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# Justiciability

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# JUSTICIABILITY

THE essay by Mr. Geoffrey Marshall on the subject of " Justiciability " is one of the most stimulating essays in the recent volume, *Oxford Essays in Jurisprudence*, edited by Mr. A. G. Guest. Marshall's essay might be viewed as a brief defence of the thesis that only the legislature in England should decide what issues are justiciable, *i.e.*, peculiarly suited to judicial solution. Although this thesis has been controversial, it is not my aim to question it. My purpose is to comment on the essay as a jurisprudential essay on the concept of justiciability. In so far as Marshall analyses and evaluates alternative modes of settling disputes, his efforts constitute a contribution to the study of important forms of social order, a study which Professor Lon L. Fuller of the Harvard Law School has recently called a much " neglected " branch of jurisprudence.[1]

One of the principal functions of a legal system is to provide methods of resolving disputes. Legislatures, courts, administrative tribunals, ministers and " local " government units all resolve disputes in the Anglo-American legal systems.[2] Of the many kinds of disputes resolved daily through these " modes of settlement," which are more suited to solution by one mode than to solution by others? More specifically, which are peculiarly suited to " court settlement," and which are not? The circumstances in which this question might arise vary, and the form of the question sometimes differs accordingly. For example, a legislature might want to know whether it should establish an administrative tribunal to administer a policy, or should, instead, embody this policy in a

[1] Fuller, " American Legal Philosophy at Mid Century " (1954) 6 J. Legal Ed. 457, 477. Another eminent American legal scholar has recently said that " To serve the general society, legal research needs some new directions of emphasis. We should study the separation of powers from the standpoint not of formal distinctions but from the standpoint of function. What are the distinctive jobs which the judicial, legislative and executive branches of government are fitted by their respective institutional characters to do? " Hurst, " Perspectives Upon Research into Legal Order " (1961) Wis.L.Rev. 356, 366.

[2] " Private " settlement through negotiation, arbitration, " agreement to disagree," and other means, constitutes an additional significant mode of settlement which it is not my purpose to consider herein. The question whether a class of disputes is more suited to " private " settlement than to settlement through the legal system is a question that must be resolved before the issue of the suitability of these disputes to alternative " public " modes of settlement arises. Of course, the suitability of these disputes to one or more public modes of settlement is relevant to a determination that such disputes either ought or ought not to be removed from the domain of private settlement. Consider, for example, whether a court should decide issues that arise in the course of contract negotiations and ultimately prevent the parties from contracting. Can a court satisfactorily substitute its judgment for the judgment of those best qualified to determine the adequacy of an exchange?

statute to be administered by the courts. A legislature might want to know whether it should remove a class of disputes from the jurisdiction of courts. A constitutional provision might require a court to determine that disputes are " justiciable " before that court could decide them. An appellate court might want to know whether issues arising on appeal from an administrative tribunal are of a kind that a court, as such, ought not to resolve but should instead leave to the tribunal. A scholar might be interested to describe the characteristic features, if any, of those disputes which courts should resolve. The list of contexts in which the notion of justiciability might be significant could be extended.

Discussion of the question whether some disputes are, or are not, peculiarly suited to court settlement is pointless unless court settlement is in some way unique. It is, therefore, necessary to differentiate this mode of settlement from other modes. Marshall suggests in his essay that this can not be satisfactorily done. He concludes, further, that " no dispute or issue is inherently justiciable or suited to judicial solution " (page 278). If these conclusions are sound, they are profoundly significant. But are they sound?

Can the notion of court settlement be made sufficiently precise for the purpose of considering the " inherent " suitability of disputes to such settlement? Marshall asks: Is a court solution simply a decision by persons of a certain status? Decision according to certain procedures? Decision according to substantive rules? Decision under certain conditions, such as independence of popular pressure, objectivity and finality of result? He suggests that all of these features are relevant to the characterisation of court solution, and that adherence to characteristic procedures is of special importance. However, he concludes that:

> ". . . it is not possible to construct from judicial materials a single set of reasonably unambiguous criteria for calling a procedure ' judicial.' Moreover, many of the tests historically enunciated by the courts are now insufficiently precise to discriminate within a large penumbra of doubtful cases, and too great an element of chance enters into the question of classification where there is no specific guidance by the Legislature " (page 277).

