ADMINISTRATIVE JUSTICE IN CONTEXT

EDITED BY MICHAEL ADLER

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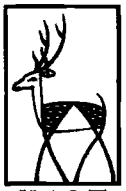

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Introduction

MICHAEL ADLER

Administrative Justice in the UK Emerges from the Shadows

The terms 'civil justice' and 'criminal justice' are both familiar and reasonably well understood. The former refers to the provision by the state for all its citizens of the 'means by which they can secure the just and peaceful settlement of disputes between them as to their respective legal rights'[1] and 'a remedy for the adverse effects of a breach of public duty'.[2] The latter refers, on the one hand, to the means for 'convicting and punishing the guilty and helping them to stop offending' and, on the other, for 'protecting the innocent',[3] but also covers the means for detecting crime and bringing it to justice; and for carrying out the orders of the court, such as collecting fines, and supervising community and custodial punishment. In the mid-1990s, Lord Woolf carried out a review of civil justice in England and Wales and his two reports (Woolf 1995, 1996) gave rise to a wide-ranging programme of reform. Criminal justice has been under almost constant review and has been the subject of legislative reform at regular intervals.[4] By comparison, the term 'administrative justice' has, until recently, been shrouded in obscurity and has not been a concept with which many people—except perhaps a few academics and researchers—were familiar. Recent developments suggest that this looks set to change. The White Paper *Transforming Public Services: Complaints, Redress and Tribunals* (Department for Constitutional Affairs 2004), which was written in response to the Leggatt Report,[5] *Tribunals for Users* (Leggatt 2001), which had proposed a series of reforms to the organisation of tribunals, was considerably more ambitious than Leggatt in that it did not just deal with tribunals but aimed to improve the entire system of administrative justice. It devoted a chapter (chapter 3) to 'The Administrative Justice Landscape' and recommended, inter alia, that the Council on Tribunals should be replaced by an Administrative Justice Council, with a correspondingly wider remit of keeping

[1] Lord Diplock in *Bremer v South India Shipping Corp Ltd* (1981) AC909, 917, cited (with approval) in Woolf (1995: ch 1, para 2).

[2] Woolf (1995: ch 1, para 2).

[3] 'Aims and Objectives of the Criminal Justice System', available at http://www.cjsonline.gov.uk/the_cjs/aims_and_objectives/index.html.

[4] Most recently the Crime and Public Order Act 1994, the Criminal Justice and Police Act 2001, the Criminal Justice Act 2003 and the Criminal Justice Act 2006.

[5] Commissioned by the then Lord Chancellor, Lord (Derry) Irvine in 2000.

under review the performance of the administrative justice system as a whole and advising government on changes in legislation, practice and procedure that would improve the ways in which it works. This change was implemented by the Tribunals, Courts and Enforcement Act (TCEA) 2007, which placed the new two-tier Tribunals Service and the Administrative Justice and Tribunal Council[6] on a statutory footing.

TCEA has brought in numerous changes. It enables judicial review cases, over which the superior courts formerly had exclusive jurisdiction, to be heard in the second-tier or Upper Tribunal, and has made the Tribunals Service, like the Court Service, into an executive agency of the Ministry of Justice, with a much-enhanced status, and has given the Administrative Justice and Tribunal Council, which formerly had oversight over tribunals, oversight over complaints procedures, ombudsmen and redress mechanisms as well. Change is in the air. Since TCEA was concerned with those tribunals that had a UK and GB remit, it obviously had implications for 'devolved tribunals' in Scotland, Wales and Northern Ireland and these are now being addressed. Administrative justice is, indeed, emerging from the shadows.[7]

Background Developments

The sense that administrative justice was an idea whose time was about to come provided the motivation for an application to the Economic and Social Research Council (ESRC) under its Seminars Competition for a grant to support a series of seminars on the topic. In my application to the ESRC, I noted that research on administrative justice was, at that stage, characterised by an institutional division of labour. Those who had undertaken research on particular forms of resolving disputes between the citizen and the state, such as complaints procedures, ombudsmen, administrative tribunals and judicial review, were familiar with research in that field but not necessarily with research in other, related fields. One aim of the seminars was therefore to bring together academics who had undertaken research on these sub-divisions of administrative justice in the expectation that it would lead to a cross-fertilisation of ideas and lead to a greater understanding of 'administrative justice' as a whole. Another aim of the seminars was to encourage communications among academics in different disciplines, in particular law, political science, public policy, sociology, social policy and accounting, and between academics on the one hand and representatives of the various stakeholders in the field on the other. There are a large number of stakeholders in central and local government, in the various sub-divisions of administrative

[6] The change of name took account of the fact that Employment Tribunals, which fall under the remit of the Council, do not hear disputes between the citizen and the state and are not part of the administrative justice landscape.

