

many masters there shall be over the transportation system, as *who* shall be the master. The Arnold-Wiprud master would, at best, be a policeman wielding a corrective stick in an area of activity urgently in need of the tools of a planner. Mr. Drayton, on the other hand, has a master *and* a plan. But unfortunately, his is not a *master plan* in the public interest.

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THE MEDIEVAL IDEA OF LAW. By Walter Ullmann, with an introduction by Harold Dexter Hazeltine. London: Methuen & Co. Ltd., 1946. Pp. 220. 20s.

THE most important work of Lucas de Penna (*ob.* 1390), a contemporary of Bartolus and Baldus, is a very full commentary on the *Tres Libri*, the last three books of the *Codex*. It is not merely a simple gloss on a well-known text, but more accurately, a number of comprehensive legal treatises hung upon it, the provisions of the Code furnishing a series of convenient points of departure. Nine sixteenth century editions of the *Commentaria* sufficiently attest its popularity and usefulness, but in more recent times neither the volume nor its author has attracted the attention of any but the learned. This undeserved neglect now has been remedied, for an account of Lucas de Penna and an analysis of his work form the major portion of Dr. Ullmann's book, which thus would seem less a treatise on the medieval idea of law than an exposition of the ideas of a fourteenth century Italian jurist. But this is only a partial truth. Though Lucas de Penna is without doubt its central figure, the volume provides interstitially a general view of late medieval juristic thought. Emphasis within this field is placed almost completely upon the broad jurisprudential and philosophic aspects of law, though some attention is devoted to the no less revealing details of its practical, administrative side. Thus Dr. Ullmann's volume is essentially an account of Lucas de Penna's social, legal, and political ideas, extracted from the *Commentaria*, supplemented by shorter discussions of these same subjects drawn from the writings of other contemporary post-Glossators.

For Lucas de Penna, as for most jurists in the middle ages, justice is pre-eminent and sovereign. Law can be an enforceable rule of action only when its ordinances realize the idea of right.¹ Only in so far as decisions embody justice do they acquire validity and authority.² "*Humanae leges eatenus valent, quatenus non discrepant a divinis.*"³ Despite the explicit command of the ruler, an appointed judge may be objected to and removed *ex justa causa*,

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1. Pp. 38, 54, 110.
2. Pp. 39, 105.
3. P. 54.

and he cannot, for example, be made judge in his own case.⁴ "*Manifestum est, quod cum voluntas principis ad aequitate, justitia et ratione deviet, non est lex.*"⁵ The king is a legitimate ruler only so long as his government conforms to the requirements of justice; if it does not, he is a tyrant, and tyrannicide is eminently justifiable.⁶ "*Sublata namque justitia et regna, res publicae urbium singularum nihil aliud sunt quam latrocinia.*"⁷ Such statements are characteristic of the ethical or moral State in which both the ruler and the ruled are subject to justice, or to law, which as hypostatized, articulated justice is identical with it.⁸ And it is clear that much in medieval society, not yet complicated by problems beyond *meum et tuum* and secure in an accepted ethic based upon the solid bedrock of belief, lent support to the hypothesis that justice provided the ultimate touchstone of human behavior and was an ascertainable absolute, to be recognized in every case with immediately apprehended confidence.

This is the face of the medal, but in the middle ages its reverse was not hidden from view. When applied to what may be called public law, the idea of justice as a controlling principle required modifications that vitiated to some extent an analysis based essentially upon observations drawn from private litigation. The authoritative acts of the king, ruling as a representative of God, were valid and enforceable though not always reconcilable with ideas of right and law.⁹ A royal enactment which transfers the property of one to another but does not state the cause of the transfer, nevertheless must be enforced by the judiciary on the presumption that it is based upon justice, though it may in fact be *contra jus naturae*. If so, the ruler is responsible to God and "*peccat gravius et mortalius,*" but the requirements of administration preclude investigation in each case.¹⁰ In juristic theory the ruler should not be *legibus solutus*, but punishment for non-compliance presented insurmountable practical difficulties which forced a more realistic view.¹¹ An enactment providing for expropriation or condemnation in the public interest, or the withdrawal of privileges for reasons of public policy, though a deprivation of property and contrary to natural and divine law, must of necessity be permitted *ratione publicae utilitatis*.¹² Here the ruler stands above the law, and these are cases in which concessions seemingly were forced from the comprehensive theory of the moral State. But it is a

