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PUBLIC LAW AND PRIVATE LAW†

ROSCOE POUND

"Public law," so wrote an English law teacher recently, "is gradually eating up private law. Industrial law is being controlled by administrative organs and is at the same time eating into the law of obligations. Quotas and marketing schemes under administrative control reduce the operation of commercial law. Housing and planning legislation takes the law of property under public control. This is only to say that *laisser faire* has been abandoned, the public lawyer is ousting the private lawyer, and duties of institutions are superseding the ordinary rights and duties of private citizens."[1] Certainly it is true that the lawyer of today is occupied more with matters depending before bureaus and commissions and boards than with matters depending before courts. It is true also that along with the giving up of the extreme abstract individualism of the last century there has come a multiplication of administrative agencies and a continual increase in the subjects committed to those agencies. It is manifest that the traditional American jealousy of administrative agencies has been forgotten and that there has come to be as strong a tendency to trust them as there was formerly to distrust them. But we have always had administrative bureaus and boards and commissions and officials in the common-law world. Some are quite as old as the courts. They had a development in the sixteenth and seventeenth centuries entirely comparable to the development today.[2] The common law had its place for them. In Blackstone's system public law is a part of the private law of persons. Officials are persons and the law applicable to them is the law applicable to every one else.[3] The law applied by administrative tribunals is the law applied by other tribunals—statute and common law, developed and applied by a received technique as in a common-law court.[4]

Taken by itself, therefore, there is nothing in the rise of administrative agencies in common law jurisdictions to indicate any such profound change as the extract quoted suggests. If the exercise of administrative powers is

†A lecture delivered at the Cornell Law School under the Frank Irvine Lectureship of the Phi Delta Phi Foundation, April twenty-second, nineteen hundred and thirty-nine. *Ed.*

[1]Jennings, *The Institutional Theory*, in MODERN THEORIES OF LAW 68, 72.

[2]1 HOLDSWORTH, HISTORY OF ENGLISH LAW (6 ed.) 492-516.

[3]1 BLACKSTONE, COMMENTARIES chaps. 3-9.

[4]ANSON, LAW AND CUSTOM OF THE CONSTITUTION.

subjected to the law of the land, if those who wield those powers are judged by the law of the land when they go beyond them or employ them unreasonably and arbitrarily in contravention of guarantees which are the supreme law of the land, the common law stands as a great body of private law as much as it ever did. What, then do European writers mean when they write, as so many of them do today, of the disappearance of private law?[5]

According to the Roman law books, public law was that part which had to do with the constitution of the Roman state; private law was that part which had to do with the interest of individuals. So say the Institutes of Justinian.[6] Ulpian added, as the whole passage from his Institutes is preserved in the Digest, that public law was "concerned with sacred rites, with priests, and with public officers".[7] In the last century the Pandectists, or expounders of the modern Roman law on the basis of Justinian's Digest, were wont to say, in effect, that private law had to do with adjusting the relations and securing the interests of individuals and determining the controversies between man and man, while public law had to do with the frame of government, the functions of public officials, and adjustment of relations between individuals and the state.[8] If the proposition with which we started refers to public law in the sense of the Roman distinction, we may admit that if the frame of government is not more complex, the details are infinitely more numerous and minute, the functions of public officials have multiplied and the legal precepts relating to them multiplied correspondingly, and that the relations between individuals and the state have become more varied, more intimate, and more numerous. But everything with which the law has to do has become more complex, more detailed, more difficult to organize and put in the order of reason. Private law today, as compared with what it was fifty years ago, has grown to huge proportions, as a comparison of the digests of today with those of the 'eighties, or of the text books of today with those of the last quarter of the nineteenth century, or a comparison of our first law school case books with those of today, will bear witness abundantly. Obviously the proposition that public law is eating up private law, a proposition which our English writer is taking up from writers of Continental Europe, refers to public law in another sense. The term is not in our digests. One who looks for it in the literature of the common law will look in vain. Both in England and in America, constitutional law has been a part of the everyday law for the ordinary courts.