[7] These are most advanced in Scotland. See Administrative Justice Steering Group (2008, 2009).

justice referred to above, and among organisations representing the public, and, I argued, a serious effort needed to be made to ensure that these stakeholders took an active part in the seminar series. At the time, relations between academics and stakeholders were cordial but not particularly close, although past experience suggested that many stakeholders would be keen to take part.

The specialised nature of research on administrative justice was something of a disappointment in light of the very similar concerns that motivated researchers in the different sub-divisions of administrative justice and the fact that, over the previous 25 years, several attempts had been made to bring them together and create a more coherent research community. In 1985, the Social Sciences and the Law Committee of the Economic and Social Research Council (ESRC) commissioned Richard Rawlings to undertake a review of socio-legal research on aspects of administrative justice. The review, entitled *The Complaints Industry* (Rawlings 1985) focused on grievance mechanisms, that is, on mechanisms for 'wrong-righting' the activities of administrators and their surrogates, and holding them to account.

Although Rawlings recognised that grievance mechanisms were only one means of achieving fair procedures and just outcomes in administrative decision making, his report, nevertheless, focused on them. It did not attempt to analyse the concept of administrative justice as such and had little to say about first-instance administrative decision making. For various reasons, it did not attempt to review research on judicial review, regulation or managerial techniques (such as accounting and audit procedures) for holding first-instance decision makers to account, and focused on administrative tribunals, public inquiries, ombudsmen, MPs and councillors, and internal complaints procedures. This 'institutional' approach had some beneficial consequences in that it facilitated cross-sectoral comparisons between examples of the same institution in different sectors or fields, for example, between different tribunals or different ombudsmen. However, it was probably not the most intellectually exciting of approaches, and helped to perpetuate the division of the field into a number of institutional sub-fields.

In light of the Rawlings Report, the ESRC launched a small initiative on 'Citizens Grievances and Administrative Action'. However, if one of the aims of this initiative was to provide an intellectual impetus for further socio-legal research on administrative justice, it was not particularly successful. Although Rawlings' innovative textbook (written with Carol Harlow), *Law and Administration* (Harlow and Rawlings 1984, 1997, 2009) has undoubtedly been very influential, it did not itself lay the foundation for a wide-ranging socio-legal research agenda. A considerable volume of socio-legal research continued to be undertaken within each of the institutional sub-divisions that were reviewed in the Rawlings Report—and within several of the institutional sub-divisions that were not considered—but the extent of intellectual cross-fertilisation and the number of attempts to make sense of developments in administrative justice as a whole in light of the major changes in the nature of the state that have taken place in recent years was very limited. *Grievances, Remedies and the State* (Birkinshaw 1985, 1994), *Grievances, Complaints and Local Government*: (McCarthy, Simpson and Hill 1992) and *When*

Citizens Complain: Reforming Justice and Administration (Birkinshaw and Lewis 1993) represent the only attempts to analyse the different mechanisms for obtaining redress of grievances against a wide range of government departments and public bodies. However, they are largely descriptive and do not refer to the term 'administrative justice'.

In light of this generally negative assessment, it is important to acknowledge one successful initiative, which was intended to draw attention to the importance of administrative justice in the UK. This was the 'International Conference on Administrative Justice', organised by Martin Partington at the University of Bristol in November 1997. This conference, which was supported by the (then) Lord Chancellor's Department, brought together large numbers of academics with an interest in administrative justice and practitioners in the field. Some 50 papers were presented, 33 of which were subsequently published in a book entitled *Administrative Justice in the 21st Century* (Harris and Partington 1999). The discussions that took place were extremely lively and informative, and the papers that were published provide evidence of the quality and quantity of research on administrative justice that was being undertaken in the UK.

