Administrative Law Facing The Future:
Old Constraints & New Horizons

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Foreword

Modern judicial review of public administration has been, in terms at least of public perception, the principal victim of its own success. It has attracted not only public approbation and a still-growing caseload, but also a political counteroffensive drawing upon constitutional notions of sometimes surprising eccentricity. This is not to say that the judges have been getting it consistently right, even if one shares the Dworkinian belief that there is a right answer to every legal question. The courts themselves, as is the way of the common law, have been tacking in the face of a complex of pressures which include both the demands of legal consistency and the background noise about what they are up to. There has certainly not been the kind of linear movement towards a supremacist goal which their critics claim to fear.

During the 1960s a change of mood and a change of pace without question entered public law. In effect it was rediscovered by a profession which had been educated to believe that there was no such thing. The single court which heard all applications, presided over by the Lord Chief Justice, began to take a gradually greater interest in errors of law and misuses of power. Property developers, who had money to spend, were among the most vigorous initial litigants, but close behind them — with the help of legal aid — came the new law centres whose clients were repeatedly encountering awkward local officials. By the end of the 1960s two major territorial claims had been settled by the courts: the exercise of the royal prerogative (no minor anachronism but a major reservoir of state power) had been brought within their supervisory jurisdiction, and the privative clause had been stood on its head, effectively opening all issues of administrative law to legal scrutiny. The rest is history — that is to say, a succession of events the evaluation of which itself continually changes.

Why, for example, has it happened as and when it has? Legal historians have so far been disconcertingly silent; but political scientists have offered some valuable perceptions. We know that from the time of the First World War until the end of the 1950s judicial intervention in public administration — apart, notoriously, from recalcitrant local authorities — was modest in the extreme. Judicial quietism coincided with what is recognised as the Civil Service's period of

unimpeded growth and unchallenged power, a period which embraced the radical reforms of the post-war Labour government. Yet this phenomenon followed a much greater period of judicial interventionism, spanning the later Victorian years, in which legal and procedural challenges to the boards and commissions set up by Parliament to regulate public and private enterprise were entertained by often sympathetic courts, and the Edwardian years when the newly installed Northcote-Trevelyan Civil Service continued to attract judicial suspicion. It was in this era that practically all the modern principles of judicial review were established. Much of the post-1960s flowering of public law has been no more than the rediscovery and reapplication of them.

Yet something sent the courts to sleep in the first part of this century. I have advanced elsewhere the suggestion that it had in part to do with the fact that by 1914 the Civil Service was headed by a remarkable intellectual elite recruited from the same schools and universities as the judges themselves and able, as the old politicians' placemen had not been, to be trusted to run the country soundly while governments came and went. It clearly also had to do initially with a sense that in wartime it would be unpatriotic to rock the boat.

Legal historians have been equally reticent on why it is since the 1960s that public law has rediscovered itself. One can pick out certain barometric events — the Crichel Down affair among them — which may have triggered a judicial sense that government was capable of going out of control. It has also been attributed to a 'never again' reaction towards the statism of post-war administrations, especially the first. Certainly the first great modern stirring, the *Northumberland Case* in 1952, is redolent of judicial resentment of the new welfare state's claim to immunity from legal challenge to its administrative wrongdoing. But it would be unwise to come to any conclusion without a comparative study of other common law jurisdictions. The US, to take a single example, has gone in the last hundred years through a not dissimilar cycle. India, remarkably, seems to have condensed it into little more than the last 10 years. Popular feeling and popular movements undoubtedly play a part, though how these are mediated is complex. The easiest and poorest historiography is that which tries to explain the development of law simply in terms of judicial abstention or interventionism, and which thereby collapses independence into autonomy and effect into cause. It feeds the dangerous assumption that intervention is value-laden while abstention is neutral.

Against this tentative theoretical background, what is happening in public law now? To suggest, as is sometimes done, that it is running out of control is to echo the crassest of the media coverage; but it is nevertheless worth asking why and from where this message has been coming. The time when it might more defensibly have been put out was in the early 1980s when the House of Lords' unexpected decision in the *Fares Fair* case sent local authorities running to their lawyers for fear of challenge and surcharge should they do anything remotely

autonomous. It was not then, however, but in the run-up to the Scott Report and the first Nolan Report that the segment of the press which feeds on the lobby system of unattributable departmental briefings undertook regular assaults, some of them abusive, on judges whose decisions were going against central government. The message was that judges were interfering unwarrantably in the business of government. Any doubt that it was a pre-emptive strike from Whitehall at Scott and Nolan has been dispelled by the fading away of the campaign in the wake of publication of the two reports — though not before a series of loaded leaks had greeted every attempt by Sir Richard Scott to be open in finalising his text.

