Law and justice in the United States are so closely patterned after the British model that we dare not ignore the dangerous trend toward —

Administrative Law *in Great Britain*

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THE GREAT HERITAGE that ancient Rome left to modern civilization was the conception of the Rule of Law. Perhaps the greatest service that the British people have performed for mankind has been to develop and spread this heritage throughout many parts of the world which have never known the sway of Rome – including her own Dominions and, not least of all, the United States of America.

If there is one institution of which the British people are proud, and which, until a few short years ago, possessed their absolute trust and confidence, it is their legal system which, under the aegis of the High Court, has evolved over many generations until it has become the admiration of lawyers of many lands.

In an article in the *Reader's Digest* of December 1952, condensed from the *Winnipeg Tribunal,* the American lawyer, Karl Detyer, writes: "I am convinced that British justice is fairer and faster than its American counterpart. Punishment of the guilty is more certain, the innocent are more vigorously protected, and public safety is better served." He gives, as his reason for this, the complete freedom of the British Courts from the machinations of the politician. "No political influence," he writes, "direct or indirect, is tolerated anywhere in the administration of British justice."

This American lawyer's opinion accords with that of no less a man than Voltaire, who, over 150 years ago, wrote that, in traveling from France to England, he had passed out of the realm of despotism into a land where the Courts might be harsh but where men were ruled by law and not by caprice.

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When the British legal system can be praised so highly, why has there lately developed concerning it a measure of doubt, as yet like a cloud on the horizon but nevertheless persistent in the minds of some British lawyers?

As far as the traditional British Courts are concerned, the confidence of the people is as justified as ever. The doubt lies in the fact that, alongside these ancient institutions, there is growing up a new form of legal tribunal which is beyond the jurisdiction of the High Court, and quite new to British legal principles.

One Code for All

Before 1914 – a year which marks the end of so many accepted ideas – the authority of the High Court over the British legal system was complete. No one could be punished, no fine imposed, no injury received, nor any tort inflicted, without the victim having the right to appeal to a British Court of Justice. As that great guide to the British Constitution, Professor Dicey, has pointed out, the very basis of British justice was the fact that the whole of her legal system came under the one authority – that of the High Court.

The legal code was not split into two parts as it was in France – one interpreted and enforced by the ordinary Courts, the other a system of so-called administrative law applied by officers. The idea of administrative law and administrative Courts was wholly repugnant to Dicey. It implied that the executive and the administration could be independent of the judiciary. Such an independence he believed to be contrary to the British conception of the rule of law.

There are strong reasons for believing that the unity of the British legal system under the High Court was due to the fact that, in Great Britain, the State played little part in the economic activities of the people. The great work of the Courts, apart from their criminal jurisdiction, was to see that the rights of individuals were enforced. As the State was seldom involved, it allowed the Courts complete freedom from political pressure of any kind. Such administrative rules as there were – as, for example, those under the Merchant Shipping Act or the Factory Acts – being comparatively few, could be enforced quite easily by the ordinary Courts.

The economic system of France, on the other hand, had been subject, ever since the days of Louis XIV, to a wide system of control exercised by the district Intendants, who took the greatest care that their exceptional jurisdiction should be continually extended.

These controls were one of the primary causes of the French Revolution, but as de Tocqueville pointed out, they survived to a far greater extent under the Republic than is popularly supposed; and, so that they might be effectively enforced, administrative law survived with them.

Changes after World War I

It was not until after World War I that ideas inimical to the free economy began to be extensively reflected in British legislation, and the powers of certain Ministers of the Crown and their officers were increased beyond anything hitherto known in modern times. Under the old system, the sole concern of the British Courts was justice for the individual. Consequently, all their rules of evidence and procedure were evolved solely with that consideration in view. It was never conceived that they should have to deal with the thousands of regulations necessary to administer an economy with speed and efficiency. As a result, they were quite unprepared and unsuited to meet the changed conditions brought about by economic planning.

Parliament realized this, for with the new legislation, it provided for forms of legal enforcement under tribunals, which were quite new to British legal tradition. It also provided that the Ministers of the Crown and the officials responsible for enforcing the new legislation should have wide discretionary powers which were placed beyond the jurisdiction of the High Court.

These new tribunals are so alien to British ideas that their true nature is not yet fully recognized, but there is no gainsaying the fact that they are able to inflict very heavy fines on those who appear before them; and to enforce those fines, they may sell the offender's property. For the first time in many generations, a British subject can stand before such a tribunal defenseless in that he is deprived of his ancient right of appeal to a British Court of Law.

