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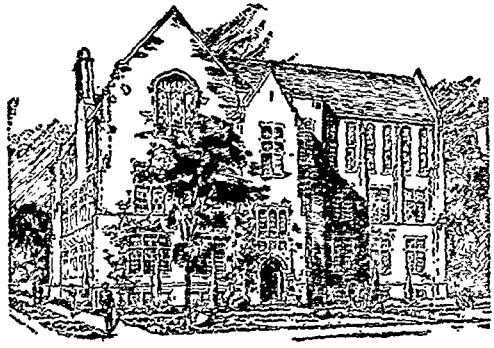

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THE SUPREMACY OF THE LAW: LAW VS. DISCRETION*

MARVIN B. ROSENBERRY

"IN THE government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers or either of them: the judicial shall never exercise the executive and legislative or either of them; to the end it may be a government of laws and not of men."

Thus reads section 30 of Part the First of the constitution of the Commonwealth of Massachusetts. Adopted in the year 1780, four years after the adoption of the Declaration of Independence and seven years before the Constitution of the United States was formulated, it served as a model for subsequent constitutional conventions. Because it is typical of all our constitutions, state and national, I quote from it.

Section 30 is an explicit statement of the major objectives the people of the original thirteen states hoped to attain by a government under a written constitution. While no similar statement is to be found in the constitution of the United States, what is explicit in the constitu-

*An address by Chief Justice Marvin B. Rosenberry of the Wisconsin Supreme Court at the 1938 Commencement Exercises of Marquette University in the Milwaukee Auditorium on Wednesday night, June 15.

tion of the State of Massachusetts is implicit in the Constitution of the United States as is to be found in one form or the other in the constitutions of all the forty-eight states. It is difficult for us of this day to appreciate the great importance attached to these fundamental principles by the Colonists. One of the principal objections urged against the adoption of the Constitution of the United States was that it contained no similar declaration of fundamental principle. Replying to this contention in the *Federalist,* James Madison said:

> "No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded. The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

He then considered the constitutions adopted by the states under the Confederation and pointed out that a complete separation of powers was as a matter of practice not attainable. More than one-hundred fifty years have elapsed since James Madison wrote his article. Today the truth of his statement is perfectly apparent. It is not to be denied, however, that this doctrine of the separation of powers whether explicit or implicit in the constitutions of the various states, has profoundly affected the development of political institutions in this country. A re-examination of this doctrine and its historical development would not only be profitable but a most alluring task to anyone interested in government.

It is my purpose to direct attention to the principle stated in the last clause of section 30, "To the end it may be a government of laws and not of men." Just what did the framers of the constitution of Massachusetts have in mind and what prompted them to include this statement in their fundamental law? In considering this matter we must not forget that the Colonists and particularly those of Massachusetts had had more than a hundred years' experience under the royal charter. Their governors had not been elected but appointed by the Crown. As Colonists they had been permitted to exercise only such authority as the royal charters prescribed. They had suffered grievously from what they regarded as the tyranny of the royal governors; acts of Parliament and Orders in Council to which they had given no assent had in their opinion deprived them of their rights as English subjects. They were setting up a government in which the people were to govern themselves. The whole people was to be the source of authority. It was apparent that the people could rule only by and through representatives. It was necessary then that their representatives should be under the

law, not above it. These representatives must rule in the name of the people in whom the ultimate sovereignty was vested.

There can be no doubt that in order to realize the ideals set out in the Declaration of Independence the people intended to form a government with limited and well-defined powers, and to exclude so far as possible the exercise of discretion by those who should administer the law. They believed from their experience that a large measure of official discretion was incompatible with liberty. An official exercising large discretionary power is apt to regard himself as the source of power and act accordingly. It was quite generally believed that a government should interfere as little as possible with what was then regarded as the private affairs of the citizen. To them "liberty" meant the right to be free from governmental restraint in the pursuit of happiness and the acquisition of property.

It was of course realized that no government could be established which would entirely eliminate the exercise of discretion by those who administer it. The conception of the function of government held by the framers of the constitution of Massachusetts was stated in the preamble to that instrument:

> "It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation, and a faithful execution of them; that every man may, at all times, find his security in them."