The impulse to resist this loaded coverage makes a balanced account doubly difficult to assemble. Public law *has* made strides in the last 30 years. The fact that these have consisted in large part of the rediscovery of forgotten or occluded doctrines of standing, reviewability and natural justice does not make them any less important, for they are being reapplied in a polity of far greater complexity and in a democracy of much greater sophistication than before. How the courts deal, or decline to deal, with the independent bodies to which significant powers of government are now being devolved will be the next crucial question.

The development of judicial oversight has been part of a centuries-long search for consistent standards of fair and lawful administration in a protean state. To their breadth, which is readily defensible in terms of principle and consistency, modern judicial review has — perhaps most significantly and certainly most controversially — added a new depth. The real sea-change has in my view been the relative rigour with which, compared with say the 1940s, today's courts of judicial review require to be satisfied of proper standards of legality, rationality and fairness in public administration, and it may be that on analysis it is the strongest of *these* cases which have provoked the most noise.

To this wide-ranging debate the present volume makes a handsome contribution. It ebbs and flows, like all legal discourse, between what is and what could or should be: between, in other words, received textual authority and the calls of legal principle in a changing polity. Its greatest virtue is its practical orientation — neither a practice manual nor a textbook of theory, it engages from a variety of positions with what is happening and what could or should be happening in this most dynamic of all contemporary fields of law. I wrote somewhere once that law spends its life stretched on the rack between certainty and adaptability, sometimes groaning audibly but mostly maintaining a stoical silence. A book like this can both soothe some of the groans and speak in the silences, and it will be good to have it on the shelves of all those who think or act (or, praise be, do both) in the arena of public law.

Stephen Sedley
Royal Courts of Justice
September 1997

Introduction

In this collection of essays on administrative law we have set out to offer students a readable and accessible supplement to the textbook they may use on an everyday basis, while at the same time providing academics in the field, as well as those in related disciplines, with an interesting and insightful collection in its own right. In our experience students reading a chapter in a textbook very often find that they wish to undertake further research (or that their tutor advises them to go and look up a number of journal articles). One problem is that such sources are not readily available (or not as readily available as they should be). Another is that they are frequently very academic in style, having been written for other scholars rather than with the needs of the student also in mind. This book has the clear intention of bridging the frequently perceived gap between the two audiences by offering something in the nature of a rigorous yet approachable discussion of a variety of areas of continuing interest and concern to those studying public law in general, or administrative law in particular (as well as busy practitioners seeking analysis of the law and related issues in a relatively short space). There is also a certain logic to the order of the contributions in the collection. The text begins with an overview of the recent transformation in the structure and role of the state. It then moves on to consider the variety of non legal and legal mechanisms available to hold government and governmental bodies to account. The remainder of the book concentrates upon the role of the courts in their practical function as supervisory mechanisms of review and the controversy surrounding the theoretical underpinnings of this function, as well as the place of public law theory in relation to the whole.

Having noted this, it is by no means easy to say in the United Kingdom today just what it is that constitutes the 'field' of public or administrative law, so rapid have changes been in recent years. It is one measure of the pace of these developments that although the focus of the collection remains the courts, today there are many other emphases given to the study of the subject, in particular how the citizen secures a remedy for a grievance at the micro level. For example, Mulcahy and Alsop discuss internal dispute resolution procedures in the National Health Service. Another aspect of the debate centres upon the analysis of empirical

data surrounding the efficacy of judicial review itself, discussed here by Maurice Sunkin with reference to the issue of settling.

Indeed, the content and boundaries of the subject are not only debated but the very terms of the debate itself are being constantly re-cast, prompted by changes in the wider society beyond the confines of the law courts or the academic seminar room. For example, we have witnessed since the 1980s the emergence and triumph (at least for the moment) of new models of public administration ('new public management') based on public choice theory, models which assert the priority of efficiency, effectiveness and value for money: parameters set by economists rather than the traditional lawyer's values of justice and the rule of law. Similarly, the proper (public) role of the judiciary has emerged as a matter for debate to an extent that would have been unthinkable before 1980, not least among the judiciary themselves. In fact, the perception has gained hold in some quarters that the courts have over the last 20 years or so become something of a surrogate opposition to the results of executive dominance over Parliament. A number of aspects of the alleged failures of parliamentary scrutiny are dealt with in the chapters by Gabriele Ganz (e.g., regarding the relative ineffectiveness of the available mechanisms for the control of delegated legislation) and Mike Radford (e.g., regarding the ability of the courts to remedy the obvious deficiencies inherent in the convention of individual ministerial responsibility to Parliament). The election of a Labour government with a majority of 179 will inevitably place further strains on these mechanisms of control.