Marshall appears to acknowledge, however, that historically, courts have evolved some general criteria " for calling a procedure 'judicial'." A court should, for example, be able to decide with relative ease whether a tribunal " bound to act judicially " did in fact so act. Such a court could be expected to inquire whether the tribunal had acted impartially, had afforded an adequate opportunity for adversary analysis of factual and non-factual issues, had decided primarily on the basis of such analysis, and had articulated the reasons for its decision. Although characteristics such as these may be adequate to distinguish judicial from legislative and ministerial methods, Marshall implies that they are not

adequate to differentiate judicial methods from the methods of some administrative tribunals. To the extent that this is true, however, it means only that the methods of some administrative tribunals approximate to judicial methods, and not that the concept of judicial methods is so imprecise that discussion of the peculiar suitability of some disputes to court solution is likely to be futile. Moreover, Marshall's argument that the notion of judicial methods is imprecise, even if sound, would not alone dispose of the question whether the peculiar suitability of disputes to court settlement can be profitably discussed. The distinctiveness of court settlement might also be found in characteristics other than procedure or " method."

Are some disputes peculiarly suited to court settlement? Marshall contends that the belief that some are rests not only on the erroneous assumption that the concept of judicial methods is " precise," but also on the equally erroneous supposition " that a dispute can be clearly contrasted with its methods of settlement and described independently " (page 278). He states that this supposition is erroneous because

> ". . . once an issue or contest of interests is defined it is impossible to avoid mentioning or implying at least some indication of what constitutes winning or losing (*e.g.*, that the contest is not to the death or one for physical combat) and therefore indicating some limitations upon procedure. Yet once the description of the issue is filled out, the contrast between the issue itself and its mode of settlement crumbles. These difficulties are crucial . . ." (page 278).

Are these difficulties crucial? Undoubtedly an issue can be formulated in terms which suggest the appropriateness of a specific mode of settlement. But this same issue may also be formulated in terms suggesting other modes of settlement. Marshall illustrates this fact when he says:

> ". . . no description of a situation is uniquely correct. ' Clearing a slum,' ' Implementing a social policy,' ' Extinguishing private rights,' ' Resolving a dispute between parties ' are, for example, all possible descriptions from different standpoints of what may be the same process " (page 269).

This analysis does not impair the defensibility of a thesis that some disputes are " inherently " suited to court solution. Such analysis shows only that in " argument about tribunals," to use Marshall's phrase, it is *possible* to indulge in question-begging by describing an issue in, for example, " judicial " terms, and then proclaiming that the issue is, " by its nature " suited to judicial solution.

Surely some disputes are " inherently justiciable." The phrase " inherently justiciable," as Marshall uses it, should probably be understood to mean simply, " more suited to court settlement than

to other modes of settlement." [3] According to this meaning, some disputes are clearly more suited to court solution than to solution by the legislature or by ministerial action. Examples of these may be briefly identified. Marshall suggests that one of the characteristic features of courts is that they are independent of " short-run " political pressures. Obviously, there are some disputes, for example, cases of alleged political defamation, the legislative or ministerial resolution of which might be undesirably affected by such pressures. Another characteristic feature of the process of court settlement is that someone ordinarily presides over this process who has valuable " legal " proficiencies, such as the capacity to interpret and apply complex statutory provisions. A dispute over the meaning and application of a complex revenue provision would ordinarily be more satisfactorily resolved by court action than by legislative or ministerial action. Another feature of court settlement is the elaborate system of procedures and rules of evidence according to which fact findings are made. Should criminality be determined according to this system of procedures and rules, or by ministerial or legislative processes? The Constitution of the United States provides against legislative determinations of criminality.[4]

Marshall would probably agree that the hardest question is not whether some disputes are more suited to court solution than to legislative or ministerial solution, but instead, whether some are more suited to court settlement than to settlement by an administrative tribunal. The difficulties of resolving this question should not be exaggerated, however. A sound answer obviously requires consideration of the purposes and characteristics of the administrative tribunals to be compared. Some tribunals are not significantly different from courts, while others are quite unlike courts. In so far as the differences are, in a particular case, unimportant, the question whether disputes should be resolved by the administrative tribunal or by the courts becomes less significant. Marshall points out that of those who have generalised with respect to the relative merits of judicial and administrative adjudication, some have said that:

> " . . . a virtue of administrative adjudication . . . [is] . . . that apart from its speed, cheapness and procedural informality it might result in impartial decisions which were nevertheless ' infused with policy ' " (page 286).

