ADMINISTRATIVE PROCEDURE IN POLAND*

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I feel greatly honoured by the invitation extended to me by the Indian Law Institute to submit before this learned gathering a few remarks on the recent development of Polish Administrative Procedure. I believe that this initiative of Dr. Markose, the Director of Research of the Indian Law Institute, is both timely and useful, as such discussions before bodies professionally dealing with legal problems in various countries serve not only the purpose of bringing better knowledge and understanding, but also help the development of the learning of law and often may assist both the legislator and the administrator of law and justice in reaching right formulas.

In the process of codifying various parts of the Polish law an important step was reached when on 14 June, 1960, the new Code of Administrative Procedure [1] was passed by the Polish Parliament. Administrative law is defined as the law regulating the organisation and activities both in substance and in form of the administration. It can be divided into three basic parts: one dealing with structural matters, the other containing the material law itself and finally the third part would be that of administrative procedure. Administrative law and procedure should be considered as a separate field of the learning and practice of law and only by analogy and out of concern for a unified system it can draw certain conclusions from the present state of development of the judicial process. Administrative law and procedure is strictly connected with the problem of securing the proper functioning of the administrative organs at all levels of state administration, but on the other hand they are strictly connected with the problem of ensuring the rule of law and guaranteeing the citizen his rights deriving from the laws of the country.

The control of the legality and rightness of administrative acts is one of the guarantees without which the functioning of a state in which the rule of law prevails would be impossible. Such controls can assume various forms. They are carried out by representative bodies to which the administrative organs are subordinated as well as by

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1. Code of Administrative Procedure. Commentary by E. Iserzon and J. Starościak. W. P. Warszawa 1961.

parliamentary bodies and finally.Parliament itself. A proper control however of administration is only possible when at the same time it is directly exercised by individual citizens, physical or legal bodies whichever are the party concerned.

This was the very idea which prevailed in the discussions on the principles and norms of administrative procedure in Poland. It was agreed that the administrative procedure must give due cognisance to the right of every citizen to a proper application of law by the administrative authorities and a control of its legality. The formulation of the norms was an attempt to apply to administrative procedure standards required by judicial procedure.[2]

Law can never be considered as an accomplished process and no legal system can be considered to be immune from the necessity of changes to the requirements of life, to new social development. The problem of the rule of law just as a problem of administrative procedure cannot be discussed without taking into consideration the full content of the provisions which have to be observed and the basic aims which motivate administration in its activities. This cannot be regarded from a purely formal point of view, for every law calls for proper interpretation and implementation in accordance with the needs of life and the social system to which it gives expression.

When discussing, therefore, the problem of administrative law and procedure in Poland, one must look upon it as a function of the economic and social system upon which the State is built and the philosophy behind it. From this point of view the society in its present state must be considered as a result of a historic process conditioned by the objective laws and social development. In Poland, as in every country, its laws, its legislature and its judiciary are the result of historic evolutions and revolutionary developments. The chequered history of Poland left a particular imprint on the development of Polish law and Polish legal institutions.

The strongest ever impact upon Polish legislature and the content of Polish laws has been the developments since 1944. The national liberation of Poland coincided with the social revolution. It culminated in the abolition of the old bourgeois state system and in the creation of a People's Republic. It had set Poland on the road to socialism. This was more than a change of political system. It was a change of the very basis on which the state was formed and the various

2. Dr. S. Rozmaryn: The draft Code of Administrative Procedure. State and Law, 1960, No. 4/5 p. 609.

laws enacted at that time are the expressions of those basic changes. The laws of that time like the law of the nationalisation of industry, transport and banking, the law on land reform, the creation of the People's organs of power, the adoption of a system of planned economy created the need for new administrative forms and filled those forms with new legal content. This had to influence the Polish administrative procedure which is to be considered as a part of the basic legislation aimed at strengthening the fundamental guarantee of the rule of law in a state of socialism.