Milk Board Tribunals

Perhaps the most typical example of the new kind of "administrative court" is provided by the Tribunal of the Milk Board. In 1932 the British government decided that the free contract system should no longer apply to the sale of milk, and that its distribution from the farm to the consumer's doorstep should be completely within the control of the state-created Milk Marketing Board. The imposition of the necessary discipline upon farmers to effect this was not so very easily enforced. Shortly after the

Board's inception, it had to deal with farmers who undercut its fixed prices in the hope of increasing their sales. It is interesting to speculate what might have happened to these offenders had they been arraigned before the ordinary Courts, charged with the entirely new crime of selling perfectly clean milk too cheaply. Fortunately for the Board, it was able to bring such recalcitrants before its own tribunals.

These were made up of milk producers little inclined to bias in favor of a rival who had undercut the price of their product. After listening to such a trial before such a tribunal, one lawyer has described how he saw the accused pronounced guilty and heavily fined – on the unsworn hearsay evidence of the Board's own servants. He also pointed out that the Board acted as judge, prosecutor, and recipient of the fines it inflicted.

Futile Protests

It must not be thought that British judges were unconcerned at this limitation of their jurisdiction. The Milk Board's judgments could only be enforced by a Court order. When applications were made for such orders, some judges put up considerable resistance and attempted to review the reasons for such judgments.

Judge Tobin, asked to sign such an order, said: "Am I to understand that certain of the King's subjects can be fined by some kind of tribunal sitting in a room to which the public are not admitted!" On being assured that this was so, he added: "It seems contrary to our law. I thought the essence of British justice was openness."

However, the disapproval of British judges was of no effect, and it soon became evident that there was a new punitive body in Great Britain, completely beyond the reach of a High Court judge.

The State Can Do No Wrong

To allay public suspicion, however, a Departmental Committee under the chairmanship of Viscount Falmouth was set up to report on this new legal procedure. In its finding supporting the tribunals, the Committee stated:

> There is also a possibility that the Courts, either from imperfect understanding of the schemes, or from lack of sympathy with them, might not inflict adequate penalties, particularly in the case of such offenses as undercutting, where the interests of producers as a whole might appear, on a short view, to be contrary to those of the public. Even in serious cases under the ordinary law, these Courts do not usually impose the maximum fines for offenses; indeed, the expectation that smaller

fines would be imposed by the Courts than by the Marketing Boards has been used as an argument in favor of the former tribunal. Moreover, undue leniency to offending producers under the marketing schemes might cause such dissatisfaction to other producers, and so place a severe strain on their loyalty, thus leading to a breakdown of the schemes.

So the principle was accepted that, when the judgments of the Courts are unlikely to suit the purposes of the State, then in the name of expediency, a more compliant tribunal should be appointed in their place. So might Louis XIV have reasoned when he promulgated the following decree: "It is moreover ordered by his Majesty that all disputes which may arise upon the execution of this order, with all the circumstances and incidents thereunto belonging, shall be carried before the Intendant to be judged by him, saving an appeal to the Council, and all the courts of justice and tribunals are forbidden to take cognizance of the same."

De Tocqueville, who quotes this decree in his *State of Society in France before the Revolution of 1789*, also reminds his readers of the unity of the British legal system and the difficulty British people had of even conceiving an idea so alien to their thoughts as "Administrative Law":

> The difficulty of rendering these terms into intelligible English, arises from the fact that at no time in the last two centuries of the History of England has the executive administration assumed a peculiar jurisdiction to itself, or removed its officers from the jurisdiction of the courts of common law. . . . It will be seen that the ordinary jurisdictions of France have always been liable to be superseded by extraordinary judicial authorities when the interests of the government or the responsibility of its agents were at stake. The arbitrary jurisdiction of all such irregular tribunals was, in fact, abolished in England in 1641 by the Act under which fell the Court of Star Chamber and the High Commission.

De Tocqueville did not conceive that, many years after his death, those irregular tribunals beyond the reach of the High Court would be re-established in the country whose legal system he so much admired.

The Agricultural Act

After World War II, the advance of administrative law in Great Britain continued apace. The most outstanding addition to the new system was the Land Tribunal, set up under the Agricultural Act. This Act provided for the dispossession of farmers from their land if Agricultural Committees considered them inefficient. Their age-old right of access to

the ordinary Courts was denied them, and instead, they were permitted to appeal to this entirely new court, the Land Tribunal.

The members of this body were appointed by the Minister of Agriculture himself, but as his servants had initiated the proceedings against the farmer, this practically made him the judge in his own case.

