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Thirty Original Articles

It's Up to Us

An official of the Administration asks whether we prefer laws or lawyers

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THE AMERICAN PEOPLE must choose whether they wish to be ruled by laws or lawyers — legislation or litigation.

The first series of alternatives is preferable because it accords with our tradition and needs, but unless both bar and bench move to regain popular trust and prestige, they will lose the only kind of leadership which counts in a democracy — the direction of moral and social forces which underlies human happiness and progress. They will contribute to the creation of a bureaucracy which, though inefficient, may function more speedily and adequately in our modern, economic society.

The most serious challenge to the lawyer is growing public disapproval of the litigation method of settling controversies and the increasing tendency to substitute the administrative method for litigation and administrative tribunals for the courts. The American Bar Association, in a committee report, has demanded that, "so far as possible, the decision of controversies of a judicial character must be brought back into the judicial system."

Now, if judicial functions must be "brought back" into the judicial system it is proper to inquire when, why, and by whose motion and inspiration these judicial functions escaped or were driven from the judicial system.

Why is it that we, as a people who must work and live in the present, are entrusting the adjudication of problems affecting our daily bread and our children more and more to administrative agencies rather than to the duly established courts?

The Bar Association's report, somewhat naïvely, treats the loss of judicial function as a current political development, and singles out for criticism the period beginning March, 1933, or, in other words, the Roosevelt Administration. As a matter of fact, it was a completed process, introduced by other administrations (Republican and Democratic), and approved judicially, long before Mr. Roosevelt took office. Among the distinguished jurists who have approved the philosophy of withdrawing certain classes of disputes from litigation and turning them over to administrative determination are Chief Justice Hughes and Justice Brandeis.

The litigation method of settling controversies has for years been steadily superseded by the administrative method for definite and obvious reasons. Controversies now being decided in courts of general jurisdiction are of small magnitude compared to the values being adjudicated in such tribunals of special jurisdiction as the Interstate Commerce Commission, utility commissions, trade commissions, "Blue Sky" commissions, workmen's compensation commissions, zoning and building commissions, and scores of similar agencies — federal, state, and municipal.

These special tribunals exercise more power than many of our judges. Few and trivial are the decisions of a judge of original jurisdiction that are not subject to full review on both law and fact. But many of the administrative bodies, under statute fully sustained by the Supreme Court, have been granted authority to make final findings of fact which, if supported by evidence, no court can review.

In competition between the litigation method and the administrative method of settling controversies, both bar and bench are severely and needlessly handicapped by a burden of delays, costs, formality, technicality, and uncertainty. Lawyers and judges, in too many instances, value these things too highly.

The public seeks a different set of values. It seeks — and needs — speedy settlement, finality, and freedom from the procedural contentions it subsidizes but does not understand. As against the scholarly abstractions of the law courts, it prefers a lay commission which grants orders that mean prosperity or failure and makes awards that must be paid in cash. In short, it wants action before the time for acting is too late.

Costly Delays

If lawyers' and courts' adherence to tradition and slow-motion performance have cost them prestige in the field of criminal and private civil law — and nobody doubts that — it has been even more costly, and the prospect is even more threatening, in the field of government and public law. Legislation and administration cannot await the interminable delays of the courts. Congress and the Executive Department are compelled to outrun the Judiciary.

This has always been true, but the present Administration has given the most dramatic and challenging examples.

Not even the most ardent champion of judicial supremacy would claim that the Administration could halt its policies dealing with the banking emergency, unemployment relief, gold as a basis of our currency, or many other problems, while the judicial view — or review — was slowly made available through the tedious and often devious process of private litigation. Under this litigation system the public good came second and subject to private claims and contentions.

The naïve assumption that this provides practical justice imposes too great a strain upon human credulity. It directs — or misdirects — the pursuit of life, liberty, and happiness down a blind, technical alley.

For two years business and the life of the country adapted themselves to the measures which Congress and the Executive were compelled to formulate alone — for the simple reason that the views of the Judicial Department could be expressed only in private litigation. With its opinions inaccessible at the very time when they were most needed to be constructive and corrective — can the judicial department later intervene except as a force for mischief and confusion?

Can we adhere to a legal philosophy that denies the benefit of our Judicial Department's wisdom and neutral views to the policy-making departments, except as they may, after a lapse of years, be revealed piece-meal through opinion on private litigation?

If the highest authority on legal philosophy is going thus to reserve itself, can the lawyers complain if the processes of legislation and administration must go on meanwhile and solve national problems as acute as an appendix which requires a midnight operation?

If legislation and administration must proceed in ignorance of the judicial view, is it not inevitable that it will proceed with some indifference to it?

And if the great affairs that deeply concern and affect our people must actually march on to effect and accomplishment, while our legal philosophy merely hovers in suspense like a cloud of uncertain shape and threatening meaning, can lawyers complain if our legal philosophy is given less and less place in the actual affairs of state — in the universe of mankind?

To answer in terms of ancient precedents begs the question. It is the validity of the ancient theory that is challenged by the modern event.

Legal Evasions

To submit specific evidence that the bar evades and the bench emasculates laws vital to society is not difficult. Let us consider historically but briefly the general judicial attitude toward the antitrust laws. I think it is fair to suggest that few items of unfinished national business present such a challenge to the country as settlement of the problem of increasing concentration of business control.