Those basic changes were the principal reason which brought the necessity of a new codification of administrative procedure to replace the Administrative Procedure Acts of 1928. The new procedure had to take into consideration the fundamental changes in the social and economic contents of the state which had to serve the interests of the working people and be controlled by them. It became necessary to give a statutory enactment to the democratic institution of complaints and grievances and take into consideration the new system of local self-government which overtook a certain number of administrative duties. A gulf has been existing between the new realities of life and the laws enacted in 1928 where it was accepted that the administration be a natural enemy to the rights of the individual. The new Code was to create a procedure which would permit a harmonious co-operation between the administration and the individual while at the same time providing the individual with much stronger measures than those of 1928 to oppose all actions which are directed against his rightful interests. The new Code had to take into consideration the development in the last 30 years in the theory and practice of administrative law. It had to give cognisance to new legal institutions and provisions adequate for socialist state and law departing from provisions which belonged to a past social formation. In preparation of the new administrative procedure an all–Polish discussion was opened. By the end of 1956 the Association of Polish Jurists on its own initiative prepared the first draft of the Code of Administrative Procedure and gave rise to new discussions amongst lawyers, administrators and schools of law on its content. The growing conviction that the codification of all administrative procedure is necessary caused the Council of Ministers in January 1958 to convene a Commission for the purpose of preparing draft rules on administrative procedure. This Commission composed of representatives of the science of law and representatives of certain central organs of state administration, representatives of the judiciary, the Attorney-General and the Arbitration Court set under the chairmanship of Professor Rozmaryn and prepared 5 drafts which were

discussed within the Commission. The last draft of April 1959 was subject of discussion by all interested parties and opinions were heard from Ministries, the Supreme Court, the Attorney-General, the Supreme Chamber of Control the regional and national councils, the, central Council of Trade Unions, the Association of Polish Jurists, the Association of Polish Journalists, the Law Committee of the Academy of Science, the Institute of Law, etc. The discussion gave a very rich variety of views which were published and discussed by the Commission who in the light of those remarks and opinions prepared a draft which the Government submitted to the Parliament and was adopted by the Parliament as a law on 14th June, 1960.[3]

In all countries laws must derive from the basic law of the country, that is the Constitution. It is therefore the constitutional provisions which form also the basis for administrative law and procedure and give expression to the guarantee of rule of law and the necessity for the proper application of law in the interests of the community concerned and the guarantee of the rights of the individual.

The Polish Constitution provides in the Preamble that is being adopted " as a fundamental law by which the Polish nation and all organs of authority of the Polish working people shall be guided." The Constitution itself, recognising the general character of these provisions calls for " strict compliance with the laws of the Polish People's Republic " which is considered the basic duty of every citizen. (Article 4). Deliberate inaction, abuse or misuse of powers on the part of the State authority are inconsistent with the Constitution, for it provides explicitly that " all organs of State power and administration acts on the basis of law ". The Constitution, therefore, offers its authority to the enactment of all legal provisions which are borne out of it. The rule of law in the light of the Constitution means in effect the protection of the rights laid down by it against all kinds of abuses. It is directed against any action of the State organs which would violate the rights of the individual.

Those guarantees of the Constitution have to be put into practice by many acts and laws providing for proper implementation of constitutional provisions. This was done by many acts. For instance, the Act of November 15, 1956, states the responsibility of the State for damage caused by its employees, conceiving this responsibility very broadly and excluding from it none of the State organs nor any type of activity undertaken by a state employee in the performance of his

3. Parliamentary debates, 46 Meeting, 14-6-1960, col. 6.

duties. Another important act was the order for all shops of retail trade to maintain open for the public a book for inscribing complaints. Provisions for securing the rule of law are made also in the system of criminal trial guarantees, in civil proceedings, in the system of appeal, etc.

Practice shows that the securing of the rule of law in the judiciary is always much easier than in the every day activities of the administrative authorities. Bureaucracy often becomes the greatest enemy of the rule of law. It does not suffice therefore to lay down general provisions of conduct or provide a strict division of competence. It frequently happens that even with the best intention an official violates law for reasons which in his views are justifiable and apart from criminal intent abuse is sometimes practiced on the alleged ground of State interest. To prevent bureaucracy from growing and officialdom from becoming too rigid the Council of Ministers in their decision of December 1960 laid down the rights of every citizen to present his complaints and grievances to State authorities. Every citizen, in whatever case it may be, acquired the right to apply in writing or be heard personally by the superior organs to those authorities he is complaining against. Ministries and central authorities were ordered to set special hours for hearing grievances and complaints of individual citizens. This system proved not only as a deterrent to bureaucracy, but it helped also in clarifying complicated cases and sometimes led to a change of law when it proved unequal to the task it is meant to perform.