The outcome of this ferment of historical and sociological change, as well as of ethical and legal debate, has been that not only does each subject discussed in this book constitute a field of systematic knowledge and learning practices in its own right, but new contributions embodying fresh approaches to the subject are always being welcomed. The grounds of review, for example, have witnessed some development and refinement over recent decades, which are thematically discussed in an essay by Michael Fordham. The area of standing has also been significantly modified with the apparent acceptance, in a string of cases, of a public interest basis for an application for judicial review by pressure groups (see Christopher Himsworth's chapter on standing). In addition, the scope of public law remedies has been considered by the Law Commission as recently as 1994 as well as being influenced by the jurisprudence of the European Court of Justice (see the chapter by Peter Cane). The utility of the divide between public and private law itself is a topical issue that has also been analysed and debated by many scholars. For example, in relation to the emergence of new kinds of contracting state formation (see the contribution by Rodney Austin) and in terms of the legal-technical necessity of the divide between public and private law made by Lord Diplock in *O'Reilly* v *Mackman* [1983] 2 AC 237 (see John Alder's chapter). Or whether, regarding a number of the more theoretical aspects of the debate, the state itself is

an entity so markedly different from any individual citizen as to necessitate a distinct system of remedies for the litigant (for a wide-ranging discussion see the chapter by Nicholas Bamforth).

Another important development of recent decades, reflected in this collection, has been the opening up of many opportunities for the comparative study of public law. (See, for example, the chapters by David Pollard on the use of the prerogative power in Britain and France, and that by Gavin Drewry on the role of the ombudsman institution in a variety of jurisdictions.) At the same time, the contribution by Paul Craig considers the influence on English law, both direct and indirect, of our membership of the European Community since 1973. For example, regarding the doctrine of the sovereignty of Parliament, the availability of remedies for the citizen and the effect on the judiciary of various jurisprudential doctrines of the European Court of Justice, including those of purposive reasoning in the interpretation of statutory provisions and the doctrines of legitimate expectation and proportionality. The steady growth of the increasingly influential case law of the European Court of Human Rights, or of international human rights law, has also been a factor, one now set to have a more immediate impact on this country following the Labour government's decision to incorporate the European Convention on Human Rights into English law. (See in particular the essay by Fiona Donson.)

A further significant matter alluded to above has been the steady growth among lawyers (judges as well as academics) of dissatisfaction with the Diceyan model of administrative law. In particular, the search has been on for a new foundational statement, sometimes based on natural law or human rights principles, sometimes on new principles of public management and theories of the proper role of the state. These dissentients vary, from those who seek to limit the role of the courts to the minimum level of intervention in public affairs and who argue for the development of the democratic process (see Adam Tomkins in relation to demands for more open government and the law of public interest immunity) to those who would like to see the courts and the judiciary take a more principled and interventionist stand in issues of public law. The final three chapters in the book by Fiona Donson and by Leyland and Woods discuss some important aspects of this ongoing debate.

In sum, the whole subject is now more 'up for grabs' than ever before. Indeed, it will soon be apparent that there has been no attempt by us to impose a uniform line on our contributors, other than that of the broad theme of administrative law looking to the future rather than seeking to excavate the past. For this reason the reader will find that topics are discussed from a number of perspectives, ranging from largely court-centred approaches to those of a more socio-legal persuasion, to more abstract philosophical approaches. Looking back over the whole project, perhaps the largest and most problematical question, in the light of the changes

charted in the contributions to this volume, is whether a new foundational theory for the subject is needed (or, if it is, what the implications of such a theory would be) as we look towards the 21st century.

We would like to acknowledge here what a pleasure it has been to work with our contributors. The process has at times been a testing one, but it has provided the opportunity to explore our own ideas about the subject with others, often far more knowledgeable than ourselves. We have also had the opportunity to make a number of friends and to build upon our contacts in the field of administrative law.