Marshall criticises this view as follows:

> " But this notion seems to have little to commend it. It is not easy even to see what it means. It might mean several things—that the same rules should, in comparison with the ordinary courts be applied in a different spirit; or that different and more

[3] The phrase might also mean " exclusively justiciable," but Marshall does not appear to intend this meaning.

[4] U.S. Const., art. I, s. 9.

flexible rules could be enjoined upon tribunals; or that tribunals might properly be subject to forms of ministerial guidance and intervention as to the general lines of decision or standards to be applied, though not subjected to intervention on the merits of individual decisions.

" But there is a conflict of purpose between policy influence in the last sense and the notion of independent adjudication. If it is thought necessary for undefined and flexible policy considerations to influence decisions then it could be argued that the work ought to be done as part of the routine of a department headed by a responsible minister and that if independent application of rules is desirable the only policy which ought to infuse the process is that set out on the face of the statute or regulations which contain them. And what sort of infusion is this, which is different from the relation between any general rule and its correct application? " (page 286).

Marshall does not pause to analyse the " relations " between a general rule and its application. One such " relation " is that the rule ordinarily serves as a primary source of useful criteria for determining the correctness of its application. Such criteria cannot be found in vacuous rules or rules which embody vacuous concepts, such as " the public interest." In the United States, " rules " of this character are sometimes stated " on the face of the statute " defining the functions of an administrative tribunal.[5] When this occurs, the tribunal must formulate its own policies and adjudicate accordingly. This process may plausibly be said to involve an " infusion of policy " that is " different from the relation between any general rule and its correct application."

Does such a process involve a " conflict of purpose between policy influence . . . and the notion of independent adjudication "? Marshall might agree that there is no such conflict here, and therefore might also agree that disputes which ought to be resolved by such " infusion " are not necessarily unsuited to *independent* adjudication. The primary function of institutional independence is to secure impartiality. A litigant who loses because his interests conflict with tribunal policy does not lose because the tribunal is not impartial. The notion of impartiality connotes absence of bias, prejudice, and external influence. Moreover, ordinarily it is only with respect to the decision of a particular case that a third party is said to be partial or impartial. Policy is by hypothesis formulated for application to classes of cases. True, a tribunal may be considered partial to a class of litigants, but this is not an instance of lack of impartiality in the common law sense.

Inasmuch as administrative adjudication " infused with policy " is, in one significant sense, a meaningful notion, and inasmuch as courts are accustomed only to highly interstitial policy-making, it

[5] The concept " public interest " appears, for example, in the statutes governing the adjudicative function of the United States Federal Communications Commission. See 47 U.S.C. s. 201.

may be that disputes which should be resolved in accordance with infusions of policy are less suited to judicial than to administrative adjudication. But this raises the problem of non-justiciability.

What disputes are non-justiciable? Marshall suggests that it may be more fruitful to approach the problem of justiciability through an examination of this question, rather than the question whether some disputes are inherently suited to judicial solution. He discusses one class of disputes frequently characterised as non-justiciable: those which turn ultimately on issues of policy; and suggests that the only sound bases for such characterisation are that some policies cannot be " set out in a sufficiently detailed objective way," that some decisions are " best controlled by elected persons," and that " some rights are best protected by a predominantly political process rather than a predominantly judicial one." He rejects the argument that because of judicial adherence to precedent, policies cannot be changed or flexibly administered in courts, and suggests that, as " feelings about the Rule of Law " require only that individuals should be able to predict within a reasonable period what the future will bring, courts can reasonably alter the future simply by giving " due notice " (pages 282–283).

Marshall's view of judicial flexibility is not entirely realistic. Courts are not, and ought not to be, as flexible as he suggests. The need for flexibility may, therefore, be an important criterion of non-justiciability. Courts are quite disinclined to overrule precedent, largely because litigants may have relied thereon.