What is meant is brought out as something quite new to the common-law lawyer if, for example, we read Radbruch's philosophy of law. He tells us that "labor law and economic law", the latter meaning the legal

[5]COKE, FOURTH INSTITUTE chaps. 1, 2, 5, 16, 17, 18, 49, 50 § 11, 62.
[6]INSTITUTES OF JUSTINIAN I, 1, § 4.
[7]DIGEST OF JUSTINIAN I, 1, 1, § 2.
[8]1 DERNBERG, PANDEKTEN § 21.

adjustment of relations involved in trade, finance, banking, industry, transportation, public utilities, and the like, are "a penetration of public law into the domain of private law".[9] By this he does not mean merely that such things have in the English-speaking world come more and more under the jurisdiction of administrative boards and agencies. On the Continent, administration has always had to do with a large domain in the legal order. He refers to an entire difference in spirit between public law and private law, which he takes to be nothing less than opposition of the one to the other. Moreover, he holds that opposition to be necessary, founded in the very idea of justice, essential in the idea of law, and to be taken into account in every connection in which we have to do with legal phenomena.[10] What is the distinction that involves this fundamental and necessary opposition between what since the Roman law had been taken to be two branches of the body of authoritative grounds of and guides to judicial decision and administrative determination?

We are told that we must start with a contrast between commutative justice, a correcting justice which gives back to one what has been taken away from him, or gives him a substantial substitute, and distributive justice, a distribution of the goods of existence, not equally but according to merit or a scheme of values.[11] In the positive law this distinction, we are told, corresponds to a contrast between "the coordinating law", which secures interests by reparation and the like, treating all individuals as equal, and the "subordinating law", which prefers some or the interests of some to others according to its measure of values.[12] To give an example, the common law of employer's liability was "coordinating law". It thought of employer and employee as equal and sought to put each, in case of wrongful infringement of his interests, in the position in which he had been before the injury. On the other hand, workmen's compensation is an institution of "subordinating law". It puts the claim of the workingman on a higher plane of value, as one of greater merit, and imposes a liability upon the employer without regard to fault. To take a more general instance, where the nineteenth-century law of torts as a rule imposed liability on the basis of culpability, treating interests of individuals as of equal value, the tendency in Continental Europe in the present century has been to give over the idea of culpability in favor of an idea of security in which the interests of some are given a higher value.[13] Public law, he continues, is a "law of subordination", subordinating

[9] RADBRUCH, RECHTSPHILOSOPHIE (3 ed.) 122.
[10] *Ibid.*
[11] *Id.* at 31, 125.
[12] *Id.* at 125.
[13] 6 PLANIOL ET RIPPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nos. 477, 478; DUGUIT, LES TRANSFORMATIONS GÉNÉRALES DU DROIT PRIVÉ DEPUIS LE CODE NAPOLÉON 137-146, transl. in PROGRESS OF CONTINENTAL LAW IN THE NINETEENTH CENTURY (Continental Legal History Series, vol. 11) 124-128; 3 DEMOGUE, TRAITÉ DES OBLIGA-

individual to public interests, and identifying some individual interests but not the interests of other individuals with those public interests.[14] Moreover, as he sees it, all "coordinating law", that is, law coordinating individual interests by treating individuals as equal, gets its force from the "law of subordination", which identifies with public interests the interests coordinated, and hence public law has primacy over private law, subordination of individual interests over coordination of them. The primacy of public law is a primacy of state established law. Public or subordinating law proceeds from the state and private law depends upon it.[15]

It will be noted that this reverses the common-law conception in which the king rules under God and the law and his ministers and agents and all those who wield governmental power or authority stand on an equality with every one else, and equality before the law is no less an attribute of every individual. To this, thinking evidently of Anglo-American pronouncements of the classical era and modern pronouncements to the same effect, he says that "what are called liberal conceptions" propose, under different forms, to reduce public law to private law by "dissolving the state into a contractual relations".[16] He contrasts with this the collectivist, the autocratic, and the orthodox socialist or social individualist conceptions, which insist on the primacy of public law and pre-eminence of the state. But, he says, the motives of attributing this pre-eminence are different. For the advocate of an autocratic regime the motive is a concentration of all values in the collective person of the state. For the orthodox socialist the state ought to prevail in order to protect the concrete individuality of the individual against economic oppression. Achievement of this protection leads to penetration of private law by the spirit and methods of public law,[17] and this, it seems, is what in English we have been calling "the socialization of law".[18]

Radbruch considers the contrast or opposition between public law and private law as something given *a priori* and inevitable for any body of law,[19] so that our common law attempt from the Middle Ages to the twentieth century to reduce the whole law to private law was a futile kicking against the pricks. Certainly Bacon and James I and Charles I would have agreed with him, and perhaps a generation of English and American writers on administrative law, and a band of skeptical realists who seem to carry over their ideas of administrative law into private law, agree also and may yet give Bacon the last

TIONS EN GÉNÉRAL no. 293; Takayanagi, *Liability Without Fault in the Modern Civil and Common Law* (1923) 17 ILL. L. REV. 416, 438-439.

