Book Review. Gelhorn, W., Federal Administrative Proceedings

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The special students of legal philosophy are already familiar with Professor Gurvitch’s other works, distinguished by their thorough erudition, critical insight, and broad outlook. The general reader of this volume, who may not follow every step in the author’s detailed critical history of his subject or the intricate logic of his systematic analysis, will find in the introductory and in the concluding chapters two lucid and civilizing essays. Lawyer and layman alike will appreciate in them the highly significant reinterpretation of the nature of law. For law is neither handed down by God, nor is it merely what the courts make it; not fundamentally. It is a basic social manifestation, revealed through the “immediate jural experience, infinitely variable in both spiritual and sense-data” (p. 306), consisting of “collective acts of cold recognition of tangible social situations which realize positive values.” (p. 307). Such a view enables us to grasp the full social reality and meaning of law. Especially in this day of seeming dissolution of social-institutional and legal order, Professor Gurvitch’s work is one of very timely enlightenment and orientation in fundamental social ideas.

Radoslav A. Tsanoff.

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The James Schouler lectures for 1941 at Johns Hopkins University, which form the contents of this volume, inevitably invite reading at the present time in conjunction with the year-old Report of the Attorney General’s Committee on Administrative Procedure,¹ which the author served as Director with such distinguished ability. These lectures, now transformed to chapters, draw heavily upon the knowledge and experience acquired in the Committee’s work and frequently cite the Monographs published under the Committee’s auspices.² The lectures supplement the Committee’s findings and take on added significance when viewed in this light; but they also have a content, and especially a reflection of the author’s personal study and governmental philosophy, which give them independent and permanent value. Their style makes them a joy to read.

²Sen. Doc. No. 186, 76th Cong., 3d Sess.; Sen. Doc. No. 10, 77th Cong., 1st Sess. The Monographs are the work of the staff, headed by Professor Gellhorn, and not of the Committee, although they were reviewed by the Committee prior to publication. They contain the bulk of the data upon which the Committee relied and were, of course, heavily drawn upon in the formulation of the final Report.
In his first chapter Professor Gellhorn restates the thesis, common to the Committee’s Report and a good deal of the earlier literature, that administrative agencies are democracy’s means of realizing itself under modern conditions and that the leading characteristics of these agencies—specialization, expertness, possession of initiative, and combination of functions—are necessary concomitants of that fact. This new statement is cast against a background of more thorough knowledge than existed for earlier statements; it is realistic and made with consciousness of difficulties at the same time that it is more vigorous than a group statement can be. Professor Gellhorn, speaking of separation of the deciding function from that of “prosecution,” says that “the purposes upon which Congress has fixed cannot be realized if the enforcement efforts of one group of officials be nullified by another’s lack of understanding.” The Committee in dealing with the same issue pointed to “the danger of friction and a breakdown of responsibility as between the two complementary agencies,” which “is a danger to public interests no less than to private ones.” The first statement effectively emphasizes a primary consideration; the second judiciously points to the range of relevant factors.

Professor Gellhorn’s second chapter, like the Committee’s report, stresses the importance of informal adjudicative methods in administration, both by way of settlement of matters otherwise subject to contested proceedings and by way of simple investigation or test as a means of arriving at final determinations where, e.g., quality, safety, or personal fitness are involved. The chief contribution of the book on this point lies in its emphasis upon the normality of such direct methods of arriving at truth, in government as well as in private affairs. “Narrations concerning . . . past happenings, made with full solemnity . . . in a public forum” are the best possible basis for adjudication in some circumstances; but the procedure to which they belong is, after all, a very special device employed at times by government in order to secure certain safeguards. It is necessary and proper to limit this procedure to the circumstances in which its attendant safeguards actually contribute to sound results. Professor Gellhorn supplies a clear account of the situations in which alternative, direct methods are essential and are actually giving satisfaction in federal administration at the present time.