In particular, we would especially like to thank Sir Stephen Sedley not only for writing a stimulating foreword to the collection, but also for finding the time to read all the chapters so thoroughly.

In regard to our own contributions, we would like thank Caroline McCann, a research student in public law, who was not only efficient and methodical but who also demonstrated considerable initiative in obtaining materials for us. A number of colleagues were also kind enough to read and make helpful comments upon earlier drafts of our chapters. Particular thanks to Bill Bowring, Adam Tomkins and Carol Harlow. All cross-referencing in this volume is the work of the authors. Of course, any remaining defects of style or content are entirely our own responsibility.

Bridget Shersby, the law librarian for the School of Law at the University of North London, was, as ever, extremely helpful. We would also like to thank Bob Wareing MP and Sarah Crabbe for some additional assistance with our research. Last, but by no means least, we would like to express our gratitude to Alistair MacQueen and Heather Saward at Blackstone Press for the support and encouragement they gave to this project from the start.

Peter Leyland
and
Terry Woods
October 1997

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Administrative Law's Reaction to the Changing Concepts of Public Service

Rodney Austin

SUMMARY

British public administration has been transformed in the last two decades by a series of structural, institutional and process changes, such as privatisation, contracting out, and a number of reforms known collectively as the new public management. The response of administrative law has been largely to ignore these radical new developments which have taken much of government beyond the scope of legal regulation. But administrative law does have a positive role to play, albeit a limited one, in the transformed public services.

INTRODUCTION

British public administration has, in a period of just under two decades, undergone a radical transformation in both structures and processes. The comfortable post-war consensus as to the proper role of the state as collective provider of almost every need, from cradle to grave, of the vast majority of the population, and as engine to the forces of the economy by virtue of its substantial ownership or control of the means of production and distribution, was rudely shattered when the Thatcher government was elected in 1979. The revolution of the Thatcherite right and its Majorist successors was dedicated to the transformation of the state — privatisation, the search for efficiency savings, value for money audit, the new public management, Next Steps executive agencies, public choice and public information,

the quest for direct accountability to the consumer, contracting out and the internal market, the Citizen's Charter, and the *Open Government* White Paper. These and other reforms aimed at 'rolling back the frontiers of the state'[1] and empowering the individual have dramatically altered the government's business and the way government goes about it.[2] A new and fundamentally different concept of public service and the manner of its performance has been developed, which transforms the relationship between the individual and the state and completely alters the notions of and mechanisms for accountability of the public services. Many, if not most, of these developments have been carried through without the need for legal change, in the sense that no legislation, either primary or subordinate, was required to effect most of these reforms. Curiously, administrative law, the law which regulates much of the activity of the state and other public authorities, which might have been expected to react dynamically to such a radical transformation, has undergone no such development. This chapter seeks to examine these constitutionally significant changes in the concept of public service and the reaction of administrative law to those changes.

THE HISTORICAL PERSPECTIVE: SUBJECTS NOT CITIZENS: THE TOP-DOWN TRADITION

The historical continuity of British government without a genuine revolution for nearly a millennium (since the Glorious Revolution of 1688 was merely the transfer of absolute legislative sovereignty from the King to another select group of powerful and wealthy men, already institutionalised as part of the existing constitutional structure, i.e. Parliament) has meant that the UK continues to have a top-down system of government, which the advent of popular democracy in the 19th century did not fundamentally change. Indeed, the creation of mass political parties which resulted from the extension of the franchise under the Reform Acts 1820–1867, and the control exercised by the modern party leadership over the party MPs via its immense powers of patronage, the whip system and the payroll vote, have strengthened the executive's power over the legislature and transferred effective sovereignty over to the 'elective dictatorship'[3] of the Prime Minister and Cabinet, creating an even more autocratic and politically top-down system.

Power in the UK constitution springs legally also from the top of the constitutional structure i.e., from the Crown exercising its prerogative powers, and from

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1 See the Conservative Party's 1979 election manifesto, referred to in McDonald, O., *The Future of Whitehall*, London: Weidenfeld & Nicolson, 1991, p. 2.

2 See McDonald, O., *op.cit.*, for an analysis of the early years of these reforms. See Oliver, D., and Drewry, G., *Public Service Reforms*, London: Pinter, 1996, for the most recent comprehensive analysis of the revolution in public administration.

3 Lord Hailsham, *Elective Dictatorship*, London: British Broadcasting Corporation, 1976.