

Pennsylvania Bar Association Quarterly

Volume XXX
1958-1959

(October, 1958 to June, 1959, inclusive)

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12/7/59

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March, 1959

IS A NEW CONSTITUTIONAL PROVISION ON PROCEDURAL RULES DESIRABLE IN PENNSYLVANIA?

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In the November 1958 issue of the *University of Pennsylvania Law Review*, Prof. A. Leo Levin and Mr. Anthony G. Amsterdam have performed an invaluable service for lawyers in Pennsylvania and throughout the entire country. They have assembled, in the most complete detail, a history of the development of judicial rule-making, an analysis of the arguments for and against judicial rule-making, a study of the troublesome problem of defining "substance" and "procedure," a discussion of the role of the legislature in improving legal procedure, and a proposed constitutional amendment to divide power between the court and the legislature.

It is not our purpose to suggest that we can add anything substantial to the superb collection of background material gathered in the article. Whatever our individual views may be, it is not the purpose of this paper to consider the extent of inherent judicial power over rule-making. We will not debate the conclusions in the article that neither court nor legislature should have a monopoly of power and that a "naked struggle for power" between them should be unthinkable. We do, however, suggest a quite different approach to the practical resolution of the problem of reconciliation of the common interest of the court and legislature in effective judicial administration.

As we read the article, the authors support, as a general thesis, the desirability of judicial rule-making on the three grounds usually advanced—expertise in the court as compared to the legislature; lack of interest in the legislature in the problems of legal procedure; and the speed and

flexibility of judicial rules. They also repeat the grounds usually advanced against judicial rules: possible unwillingness of the court to act; adoption of procedural rules that impinge on substantive rights; and the risk that the judges may be "out of touch" with the problems of actual trial. From this, the ideal system suggested by the authors is one which

"charges the judiciary with the responsibility for the development of adjective law while retaining for the legislature, on appropriate terms, power to reassess or evaluate."

We will concede the correctness of this conclusion.

Before discussing the specific constitutional formula proposed in the article, it may be well to review the situation actually existing in Pennsylvania today. This can best be described as a perfect illustration of mutual self-restraint on the part of both court and legislature. Our present constitution contains no provisions for rule-making. It does however provide, in Article 1, §12 that:

"No power of suspending laws shall be exercised unless by the legislature or by its authority."

Our Supreme Court has not historically asserted any exclusive power over procedural reform. To the contrary, prior to 1937, procedural reform was left entirely to the legislature, evidenced by a long series of statutes, including the great codifications of 1836 and 1887. The latest important legislative reform was the Practice Act of 1915. The Supreme Court, unlike the highest court of some other jurisdictions, never asserted any inherent rights in this field, either by reason of its powers as the inheritor of the powers of the King's Bench, under the Act of May 22, 1722, 1 Sm. L. 131, §13,¹ nor under the Act of June 16, 1836, P.L. 784, §3, 17 P.S. §44.

1. "(The Supreme Court) shall . . . exercise the jurisdiction and powers hereby granted, concerning all and singular the premises, according to law, as fully and amply, to all intents and purposes whatsoever, as the justices of the Court of King's Bench, Common Pleas and Exchequer at Westminster, or any of them, can or may do."

"By the terms of the old Provincial Act of 1722, the judges of the Supreme Court here have all the powers of the Court of King's Bench in England." *Respublica v. Cobbett*, 3 Yeates 93 (1800). See also *First Congressional District Election*, 295 Pa. 1 (1928).

With the exception of the equity rules, promulgated pursuant to specific statutory authority granted by the Act of June 16, 1836, P.L. 784, §13, 12 P.S. §1221, the court did not exercise rule-making powers until the legislature passed the Enabling Act of June 21, 1937, P.L. 1982, 17 P.S. §61. And within the field of procedural reform the Court has not sought to act outside the scope of the Enabling Act. For example, rules on eminent domain and viewers' proceedings have not been proposed, since the bulk of proceedings in these fields lies in the jurisdiction of the Quarter Sessions Court, which is not included within the scope of the Enabling Act. Further, the Court has acted through its Procedural Rules Committee, composed of members of the Bar and of the lower court Bench. That Committee has adopted the policy of submission of proposed rules to the Bar and Bench for discussion and comment, particularly through the facilities of the meetings of the Pennsylvania Bar Association.