[14]Radbruch, *op. cit. supra* note 9, at 123.

[15]*Id.* at 124.

[16]*Ibid.*

[17]*Id.* at 125-126.

[18]Pound, *The End of Law as Developed in Legal Rules and Doctrines* (1914) 27 HARV. L. REV. 195, 225-234; 1 VINOGRADOFF, HISTORICAL JURISPRUDENCE 157-159.

[19]*Supra* note 14.

laugh over Coke. At any rate, Radbruch demonstrates his proposition by the principle of security as a constituent element in the idea of law.[20] To him, there are three such constituent elements: justice, the ideal relation between men; morals, the ideal individual development, and security. Each of these, he holds, is in an irreducible contradiction to each of the other two. That is, no one of them can be given its fullest and highest development in the legal order consistently with the others or either of the others. But we must admit each in the very idea of law.[21]

Admitting it as a necessary element in the idea of law, he tells us the principle of security demands, on the one side, that the authorities empowered to formulate the law (in the sense of the body of authoritative precepts) be privileged, and on the other hand, that they shall be themselves submitted to the law which they formulate. The judges who make precedents under our common law system must hew to the rules of law they lay down and the bureau officials who make rules must abide them or revise them in accord with the statute which gives them rule making power. That is one side of security and is embodied in the common law doctrine of the supremacy of the law. On the other hand, however, as he sees it, it is not possible to satisfy the demands of security except by a subordinating type of law which puts a special value on the position of these officials in the legal system.[22]

I take leave to doubt this last proposition. We in the common law world have achieved the end for at least two centuries and a half by the coordinating type. But few Continental jurists understand the common law form of public law. When constitutional regimes replaced the absolute governments on the model of the old regime in France, the theory was that the people succeeded to the sovereignty theretofore exercised by the king. The king was legally unaccountable and his ministers and agents were likewise legally unaccountable. They were held to their duties by the king, not by the law. Hence the people and their ministers and agents were legally unaccountable. The latter were accountable to the people, not to the law.[23] The separation of powers was adapted to this theory.[24] Each department of government was the judge of its own competency and its own powers. Each could interpret the constitution for itself and in its own way. But it is practically necessary that these departments and the bureaus in each and agencies of each work in harmony so far as possible. Hence, with no positive constitutional law in the English and American sense, those countries have had to develop what they call a positive constitutional law on the basis

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[20] *Ibid.*
[21] *Id.* at 70-75, 81-84.
[22] *Id.* at 123.
[23] HAURIOU, PRINCIPES DU DROIT PUBLIC (2 ed.) 717-724.
[24] 2 DUGUIT, TRAITÉ DE DROIT CONSTITUTIONNEL (3 ed.) nos. 41-42.

of a customary course of action, developed by experience, furtber developed by reason, and guided and expounded by doctrinal writers on a basis of natural law—*i.e.* of ideals of how harmonious working of all the agencies of government can be brought about. One is tempted to call this a positive natural law. It is midway between natural natural law (as one might call it) and the positive public law of the English-speaking world.

When it comes to be applied to common law jurisdictions, this idea of public law as a "subordinating law" putting a higher value on officials and what they do and allowing them to put a higher value on some persons or groups of persons than on others by identifying the interests of those persons or groups with public interests, is in effect an idea of supplanting law (in the sense of an authoritative body of precepts, serving as guides to decisions and determinations and developed and applied by an authoritative technique) by an unchecked magisterial and administrative adjustment of relations and regulating of conduct.

