2-1-1949

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Recommended Citation
Pat McCarran, Total Justice and Administrative Procedure, 24 Notre Dame L. Rev. 149 (1949).
Available at: http://scholarship.law.nd.edu/ndlr/vol24/iss2/2
TOTAL JUSTICE AND ADMINISTRATIVE PROCEDURE*

For want of a better term, I should like to discuss what I call "Total Justice". It will do no harm first to recall the different meanings and methods of law and justice. Then, I think, we shall have placed ourselves in a state of mind to explore a particular dark corner of the law today and to consider what may be done about it.

Except for the totalitarians, we all base our law and law making upon the premise that there is a difference between right and wrong, between justice and iniquity, between goodness and sin. Occasionally, there is some attempt to make it appear that law is not necessarily right, nor just, nor good. Some legal scholars have distinguished between law and morals. Other learned men have delighted in distinguishing between justice and mercy. Perhaps a man from Mars would be puzzled by these seeming contradictions. But we know that they represent shades of meaning rather than conflicts. They express our self-criticism. They mean that man-made law and man-made justice have a natural difficulty keeping up with morals, mercy, and the Christian ideal of perfection.

A more tangible difficulty lies in the several very different methods which go to make up our legal system. Of these, presumably no factor is more disillusioning than the fact that law must be applied by mere men to inexorably concrete cases. Thus we have on the one hand a plea for an ideal "government of laws and not of men" although there never was and never can be such a government; and on the other hand we have cynical surrender to thinly veiled anarchy or to the dictatorship of officialdom. Those are not so much conflicting points of view as they are the usual contrast of

*Originally delivered as a speech at the annual Senior Banquet of the Notre Dame Law Club, January 21, 1949.
the high, hard goal, on the one hand—never fully attainable but infinitely worth while—with the dark, easy, barbaric level on the other. On this continent we have chosen the hard ideal rather than the easy level.

Still a third mooted premise of our legal system is the statement, or writing down, of our law. In ancient times when men's minds and words were more brutal and blunt than they are today, the situation was a dramatic one. There was, for example, the classic struggle in Republican Rome to see whether the law should remain a mystery in the hands of the pagan priesthood or be written down for all to see and know and rely upon. The victory which gave the people of Rome their crude twelve tables is one of the earliest historic landmarks of government under law. Not only is there an almost perennial struggle throughout subsequent history as to how far the law should be thus written, but the difference has been refined and complicated by the further questions whether it should be written by kings, by legislators, by judges, or by less well-defined State functionaries.

Let us consider whether the law should be written by legislators or by judges. An example and contrast will perhaps shed more light than any argument of mine. In England the law is indisputably made by the legislature and, as a consequence, courts merely construe and apply the very detailed statutes, as written by Parliament, to the facts they find in particular cases. There is no significant talk of "judge-made" law there. The courts do not have an overriding constitution to construe and apply, and for that reason they are not concerned with broad economic questions de novo. Indeed, lawyers do not even file briefs with the English courts; instead, after only oral argument, the judgment is almost invariably announced forthwith from the bench.

But in the United States we have a legal tradition which favors either judge-made or administrator-made law. Yet, so far as judge-made law is concerned, this tradition is now
rather largely honored in the breach. Congress and the forty-eight state legislatures produce the greater weight of law, although I do not know that they surpass the courts in word count. This situation was not always with us. In the last century the subject was fiercely debated for a period of years by the noted lawyers, David Dudley Field and James Coolidge Carter, in New York, with the nation’s entire legal profession as the audience. Although Carter appeared to win most of his point in New York, Field’s codes have been adopted in substantial part in nearly half the states of the union, and his idea of periodic legislative codification and revision of the law has won avowed or tacit acceptance in every jurisdiction in America. It would therefore appear fair to say that our law in the Nineteenth Century tended to be judge-made, but in the Twentieth Century it is primarily legislature-made. That change simply evidences, far more than words of mine could, our gradual conversion to the theory that the law should be stated in writing by the people’s representatives so far as the latter find it feasible to do so.

But we have now in this country a new phase of the law, in which these old struggles in the development of our legal system are being reenacted. In the field of administrative law we are just reaching the question as to how far the legislature should go in prescribing the rules of the game. This is not because the legislatures have been dilatory, but because administrative law is new in its significant scope and impact. It is a sign of growth and virility of our legal system that it should rebuild itself around each new legal field. Nor will such readjustment smother the budding field of administrative law. It will strengthen it by giving it recognition in our legal system and the tools to perform its task. Administrative agencies will continue to receive delegated powers. They will continue to adjudicate cases and issue what might be termed “sub-legislation”. But the legal framework within which they operate will be perfected by a statutory
accretion slowly designed in the light of experience, reason, and the needs of modern government. This inevitable development may be achieved in major part in our time.

On the foregoing general background I venture to draw the conclusion that our people demand that our law be written, adaptable, and understandable. To the extent that it falls short of that standard, it does not represent total justice. But of course this does not mean that there is not a place for sound discretion case by case, as well as a place for precise legal rules. The cry of history and of reason is that we write and revise our laws as precisely as we may, so that they shall be as understandable as possible to the millions whose lives and fortunes they govern.

This continent—and the globe itself—have been so shaken by domestic and international crises for nearly twenty years that we are apt to overlook what has been done here in our own land to improve the administration of justice. Undoubtedly it would surprise many people in other parts of the world to learn that, in addition to weathering depression and war, we had been able to make vast improvements in our legal system in the current generation. I should like to devote the second half of my remarks to the achievements, and the future, of one such line of development which has already brought order out of chaos in a large segment of our federal law.