The Supreme Court has followed the same policy by the appointment of an Appellate Rules Committee in connection with the adoption of a complete set of rules governing appellate practice authorized by the Act of July 29, 1953, P.L. 1012, 17 P.S. §67. Further, we are advised that the Supreme Court and the Superior Court are about to appoint a Criminal Procedural Rules Committee under the authority of the Act of July 11, 1957, P.L. 819, 17 P.S. §2084.

All of the enabling acts authorizing the Court to regulate practice and procedure by rules of court contain the limitation that the rules shall be "consistent with the Constitution," shall neither "abridge, enlarge nor modify" substantive rights, and shall not affect "the jurisdiction of any of the courts" nor any "statute of limitations."

The Court has moved slowly and deliberately. No comprehensive and unitary practice system, similar to the Federal Rules of Civil Procedure, has been promulgated. Instead the Court, with the assistance of the Committee,

has adopted the policy of selecting specific topics for Procedure Rules treatment, with each series of proposed new rules separately submitted for discussion and comment in advance of promulgation. Further, the process of amendment has been sparingly, yet effectively used. Many of the Rules have been in effect for nearly twenty years and have needed no amendment. Rules on Additional Defendants and on Depositions and Discovery, however, were each radically rewritten within a short time after initial promulgation, in the light of obvious improvements which actual use demonstrated as necessary.

The Court has maintained, throughout the period since 1937, an ideal relationship with the legislature. The legislature has shown its approval of the existing system in a number of ways. It has furnished the Court, for the use of its Procedural Rules Committee, with an appropriation each biennium for the payment of the minimal expenses of the Committee, all of whose members serve without compensation. It has passed statutes containing express provisions that the procedural aspects of the legislation shall be governed by Rules of Civil Procedure. It has followed the pattern of non-action with respect to bills introduced, whose content would fall within the scope of the Procedural Rules. The Joint State Government Commission has kept in close touch with the Procedural Rules Committee on proposed legislation in which procedural provisions are to be included, *e.g.* the proposed new Highway Code, now being tentatively drafted with the cooperation of the University of Pittsburgh Law School and the Dickinson Law School.

The Court also has maintained an ideal relationship with the practicing lawyers, primarily through the Pennsylvania Bar Association. Discussions of new Rules and of new proposals are regular parts of Association meetings. Members of the Court attend these seminars and discussions. The Association and its Committees submit proposals for procedural reform to the Court and to the Procedural Rules Committee for consideration.

The present system could easily take care of the hypothetical situation that the Court would perform its function so inadequately that the Bar and the public would want the legislature to give relief. Every remedy necessary, in that event, is now easily available. The legislature can modify or repeal the Enabling Act. Is it suggested that the Court would then embark on a "naked struggle for power" in this field, a field in which the Court never entered until the legislature provided specific authorization? Is it suggested that, if the legislature itself should return to the old method of passing procedural statutes, the Court would then seek to suspend the legislative enactments as fast as the legislature would adopt them?

Lastly, under the present system, it is hardly conceivable that any legislative action would be taken, except under the sponsorship of the organized Bar. On what basis would the legislature reverse twenty years of successful procedural reform, entirely on its own? Who would press it into action? Would the Governor sign procedural bills, disapproved by the organized Bar? The key to future action lies with this Association, and the local Bar Associations. When they are satisfied with the reforms which are being made, it is hardly conceivable that the legislature, so overburdened with economic and political matters of great magnitude, would, entirely on its own initiative, trouble itself with procedural reform. This would be particularly true where the Association actively disapproved the proposed legislation.

Our point, then, is that the present system, with no constitutional provision whatever, has, through twenty years of experience, developed a method that satisfies all the interested parties, the courts, the Bar and the legislature. At the same time, ample procedures exist to remedy any situation where the organized Bar or the Supreme Court feels that legislative action would be preferable to court rules. Yet none of this is the result of any fixed, inflexible system of "division of powers." It is the result of a carefully

planned, and carefully administered, program of three-way cooperation between the Court, the legislature and the organized Bar. It is very much like the organization of the British Commonwealth, which has no constitution whatever, operates with no fixed rules, but works successfully on the basis of mutual self-interest and mutual self-restraint.