Impartial interpretation of law implies that its interpretation shall be uniform, that is, according to some fixed rule or standard. Moreover, the laws equitably made were to be impartially executed, that is, they were to be applied with uniformity to every individual subject to them. As little as possible was to be left to the discretion of the courts or the administrators of the law. It was realized of course that there must always be some measure of discretion in the administration of law. The policeman who witnesses a public disturbance must in the exercise of his discretion determine whether or not it is of sufficient importance to warrant his interference. If he interferes he must determine to what extent he will go. Shall he merely warn the offenders or shall he arrest them and bring them before a court? What is true of the policeman is true of other and more important public officials. Thus despite the efforts of the framers of our constitutions to create a government of laws instead of men, it was impossible for them entirely to eliminate discretionary action on the part of officials, executive, administrative or judicial. What the framers of all our constitutions, however, sought to do was to eliminate this discretionary element so far as it was possible and yet leave a workable government. Adher-

ence to the principles laid down with particularity in the earlier constitutions resulted in a certain inflexibility which in time proved to be a barrier to desirable governmental action. Everything that the legislature did was subject to the test of constitutionality. As occasion arose for the creation of new instrumentalities of government, the laws which brought them into existence were closely scrutinized and frequently declared to be unconstitutional. Yet, comparatively speaking, very few cases arose prior to the Civil War in which these fundamental principles were involved. No doubt the reason for this was that it was a period of comparatively slight social change. We were as a people still predominantly rural. The problem of a complex, interdependent civilization had not yet arisen and consequently the ideals which obtained in the 1780's were still valid in the 1850's.

The language quoted from the preamble discloses another objective sought by the framers of our constitution, that is, the security of the citizen, security in his person and in his property. The security referred to in the preamble was no doubt the security which comes from certainty in the law. No citizen may deem himself secure in his rights unless there is certainty in the law. In other words, security in the enjoyment of his rights is in direct proportion to certainty in the law. No citizen can make commitments for the future with safety unless he is reasonably certain that the law governing the transaction will be the same when the day of performance arrives as it was on the day the commitment was made. If any considerable degree of discretion is vested in those who have the duty of administering the law and no prediction can be made as to when or in what manner that discretion will be exercised, the citizen will fail to find that degree of certainty which will warrant him in entering into transactions which extend over any considerable space of time. The lack of certainty produces a feeling of insecurity.

On the other hand we cannot under modern conditions operate under a rule of law which is as inflexible and unchangeable as the law of the Medes and Persians is said to have been. We shall not at this time deal with legislative or judicial discretion, but with another phase of discretionary power, for which no provision was made in the constitutional system.

For something like a hundred years we adhered very closely to the fundamental principles stated in section 30 of the Massachusetts constitution already quoted. There was practically no delegation of legislative power. Likewise there was very little delegation of judicial power to officers other than those who belonged to the judiciary. It was consistently held that judicial power could not be conferred upon administrative officers. It was likewise held that judges could not exercise

legislative powers although legislatures occasionally attempted to delegate such power to them. There are not many cases to be found in the law books upon those questions prior to 1860 because these fundamental concepts were so generally regarded as essential to the perpetuity of our institutions that very few attempts were made to go contrary to them. These concepts worked out very well as long as our society remained comparatively simple and developed along traditional lines. But with the invention of the steam engine, the electric telegraph, the internal combustion engine and the various adaptations of these fundamental inventions a new situation arose.

Great transportation systems came into existence extending from one end of the country to the other. It was soon apparent that if Congress should sit continuously and devote itself entirely to the railway matter, it would not even then be able adequately to handle the problems which would be presented to it and so there was brought into existence the Interstate Commerce Commission. At first it was little more than an extra-congressional committee empowered to investigate and report to the secretary of the interior, who in turn reported to the President, who finally laid the matter before Congress. It was soon discovered that such limited power was inadequate to enable the commission to deal with the situation so Congress conferred upon the Interstate Commerce Commission the power to make rules, in other words, power to legislate; the power to make determinations, in other words, to adjudicate controversies arising within the field of its jurisdiction.

Since the beginning of the century the creation of bureaus, boards and commissions to which are delegated legislative and judicial powers, has proceeded with great rapidity. It would be difficult to exaggerate the importance of the changes wrought in the structure of our government by the creation of these administrative instrumentalities which not only exercise legislative and judicial powers but exercise these powers in combination. It is not, however, within the scope of this discussion to pursue that particular phase of the matter.

Yet we may inquire, first, why this departure from the fundamental principles laid down by the founders of our constitutions, was made? And second, what effect has it had upon constitutional government?

