# BOOK REVIEWS

THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY. By Roscoe Pound. New Haven: Yale University Press. 1957. Pp. vi, 207. $3.50.

To epitomize 800 years of constitutional development in four hourly lectures is a challenging undertaking. The story which Dean Pound retells in this series (originally delivered at Wabash College in 1945) is the timeless one of the "development of our constitutional guarantees out of the medieval faith in law, of how the idea of those guarantees became involved in the very idea of law, and of how that idea maintained itself against masterful monarchs and in eras of profound social and economic change to become the law of the land in formative America." (p. vi)

This and much more is accomplished within the four-period framework: "Medieval England" (to the Reformation)—the bases, beginnings, distinctive features of the Common Law and constitutionalism; "The Era of the Tudors and Stuarts"—royal prerogative matched and checkmated by *lex terrae*, "common right and reason"; "In the American Colonies"—parliamentary supremacy itself challenged by repeated appeals to "fundamental law" and to history; "From the Revolution to the Constitution"—chartered "inalienable rights of Englishmen" finally made explicit in written constitutions which at once began to be judicially construed as the supreme fundamental law.

Dean Pound thus stops with the adoption of the Federal Bill of Rights, characterizing American constitutional development along with the English. The unifying theme is the Common Law heritage and technique, "the sure-footed Anglo-Saxon's habit of dealing with things as they arise, and in the light of experience." (p. 19) Over and over, it is stressed that "Law," within this tradition, is a fundamental, justifiable rule binding on rulers and peoples alike—not the mere product of government or of authority. Capacity to challenge the procedural operations of government is the basic distinctive feature. Here is the nub of it: Government by consent developed and maintained itself, not because Englishmen originally were more attached to their interest or to the idea of a universal natural law, but because, from the time of Magua Carta onward, rulers and ruled habitually particularized their powers, rights, and relations, and cast them into documentary, pseudo-contractual form. Both

parties then proceeded to regard such documents as bases for subsequent interpretation and bargaining, especially whenever "arbitrary" or "unreasonable" practices threatened the pledged orderly administration of justice according to the "law of the land."

Intense historical- or procedural-mindedness — Sticklerism — this might be called. Certainly the Stuarts and Hanovers thought of it in this light. Yet more was involved. An Englishman, convinced that a rule laid down by his sovereign violated natural right and reason, had a "place to go." (*cf.* p. 10) From Angevin times onward "the place to go" was to the royal chancery and courts. Judges developed an independence, a professionalism, and at length, a body of precedent that became bases for limitations, first on royal prerogative, then on parliamentary, and finally on legislative-executive power. A point often overlooked is that this same belief in natural law pervaded the Roman and medieval worlds. In England it combined with an individualistic lay-professional system of rights protection. This we tell ourselves, at times pretty smugly, is the distinctive Anglo-American way. When an entire people commits itself to a legal-political system of this order and is provident and fortunate enough to develop machinery and traditions that permit *individual* challenge of arbitrary authority, results are precious, and as the world has gone, very nearly unique.

To overlook this enduring lay element and contribution would be to miss half the story—and almost the point of the English and American Revolutions and the Civil War Amendments. We unquestionably owe much to lawyers; but we owe even more to a Law that progressively has "constitutionalized" political experience and translated a vague, evolving ethico-moral sense and quest for personal and social justice into "the law of the land." Laymen occasionally have led lawyers here. Research for Lord Mansfield's decision abolishing slavery in England[1] was done for Francis Hargrave by Granville Sharp, a learned linendraper-fishmonger turned government clerk.[2] The lay-philanthropist William Penn compiled and published the first American law treatise in 1687—fittingly entitled *The Excellent Privilege of Liberty and Property,* a commentary on the law of the land clause of Magna Carta made up from Coke. A band of Oberlin divinity students and evangelists successfully propagated the Abolitionists' constitutional argument against slavery and race discrimination. The overlapping guarantees of Section One of our Fourteenth Amendment today preserve and extend their accomplishment.