Let us now examine the constitutional provisions, suggested by Professor Levin and Mr. Amsterdam. It may well be that their adoption will be desirable in many States of the Union. However, our problem is a local problem. We must examine the proposals in the light of the existing situation in Pennsylvania, to determine whether our acceptance of them would create a system for us better than that presently existing in the Commonwealth.

The first paragraph provides that

“The Supreme Court *shall* make rules governing the administration, practice and procedure, including evidence, of all courts in the state.”

This provision will create a radical change in the present situation. In the first place, it will impose upon the Court new and additional mandatory duties. It provides constitutionally for the administration of all the inferior courts by the Supreme Court, and would appear to forbid the setting up of a separate independent administrative agency by the legislature, even if the Court should concur in its desirability. It makes it mandatory for the Supreme Court to make the rules for the Superior Court, even though all may be agreed that the Superior Court should make its own rules. It makes evidence the subject of judicial rules only, even though there may be strong support for legislative control of some or all of the varied aspects of evidence. It provides no power in the legislature to adopt procedural rules in areas where the Court itself may prefer legislative action. It necessitates the clumsy and difficult machinery of constitutional amendment if, in any case, a different handling of procedural rules is desired. Is this superior to our

present system, under which there is the most complete flexibility to divide functions, and to alter functions, as the case may require, merely by passage of an Act of Assembly?

The second paragraph provides for a veto by the legislature of any such rules adopted by the Court, the veto to be effective for six years, and with the power in the Court to reenact the rule after six years, subject to the right of the legislature to veto a second time. It seems fairly clear that such a veto will, in the end, amount to a permanent veto. It seems most unlikely that the Court will reenact a vetoed rule, and thereby precipitate a contest for power with the legislature. If this is merely a device for a legislative veto, it adds nothing to our present system. The Court, in twenty years, has never indicated any desire to engage in a contest with the legislature over the limits of judicial rule-making. Nothing in the present constitution prevents the legislature from affirmatively entering the rule-making field, at any time, even though the legislature has voluntarily withdrawn, up until now, from competition with the Court in this area. Is not the present flexible system superior to the complete, rigid exclusion of the legislature except on a negative veto basis?

The third paragraph provides for the presence of the Chief Justice before the legislature in connection with any veto legislation. This provision, of course, will fall automatically with the disapproval of the second paragraph. But there is a much deeper objection. Is it seemly for the Chief Justice of our Supreme Court to participate in a legislative debate over the Court's own rules? Should the Chief Justice be put in the undignified position of having to justify the considered judgment of the Court, and then having the legislature reverse what the Court has done? We rather think that any contest over the rules should be the task of the organized Bar. They are the ones most vitally interested. If the Court has adopted Rules which the Bar supports, the

public support of those Rules against any opposition in the legislature should be the duty of the Bar. If the Bar disapproves the Rules which the Court has drawn, the Bar itself should lead the movement for their amendment or repeal, either by the Court or by the legislature. But, in every case, the Court should maintain an independent, non-political position. In no case should the Chief Justice become a special pleader for the Court's action in public contest with the legislature.

We are deeply grateful to Professor Levin and Mr. Amsterdam for their contribution. Our comments in no way detract from the value of their scholarship and of their historical analysis. We agree completely with them in the basic philosophy of their approach. Our difference is only in the method of best achieving the result in which we all concur. We suggest that the simple, flexible, non-constitutional method, presently in force in Pennsylvania, has a better chance of achieving these results, than the more formalized, rigid, constitutional division of functions suggested in their article.

DEBATE

BY WILLIAM M. MUSSER, JR.

Of the Lancaster County Bar

“The legal profession is on its greatest decline in history. We are allowing our own condition to deteriorate largely because we refuse to believe it. We have confused clients and permitted delay. Paper work has piled up. There is a backlog of untried cases and it’s our own shortcoming. We accept delay as an inherent part of our operation. The Bench and Bar won’t accept responsibility. The Bench says we are not responsible, and the Bar has some surreptitious criticism of the Bench.”

These are the striking words of Pennsylvania’s first woman Attorney General, Anne X. Alpern, before a meeting of the Philadelphia Bar Association held in her honor on March 3, 1959. Lawyers may discount these words as merely those of a woman. Unfortunately these words are well supported by the facts. But how do we get lawyers to believe them and to do something about them?