In practically all of the state constitutions not only was the legislative power vested in the legislature but the manner in which it was to be exercised was carefully prescribed. There should be two houses; they were to assemble once each year, a veto power was vested in the governor, revenue bills were to originate in the lower house; length of adjournments were regulated and many other limitations placed upon the exercise of legislative power. When legislatures were called

upon to deal with intricate and complex problems growing out of an increasingly interdependent economy they found it physically impossible to deal with these problems under constitutional limitations. As already pointed out the Interstate Commerce Commission was called upon to deal with the railway problem as it affected the country at large. That the Interstate Commerce Commission has proven itself to be an effective instrumentality for the regulation and supervision of the railways of the country is conceded upon all sides. While it is of course subject to criticisms—some valid and some unjust and unwarranted—no one has come forward with a better solution of the problem.

No attempt will be made to catalogue the sins of omission and commission of the railway companies which led to the demand for regulation. It is only necessary to call your attention to a few of these to make clear why the Interstate Commerce Commission was created. There was discrimination in rates as between shippers and localities; there was corruption of legislators and municipal bodies; there was watering of stocks; there was the over-issuance of securities; there was manipulation of markets; and there was a general disregard of public as opposed to private interests. Managers of railways thought of themselves as managing their own private affairs and resented any intimation that the public had any interest at all in transportation problems. They were in their opinion merely enjoying the liberty guaranteed to them by the constitution. Events proved that legislatures and courts could not deal effectively with the problems growing out of these abuses. They were not properly implemented to enable them to apply the needed correctives. Here was a set of new problems. There existed no pattern or plan for dealing with them. An effective method was to be devised largely by trial and error. As a practical matter it was essential that some degree of legislative power should be conferred upon the Interstate Commerce Commission and along with it if it was to deal with the situation effectively, must go some degree of judicial power. It served no useful purpose for the Interstate Commerce Commission to make a rule if it were compelled in order to enforce it to proceed in a court of equity where enforcement might be long delayed. The problem to be dealt with was really neither legislative nor judicial, it was an administrative problem. However, if the administrator was to be equipped with effective power it must be drawn from the coordinate departments, for under the constitution all governmental power was vested in them. Slowly but reluctantly the people of the country, and then Congress, became convinced that the delegation of these powers was essential, and finally the courts held valid the laws creating administrative tribunals.

The application of steam, electricity and the internal combustion engine to manufacturing had concentrated the production of goods in

great industrial centers. The country grist mills had moved away to Minneapolis or other centers and had become great flour companies. The village blacksmith shop and wagon shop had turned into the automobile industry. The methods of mass production were applied to every line of manufacturing. There fell with crushing weight upon the working man personal injuries sustained in industry. The family was incapable of absorbing the losses created by industrial accident, hence there came into existence workmen's compensation laws. The object of these laws was to fasten upon industry responsibility for the injuries inflicted by it. Attempts to handle the situation through the courts resulted in failure. The losses were not distributed properly or justly. The results of suits for personal injuries were oftentimes ruinous to the employer as well as to the employee. To administer the workmen's compensation law there were created boards and commissions. Today after twenty-five years' experience, neither employees nor employers would go back to the old system. Thus another great administrative problem was satisfactorily solved.

The development of the modern business corporation had resulted in great concentration of wealth. Many enterprises were legitimate, profitable and socially valuable. At the same time many schemes were set on foot which had no other object than to promote the sale of worthless securities to a gullible and trusting public. Millions upon millions of dollars were taken annually from unwary investors by means of fraudulent stock-selling schemes of one sort or another. Neither the courts nor the legislature could deal effectively with this problem, which was also of an administrative character. Thus the various bureaus for scrutinizing the issue of securities came into existence. Other agencies of similar character were created to deal with other specific problems and to each of these was granted some quantum of legislative power as well as of judicial power. These powers were to be exercised by a single agency in combination and thus there came about an invasion of the principle of the separation of powers. We now have governmental agencies which are at once executory, legislative and judicial in character.

In order to make these agencies effective it was necessary to confer upon them broad discretionary powers. Thus there was put back into the constitutional system a considerable part of the discretionary power which the framers of our constitution sought to eliminate in order that we might have a government of laws instead of men. Since the beginning of this century there has been a steady increase in the number of administrative agencies, state and national until today in the aggregate they deal with matters of the highest importance whether we consider the property interest involved or the social value

of their activities. They are thoroughly entrenched in our legal system. No one proposes that the laws creating them shall be repealed. The question which concerns the country today is how far this process may go on without imperilling impartiality in the administration of law and endangering the security of the individual citizen which the framers of our constitution sought to safeguard. Are we approaching a point in the development of these extra-constitutional agencies where wide discretion vested in administrative tribunals menaces the constitutional system? This problem has been considered for many years by our statesmen and jurists. Writing in 1911, under the title "A Government of Law or a Government of Men?", Justice Horace H. Lurton of the Supreme Court of the United States, said:

> "As the alternative to a government of law is a despotism, whether the despots be many or one, benevolent or malignant, the question admits of but one answer. But are we not more or less conscious of a restless tugging against the bonds of the law and the yoke of the Constitution? Is there not a growing disposition to disregard the limitations which we have placed upon those in authority and a tendency to applaud the doing of things which we wish done, regardless of whether lawful or unlawful? If one in power does things which displease us, we are swift to inquire into his authority; but is that so if the thing done meets with our approval?"