All those decrees and orders, as well as the existing and amended laws were needed to be brought down to one system, which will remove the discrepancies, gaps and contradictions and take into consideration new realities and the new institutions. This was achieved by the new Code. The Code of Administrative Procedure covers practically all fields of administration, establishes general principles and means and methods of their implementation in the procedure. The Code contains six parts and 195 Articles, going into full details of the procedure.

In this brief lecture, it is hardly possible to cover details of this Code. I shall therefore limit myself to review shortly the general principles, the procedure on complaints and proposals, the role of the Public Attorney and the role of social organisations.

General Principles

The first chapter of the first part in 12 Articles deals with the general principles of the Code of Administrative Procedure. The

general principles constitute a certain novelty in the legislation concerning administrative procedure. The legal essence of those general principles is that they are norms of a codified law and have a statutory character.[4] They are neither supra positive nor customary norms. Being legal norms their infringement is to be treated as the infringement of a statute and not merely of principles of good administration or of similar instructions or standards. The generality of such principles is manifested in a number of legal consequences. Thus these general principles are common to all stages of the proceedings and are to be applied along with the remaining norms of the code. They do not introduce new independent institutions, but have to be implemented by means of existing procedural institutions. The existing institutions of administrative procedure regulated by the code are the instruments by which these principles are to be put into effect. The detailed institutions of the code are therefore practical concretisation of the general provisions which exert a decisive influence upon the interpretation of those institutions.

They can be catalogued into the following principles by which the administrative organs are to be guided :

The first requirement is that the administrative organs should act on the basis of the provisions of the law. Thus, no activity of administration can infringe existing laws, and also such actions must be based on a legal basis. Legal bases have to be treated equally with constitutional norms, laws, decrees and orders derived from it.

The administrative organs have to be guided by the interests of the working people and the task of the socialist construction. Thus the legislature stresses the close link which exists between the principle of legality and the principle of the interests of the working people in accordance with the basic function of the People's State which is the construction of socialism. The interpretation and application of legal norms have to take into consideration the interests of the working people. This does not mean that the activity of administration can be based on any other basis than on the existing legal norms. The code does not sanction any exceptions from the principle of legality.

The administrative organs have to watch over the observance of the rule of law. The aim of this article is that the existing laws should be strictly applied and observed equally by the authorities as well as by the citizen. This principle of the rule of law covers both the procedural norms as well as the material norms.

4. Dr. S. Rozmaryn : On the general principle of the Code of Administrative Procedure, State and Law 1961, No. 12, p. 887.

The administrative organs have to act ex-officio in order to elucidate the factual state in detail and to settle the matter. In their activities they should have regard both for the social interests as well as for the legitimate interests of the citizen.

The Code requests the administrative organs to assure that ignorance of law does not prejudice the interests of the parties concerned and, therefore, they are obliged to give the parties all necessary instructions and also to make it possible for the parties prior to the decisions being issued, to pronounce themselves on all matters concerning the evidence, the material accumulated as well as to the claims entered. Persuasion has to be applied first and foremost and not means of compulsion.

The administrative organs have to act penetratingly, rapidly and with the simplest means available. As a rule, they have to settle matters in writing. Decisions can be only waived or changed in such cases as provided for in the code itself.

This has given rise to a discussion on the problem of the stability of administrative decisions.[5] The code provides an appropriate norm for the possibility of a decision being annulled or modified. By no means the quality of *res judicata* can be attached to administrative decision. The code had to take into consideration that because of the changes in social structure the tasks of the administration had tremendously increased in the field also of the economy and every day problems of life of the citizen. Therefore, it requests, whenever possible, that in all decisions an essential participation of those concerned be secured. Stability of decision ought to be the rule while revocations have to be an exception. The code establishes that administrative decisions from which there is no appeal are definitive and can be annulled or modified only under special circumstances. These are enumerated in Article 157 of the code, like for instance, the decision issued by an incompetent organ or one issued without legal foundation or directed to a person who is not a party to the matter, etc. Whenever facultative revocability is concerned at any time a decision may be either waived or altered if as a result of this decision neither party has acquired an individual right. (Article 135). On the other hand, a decision by virtue of which the parties have acquired certain rights may be either waived or altered only with an agreement of the holders of that right. (Article 136). Revocability is also defined in Article 141

5. Dr. F. Longchamps: The problem of the stability of an administrative decision, State and Law, 1961, No. 12, p. 906.

whereby every definite decision can be waived or altered if there is no other way of removing of a situation which endangers human lives or health or of avoiding serious injury to the national economy. The parties who have sustained the damage as a result of this have the right of compensation which can be claimed before ordinary courts. Other possibilities of waiving or altering decisions are provided by Article 142. Apart from the exceptions, a correct decision by virtue of which some one has acquired a right is irrevocable.