If you are a non-believer, read the lead article in the May issue of *Readers’ Digest* on “LAW DAY,” and the legion of articles everywhere on Court congestion and delay. Since there is ample material available to convert the non-believers, this article is addressed to the average lawyer who believes that a serious problem exists and wants to help solve it. The decline of our profession did not occur overnight and it will not regain its position overnight. It will take many large and small contributions to reverse the tide. Here we seek your support to help place your profession on the incline.

The crux of our problem is that we have lost respect for the basic precept of our system of law—*debate*. We have forgotten to respect debate and have taken it for granted. It should be unnecessary to remind ourselves that

debate is the keystone of our system, in elections, congress, state legislatures, courts, etc. The greatest debates in our history produced the Constitution and Bill of Rights. The valuable contribution that you and I can make to reverse the decline of our profession is to help all our contacts realize the necessity for debate and to teach them to respect it.

The public does not respect debate because the people do not consider it necessary, nor do they see it frequently practiced. The significance of this lack of understanding is illustrated when we are repeatedly asked, "How can a lawyer with any self-respect defend that gangster, that crook, or that murderer?" In effect, the layman is asking, "Why should a criminal be allowed counsel?" It vividly illustrates his deep seated lack of understanding. The answer seems so elementary to us, but the layman is really asking for help and if he does not receive a logical answer he loses respect for us and the law. Is not the best understood answer going to be the one that simply says that our democracy is based on a fair hearing of both sides of a question—*debate*? By doing this, we appeal to the layman's sense of fair play and he clearly understands the reason for the rule.

Frequently we allow the fundamentals of our system to be misunderstood. This is true of the Fifth Amendment—used herein to include only this part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." Recently I was asked to talk on this subject before a lay audience. After consideration, I decided to present the question—"Resolved that the Fifth Amendment should be abolished"—in the form of an actual debate. I formally introduced myself first, as a speaker for the affirmative, and then for the negative and addressed my "worthy opponent," etc. The arguments follow. I hope they illustrate that debate may be utilized as a worthwhile technique to clarify the fundamental questions about our democracy.

AFFIRMATIVE

First: Justice requires that all thieves, gangsters, murderers, etc., be punished for their crimes. A law that protects the criminal is unfair. The Fifth allows the criminal to go free because he is not compelled to tell the truth. The truth is all that is being asked. If the witness tells the truth and is found innocent, that is justice. If he incriminates himself that, too, is justice. If he refuses to testify and conceals his guilt, justice has been denied.

Is it possible to envision a case where an innocent person would refuse to testify? The innocent person need not fear the truth. We know that if you are innocent and tell the whole truth, you will be found not guilty. We have always told that to our children. It is an age old truth. In fact, how would a parent react if a child refused to answer? Of course a parent would punish a child, for it would be rather ridiculous to give a child the benefit of the Fifth. It is much more absurd to allow murderers and gangsters to go free under this rule.

Second: The Fifth Amendment should be abolished because the reason for the rule no longer exists. My opponent will say that history is on his side. He will say that our Fifth Amendment was born in the Star Chamber and High Commission proceedings, that religious non-believers were often tortured until they told the truth, and that the Fifth Amendment is a rule to prevent barbarism. I deny that charge.

Today an accused's rights are amply protected without the Fifth. There is little chance of convicting an innocent man. The accused has a lawyer, the judge is impartial and much publicity is given the trial. The questioning of the prosecutor is done in the glare of the courtroom. The convicted criminal has the right to appeal to higher courts. The great wrong involved in the Star Chamber was that the judge was the questioner and prosecutor. He was not impartial. His primary function was to obtain a conviction.

This is the real reason why the Star Chamber was condemned. This reason does not exist today. There is an old saying in the law that when the reason for a rule no longer exists, that rule should be abolished. That is why the Fifth Amendment should be abolished.

Third: The final reason for removing the Fifth Amendment is most important of all. It is a haven for gangsters, murderers, communists and more recently labor racketeers. It is not the little fellow that takes advantage of the Fifth. It is the big time criminal. Time and again he scoffs at the law that protects them and go scot free by hiding behind the Fifth Amendment.

How can respectable people sit idly by and watch these big time criminals make a mockery of our system of justice? Worst of all, the example set by these criminals causes the general public to lose respect for our law and government. How can we expect anything else? Our children see this example clearly. They laugh at the old adage "Crime does not pay." The would-be criminal is tempted to commit crime and our crime rate is ever on the increase. Some of that increase is due to the bad example set by the Fifth Amendment.