You will recall that we were hardly out of the depths of the Great Depression when, by the Rules Act of 1934, Congress provided for the formulation and operation of one set of uniform and simplified rules of Civil Procedure for all the Federal trial courts. Not only was that effort successful, but it finally closed the breach between law and equity which had prevailed for some two hundred years. The legal profession has now been enjoying that simplified system for over a decade, and not a single voice has been raised to demand a return to the old days.
Indeed, so successful has that bitterly fought reform proved to be, that in 1938 a similar project was proposed for the field of federal criminal law. Accordingly, we now have uniformity of practice and procedure in such widely different fields as law, equity, admiralty, and criminal law. Variation and complexity have been reduced to an understandable system. A few rule books which any lawyer can obtain have replaced great sets of speculative discourses on the morass of federal practice and procedure. Thus our law has developed in the direction of consolidating and simplifying and explaining. Not the least of our pride in this achievement should rest upon the fact that these simplified restatements of the law were formulated in the first instance by the voluntary and uncompensated labors of lawyers and scholars acting in an advisory capacity. It is perhaps not too much to venture to say that this achievement represents democracy at its best.

But I should regard myself as remiss if I were to remain content to point with just pride at what has been so splendidly done. For I know that our labors to maintain and improve justice are never finished. Moreover, there are today dark forces at work over most of the earth who preach not only against law and against order, but who insist that the appointed agents of the state are the sole and infallible masters of human destiny. For that reason I shudder to think that any responsible servant of democracy, be he Democrat or Republican or Bureaucrat, would want to leave any stone unturned to prevent the development of a lawless administrative law in this country. Yet even our process of simplifying and unifying the rules of practice and procedure has stopped short of administrative agencies.

It is no answer to say that we are engaged in other more important works of post-war legal rehabilitation. The situation recalls the remark of that eloquent advocate of law reform who, reminding his hearers of the boast that Augustus
had found Rome a city of brick and left it a city of marble, noted how much greater would have been Caesar's glory if he could have said that he found

... Law dear, and left it cheap; found it a sealed book, left it a living letter; found it the patrimony of the rich, left it the inheritance of the poor; found it the two edged sword of craft and oppression, left it the staff of honesty and the chief of innocence.

I venture to say that the same would be true here today, even though our dwellings remain scarce and of wood instead of brick, for what good will many mansions do us if the legal fibre of the modern democratic state is to weaken and give way little by little?

Indeed, I doubt that the modern administrative state has much further to go unless it first puts its administrative house in order. Our war time experience alone demonstrates that there is a limit to the patience of our people, even in times of emergency. Unless better public relations can be achieved by our administrative agencies, there will be a lack of ability on the part of administration to meet new problems of society or to win the necessary acceptance of extended government. Consequently, in the matter of federal legal procedure alone, we are in the position of having one weak link in the precious chain which holds together the whole mechanism for the administration of federal justice.

This is not the place to go into further detail. It will suffice for the moment if I say that, after long study and consideration, I propose to introduce in Congress, immediately, a bill "To Provide General Rules of Practice and Procedure Before Federal Agencies". With essential differentiations, this bill is modeled after the statutes of 1934 and 1938 which implemented a similar purpose in the fields of civil and criminal procedure in federal courts. It is my hope that by enactment of the legislation which I propose we shall demonstrate that we are capable of having total justice—that our
determination to unify and simplify practice and procedure can be successfully applied throughout all our instrumentalities of justice including the administrative agencies. But it will be no simple task. It will test our best legal judgment and ingenuity. It will be a creative undertaking of high order.

Of course we shall have doubters and some opponents, as well as many who will be indifferent. They will be well-meaning folks, no doubt. But, in some part at least, they will consciously or unconsciously reflect various common attitudes against law, against congressional legislation if it does more than appropriate money or grant powers, against the idea of simplicity or uniformity, against anything which may limit administrative authority to operate as it chooses. There will be talk that we need more justice and less law, that the project will be too difficult or too expensive, or that it will place administrative agencies in a "straight jacket". The answer to most of these arguments and fears is simply that all will depend on how well the job is done. Far more difficult undertakings have been proposed in Washington during the last fifteen years, and none have been rejected because execution would pose serious problems. Indeed, what I propose is a minor challenge compared with the problems of administration in uniform minimum wages, registrations for security issues, maximum commodity prices, limited agricultural acreage, and so on.

The objective end of all law is the rendition of justice, even to the most lowly human being. If law takes not its spirit from the fountain of all knowledge then it, the law so-called, falls short of total justice. In no phase of the law is there more impingement with man in his every day activity than in the operation of administrative law. Here we have human effort brought before the state to have its rights assured and its wrongs redressed. Thus we are confronted with the question of the care and accuracy which must precede judgment or conclusion.
The people must be assured of the righteousness of the arbiter and the uniformity of the rule applied. So you may appreciate our anxiety to set the law of administrative procedure down so that he who runs may read; and, reading, know the truth expressed by His Eminence, James Cardinal Gibbons of happy memory, when he said,

The law is not the people, the people is not the law. The law is the spirit of justice governing the people, and its application to individuals, to associations, to every form of civil life, must be so hedged round with reverence and security that the civil courts in an hour of popular passion may protect all the people from the tyranny of what might be a lawless majority.

In this hour of social and political revolution when law is loose and unstable, when individual human liberty is lightly dealt with, when property rights are precarious, when God, the source of life and law, is dared and denied, this nation at the head of the nations of the world must hold high the torch that will shed light into the dark places of legal procedure, must meet the onslaught of lawlessness by assuring to the world and to our people the rights that God intended for those who bear his image and likeness.

Pat McCarran