Article 12 imposes the duty on administrative organs to act in such a manner as to increase the confidence of the citizens in the organs of the State. This Article closes the general principles and aims at creating a harmonious co-operation between the citizen and the administration. This principle is not limited to problems of the relation between an administrative organ and the parties in a given case, but applies to the whole activity of the administration.

The Code of Administrative Procedure (Chapter 5, Article 25), recognises every one as party whose legal interest or duties concern the procedure or whoever requests the administrative organ for some activities because of legal interests or duty. Physical and legal persons as well as state administrative units or social organisations can appear as parties.

Complaints and Motions

Part IV of the Code of Administrative Procedure is devoted both to the principle as well as to the procedure of filing complaints and motions.[6] This is in implementation of Article 73 of the Constitution which guarantees to every citizen the right to approach all organs of State with complaints, grievances and motions, which are to be settled in a just and expeditious manner. The Constitution provides that those guilty of displaying a callous and bureaucratic attitude towards those complaints or motions be held responsible. This basic right was previously regulated by the decree of the Council of Ministers of 1950. This caused that due to the separate regulations the complaints and the motions were treated as an institution separate from administrative procedure. By bringing into the Code and defining the substance, the competence of the organs as well as time limits, the institution of complaints and motions was made into a part of codified law and imposed upon all state organs a unified procedure and organisation of accepting, hearing and settling of complaints and motions. The first

6. J. Bielski: The acceptance and review of motions and complaints—Law and Life, 1960 No. 21(117).

chapter of the part dealing with this subject reaffirms the right of both physical and legal persons to submit complaints and motions to all state organs. They may be submitted on behalf of the person himself or on behalf of other persons as well as in public interests. They may concern all matters which fall within the activity of the State organs as well as from the activity of trade, self-government, co-operatives or other social organisations in the process of their fulfilment of tasks within the field of public administration. Complaints and motions have to be submitted in writing. It is the substance and not the form which decides whether it be considered a complaint or a motion. The Code imposes upon the State organs the duty to review and settle expeditiously according to their competence such complaints or motions and protects any plaintiff from acts of discriminations because of the complaint he has submitted. The Code puts an obligation upon the Council of Ministers to issue appropriate orders regarding the organisation of acceptance and reviewing of motions and complaints.

The subject of the complaint can be neligence or improper fulfilment of their tasks by administrative organs or officials, the violation of existing law or interests as well as a protracted action in settling some of the requested motions. The complaint can be submitted on all levels of State organisation and it is the duty of the competent organ to settle the complaint within two months. Motions may cover proposals for the improvement of the functioning of the organisation, the strengthening of the rule of law, the improvement of the method of work, protection of public property, better satisfaction of the needs of the population and means of preventing abuse or misdemeanour.

The Code provides for the participation of both the press and social organisations in the review of complaints and motions. In implementing these provisions the Council of Ministers by its decisions of December 1960 and November 1960 established the proper organisation for accepting and reviewing complaints and motions submitted. In their implementation the various Ministries had to issue appropriate orders regulating in detail the organisation of complaints, review of grievances and of motions. This right, widely applied, became an important organ in limiting bureaucratic excesses, abuse of law and of securing a better functioning of the state administration within the framework of the rule of law.