The third chapter of Professor Gellhorn’s book contains its most striking contribution to the intelligent appraisal of administrative methods. Turning here to a discussion of problems of proof in those proceedings which involve hearings of greater or less formality, the

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3P. 38.
BOOK REVIEWS

author points to certain significant differences between administrative agencies and courts, which should give rise to differences in their ways of acquiring and using evidence. These differences of method are growing narrower as judicial methods grow less rigid; but some which remain, based upon "the qualifications of the triers of facts" and upon "variant subject matters," will continue to be important. An agency, says Professor Gellhorn, as it accumulates knowledge "by devoting special attention to a given area," should be able to use that knowledge without formally introducing it as testimony in each separate proceeding, whether or not a court, lacking the same accumulation of information, could take judicial notice of it. The agency should be able to do this in respect to knowledge which is not newly gathered in the particular proceeding and which does not relate peculiarly to the individual case or parties, provided a statement of what is being done is made for use upon judicial review and provided further that the parties against whom the information operates have an opportunity at some stage or other to combat its effect in the administrative proceedings themselves. It is impossible in the space of a review to illustrate the practical, informed approach to this problem which Professor Gellhorn adopts. Other writers, whom he cites, have made similar suggestions; but none has developed them to the same extent or suggested with similar precision the limitations that should attach to the freer use of official "notice" by administrative agencies in formal proceedings. This discussion should have a marked effect upon both administrative practice and judicial decision. Equally salutary, if less unique, is the author's advocacy in the concluding portion of his third chapter of the more generous use under some circumstances of written evidence not subject to cross-examination.

The final chapter, on The Infusion of Lay Elements into the Administrative Process, evidences the same combination of progressive vision and realization of practical considerations as characterizes the third chapter. Professor Gellhorn sees the democratizing of government which comes about in specific areas through the opportunity which administrative agencies afford to "the interests and individuals immediately affected to shape the contours of regulation." He summarizes the extent to which this has been done, particularly through consultation in the preparation of regulations. But he stresses at the same time the limitations upon the extent to which interest groups really represent all interests and upon the ability of these groups to arrive at sound results through their own efforts. They should remain advisory, with ultimate authority vested in officials charged with infusing a detached viewpoint and a genuine concern for the general welfare into official action.
All in all, Professor Gellhorn's discussion highlights in a relatively small number of pages some of the most significant aspects of administrative proceedings. Here is no empty rhetoric which begins and ends with concepts and shibboleths. Here is, rather, a hard-headed but inspiring appraisal of both the significance and the details of the methods employed by modern democracy in one of its most important phases. The book merits the attention which most readers will find it a genuine pleasure to give.

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This pamphlet is worthy of the attention of any one interested in judicial administration, and that should include nearly all of us. It is chock-full of information and statistics on current federal judicial administration.1 Moreover, it gives an insight into the functions and achievements of the recently-created Administrative Office of the United States Courts,2 an innovation of great importance and significance.

Congress in investing that Office with its present functions finally recognized that systematic and continuous study of the federal judicial machine may be worth a little of the taxpayers' money. During 1941 the Office contained three divisions pertaining, respectively, to the fiscal administration of the federal courts, procedural study and statistics, and supervision of federal probation. The congressional appropriation for the fiscal year 1942 includes a small sum for the inauguration of a bankruptcy division in the Office to examine and audit the affairs of the referees and other bankruptcy officials, to collect bankruptcy statistics, to examine bankruptcy practice and rules with a view to their improvement, and to investigate complaints and suggestions with respect to bankruptcy administration.3

The transfer of the business administration of the federal courts from the Department of Justice to this Office is undoubtedly a step

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1Although this pamphlet has a very detailed table of contents, the lack of an alphabetical index hinders its use for purposes of reference.
2The Administrative Office came into existence November 6, 1939, and this Report covers the first full fiscal year during which it has operated, namely the federal fiscal year July 1, 1940-June 30, 1941, spoken of herein as "1941." For the legislation creating this Office and defining its functions, see 53 Stat. 1223-1226 (1939), 28 U.S.C.A. §§444-450 (Supp. 1940).
3Pp. 31, 168.