed will illustrate the point.\(^3\)

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2 The Price of Perfect Justice, p. 155.
The author says that in the *Griswold* case the Court simply "exercised a supervisory veto" over legislation whose fairness and wisdom failed to pass muster with a majority of the justices. In *Miranda*,

\[\ldots\] the Court undertook to function as a legislature—which sees a problem, devises a solution, and puts its solution into effect by creating and adopting new law \[\ldots\] which \[\ldots\] if it doesn't work \[\ldots\] can never be repealed short of constitutional amendment or a change of heart by the court itself.\(^4\)

The limitless range of the Supreme Court's present power to reconstruct, amend, or simply veto all state legislation was built upon a dissenting opinion by Justice Black in 1947, in the case of *Adamson v. California*.\(^5\) Black argued:

\[\ldots\] that the restrictions on the power of the Federal Government contained in the first ten amendments to the Constitution (the Bill of Rights) had been incorporated by the due process clause of the Fourteenth Amendment as restrictions on the power of the states. By adhering to this position over a period of years, Black eventually persuaded a majority of the Court to make a selective incorporation of the restrictions in the Bill of Rights into the Fourteenth Amendment and thereby make these restrictions binding upon the states.

Justice Fleming develops the fact that by 1953 the expansion of federal court power over state court proceedings was well on its way to becoming complete. In *Brown v. Allen*,\(^6\)

The court ruled that a defendant in a state criminal case whose conviction had been affirmed on direct appeal in the state courts and been rejected for hearing by the United States Supreme Court, could apply to a federal district court on habeas corpus for review of his claim that his federal constitutional rights had been withheld in the state proceedings.

And if he were unsuccessful there, he could go up through the federal courts back to the Supreme Court again for another hearing. In effect, *Brown v. Allen* thus gave the defendant two complete sets of reviews in his quest for perfect justice. In his dissent in *Brown v. Allen*, Justice Jackson said:

The expansion has now reached the point where any state court conviction disapproved by a majority of this court thereby becomes unconstitutional and subject to nullification by habeas corpus.\(^7\)

In this manner, the quest for perfect justice by the Supreme Court has produced many more than the twenty-six new procedural constitutional rights that Justice Fleming lists on pages 50 and 51 of his remarkable book. Scattered throughout the volume elsewhere the reader continually finds other court-created additions to the author's catalog of new constitutional rights for the individual to violate state laws; for example:

The right to escape the death penalty;

The right to commit an abortion;

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\(^4\) *The Price of Perfect Justice*, p. 158.


\(^6\) 344 U.S. 443 (1953).

\(^7\) *The Price of Perfect Justice*, pp. 23-24.
The right to speak by disorderly public demonstrations for or against anything;
Or for females, the right to go "topless" or engage in nude dancing;
The right of access to pornography;
The right to repetitious reviews of all state court proceedings by Federal habeas corpus proceedings;
The right of a welfare recipient to travel into a state where higher benefits for residents are available and receive the higher benefits immediately;
The right to sit on the grass on public property;
And so on and on . . . .

Added to the other evils of such judge-made law, says Justice Fleming, "Is the fact that it debilitates the strength of representative government." "Even when the social undesirability of a law may be convincingly urged," said Justice Frankfurter, "it is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests (namely) the people." 8

Throughout his book, Justice Fleming’s citations show that the range of the Supreme Court’s newly acquired administrative jurisdiction over the internal affairs of the several states now stretches as far and as wide as its power to modify and veto all varieties of state legislation. The court’s justification for this extra constitutional reach for power is epitomized by Justice Douglas in Griswold, who maintains that:

the foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. 9

According to Justice Fleming:

The court then found that the Connecticut statutes on contraception violated the zone of privacy surrounding the marriage relationship protected by several fundamental guarantees, among them, those of the first, third, fourth, fifth, ninth and fourteenth amendments. 10

The Douglas quote indicates how far and firmly Justice Black’s "merger" doctrine has traveled since he first enunciated it as a dissent in 1947. 11

Justice Fleming’s suggested remedy for correction of the extra-constitutional judicial absolutism that he has so well documented is not as well reasoned as is his analysis of how arbitrarily and ruthlessly the power has recently been developed. He recommends a constitutional amendment limiting the term of office for members of the Supreme Court to sixteen years, without eligibility for reappointment. 12 He believes that the advanced age of the justices tends to stratify their tendency to absolutism.

8 335 U.S. 553 (1949).
9 381 U.S. 484 (1965).
10 The Price of Perfect Justice, p. 95.
11 Supra, fn. 5.
12 The Price of Perfect Justice, p. 164.
The fact is, however, that practically all of the new “extra-constitutional” rights and the radically extended jurisdiction of the court cited by the author have been created by the Supreme Court since 1950. With the exception of Justices Black and Douglas, none of the offending justices whose decisions helped to create the “new absolutism” had been on the court for sixteen years when a majority of the court confirmed its absolute authority over the judicial procedures and executive jurisdiction of the several states in overriding *Twining v. New Jersey* by its decision of *Malloy v. Hogan*.

Justice Douglas became the bellwether of the new absolutism in 1943 when he was only forty-five years of age and had been on the Supreme Court only four years. In deciding the case of *Murdock v. Pennsylvania* at that time, Justice Douglas began with:

The First Amendment, *which the fourteenth amendment makes applicable to the states* (italics mine), declares that Congress shall make no law respecting an establishment of religion, etc.

This was four years before Justice Black’s dissenting opinion in *Adamson v. California* which Justice Fleming cites as the origination of the “merger” doctrine which is at the root of the “absolutism” he so accurately describes and so properly deplores in *The Price of Perfect Justice*. Thus, the sixteen-year tenure for Supreme Court justices would not have deflected the court’s subsequent development of the Douglas-Black formula for judicial absolutism; nor, in the opinion of this reviewer, would the adoption of Justice Fleming’s proposed amendment (if it could be adopted) dissolve the unfortunate results of that judicial absolutism now. However, if our Congressmen could be persuaded to read Justice Fleming’s book carefully and critically, in the context of Article III, Section 2 of the Constitution of the United States, the presently rampaging evil of absolutism by all federal courts now being inflicted upon the reserved civil and criminal jurisdiction of the states of the union in defiance of the Tenth Amendment of the Constitution, could be destroyed quickly and decisively by a majority of the Congress.

The Supreme Court itself has acknowledged many times and uniformly recognized the authority of Congress to restrict the appellate jurisdiction of the Supreme Court and all jurisdiction of all other federal courts by the plain terms of Article III, Section 2 of the Constitution.

Ironically, the pertinence of this remedy for the overloaded federal court docket has been recommended by Chief Justice Burger himself in a recent interview with the editors of *U.S. News and World Report*. Said he:

I should emphasize that the Constitution places in the Congress of the United States the power to define the jurisdiction of the Federal Courts. I must add, in all fairness, that the courts have also made decisions that enlarge the case load.

This reviewer’s postscript to Justice Fleming’s excellent book is simply this. ... After what Justice Fleming documents, and the Chief Justice of the United States Supreme Court frankly admits, what else is Congress waiting for?

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13 *211 U.S. 78* (1908).
14 *Supra*, fn. 5.