But, it may be asked, could not a court simultaneously protect a party who has relied on a precedent, and also warn that the precedent will no longer control future cases? [6] Courts have used this technique of " prospective overruling," but only very sparingly. There are several arguments against its widespread adoption, not the least of which is that such use would tend to distort the important distinction between holding and dicta. As lawyers usually dispute the applicability rather than the authoritativeness of principles, courts would ordinarily not have the benefit of arguments respecting the soundness of alternative principles. It might be contended that after courts once adopted the technique of prospective overruling, lawyers should thereafter supply such arguments. If this were so, would lawyerly thoroughness then require examination of the soundness of all plausible alternative principles for the decision of each case? Many lawyers are likely to think that this is not their job. And would the litigants be

[6] An eminent American judge, Roger J. Traynor, has recently remarked that: " The plea of reliance would perpetuate archaic precedents. We have not begun to make use as we should of the sensible solution approved nearly a generation ago in *Great Northern Ry.* v. *Sunburst Oil & Refining Co.* . . . (287 U.S. 358, 1932). . . . The court simultaneously protected those who might have relied on such a precedent and gave warning that it would no longer control future cases ": Paulsen (ed.), *Legal Institutions Today and Tomorrow*, Columbia University Press, 1959.

sufficiently interested in what the law ought to be? If not, the lawyers would be even more unlikely to perform their new task well. Moreover, adoption of the suggested technique might offend popular notions of equality before the law, and undermine the acceptability of judicial decisions. The losing litigant, in a case announcing a principle favourable to him, but to be applied only *in futuro*, is not likely to be consoled by the thought that he would have had the benefit of this principle if someone else had litigated the issue initially. Finally, adoption of the suggested technique would not assure non-interference with the reliance interest. A litigant's reliance on an authoritative principle should be interpreted to mean that many potential litigants may also have relied thereon.

Marshall does not consider the question whether there are any significant disputes other than " policy " disputes which may be non-justiciable. Suitability of disputes to judicial settlement is affected by factors other than " policy." Marshall suggests that some have thought that issues in which " official interest or interference is simply novel " should be resolved in a judicial fashion (page 278). But others have thought the contrary, partly because experimentation might be necessary and courts are not inclined to experiment.[7] What of issues involving problems of state secrecy? If one adversary is unable to prepare fully for the adjudication of an issue because of the demands of internal security, should the issue be considered non-justiciable? [8] One alternative would be to hold non-public trials. But if a trial cannot be held in public, should it be held at all?

What of issues the complete solution of which requires extensive judicial supervision? Should the federal judiciary in the United States have undertaken the task of supervising desegregation in the public schools? [9] Was the job simply too large? Are decisions involving highly controversial and socially disruptive consequences likely to invite disrespect for law? Is the judiciary, operating solely on the basis of facts presented by litigants, adequately informed to initiate and administer such widespread social change? Can the judiciary, which proceeds on a case-by-case basis, revolutionise moral attitudes?

What of issues the solution of which requires technical expertise? Many have thought that courts, as traditionally conceived, cannot, for example, adequately review the substantive aspects of technical

[7] " The development of social control of private affairs on a wide scale has required the formulation of rules of action in new fields of governmental activity where the precise rule of action to be enforced is not apparent and where careful experimentation is necessary. Hence a measure of flexibility is desirable. Discretion rather than rigid rule is the desideratum." Stason and Cooper, *Cases and Other Materials on Administrative Tribunals* (3rd ed., 1957), p. 8.

[8] This problem was presented in a case recently decided by the U.S. Supreme Court. See *Jencks* v. *United States*, 353 U.S. 657 (1957).

[9] See *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

decisions of administrative tribunals.[10] What of issues which, under relevant constitutional structure, other branches of government might resolve? Should courts hesitate to resolve such issues, hoping thereby both to avoid the appearance of usurping power, and to avoid conflict with other branches, notably the legislature? [11] These considerations, and the magnitude of the consequences involved, have influenced some English and American courts to refuse to decide so-called " political questions." [12] What of issues that may be likely to overwork the judiciary? Should courts resolve, for example, disputes between taxpayers and their government with respect to the use of public funds? Would such a practice invite " floods of litigation "? [13]

What of issues that are not " genuine " in the common law sense? Many courts in the United States have refused to render " advisory " opinions and have declined to adjudicate " collusive " and " moot " controversies.[14] Several of the explanations for judicial refusal to resolve some or all of these types of cases may be briefly stated.[15] Since adverse interests of private litigants may not be immediately at stake in these cases, or at stake only in attenuated form, the adversaries may not be sufficiently motivated to examine factual and legal issues adequately. Moreover, it may not be possible thus to examine such issues either because important consequences of alternative decisions may be unforeseeable or because the litigants may not be able satisfactorily to identify all issues and relevant considerations.[16] Furthermore, the practice of deciding cases which have little precedent value, and which may have no significant effect on the present status of litigants,[17] may

[10] See, for example, Griffiths, " The Franks Committee " (1956) 3 J.Soc.Pub.T. Law 207, 215.