Too rigid an adherence to rules of law administered with a minimum of discretion has always led to reaction in favor of more discretion and less adherence to rule. In other words, a government of laws gives way in time to a government of men. As the administration of law is never without discretion in the administrator so a government of men is never without legal rules. It is mainly a matter of emphasis. Shall an administrator in a particular case have the power to set a rule aside or to apply one rule in one case and another rule in a precisely similar case? This matter of a balance between discretion and law is one that has puzzled statesmen for a very long time. The founding fathers thought that they had found the solution when they set up a government under a written constitution and eliminated from the administration of law as much discretion as was consistent with an effective government. It is quite probable that if our society had continued substantially as it was at the time our constitutions were adopted the original constitutional scheme would have worked quite satisfactorily. While provision was made in all the constitutions for amendment, experience proves that a government under a written constitution has a certain inflexibility or rigidity which governments depending more upon the discretion of those who administer them do not have. One of the great benefits claimed for the English constitutional system as

opposed to ours is that it more readily, quickly and adequately responds to the needs of the people living under it. In the period following the World War many governments democratic in form were set up. Few of them, however, followed our system. It is well within the fact to say that as between the constitutional and the parliamentary systems, the parliamentary system won out.

While governmental instrumentalities exercising a high degree of discretionary power may be productive of great social benefits, they have potentialities for harm that should not be overlooked. It is apparent to everyone that the exercise of a wide discretion by officials makes possible favoritism and unjust discrimination as between individual citizens. The President said in an address to Congress on January 3, 1936:

> "Our resplendent economic autocracy does not want to return to that individualism of which they prate, even though the advantage under that system went to the ruthless and the strong. They realize that in thirty-four months we have built up new instruments of public power. In the hands of a people's government this power is wholesome and proper. But in the hands of political puppets of an economic autocracy such power would provide shackles for the liberties of the people. Give them their way and they will take the course of every autocracy of the past—power for themselves, enslavement for the public."

The "instruments of public power" to which the President referred were the various administrative agencies which had been brought into existence during his term. He clearly recognized and freely admitted that these agencies might be harmful to the body politic and that in order to save the people from harmful consequences he considered that it was necessary to continue a people's government in power. This seems to imply that whether they were to be helpful or harmful depended on which way the election went. Why were these agencies potentially harmful when placed in improper hands? Your attention is called to the fact that when legislative and judicial power is delegated to a governmental agency to be exercised by it according to its discretion, it escapes many of the constitutional restraints as to the manner of its exercise. This is not an imaginary but a real danger. It has been a fundamental principle of Anglo-American law from the time of Magna Charta to the present day that a citizen may not be deprived of his rights except by due process of law. Administrative action must of necessity be more summary than deliberative in character. A hearing involves delay and publicity. Public officials do not like to be advised, they often prefer to make orders and determinations. Down to the present time, speaking by and large, there has been very little to complain of in this respect because most of the administrative tribunals

have been composed of trained lawyers who have followed constitutional methods whether the act required them to do so or not. Of late these tribunals are being manned in some instances by those who are much more concerned with the achievement of their objectives than they are with the fairness of the proceedings which they conduct.

In a recent case, the Supreme Court of the United States had occasion to deal with this matter. The plaintiff sought to have an order of an administrative agency set aside on the ground that it had been denied a fair hearing. The Court said:

> "The first question (fair hearing) goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the legislature. The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles. . . .
>
> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. . . . Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command. . . .
>
> "If these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

The order complained of was set aside. It is possible for an administrative tribunal if it is so minded, to give a formal hearing and so make its determination invulnerable to court attack. Nevertheless it may act arbitrarily and oppressively. The opportunity for the abuse of discretion is in the nature of things incidental to the exercise of discretionary power. One of the reasons the framers of our constitution sought to eliminate discretion as far as possible from government was the fact that they had so frequently witnessed its abuse. The President regarded federal administrative agencies as potentially harmful because he realized that the broad discretion conferred upon them might under some circumstances be exercised without due regard to the public interest.