Unlike the Rawlings Review, the Bristol Conference did attempt to raise some theoretical questions about the nature and scope of administrative justice. However, there was only one invited paper on this subject—a very sceptical paper by the Canadian academic Terence Ison (1999)—and the other papers that addressed the issue did so from the perspective of the institutional sub-division in which their authors worked. The editors of the book provided a very helpful summary of the key questions that emerged from the published papers (ibid p 4). They included:

— How can a system of administrative justice best ensure the existence of an appropriate quality of administrative decision making at the initial stage?
— What is the significance of the development of new procedures for the review of administrative action?
— What are the practical and constitutional problems posed by the emergence of regulatory agencies in response to privatisation?
— What are the insights provided by empirical research into the operation of particular aspects of the administrative justice system?
— What are the implications of the UK assuming human rights obligations, domestically, supranationally and internationally, for the operation of administrative justice?
— What is the role and efficacy of mechanisms designed to monitor the processes of administrative justice?
— What should be the means of providing an overview and evaluation of recent, as well as potential future, models of administrative adjudication and review?

Although the Conference led to the establishment of the Bristol Centre of Administrative Justice, the very full research agenda it set out was not really taken forward.

In these circumstances, and in light of clear evidence that the government was committed to administrative justice reform, I concluded that a seminar programme would provide a very appropriate and much needed means of addressing these and related problems. Socio-legal research on redress mechanisms and forms of accountability had, until this point, paid scant attention to theoretical work on the nature of administrative justice or to the changing nature of the state and its implications for administrative decision making. In the proposed seminar programme, it was proposed that these weaknesses should be addressed by prioritising these two topics and by making them the starting point for subsequent discussions. However, although the seminar series would have a theoretical starting point, it would have some rather more practical end points in that it would conclude by considering how administrative justice could most effectively be enhanced and by developing a research agenda which identified the most important questions relating to administrative justice that needed to be addressed.

As indicated above, the White Paper (Department for Constitutional Affairs 2004) marked a great step forward in recognising administrative justice as a concept and in taking a holistic approach to mechanisms of redress or forms of accountability that was designed to ensure that citizens are treated fairly by government departments and public bodies. Written in response to the recommendations of the Leggatt Report (Leggatt 2001), which proposed a series of reforms to the organisation of tribunals, it was considerably more ambitious than Leggatt in that it did not just deal with tribunals but aimed to improve the entire system of administrative justice. Although Leggatt referred, in passing, to the need to improve first-instance decision making, he focused on tribunals because this was what he was asked to do. The White Paper took Leggatt's concerns very seriously but placed them in a wider administrative justice context by considering them alongside other systems of redress, such as complaints procedures, ombudsmen and judicial review. It pointed out (Department for Constitutional Affairs 2004: para 3.5) that '[e]ach route to redress has its advantages and disadvantages' and argued that 'our task is to find ways of combining the strengths of all the redress methods so as to give people real choice and a genuinely responsive service'. Its strategy (ibid: para 2.2) 'turns on its head the Government's traditional emphasis first on courts, judges and court procedure, and second on legal aid to pay mainly for litigation lawyers'. The aim was to develop a range of policies and services that, so far as possible, would help people to avoid problems and legal disputes in the first place; and where this was not possible, provide tailored solutions to resolve the dispute as quickly and cost-effectively as possible without necessarily seeking redress from a tribunal. Thus, it favoured attempts to resolve cases—through reconsideration, negotiation, early neutral evaluation, mediation or conciliation—prior to a tribunal hearing.

The White Paper raised a large number of questions to which, when the seminar series was planned, there were no clear answers. Although the main aim of this seminar series was not to provide answers to these questions—the parallel series

of seminars funded by the Nuffield Foundation (Sunkin 2006) focused more closely on policy issues than this one did—it was hoped that the exchange of ideas which these seminars were intended to generate, and their effects on the thinking of those who attended, would encourage discussion and debate and contribute to the process of finding answers to such questions.[8]

The ESRC Seminar Series

The application to the ESRC was successful and a grant of £15,000 made it possible to plan a series of five seminars on administrative justice. These seminars took place between March 2006 and June 2007. The main aims of the seminar series were:

— to review the current state of theoretical work on administrative justice, broadly defined as work concerned with the justice and fairness of administrative procedures;
— to consider recent changes in the nature of the state and recent developments in public administration, in the UK and elsewhere and to assess their implications for administrative justice;
— to assess the current state of administrative justice in the UK, in particular the balance between external and internal forms of accountability and the degree of co-ordination between them, and consider how administrative justice might be enhanced;
— to bring together academics who undertake research in different sub-divisions of administrative justice and practitioners who work in different sub-divisions of administrative justice in order to facilitate dialogue and address these tasks; and
— to develop a research agenda that focuses on some of the most important questions that still need to be addressed.