The Role of Social Organisations

The better the democratisation of the public administration the greater is the participation of the public and of social organisations in

the implementation of the tasks of the administration. Social organisations represent in equal measure public interest as well as lawful interests of the individuals. This idea lies at the very basis of the Polish organisation of self-government where the National Councils on the one hand and organs of the State administration and the organ of local social self-government established through election on the other work in unison. The closer the co-operation between National Councils and social organisations the better is the implementation of the very essence of the Councils which should in perspective take over as organs of social self-government the function of administrative organs.[7]

The Code of Administrative Procedure provides for the participation of social organisations at all stages of the administrative procedure. This is the broadening of the democratic principles of the role of the social element as a participant of such administration. It is being regulated by Articles 28, 83, 151, 154, 165 of the Code as well as it derives from Article 5 of the general principles. The right of the social organisation is not limited to cases instigated by it. The Code admits the public organisation the right of the party in individual cases concerning a third person should the matter be subject of its statutary aims. The administrative organ has got a duty not only to admit the social organisation as a party but also to inform a social organisation of a case being handled should the matter concern its activities. The organisation acquires all rights of a party. It has access to all material, it may request for the exclusion of an organ, it has got the right to produce proofs, to question witnesses, experts, move motions and take position towards the decision. It has got the right of recall, complaint as well as the right of suspension of the implementation of a decision.

The Role of Public Prosecutor

The institution of participation of the Public Prosecutor in administrative procedure is novel in Polish Law and it reflects the new position of the Public Prosecutor under the changed circumstances of the People's State. It is an implementation of Article 54 of the Constitution which provides the Public Prosecutor to safeguard the people's rule of law, to guard the protection of social property and ensures the respect of the rights of citizens. The new Code of Administrative Procedure in Part III precisely clarifies the rights and duties of the Prosecutor. Article 143 of the Code provides for the right

7. B. Bogomilski: Social Organisations in the Administrative Procedure. Law and Life 1960, No. 20(112).

of the Prosecutor to apply to the appropriate organs of State administration for the instigation of administrative procedure with the purpose of removing a state contrary to existing laws. That means that should the Prosecutor reveal a situation contrary to the norms of law and apply to the appropriate organ, the organ has the duty to instigate appropriate proceedings. The Prosecutor has the right to apply either on his own initiative or at the request of the other organs or persons. The Prosecutor possesses also the right of participation in the administrative procedure at every stage. His participation is limited not only to cases started at his request but also at the request by third persons. He can participate in administrative procedure from the beginning to the final settlement as also limit his participation to a certain stage of the procedure.[8]

The participation of the Public Prosecutor in administrative procedure is to secure a procedure and decision which is in accordance with the existing norms of law. He acquires all the rights of a party even if he is not a party in the substance of the case. But, he acquires only the right of a party and nothing else. He has also the right of recall from final decision to a superior organ and his recalls have to be reviewed and settled within 30 days starting from the date of the handing in of the recall. The participation of the Prosecutor in administrative procedure applies to all organs and State administration with the exception of appeals to the central organs of State administration.

The Code of Administrative Procedure lays down precise time limits for settling cases as well as settling recalls. In case a matter was not settled in a prescribed time the administrative organ has to inform its superior organ of it. Should this result from neglect by an official disciplinary proceedings have to be instigated. The new draft introduces the compulsory notifying to superior organs by the organ in question of any delays in dealing with the matter if the delay is longer than provided in the law. This aims at the ending of the so-called "silence of the administration".

The Protection of Social Interests

One of the basic assumptions of the Code of Administrative Procedure is the introduction of such procedural forms which can guarantee as to strict elucidation of the state of facts and such a decision which will take into consideration both social interests and

8. J. Swiatkiewicz and J. Kuczynski: Discussion on the role of Public Prosecutor in administrative procedure, Law and Life 1960, No. 22(118).

the well-founded interests of the citizens.[9] No doubt, it is very difficult to classify procedural forms in accordance to whether they aim at protecting individual interests or social interests. They should serve both the above purposes at the same time. The Code has introduced new forms appropriate for a State of a socialist type for the protection of social interests. The socialist State renounced arbitrarily recognition as a form of protection of social interests. This has found its expression in the acceptance of the principle that a decision which does not take into consideration the motion of the parties concerned or which imposes or else confirms the imposition of any duty upon the latter demand motivation. The introduction of motivated decisions amounts to subjecting administrative decisions to external control and thereby it amounts to giving up arbitrary recognition as a form of the protection of social interests. The only exception from the principle of motivation are considerations of the security of the State or those of public order. Amongst others to secure this fundamental tendency of the Code the new procedure lays down certain forms of control exercised by the social elements over the administration. These are as follows:

(a) Complaints and motions as well as criticism of the administration by the press which makes it possible for an individual or social organisation to compel an administrative organ to take a definite attitude in a given matter.