Whether or not one entirely approves of administrative tribunals which exercise such vast powers, it must be conceded that they are here to stay and are an indispensable part of the governmental process. It is then highly important in the interest of the citizen that safeguards

be thrown around the manner in which these powers are exercised if the citizen is to be secure in his constitutional rights. We do not always realize how important these safeguards are. Perhaps an illustration will make it clear. When the legislature passes a law a bill must be introduced, it must be read a first, second and third time, be referred to a committee, it is subject to debate in the house where it originated, it must be referred to the other house where it goes through a like process and if finally passed it must be signed by the governor. When an administrative body makes a rule which has the force and effect of law and for the violation of which a citizen may be restrained of his liberty there is no requirement that any prescribed method be followed. The rule may be made without hearing, without debate and without notice and frequently it need not be published.

The development of administrative tribunals in the last quarter of a century indicates that the people of this country no longer entertain the same fear of discretionary authority that moved the founding fathers to attempt to eliminate it from the constitutional system. This generation seems willing to exchange security in the pursuit of happiness and in the acquisition of property for security in another form, that is, security in a job and in the means of subsistence. Equality of opportunity in legal theory has not proven to be the unqualified blessing the makers of our constitutions thought it would be. If there is to be equality of opportunity in fact as well as in theory, the now generally accepted doctrine is that the government must do more than merely preserve order and administer justice. It is in recognition of this fact that our economy is now subject to a much greater degree of control than was dreamed of one hundred years ago. The slogan of that day was "That government governs best which governs least."

No attempt will be made to appraise the social value of these opposite attitudes toward governmental authority. Whether there should be a greater or less degree of official discretion in the administration of the law is a political question to be dealt with at the elections or by the legislature and not a judicial question to be dealt with by the courts.

An attempt has been made to describe the process by which a greater degree of discretion has been introduced into our constitutional system and to point out the nature of the transition through which our constitutional system has been passing. The increase of discretionary power in the administration of law is a thing not peculiar to this country. It is a worldwide phenomenon. In England, as well as in this country, a greater discretionary power has been vested in governmental officials. Nor has the phenomenon been confined to the great democratic countries. In Italy, Germany, Russia and a greater or less degree in all western countries, official discretion has been very largely increased; in Italy and Germany so greatly that they are now referred to as totali-

tarian states. After all what is involved in the process is an increase of authority and a corresponding decrease in the rights and liberties of the individual. The shift in all of the western countries has been one of degree rather than of kind. So far as the effect upon the citizen is concerned it makes very little difference whether discretionary power is exercised by the head of the government or by an administrative agency. Whether it be by one or the other, individual freedom of action is limited though there is no doubt that a subordinate tribunal can be kept more easily within bounds. But it is clear that any increase in official discretion results in a corresponding limitation of what the founding fathers thought of as liberty, that is, the right of the citizen to be free in his transactions and in the acquisition of property. It may well be that they overstressed the value of liberty as they conceived it. On the other hand, it is possible that the present generation does not appreciate its value; that experience will demonstrate that freedom of action for the individual results in advantages to the state and to society as a whole which cannot be secured through the exercise of discretionary authority by government officials. It may be that individualism is making its last stand against authority. However much the merits of a government of laws as opposed to rule by discretion may be debated the answer will be found, probably, by trial and error. One thing seems quite certain: namely, that the democratic ideal has no such hold upon the imagination of the people of the west today as it had even twenty years ago. Throughout history there has been a swing from one side of the line to the other. Highly discretionary governmental organization has been succeeded by one more legalistic. On the other hand, a rigid government according to rules of law has been succeeded by one more discretionary in character. It may be that there is no permanent solution or final answer to this problem, that the answer varies with changing social conditions; that one process is better in one time and another more efficacious or socially valuable at another time. But it would seem to an observer that this country is not as yet willing to surrender entirely the democratic process in which the rights of citizens are fixed by law rather than by the discretionary action of officials. Whether or not that is a correct appraisal only the course of events will determine. The American people, however, should be fully aware of the trend of the time, and should surrender the democratic ideal only when they are certain that some other system is socially more valuable. Our problems can be worked out within the framework of the constitution with time and patience. In any case we should not discard constitutional limitation upon the exercise of governmental power for uncontrolled official discretion without a full appreciation of just what we are doing. Ours is still a government of the people, by the people and for the people.