Five seminars were held over a 15 month period between March 2006 and June 2007.[9] A total of 15 papers were presented at the five seminars. In addition, at the final seminar, there were four 'round table discussions' (one each for academics, users, stakeholders and funding bodies) at which research priorities were discussed.

Each of the 15 papers was circulated in advance in order to ensure that participants had read it beforehand. The session at which it was discussed was introduced

[8] Following on from the seminars, the Nuffield Foundation launched a new research initiative on administrative justice. Projects have been funded in four areas: pathways from initial handling and filtering to sorting and settlement; feedback mechanisms and administrative justice; choice of redress mechanisms; and quality of decision making in redress.

[9] The seminars were hosted by seminar participants at the University of Edinburgh, the University of York, the University of Liverpool, Queen's University, Belfast and the University of Edinburgh (again). Two of them (the York seminar and the second Edinburgh seminar) were two-day events and the other three (the first Edinburgh seminar, the Liverpool seminar and the Belfast seminar) were one-day events. Attendances at the five seminars were 38 (Edinburgh I), 36 (York), 30 (Liverpool), 40 (Belfast) and 50 (Edinburgh II).

by two discussants with the author being given an opportunity to respond to their comments and those of other participants. This formula worked well at the first seminar and was adopted throughout the series.

Participants included academics from a variety of disciplines (including law, political science, public policy, sociology, social policy, accounting and IT), policy makers in government and public sector organisations; members of the tribunals judiciary and ombudsmen; and representatives of the regulatory bodies that oversee their activities, for example, the Administrative Justice and Tribunals Council.[10]

Although it is hard to judge the 'success' of a seminar series, the quality of most of the papers was very good indeed, the respondents succeeded in identifying points for discussion, and the ensuing discussions were extremely lively. Those in one branch of administrative justice learned from those in other branches, academics learned from practitioners and vice versa. Participants spoke with increasing confidence and authority about the concept of administrative justice.

A number of interesting ideas for future research were raised in the round-table discussions at the final seminar. Those that generated most support involved the need for:

— more comparative research—in which comparisons are made between different policy areas, different redress mechanisms and different countries;
— research on the nature and incidence of administrative grievances, in different policy areas;
— research on ways of improving the justice and fairness of first-instance decision making;
— research on the effectiveness of feedback from redress mechanisms to first-instance decision makers;
— research on trust in administration and the relationship between trust and complaining or appealing;
— research on 'paths to administrative justice', analogous to the extremely influential studies of 'paths to civil justice' carried out by Professor Dame Hazel Genn (Genn 1999; Genn and Paterson 2001);
— research on overlaps between complaints systems and appeal mechanisms suggested by the National Audit Office report on *Citizen Redress: What citizens can do if things go wrong with public services* (NAO 2005); and
— research on the desirability and feasibility of proportionate (appropriate) dispute resolution and on the relationship between choice and justice.

A short account of the seminar series (Adler 2007) was published in *Tribunals*, a journal published by the Tribunals Committee of the Judicial Studies Board (JSB).

[10] Two groups were unfortunately under-represented: groups providing advice and representation and postgraduate research students. In both cases, considerable efforts were made to recruit members of these groups by publicising the seminars and offering to meet the travel and subsistence costs of those who took part. The main reasons for non-attendance given by those providing advice and representation was 'pressure of work' and the difficulties involved in taking time off from their 'primary' activities. In the case of postgraduate research students, the main problem was our inability to identify those who were working in the field.

The range and quality of the papers presented during the seminar series was of such a high standard that it seemed appropriate to use them as the basis for an edited book on administrative justice, which would reflect the current state of thinking on administrative justice as it emerges from the shadows and moves centre stage.