When the Conservatives were returned to power, they amended the Agricultural Act by providing that appointments to the Tribunal were, in future, to be made by the Lord Chancellor instead of by the Minister. Otherwise, they left the Act very much as it was passed by the socialist government.

Land Tribunals Above the Law

Although they have the power to inflict heavy fines and, in the case of the Land Tribunals, can recommend to the Minister that a man be deprived of his farm, all these new administrative courts are perfectly free to decide their own rules for the conduct of the cases before them. They can ignore those principles of procedure and evidence which, in the ordinary courts, have grown up over the years with the sole aim of protecting the rights of the individual. Their power is very nearly absolute in their particular field, as they are answerable only to the Minister under whose authority they have been set up. In his turn, the Minister may act with a wide discretionary power completely beyond the reach of the High Court.

No Judicial Supervision

C. J. Hamson, Professor of Comparative Law at the University of Cambridge, has pointed out the danger to the British legal system arising from the new administrative tribunals. In his book, *Executive Discretion and Judicial Control,* he writes:

> What we have to observe today is that the English system of a universal jurisdiction has in reality broken down, with the result that the entity which today wields the most real power — the Minister and his Department — is in England subject to a merely formal legal control, and is beyond all effective judicial supervision.

Professor Hamson rather nostalgically recalls Dicey's fears of administrative law, but he believes that with the growing power of the State, the extension of such a jurisdiction is inevitable. He suggests, as a remedy, that a special Court be set up to control the activities of administrative officials. He points out that this is the function of the French Conseil d'Etat, and recommends that body as a model for a similar court in

Great Britain. Many concede that if an administrative jurisdiction must be accepted as a necessary part of the planned economy, a court with an overriding authority such as Professor Hamson suggests, can be some check on arbitrary power. But was the great Dicey wrong when he praised British law for being free from a separate administrative jurisdiction?

Justice versus Welfare State

The fact is that the British legal system, which reached its highest development in the nineteenth century, is the product of a civilization which based its economic activities on the freedom of the individual. Its traditional Courts are concerned wholly with the rights of the individual and not at all with the efficient working of the economic system. They are, in consequence, unsuited to enforce the vast accumulation of new regulations made necessary by the modern ideas of economic planning.

In Eastern Europe where the economic system is wholly planned by the State, the Rule of Law – as it was conceived by Rome and developed by Western civilization – has been completely destroyed. Its place has been taken by the wide discretionary powers of the state official.

In Great Britain, state economic planning as yet controls the producers only in a small section of the total economy, but it is already clear that the right of access of these producers to the traditional Courts must be curtailed. If the planning of the economy is allowed to extend into new fields, we can only conclude that the jurisdiction of the High Court will be correspondingly limited; and Great Britain will have substituted for her traditional legal system, concerned only with justice, a new system of law concerned primarily with the efficient working of the economy according to the ideas of the government in power.

Dicey's conception of the Rule of Law, under the one centralized authority of the High Court, was perfectly sound; but it would appear that it is only applicable to a free economy. The question is: Can the Rule of Law survive in a state-planned economy? • • •

IDEAS ON LIBERTY

The Odds Against Justice

Somebody claims to have figured it out that we have thirty-five million laws trying to enforce ten commandments.

LOYD WRIGHT, President, American Bar Association, 1955

COLM BROGAN

MANPOWER MIGRATION

Why the best British brains are quitting the Welfare State

THE MOST REMARKABLE spectacle which London can offer to any visitor is a view of the crowds besieging the emigration offices of the Dominions.

Toward the end of last year and the beginning of 1957, the number of people applying to go to Canada, Australia, New Zealand, and South Africa increased by sixfold. So far as can be discovered, the proportion of professional men and highly skilled technicians among the intending emigrants is extremely high.

These are the people Britain can least afford to lose, and their rush to get out is a cause of real and growing anxiety.

Why do they want to go?

The intending emigrants themselves find it hard to explain why they want to say a long and last farewell to their native shores. But there can hardly be any doubt that the biggest cause of the exodus can be summarized in one word: Egalitarianism.

The young people of high skill and training, enterprise, and initiative can see no future for themselves in the Britain of today. The social atmosphere is such that the man who gets ahead by his own efforts is more likely to provoke resentment and envy than respect and admiration.

The machinery of government taxation is applied to make sure that any extra rewards he may make are taken back from him and distributed to the people who feel that the world in general and the government in particular owes them a living.

Britain is waking up to the needs of a technological age and is beginning to spend fairly heavily on the training of technological experts. But roughly half of those who are carefully and expensively trained are leaving the country al-

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