(b) The possibility of the Public Prosecutor instigating or joining the procedure with the rights of a party concerned.

(c) The possibility of a social organisation instigating or joining the procedure with the rights of a party concerned, if it is justified by the Constitution of the organisation concerned.

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I hope I did not trespass upon your time and your patience by going into all those details to bring out some of the salient features of administrative procedure in Poland. I tried to the best of my ability to bring before you the spirit which pervades the Code and the intention which motivated the legislator.

Of course, the best laws and most beautifully drawn legal norms cannot secure the rule of law unless they are properly applied and implemented. It is, therefore, the tasks of the courts of law, of the supervisory organs of the administration, of the special organs of

9. Dr. W. Brzezinski: The protection of social interest in the code of administrative procedure, State and Law, 1961, No. 3, p. 406.

inspection and control, of the Public Prosecutor and of the representative organs: the Parliament and the People's Councils, the task of individuals and of social organisations, to watch over the proper carrying out of the norms and rules of administrative procedure. The attainment of the social, political and legal aims of the new codification depends first and foremost by the range, necessity and efficacy of bringing the code into effect in practical life. This requires both the citizen and the administration to get fully acquainted with the procedure and exercise fullest possible use of all the provisions which the law gives to them. For this purpose a duty was laid upon the administrative organs to acquaint each and every official with the provisions of the new Code and a wider discussion on an all-national scale as to the best methods of full implementation has commenced. Many new points came out from this discussion.[10] Some required a further extension of those rules. Some stressed the necessity of new institutions like the Competence Tribunal or Administrative Courts.[11]

The practical solution cannot be found in any ready made formula. The strongest guarantee is the raising of the moral standard of the community, the increase of the need and habit of observing laws and of the feeling of the ties which bind the interests of the community together.

Law-making is a constant process. It has constantly to check its provisions towards the requirements of life with the growing consciousness of the human aspect and adjust it accordingly. It has to contribute to the creation of social, economic and political conditions where progress will be secured in greater freedom with the full understanding of the inter-connection between rights and duties. This is the intention of the new Code which constitutes an important part of the Polish legislation directed at the attainment of the aims People's Poland has set before it.

10. The reports on the discussion are in State and Law, commencing with No. 12, 1961, p. 1041.

11. Dr. S. Rozmaryn: Competence disputes in the light of the Constitution of the Polish People's Republic; State and Law 1961, No. 3, p. 397.

COMMISSIONED RESEARCH

The general tendency of commissioned research is, I believe, dangerously adverse to academic freedom. The ultimate defense of academic freedom lies in the courage of the teacher. To have that courage, he must believe in what he is doing and in what his colleagues are doing. Whatever impairs communication within the academic community impairs that belief, so that what I have already said reveals one aspect of the adverse effect of commissioned research on academic freedom. But there are others. When a school undertakes a large amount of commissioned research, it inevitably increases that portion of its staff that is on temporary tenure. In my opinion, the true function of tenure is not to give a man the courage to say what he believes. but to put him in a situation where he can think courageously and come to know what he really believes. The thinking of young research assistants, drawn into academic life by commissioned research, tends typically to reflect the insecurity of their position. In their eagerness to make a quick impression, they seem to lose intellectual autonomy. Further more, team research stimulates group loyalties that are inappropriate to an intellectual undertaking. The academic community cannot say privately that a project is misconceived and foolish and at the same time defend it with moral fervor against outside critics—though this has, in fact, been attempted. The anonymous quality of group research tends to identify it with the institution sponsoring it.

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Perhaps we may say more fundamentally that commissioned research violates the very nature of creative and truth-seeking human thought. The line of science is typically a zig-zag. Newton had to take time out to invent the calculus before he could proceed further with his study of physics. .....

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As the American physicist Bridgman says, to be effective the scholar must avoid giving hostages to his own past; he must be ready to wake up in the morning with a new idea and to scrap everything he has done and start off on a new and better line. Obviously this becomes difficult if he labours under the double responsibility of maintaining the morale of a team and of discharging an obligation to the source of his subsidy.

—Lon L. Fuller, "House of Intellect"— 14 *Journal of Legal Education* 153, 162-'63.