From the Seminar Series to the Book

In proceeding from the seminar papers to the book, it was clear that there were some important gaps which needed to be filled. For example, among the contextual developments considered in the second seminar, insufficient attention had been paid to developments in human rights and their implications for administrative decision making. And, as a counterbalance to the emphasis on theoretical work in seminar series, there needed to be a more sustained assessment of recent policy developments in the UK. In addition, although there had been some notable seminar contributions from international scholars, it was felt that the concerns addressed in the seminar series were perhaps too parochial and that the book should have more of a comparative or international flavour. This meant that, in addition to contributions that were based on seminar papers that their authors had already presented, an edited book would be strengthened if it were to include some additional contributions. A number of additional contributions were commissioned and their inclusion has undoubtedly strengthened the collection.

The book is divided into five groups of chapters, each of which reflects a particular set of concerns. Since administrative justice is not a set of normative principles that exist in splendid isolation and the context in which administrative decision making takes places imposes constraints on the actual and potential achievement of administrative justice, the first group deals with the impact on administrative decision making of five of the most important 'contextual changes'. A number of the chapters in this group have been jointly authored by those who presented papers at one of the seminars and those who acted as respondents to them. These chapters comprise those by: **Andrew Gamble** and **Robert Thomas** on changes in governance and public administration, which analyses the rise of the regulatory state, the development of multi-level governance and new techniques of public administration, such as the New Public Management (NPM), contracting-out, and the increased use of private companies in the delivery of public services; **John Clark, Morag McDermont** and **Janet Newman** on changes in management and service delivery, which explores the contested logics of consumer choice and administrative justice in the governance of public services; **Irvine Lapsley** and **Jeremy Lonsdale** on changes in audit and accounting, which argues that the growth in audit has been accompanied by a high degree of scepticism about whether assessments accurately reflect performance and about whether the performance movement is good for democracy; and **Helen Margetts**

and **Martin Partington** on changes in information technology, which outlines the development of e-government in the UK and identifies those areas in which its implications for administrative justice are most important. This group of chapters also contains a newly-commissioned chapter by **David Feldman** on the implications of developments in human rights and, in particular, the stronger protection for human rights in the UK that resulted from the passage of the Human Rights Act 1998, for administrative decision making.

The second group of chapters deals with conceptual issues and analytic approaches and contains four chapters. The first, by **Michael Adler**, argues that administrative justice is an 'essentially contested concept', identifies three 'competing conceptions' and commends the approach which now appears to be in the ascendancy in the UK. The second, by **Bob Kagan**, analyses the roles of trust, and mistrust, in shaping the way administrative decision systems are organised. He argues that when political parties, interest groups, legal experts, or political leaders distrust the competence, political neutrality, and fairness of bureaucrats, they are inclined to demand stricter control of administrative discretion through detailed rules, rights to participate in administrative decision making processes, more formal and adversarial legal procedures, and searching judicial review of administrative decisions and that, when this occurs, administrative systems are driven or at least 'nudged' toward more formal, bureaucratic and adversarial modes of structuring the processes for deciding individual cases. When this happens, the administrative process becomes more formal and less reliant on professional judgment in dealing with hard cases, while individual officials become more likely to be pressured toward a legalistic style of applying rules and deciding cases. The third, by **Simon Halliday** and **Colin Scott**, criticises these two approaches and puts forward a cultural typology of administrative justice, based on 'grid-group cultural theory', originally developed by the anthropologist Mary Douglas. The fourth chapter in this group, by **Marc Hertogh**, applies the concept of 'legal consciousness' to front-line decision makers, suggesting that public officials can be characterised as 'legalists', 'loyalists', 'cynics', or 'outsiders' and discusses the ways in which a focus on legal consciousness can contribute to the study of administrative justice.

The third group of chapters deals with the application of administrative justice principles to private law disputes and includes two chapters, one by **Dawn Oliver** and the other by **Walter Merricks**. Dawn Oliver discusses the potential for developing the 'horizontal effect' of administrative justice and considers the scope for extending both human rights protection and the substantive grounds for judicial review (irrationality, procedural impropriety and illegality) to purely private activity. Walter Merricks explores the place of private sector ombudsman schemes (and in particular the Financial Ombudsman Service) in the world of administrative justice; and the extent to which they contribute to the notion, explored in Dawn Oliver's paper, of a horizontal effect of administrative justice principles.

The fourth group contains three chapters on administrative justice in other countries. The first chapter, by **Robin Creyke**, identifies the distinctive features