Let us see an example of public law in this new sense in action in America of today. In a case recently decided by a federal court of appeals it happened that the employees of a company were divided as between two rival labor organizations. The employer was quite willing to make a collective bargain as the law required and left it to the employees to determine to which organization they would adhere. The very great majority chose one and he made a contract with it. A small minority, however, preferred the other, and struck. They picketed the place of work, stopped all work, interfered with customers, and forced a complete and damaging suspension of business. Neither organization would apply to the National Labor Relations Board, one because it feared the Board was hostile to it, the other because it knew it was in a hopeless minority. The employer finally sought to put an end to the *impasse* by appealing to the courts for relief against the continued holding up of his business by the small minority of strikers. But the court had to deny him relief. A statute forbade the court's acting until the matter had first come before the Board, before which the act creating the Board did not allow the employer to bring his case.[25] The interests of the employer and the interests of the majority of the employees and the interests of all those who had or wished to have business with the employer were subordinated to the interests of the small minority. This is the sort of legislation which our bills of rights sought to preclude and the courts steadfastly denounced a generation ago.[26] If the courts in the last century sometimes coordinated interests too abstractly and thus, while seeking to promote a theoretical equality at times brought about unintentionally a practical inequality,[27] at

[25]Fur Workers' Union No. 72 v. Fur Workers' Union, No. 21238, U. S. Ct. App. D. C. March 27, 1939.

[26]COOLEY, CONSTITUTIONAL LIMITATIONS 389-397.

[27]See examples in my paper, *Liberty of Contract* (1909) 18 YALE L. J. 454, 471-478.

any rate they never deliberately and intentionally subordinated the interest of one to that of another in this fashion. Moreover, as they became conscious of the results they gave over abstract equality for a concrete equality when there was a manifest difference, as has been apparent in decisions of the Supreme Court of the United States for two decades.[28] One can understand why Continental adherents of the doctrine of public law as a "law of subordination" give up the idea of rights[29] and have never taken up the idea of legal checks and balances between governmental agencies, maintained by the everyday law. Rights, that is legally recognized and delimited interests, secured by the law, are a means of coordination. They belong to the regime urged by the great preacher of the Pilgrims. Consociation, not subordination; we are with one another, not over one another.[30] Rights stand in the way of subordination. So, too, with checks and balances. They impede the free subordination of the interests of one to those of another according to the hunch of the legislator or the administrative official for the time being.

As the penetration of public law, as a regime of subordination, into private law, goes forward, and it has been going on in this country more and more rapidly than is generally appreciated, we get a new definition of law. "Law" had long been used in two senses, first, to mean the legal order, the regime of adjusting relations and ordering conduct through the systematic and uniform application of the force of politically organized society, and, second, to mean the aggregate of received legal precepts, the body of authoritative grounds of or gnides to decision. The present generation has added another meaning, the judicial process, as Judge Cardozo happily called it, to which we must now add the administrative process.[31] But those who think of a "law of subordination" interpret both processes in that spirit and tell us that law is whatever is done officially.[32] It is not, as we used to think, under the influence of the common law doctrine of supremacy of the law, that things may be done officially according to law or without law or against law, with appropriate legal remedy in the last two cases. What is done officially is law in itself.

At the beginning of the present century it was not uncommon to hear complaints of judicial usurpation of lawmaking power when courts applied the received canons of genuine interpretation to legislation in order to find a solution of a case within the field covered by and yet not clearly provided

[28]Wilson v. New, 243 U. S. 332 (1916); Block v. Hirsh, 256 U. S. 135 (1920); Appalachian Coals, Inc. v. U. S., 288 U. S. 344 (1932); Home Bldg. & Loan Assn. v. Blaisdell, 290 U. S. 398 (1933); Nebbia v. New York, 291 U. S. 502 (1933).

[29]DUGUIT, LES TRANSFORMATIONS GÉNÉRALES DU DROIT PRIVÉ DEPUIS LE CODE NAPOLÉON 24; KELSEN, HAUPTPROBLEME DER STAATSRECHTSLEHRE (2 ed.) 567-579; *id.*, REINE RECHTSLEHRE 40-46; LUNDSTEDT, SUPERSTITION OR RATIONALITY 117-119.

[30]See LORD ACTON, LECTURES ON MODERN HISTORY 200.

[31]See my paper, *More About the Nature of Law,* in LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP MCMURRAY 513, 516-517.