In conclusion, the backbone of our legal system is public respect and the Fifth destroys public respect. The public feels that it is absurd to allow a criminal to go free by not requiring him to tell the truth. The public is right—The Fifth Amendment should be abolished.

NEGATIVE

There is one basic reason why the Fifth Amendment should remain a part of our law—*it was written to protect the innocent*. Let us consider if this purpose—to protect the innocent—is important enough to outweigh all of the very persuasive arguments of my worthy opponent.

First: My opponent assumes that all persons accused of crime are guilty. Let us assume one of them is innocent.

Is it true that the innocent need never fear conviction? Perhaps this is true of the *intelligent, innocent person*, but what about the *timid, fearful, unintelligent*? Is that person protected against the clever questions of the skillful prosecutor who wants above everything to solve the crime immediately. The tendency grows to rely more on self-adduced evidence and less on investigations. The questioning process breeds bullying tactics and later may lead to force and torture. An experienced civil officer of India expressed this idea quite clearly when a discussion was being held on the adoption of the criminal code of India in 1878:

“There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil’s eyes than to go about in the sun hunting up evidence.”

Our civilization has made great advances. Unfortunately they do not include a material change in human nature. Man seeks to use the easy way over the difficult. Law enforcement officers are human. Many abuse unbridled power. Even with the rule, police are frequently accused of strong-arm methods. If the curb is removed, these objectionable methods will increase.

Second: Let us look at the old English case that was responsible for the rule and ask yourself as you listen to the facts—Does this Rule help protect the innocent?

The case occurred between 1637-45 and is known as Lilburn’s Trial. John Lilburn was described as somewhere between a patriot and a demagogue. A very obstreperous opponent of the Stuarts known as “Freeborn John.” John was committed to prison by the council of the Star Chamber on a charge of printing or importing certain heretical and seditious books. Lilburn denied the charges and was then questioned further by the Attorney General on other like charges. John refused to answer saying—“I am not willing to answer to any more of these questions, because I see you go about by this examination to ensnare me; for seeing the

things for which I am imprisoned cannot be proved against me you will get other matter out of my examination; and therefore if you will not ask me about the thing laid to my charge, I shall answer no more . . ." In brief, John refused to take the oath to accuse himself of all past wrongs without first being charged with them saying, "The oath is an oath of inquiry which is against the law of the land—and the law of God as shown in Christ's and Paul's trials."

The Star Chamber convicted and condemned him to be whipped and pilloried "for his boldness in refusing to take a legal oath" and in 1638 the sentence was executed. But John, not to be outdone, complained to Parliament in 1640. There the sentence was found to be illegal and against the liberty of the subject and ordered reparation. He was not paid so he took his case to the House of Lords where they not only voted to vacate his sentence as against the law of the land and Magna Carta, but paid him 3,000 pounds.

This case vividly shows why we must have the Fifth to protect the innocent accused.

Third: Our forefathers included the Fifth as part of our law to protect the innocent. Throughout history until our Bill of Rights was adopted nearly all laws had been written for the benefit of kings or rulers. The motive had been to protect the king. Our founding fathers captured the imagination of the world with their new concept because they wrote laws to protect the individual. They included all the safeguards then known to man to insure freedom for the individual. Under this new system the individual became king and one of the rights granted was to refuse to accuse himself.

All the issues in this debate boil down to one question—When writing law should we first seek to protect the individual or help the State punish guilty criminals? Should the State or the individual be king? To ask this question is to answer it. We must not give the skillful prosecutor

the right to force testimony from the weak, unfortunate, unintelligent witness. Even with all our safeguards including the Fifth, some few innocent men are convicted of crime. We cannot sacrifice the conviction of another innocent man for the sake of convicting all the criminals that may hide behind the rule. Respect for each individual's life and liberty has attained greater heights in this country than anywhere else in the world. Individual life and liberty have become sacred to us.

John Lilburn won a great battle for individual liberty when he refused to accuse himself. To retain this right and all of our individual liberties, we must remain as stubborn and obstreperous as "Freeborn John."

Lawyers have won respect as advocates for their clients. To win the debate between freedom and totalitarianism lawyers in this country must consider their system of government as their number one client.