Nevertheless, after forty-seven years of experience with the Sherman Antitrust Act, the Clayton Act, the Federal Trade Commission Act, the National Recovery Act, and the Robinson-Patman Act, Senator Robert F. Wagner concludes that this experience has produced no coherent system of industrial control.

"Half of the laws enacted by Congress represent one school of

thought, the other half, the other half," the Senator says. "No one can state authoritatively what our national policy is."

Now, if American business were wise, it would agree that fair enforcement of a policy against monopoly is all to the good. The American people will not permanently tolerate monopoly. Every business man knows that, for he himself is against every monopoly except his own. Anti-trust complaints originate almost entirely with business men against business men.

Yet business as a whole has been plunging headlong down the road that leads to government control. Merger, consolidation, concentration, and the crushing of small competitors go on apace. Though they complain bitterly against "government interference" and "regimentation," they drive in a direction that leaves no alternative. They are asking for the medicine they dislike, and the lawyers and judges are writing the prescriptions.

I do not mean to argue that our national policy toward monopoly, and toward regulation of the form and size of business, is to be settled solely or even predominantly by lawyers. It is a challenge to statesmanship, which affects all groups and classes of citizens.

It is a fact, however, that for fifty years it fell to lawyers at the bar, on the bench, and in administrative posts, to execute the policy which has thus far produced so much of chaos, disappointment, and disillusionment. To support this contention, it is only necessary to review the legal and judicial chronology:

The Sherman Antitrust Act was enacted in 1890. It condemned every contract, combination, or conspiracy in restraint of trade. It declared that every attempt to monopolize any part of the trade or commerce among the several states to be illegal. The intent — and language — was plain. You have only to read the debates on the floor of House and Senate to discover what the law-makers had in mind.

The Court Rules

The first case to reach the Supreme Court (in 1895) was the United States *versus* E. C. Knight. Although this company controlled over 90 per cent of the sugar refining business of the United States, the Supreme Court held that its activities "bore no direct relation to commerce between the states or with foreign nations."

Nobody doubts that the sugar monopoly was a combination of the character Congress tried to prohibit. So conservative an observer as former Chief Justice Taft said:

"The effect of the decision in the Knight case upon the popular mind, and indeed upon Congress as well, was to discourage hope that the statute could be used to accomplish its manifest purpose and curb the great industrial trusts. . . . So strong was the impression made by the Knight case that both Mr. Olney and Mr. Cleveland concluded that the evil must be controlled through state

legislation and not through a national statute, and they said so in their communications to Congress."

This holding served to protect not only the sugar monopoly but all other manufacturing monopolies for many years. Then came the "rule of reason" decision, whereby the Supreme Court read into the anti-trust laws a limitation that they should apply only to restraints of trade which the court should view as unreasonable, and that Congress did not mean what it said when it condemned *every* restraint of trade. The legal reasoning of the Knight case may be read beside the reasoning of Chief Justice Hughes in the Jones & Laughlin case by those who enjoy studies in contrast.

But the lawyers, as always, took their cue from these earlier decisions. So did the lower courts. The result was that the offense of attempting to restrain trade came to be treated as frivolously — by bar and bench — as the offense of parking overtime. It was only cause and effect. Almost any lawyer may some day become a judge, and every judge is a lawyer under the robe.

Smothered with Interpretations

The Federal Trade Commission was established to add to existing remedies against monopoly practices before an administrative body. It was thought, apparently, that if the courts would not enforce the law themselves, they would let somebody else do it. This hope has in the main been shattered. The Commission's powers have been whittled away, and it has been cramped by court interpretations and judicial constructions.

The National Recovery Act has been the source of furious controversy, and whether its method of approach to the problem was economically wise or unwise I am not discussing now. The fact so frequently overlooked is that the NRA might never have been attempted, nor would any necessity have existed for it, if the milder and more moderate remedies against business abuses had been upheld by the courts and allowed to function.

Its dramatic decapitation by the Supreme Court was not a new chapter in the history of trade regulation. It was only a repetition of what happened, in substance, to the Sherman Act, the Clayton Act, the Federal Trade Commission Act. The only difference is that they were smothered with restrictive interpretations, while the NRA was given a more merciful and immediate death.

On the Record

I do not think that the legal profession — or bench — can be proud of this record. And the same practice of evading or emasculating laws they don't like has been duplicated in the field of other social and economic legislation vital to the nation — the living wage, minimum hours, child labor, crop control, unemployment insurance. It explains, I fear, why lawyers are popularly suspect.

We are unwanted children. Everyone believes that there are too many of us, and that some of us should be plowed under.

Our sincerity is under a cloud. People believe that a profession whose voice and hand are for sale may have a price on its heart also. Exceptional lawyers do have convictions of their own. But there is a cruel realism about the underworld which calls any lawyer, even its own, a "mouthpiece."

Even the upper world notes that a lawyer's retainers and his convictions *seldom conflict.* The correspondence is too frequent to be a coincidence. People wonder whether it is convictions that get retainers, or whether it is retainers that beget convictions. Sometimes — reviewing the record — I wonder, too.