4. P. 132, n. 7: "*Nam licet in rescripto principis exprimat, ut iudex recusari non possit, nihilominus ex justa causa poterit recusari. Recusatio enim species est defensionis, quam, cum sit de jure naturae, princeps in suo rescripto etiam expresse tollere nequit.*"

5. Pp. 55, 103-4, 185, n. 6: note that the words are "*rex non potest*"; 186.

6. Pp. 39, n. 3; 188.

7. Pp. 39, 189.

8. Pp. 35, 38.

9. Pp. 50, 53, 57, 170.

10. Pp. 100-2.

11. Pp. 93-4.

12. Pp. 104, 185, 187-8.

mistake to think they were inroads upon it. The State did not exist free from such concomitant exceptions, and no realistic medieval jurist could escape the inconsistencies inherent in the organism he was explaining. Recognition of these elements does not mark a retreat from an earlier position, nor do contradictions necessarily indicate an age of transition. Lucas de Penna's attempt is but one of a long series of noble, if finally unsuccessful, efforts to resolve into one unified whole the two diverse principles of reason and fiat, *ratio et auctoritas*.

Of these two irreconcilables, Lucas de Penna, imbued as he was with the Christian ethic, stressed justice, the spirit of right, as the final arbiter of human action. Page after page of Dr. Ullmann's book makes this clear. It is disconcerting, therefore, to find this medieval jurist depicted as a precursor of Bodin and as supporting, two centuries before its appearance, not only a theory of absolute sovereignty but one of absolute legislative authority in the ruler.¹³ This is the result of Dr. Ullmann's emphasis upon a portion of the whole. It must be borne in mind that in dealing with non-consecutive works, such as the commentaries of the post-Glossators, it is difficult to avoid presenting as abstract principles phrases and sentences torn from their practical contexts. Having done that, it is no less difficult to resist pointing parallels which often are less real than verbal. Much had to take place in the practical sphere before the full implication of even the words of Baldus, which go beyond Lucas de Penna's in supporting the *plenitudo potestatis* of the ruler, were to mean that law had reconciled itself to being merely the articulated will of a legal sovereign. But it must be said in fairness that Dr. Ullmann's view of Lucas de Penna as foreshadowing modern political thought and anticipating its doctrines does not distort his volume into a one-sided thesis. On the contrary, it reflects the inconsistencies and confusions inherent in his exemplar with fidelity, even to the inconvenience of the reader. It is nonetheless a valuable exploratory venture into the treacherous borderland between law and political theory and a useful guide to the thought of a medieval jurist who, through it, once more gains a stature properly his.

Much of interest in the volume cannot be noticed at length here. A chapter is devoted to Lucas de Penna's views on criminal law and punishment,¹⁴ another to the validity of customary law. There is much on the duty and function of the judge, statutory interpretation,¹⁵ the relations between the temporal and spiritual jurisdictions, conflicting fourteenth century views on a famous *casus conscientiae*,¹⁶ and on a variety of other topics of importance to the historian of medieval law. The scattered facts of Lucas de

13. Pp. 57, 102, 183, 204.

14. Pp. 142-62; the canonists had anticipated much of this: KUTTNER, *KANONISTISCHE SCHULDLEHRE VON GRATIAN BIS AUF DIE DEKRETALEN GREGORS IX* (Città del Vaticano, 1935).

15. Pp. 57-8, 105-22; see further Thorne, *Statuti in the post-Glossators* (1936) 11 *SPECULUM* 452.

16. Pp. 127-31; see further Radin, *The Conscience of the Court* (1932) 48 *L. Q. REV.* 506.

Penna's life are collected, and an enumeration of the principal authorities used in his work is supplied. On the other hand, confusion is evident between law as the received *corpus* of Roman doctrine and law in the sense of legislation. Public and private law are insufficiently differentiated. There are some obvious mistranslations, and the many general and inconclusive references to English law might have been omitted with profit. Professor Hazeltine has contributed another of his graceful introductions which skillfully sketches the main currents in fourteenth century juristic thought and neatly relates Lucas de Penna's writings to those of his better-known contemporaries.

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