1. The Case of James Sommersett, 20 How. St. Tr. 1 (1772).
2. LASCELLES, GRANVILLE SHARP AND THE ABOLITION OF SLAVERY IN ENGLAND (1928); Fiddes, *Lord Mansfield and the Sommersett Case,* 50 LAW Q.R. 499 (1934).

While we readily concede all this, essentially it is an independent, historically-endowed judiciary—one commissioned to weigh competing individual and social claims under guidance of professional counsel, and to test and interpret the statutes (product of yet another branch of that medieval *Curia Regis*)—which vitalizes and distinguishes this system, and moves us to reverence, and at times to wonder.

Broadly viewed, there can be no doubt that the doctrines and ideals of due process and equal protection, conceived substantively in the United States, constitute the core of Anglo-American constitutionalism, as they do also of Dean Pound's narrative. In some ways these lectures are the more arresting and evocative for their failure to rehearse American detail. The mind readily extrapolates the current and familiar; experience and dissent recall the possible weakness—the ever-growing subjectivity, the potentially universal reach of due process, its built-in ambiguity, seemingly unfettered discretion, indiscriminate lumping of issues that often benefit from more precise analysis. Yet, might not American judicial review and supremacy have proved unworkable without this flexible, introverted instrument?

Whether this last point be conceded or not, it is plain that there have been advantages as well as hazards. How, then, are we to interpret the public's misgivings, the recurrent disillusionment with due process? Maturity of judicial review presumes a maturity of attitude toward it. The Justices' own humility in this field is understandable. (Justice Jackson reminded his associates that new and changing problems "cast us more than we would choose upon our own judgment . . . . [W]e act in these matters not by authority of our competence but by force of our commissions.")[3] Much more difficult to accept and understand are the current evasions of some bar groups, unreservedly committed (professionally) to the principle of judicial supremacy, yet blind to present obligations, mute before assaults on a beleaguered Court. Certainly the time has come for more affirmative leadership: American ideals and the vitality of our legal system alike demand that race relations be squared with the ninety year old guarantees of the Constitution.

Constitutionalism and due process make heavy demands on more than the Bench. That is the essence of this story. As Americans heretofore have thought of it, it is the premise of Liberty itself.

Dean Pound was here unable to review these later issues and cases. People never have been, and never can be, of one mind about many of them. The point is that for us there can be no turning back now from

3. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 640 (1943).

Runnymede or *Marbury*[4] or *Yick Wo v. Hopkins*.[5] The Harvard philosopher Josiah Royce saw the whole of ethics and civilization and law rooted in the ideal of "loyalty to loyalty." "Loyalty to loyalty to law" best epitomizes Dean Pound's vision of our inheritance and our future. Grateful readers of these lectures accordingly can hope for another series on the problems inherent in contemporary due process and equal protection—themes brilliantly discussed in recent articles by Judge Hastie[6] and Professor Kadish.[7] The lessons and the way ahead again are fit subjects for the Dean of American jurisprudence.

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DESEGREGATION AND THE LAW. By Albert P. Blaustein and Clarence Clyde Ferguson, Jr. New Brunswick, New Jersey: Rutgers University Press. 1957. Pp. xiv, 327. $5.00.

After four years the decision of the Supreme Court in the school segregation cases[1] is still defied in large areas of the country. This defiance by people who regard themselves as law-abiding is necessarily coupled with a deep feeling that the Court's decision lacks legal justification: that the Constitution itself does not bar racial segregation and that the Supreme Court stepped outside its competence as interpreter of the Constitution to impose upon the South the personal preferences of the justices.

The authors of *Desegregation and the Law* have devoted their book to this critical impasse. They seem to have realized that the situation calls not only for accurate information but also for a calm and temperate attitude which alone can permit a reasoned approach to the problem. The authors bring both, in generous measure, to the book. Their stated goal is not to debate the constitutional issues but rather to explain the

4. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

5. 118 U.S. 356 (1886). "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is stil within the prohibition of the Constitution." *Id.* at 373.

6. Hastie, *Judicial Method in Due Process Inquiry*, in GOVERNMENT UNDER LAW 326 (Sutherland ed. 1956).

7. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957).

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1. Brown v. Board of Education of Topeka, 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954).