[32]LLEWELLYN, THE BRAMBLE BUSH 3.

for in the statute. Often those who made these complaints turned about and complained of narrow rigidity when courts hewed to the plain requirements of the written law instead of going afield to find extra-legal solutions.[33] That the two types of judicial action were entirely consistent often escaped notice. If a clear intention was clearly expressed there was an end of the matter. If there was not and yet the case was within the purview of the statue the court was bound to find an intention, with the aid of the received technique, and to find a reasonable one. The regime of coordinating interests required that. But as the idea of subordination grows at the expense of the idea of coordination, the search for a reasonable interpretation is taken to be unnecessary and, indeed, illusory.[34] Very likely the lawmaker intended to be unreasonable; and if he may, if he chooses to be arbitrary and unreasonable, subordinating the interests of some to those of others as seems expedient to him, why should not judge and administrative official assume unreasonableness rather than reasonableness and make such subordinations for the case in hand as suits their ideas? Accordingly, it becomes the fashion to sneer at the judicial process carried on by applying an authoritative technique to authoritative materials and to dub the method illusion or superstition or pious fiction. It becomes the fashion to assert or insinuate that there are concealed motives of subordination beneath the surface. Even in academic lecture rooms, where a better idea of the judicial process ought to prevail, it becomes the style in some quarters to decry all attempts to put the phenomena of judicial decision in the order of reason.[35]

It is worth while to ask what is behind these modes of thought; to inquire what has led to so complete a departure from the conception of law which had governed our polity from the beginning, and so rapid a taking over of ideas which we had regarded as wholly alien. Juristically they are characteristic of times of transition when men are struggling to adapt the machinery of justice to new conditions imperfectly grasped, and in impatience at the cautious advance of the courts, seek short cuts through a reversion to justice without law—not without a judicial or administrative process, of course, but without authoritative precepts or an authoritative technique of applying them. Philosophically they are attributable to new modes of thought which have grown into fashion in an era of post-war disillusionment and cynical acquiescence in a revived absolutism which has largely grown out of that disillusionment. Politically they represent a reaction from the extreme tying down of administration and dogmatic applieation of abstract individualism in the last quarter of the nineteenth century.[36]

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[33] *E. g.*, the contemporary criticism of Standard Oil Co. v. U. S., 221 U. S. 1 (1910).

[34] See, for example, the quotations from Continental jurists of the present century in FRANK, LAW AND THE MODERN MIND 191-192.

[35] *E. g.*, ARNOLD, THE SYMBOL OF GOVERNMENT 49-71, 77-80.

[36] See my paper, *Justice According to Law* (1914) 14 COL. L. REV. 1, 12-23.

In all new cases, and in this time of invention and rapid transportation and communication and economic unification new questions of every sort are presented to the courts by scores at every sitting, the courts hold themselves bound to proceed by a received technique of analogical reasoning. The crucial point in this process is choice of the initial analogy from among many of equal authority. Choice of these starting points for judicial reasoning is governed by reference to received ideals of the social order and so of the ends of the legal order and what legal precepts should be and should bring about in their application in view thereof. In the last century the received ideal was clear and definite. An idealized community of the rural, agricultural America of our formative era in which neighborhood and individual were economically independent and self-sufficient was sufficiently near to the facts and accorded with the received ethical and economic views of the public. Today no such clear and definite picture is possible. That the received ideal must be replaced by one nearer to the facts is evident and admitted. That redrawing of our picture of the ideal community is called for, is conceded. But we have not as yet been able to redraw it. We are not satisfied with the received nineteenth-century measure of values. A new measure for the twentieth century has not yet been formulated.[37] In consequence, there is a general fumbling for a new idea of justice, such as has gone on more than once before in legal history in like eras. Juristic thought is affected no less than judicial decision. New theories of the social order have sprung up. The individual is no longer regarded as the unit. Some see a society made up of groups and relations and associations, which, therefore, call for a higher valuing than the individual.[38] Some see a society made up of institutions, of undertakings and enterprizes having a *de facto* significance and interests pressing upon the legal order for recognition. These institutions, it is taught, set up authorities and develop organs for the realization of their idea and bring about a community of interest among the members of the group toward realizing it. Their efforts in that direction are directed by the organs of authority and come to be more or less regulated by a definite procedure developed within the institution.[39] Such an institution is before our eyes constantly today in the labor organization. We did not succeed well in the last generation in judging it by an ideal of a society in which the individual man is the unit. But a technique for a society made up of institutions has yet to be developed. Such a technique is quite as likely to develop in judicial decision and doctrinal writing as in

[37]See my paper, *Are We Attaining a New Measure of Values in Twentieth-Century Juristic Thought* (1936) 42 W. VA. L. Q. 81.

[38]EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (transl. by Moll) chap. 1.