[11] In a discussion which followed the address by Mr. Griffiths cited in the preceding footnote, Professor H. Street noted that English courts had abdicated some of their functions of judicial review because of a fear of " finding themselves in conflict with Parliament ": *ibid.* p. 219.

[12] *Penn* v. *Lord Baltimore* (1750) 1 Ves. 444; *Luther* v. *Borden*, 7 How.(U.S.) 1 (1849).

[13] See, for example, the decision of the United States Supreme Court in *Frothingham* v. *Mellon*, 262 U.S. 447 (1923).

[14] See, for example, the following decisions of the U.S. Supreme Court: *Muskrat* v. *U.S.*, 219 U.S. 346 (1911), on advisory opinions; *Lord* v. *Veazie*, 49 U.S. 251 (1850), on collusive suits, and *South Spring Hill Gold Mining Company* v. *Amador Medean Gold Mining Co.*, 145 U.S. 300 (1892) on mootness. For a valuable discussion of the justiciability of these types of cases see Hart and Wechsler, *The Federal Courts and the Federal System*, (1953), pp. 77–79.

[15] Decisions of the U.S. Supreme Court on justiciability may be peculiarly affected by the fact that the court, under Article III of the U.S. Constitution, can decide only " cases " or " controversies," and by the fact that the court is generally disinclined to adjudicate the constitutional issues in any cases in which there may be some alternative basis for decision. With respect to the latter see the concurring opinion of Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (1936).

[16] See, for example, *Communist Party of the United States of America* v. *Subversive Activities Control Board*, 81 S.Ct. 1357, 1401 (1961).

[17] See, for example, *Poe* v. *Ullman*, 81 S.Ct. 1752, 1758 (1961).

not be a wise use of scarce judicial resources. Such a practice might also adversely affect community acceptability of judicial decisions.

The foregoing types of issues illustrate what may be called " factors of non-justiciability." Some of these issues are currently resolved by non-judicial modes of settlement, and some are now resolved by courts. Marshall acknowledges that " what courts are in fact compelled by legislation to decide may or may not possess this suitability." It may not be inappropriate to add that courts have sometimes unwisely undertaken tasks " on their own motion." Obviously, the suitability of a dispute to court solution may depend on several conflicting factors. When this is so, a weighing process is required, and such processes are, of course, not infallible.

Marshall concludes his essay by stating that justiciability determinations are for the legislature. He does not, however, suggest how the legislature should perform their task. Perhaps this is because he does not consider this question a jurisprudential one, but, even if considered non-jurisprudential, the question deserves some consideration in his essay. He might agree that general conceptions of justiciability are not likely to be useful criteria for allocating disputes among different modes of settlement. The purposes for which it may become necessary to classify disputes as justiciable or non-justiciable are numerous and varied. Reasonable classifications are based on relevant considerations, and these are identifiable only by reference both to the specific purposes for which the classification is to be made and to the likely consequences of such classification. To search for " justiciability in general " is to pursue a will-o'-the-wisp, and also to invite irrelevancy.

To conclude: If it is assumed that some disputes are more suited to one mode of settlement than to others, the problem of developing useful criteria for the allocation of disputes among these modes of settlement becomes paramount. Lawyers and jurists have not, however, devoted the attention to this problem that it deserves. Controversy over the growth of administrative law has probably stimulated more thought on the problem than any other development in the past century.[18] Marshall's essay arises out of this controversy, and is a valuable contribution to jurisprudence and to " argument about tribunals."

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[18] One result of this controversy is that many administrative tribunals are now significantly "judicialised," both in the United States and in England. See the American Administrative Procedure Act, 5 U.S.C. (1952), and in England, the Tribunals and Inquiries Act of 1958. An excellent analysis of some of the questions considered prior to passage of the American legislation is included in the Final Report of the Attorney-General's Committee on Administrative Procedure, U.S. Government Printing Office, 1941.

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