[39]Hauriou, *La Théorie de l'Institution et de la Fondation,* in LA CITÉ MODERNE ET LES TRANSFORMATIONS DU DROIT; Renard, *La Théorie de l'Institution;* Jennings, *The Institutional Theory,* in MODERN THEORIES OF LAW 68.

rough and ready trial-and-error administration. At any rate, it is worth noting that those who now urge preferring the institution to the individual are often the same who had been urging securing individual interests by a maximum of state action—by an omnicompetent political organization of society. In the progress of their thinking from social individualism to social institutionalism, they have been constant to one idea, namely, the idea of an autocratic power in public officials. They have continued to believe in supermen administrators free from the checks of law or rights or judicial review.

Philosophically we may see behind the development of the new idea of public law and of a supplanting of private law, partly the Marxian economic interpretation of history and doctrine of the disappearance of law,[40] partly psychological determinism, applying the Freudian idea of the wish to jurisprudence,[41] and partly certain new types of thinking since the world war, either relativist and largely influenced by Einstein, or phenomenalist.[42]

Marx thought of history as the record of a progressive unfolding or realizing of an economic idea—of an idea of the maximum satisfaction of material wants. This interpretation was little noticed till the last decade of the nineteenth century, when it came into vogue on the Continent. It spread to the United States in the first decade of the present century.[43] The idea behind it, the idea of satisfying material wants as the end and aim of society, rather than one of satisfying a spiritual want to be free, has gradually had a profound effect upon political and legal thought, and so upon political and legal institutions throughout the world. In a materialist polity there is no place for law. Marx urged that law was a product of class domination and that with the elimination of private property and consequent disappearance of classes, law, too, would disappear.[44] For a time Soviet Russia went upon this assumption. Law was to be replaced by administration. As the juristic and economic adviser of the Russian government put it, in the ideal society there is no law, or rather but one rule of law, namely, that there are no laws but only administrative ordinances and orders.[45] This idea of the disappearance of law has been gaining acceptance in many quarters. Along with it has gone a rise of political absolutism in Continental Europe, setting a growing fashion of administrative absolutism everywhere.

Economic realism, as it calls itself, was the first outgrowth of Marx's

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[40]MARX, CRITIQUE OF THE GOTHA PROGRAM (English transl. 1933) 31.

[41]See as to this TOURTOULON, PHILOSOPHY IN THE DEVELOPMENT OF LAW (transl. by Read) 29-42; HOLT, THE FREUDIAN WISH AND ITS PLACE IN ETHICS; Moore and Hope, *An Institutional Approach to the Law of Commercial Banking* (1929) 38 YALE L. J. 703, 703-704.

[42]SPIEGELBERG, GESETZ UND SITTENGESETZ; A. HUSSERL, DER RECHTSGEGENSTAND.

[43]See my INTERPRETATIONS OF LEGAL HISTORY 92-93.

[44]PASCHUKANIS, ALLGEMEINE RECHTSLEHRE UND MARXISMUS Introduction and chap. 4.

[45]*Id.* at chaps. 2, 5.

economic interpretation. It holds that all action, all human behavior proceeds on economic motives; that judges decide, lawmakers make laws, jurists work out theories of rights and moralists develop theories of justice or of right and wrong solely as expressions of the self interest of the dominant social class. Hence law is nothing but a formulation of class self interest.[46] Next came a combination of Marx and Freud in the form of psychological realism.[47] This teaches that as a matter of psychology it is impossible for a human judge to decide objectively. He can only do what his temperament and prejudices and predispositions, determined by his bringing up and social surroundings dictate. A decisive element in the judicial process is the Freudian wish.

This was soon followed by a combination of Marx and Einstein. Yellowplush said of spelling that every gentleman was entitled to his own. The skeptical relativist says that in political and legal thought every one is entitled to whatever starting point he chooses.[48] Laws are only threats, and the making and enforcing of these threats are relative to the personalities of those who wield the power of a politically organized society for the time being.[49] There are no rights. It is not that men have rights and the state makes threats in order to give effect to them. The ruling class has interests, and the threats made to secure them give rise to claims miscalled rights.[50]

Most of all, however, the idea of public law, as a subordinating law, replacing private law has been furthered by the general acceptance since the world war of what may be called a give-it-up philosophy. According to the philosopher from whom I quoted at the outset, judgments of values cannot be proved or verified. Hence they cannot be recognized as valid except in the scheme of some individual system, and even in that system, valid for the individual whose scheme it is, the criterion of highest value is not

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[46]Brooks Adams in CENTRALIZATION AND LAW 23, 31-35, 63-64, 132-133; *id., The Modern Conception of Animus* (1907) 19 GREEN BAG 12, 17, 32-33.

[47]FRANK, LAW AND THE MODERN MIND 1-203, 243-252; ROBINSON, LAW AND THE LAWYERS 1-19, 46-121, 284-323; ARNOLD, THE SYMBOLS OF GOVERNMENT 1-104, 199-208. "The rules a judge announces when publishing his decision are, therefore, intelligible only if one can relive the judge's unique experience while he was trying the case—which, of course, cannot be done." FRANK, LAW AND THE MODERN MIND (1931) 150. "Of the many things which have been said of the mystery of the judicial process, the most salient is that decision is reached in an emotive experience in which principles and logic play a secondary part. The function of juristic logic and the principles which it employs seems to be like that of language, to describe the event which has already transpired." Yntema, *The Hornbook Method and the Conflict of Laws* (1928) 37 YALE L. J. 468, 480. See also FRANK, LAW AND THE MODERN MIND (1931) pt. I, chap. 12; *id., Are Judges Human?* (1931) 80 U. OF PA. L. REV. 17, 23-31, 34-37; *id.* at 233, 240-248; *id., What Courts Do in Fact* (1932) 26 ILL. L. REV. 645; Llewellyn, *A Realistic Jurisprudence—The Next Step* (1930) 30 COL. L. REV. 431, 447-453.

[48]RADBRUCH, RECHTSPHILOSOPHIE (3 ed.) 9-12, 25, 70-75.

[49]Lundstedt, *The General Principle of Liability in Different Legal Systems,* in 2 ACTA ACADEMIAE UNIVERSALIS JURISPRUDENTIAE COMPARATIVAE 367, 371, 407.

[50]Continental jurists recently very generally repudiate the idea of a right. DUGUIT, LES TRANSFORMATIONS GÉNÉRALES DU DROIT PRIVÉ DEPUIS LE CODE NAPOLÉON 24; KELSEN, REINE RECHTSLEHRE 40-46; LUNDSTEDT, SUPERSTITION OR RATIONALITY 110-119.

demonstrable to that individual.[51] The content of law and of morals are wholly different and coincide only by chance.[52] The nineteenth-century metaphysical school tried to bring about such a coincidence but failed because they left out of account the ideal relation between men and the idea of security, that is, of a stable, harmonious, peaceable social order. Accordingly of the three theories as to the basis of the binding force of the legal order, Radbruch tells us that neither can give a satisfactory answer.[53] As between the juridical theory that a law is only binding when commanded by a force imposing itself upon all other forces, the political theory that the obligation of law is based upon consent, and the philosophical theory that the value of law may be deduced directly from the idea of justice, each has a relative value, but there is an irreducible contradiction and at bottom everything is at large.[54] Philosophy of law, to which we had always turned for help when the law found itself struggling to achieve new tasks, fails us. It gives up. Ultimately all is irreducible contradiction.

I can only say a word as to phenomenalism. It tells us that there is nothing behind or beyond phenomena. They are all that we have to do with. There is nothing behind them but their own phenomenality. They are all equally significant and equally insignificant. As one might put it, all phenomena were created free and equal. Hence every item of official action is valid in and of itself as a phenomenon. We don't qualify the phases of the moon as good or bad. It is unscientific to make such subjective value judgments. Therefore we should not make them in the social sciences.[55] Law in the coordinating sense is a futility when it seeks to systematize the items of governmental action which are valid and self-sufficient without regard to any system. What the official does is itself law. It is a self-sufficient phenomenon. The law and the state itself are only the aggregate of official acts.[56]

Politically, the rise of the subordinating idea as to public law in America is a reaction from the extreme tying down of administration in the last quarter of the nineteenth century, and like all reactions is equal to the action and in the opposite direction. I have spoken of this on other occasions and need say no more than that it ought to have spent itself and would no doubt have done so had it not been reinforced by the recent movements in thought of which I have spoken and the exigencies of new social programs.

Let me be understood. I am not preaching against administration, much less against an administrative law which is a true law, and not a calling

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[51]RADBRUCH, RECHTSPHILOSOPHIE (3 ed.) 9-11, 50-57.
[52]*Id.* at 43-45, 46-49, 70-75.
[53]*Id.* at 50-57, 82-84.
[54]*Id.* at 76-78.
[55]See some comment on this in Oliphant, *Facts, Opinions, and Value Judgments* (1931) 10 TEXAS L. REV. 127, 134-139.

of everything law that is done by a commission or board or bureau because it does it. I recognize the need of administration, and of a great deal of it, in the urban industrial society of today. It is needed as an administrative element in the judicial process. It is needed as a supplement to the judicial process. It is needed as a directing process in a society so organized economically and so unified economically that things must be done more speedily, with more adjustment to unique situations, with more coordination of special skill and technical acquirements than the judicial process, looking at controversies after the event, can afford. But to admit that development of the administrative process is necessary does not involve admitting that it should be free of checks such as a due balance between the general security and the individual life have led us to impose on both the legislative and the judicial processes.

In the legislative process there are committee hearings, successive readings of bills, successive consideration by two houses, executive approval and publicity as to each step; all insuring not merely deliberation, but an opportunity for all interests to be heard. In the judicial process there are the pleadings, setting out the exact contentions of each party. There is the record of the evidence, there are recorded findings, and the judgment must flow from application of the law by a known technique to the issues raised by the pleadings in view of the evidence. All this is of public record. Moreover, if the case is reviewed, the reviewing court files one or more opinions, of public record, in which its reasons are set forth in writing and soon thereafter appear in print. Contrast the absence of checks upon administrative rulemaking. It is not so long ago that a case got to the Supreme Court of the United States and was at the stage of argument to the court when it was discovered that there was no such administrative rule as that upon which the proceeding was assumed to be based.[57] The difficulty and even at times impossibility of finding out what the administrative rules are have become notorious. The contrast is quite as marked if we compare the administrative determining process with the judicial process. Training, a taught tradition, the record, the publicity attending each important step, and above all the criticism of a profession trained in the same tradition, hold the judge to the lines prescribed by law. There are no such checks upon the administrative determining function.

Nor is a positive custom of administrative determination developing in most of our administrative bureaus and boards and commissions. Many of them expressly refuse to follow their past action in like cases, much less to develop their past action by analogy so as to start an administrative

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[56]See a good statement of this doctrine, Lauterpacht, *Kelsen's Pure Science of Law*, in MODERN THEORIES OF LAW 105, 118-125.

[57]Panama Refining Co. v. Ryan, 293 U. S. 387, 412 (1934).

customary law. I grant that in the exercise of the guiding function the circumstances of particular cases must be decisive. But the directing or guiding function must be distinguished from the determining function. Administrative officials are likely to apply the method of treating each case as unique, which is appropriate to the former, to the latter also where it is not appropriate.

Moreover, we hear it urged publicly that certain administrative tribunals are set up to be, are intended to be, partial. They were not expected to proceed after full and fair hearing. They were created in the interest of one side only, or, as it is put, of a certain policy. In other words, the idea of subordination has been adopted for and by more than one administrative agency, and the extent of the power of such agencies makes it at least unwise to entrust such powers without the check of effective judicial review.[58]

Throughout the world there has been a revival of absolutism. Administrative absolutism in the United States is but one phase of a type of thought that has infected all the social sciences, has put its mark on international relations, on politics, on legislation, and even on judicial decision. But are we, who have inherited a great tradition of justice prepared to throw it over in order to fall in line with this post war fashion of absolutism? Our tradition prevailed over the absolutist governmental theories of the seventeenth century in the Puritan Revolution and decisively so in the English Revolution of 1688. It prevailed again in the American Revolution and in the formative era of our institutions which followed. If given a tithe of the opportunity which legislation continually provides for administrative determination, judicial rulemaking is abundantly equal to developing a speedy inexpensive reviewing technique which will insure that both sides are heard, that jurisdictional lines are respected, that the law is adhered to and is equally applied to both sides and yet at the same time the legitimate discretion of the administrative agency, applied as such is not interfered with, and that the discretion of the court is not substituted for administrative discretion.

We must simplify the machinery of asserting and vindicating individual rights against arbitrary administrative infringement. This is the first and crucial step in checking the revival of absolutism in our polity, state and federal. If we do not, we may find that the phenomenalists have the better of it. There will be no rights. We shall be living under a regime of the new public law and shall no longer be consociated; we shall be subordinated.

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[58]See the remarks of Dean Landis in the *Symposium on Administrative Law at the Annual Meeting of the Association of American Law Schools* (December, 1938) 9 AMERICAN LAW SCHOOL REV. 181-184.