A. J. HARDING

PUBLIC DUTIES AND PUBLIC LAW

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PUBLIC DUTIES AND PUBLIC LAW

For Kun Bek
and
Miranda Su Lan

Preface

An analysis of public-law issues over the last twenty years or so reveals an interesting shift of emphasis. We are no longer merely concerned with setting limits to the power of government, but are concerned also with what the proper function of government is. To put it another way, we recognize that public law has a positive and not merely a negative aspect; that there are occasions when justice can be done not by preventing government from acting but by compelling it to act in a particular manner. This shift in emphasis is not wholly surprising. Our conception of the state has changed considerably, as has our conception of justice. It is no longer an adequate theory of public law which says that all will be well so long as large areas of life are left free of government intervention, and it is the job of the law to ensure that those areas remain free; while we remain rightly mistrustful of too much government power, we also realize that the very rights which we hope to preserve by limiting the power of government cannot in fact be preserved unless the law takes an interest in coercing as well as prohibiting certain kinds of government action. In addition of course our notions of what rights are worth preserving (or creating) has undergone great change, and is likely to undergo greater change with the ever increasing tempo of social and technological development.

One of the interesting pieces of evidence for this trend has been a change in the emphasis in case law. Many cases decided over the last fifteen or twenty years have concerned judicial review of the performance of public duties, situations in which a citizen or group of citizens has tried to compel a public authority to perform an act in his or its interest, or in the public interest. As a result there seems to be a greater appreciation of the fact that public law has its positive as well as its negative aspect.

The purpose of this book is to examine the case law on judicial review of public duties in order to discover on what basis the courts do in fact review such duties, and to discuss critically the doctrinal approaches which are revealed by the case law in the light of modern notions of public law.

Since no study of this kind has previously been undertaken, some words of justification are necessary.

What is quickly apparent from looking at the case law of public duties is that the reasoning processes adopted and the concepts used are not the same as those which appear in the more traditional type of case, in which the court is concerned with such questions as whether a

decision has been validly taken, whether natural justice has been observed, whether an error of law has been made, or whether a discretion has been exercised reasonably. The law of public duties does of course have something to do with this kind of reasoning, and in fact the remedy of mandamus, which was invented to enforce public duties, has played a crucial role in compelling the making of decisions and the exercise of discretion in accordance with law, as the traditional formulation has it. However, most of the law relating to public duties is not concerned with the propriety of public decision-making, but with whether authority should be compelled to do some particular act. To the extent that the law is concerned with duties to act rather than duties to decide things, the traditional concepts and modes of reasoning are irrelevant.

Of course it is possible to express all judicial control of administrative action in terms of the propriety of decisions. In fact the Administrative Decisions (Judicial Review) Act 1977, which governs judicial review of federal administrative acts in Australia, seeks to do precisely that, but only by stretching the concept of a decision to cover acts which would not ordinarily be regarded as such (see Chapter 5). To do this, however, is to disregard the obligatory nature of some important aspects of administrative action, and carries with it the danger that the law will be reduced to impotence just where it needs to be decisive. It is not very helpful, for example, to decide a case in which the issue is whether industrial action excuses failure to deliver the mail, or whether an individual can get an order forcing the police to enforce a statute, on the basis of whether the authorities have made a valid decision about the matter. Moreover, as will be apparent throughout this book, the courts in very many public-duty cases, most of which are quite recent, have not in fact used the traditional modes of reasoning to decide such issues. They have instead extemporized, making new law in the process, and it is this law which the book seeks to uncover and discuss. It is my central thesis that there is now, as a result of such cases, a jurisprudence of public duties which is worth discussing.

Central to the book is of course the remedy of mandamus. In addition to specific discussion of this remedy in Chapter 3, most of the cases discussed elsewhere in the book are mandamus cases. I recognize, however, that there are other available remedies for enforcing public duties, in particular the modern statutory judicial-review procedure, the injunction and the declaration, and the action for damages in negligence, and that, unlike mandamus, these remedies can be directed towards administrative action generally. This fact entails some difficulty, which is not present in the old law of mandamus, in presenting a clear picture

of the law of public duties, because to do so involves taking a cross-section, as it were, of these aspects of the law, which deal with powers as well as duties. One of the important purposes of the book, however, is to see in what way powers and duties are to be distinguished from each other, and the taking of this cross-section has, I suggest, its revelations as well as its awkwardnesses.

As a final point of justification it must be said that the literature on public duties is remarkably thin. Most of it is contained in textbook chapters on mandamus which are more concerned with the nature and incidents of that remedy than with the concept of a public duty as such, or in articles about various aspects of judicial review, such as standing or remedies, which are unilluminating with regard to public duties.

No apology is made for the emphasis on case law. This area of judicial review has not been subjected to careful case analysis since 1848, when Thomas Tapping published his treatise on mandamus; even this resembled more a catalogue than a conceptual analysis of the case law.

I have found that the most useful and interesting case law on public duties is from England and Australia; for this reason most of the material which is relevant to a particular jurisdiction, particularly in Chapters 5 and 6, concerns England and Australia. However, other common-law jurisdictions have also provided some interesting case law. Due to shortage of space and some doctrinal differences I have not discussed United States and Indian material.

I would like to thank my erstwhile employers, the National University of Singapore, who granted me sabbatical leave at Monash University in 1984–5, during which much of the manuscript was researched and written. I cannot name all the various colleagues, friends, and library staff at the Singapore and Monash law schools who have helped me in various ways. None the less I wish to thank them for their comments and words of encouragement. In particular I would like to thank my Ph.D. supervisors Ron McCallum and Peter Hanks of Monash University for their careful reading of the manuscript and for their helpful comments and advice.

English and Australian law is stated as at 1 May 1988.

A.J.H

School of Oriental and African Studies,
University of London,
May 1988

Abbreviations

A. & T.	Adolphus & Ellis' Reports
AC	Appeals Cases (1891–)
affd.	affirmed
All ER	All England Reports
ALJ	*Australian Law Journal*
ALJR	Australian Law Journal Reports
ALR	Australian Law Reports
App. Cas.	Appeals Cases (1875–90)
APR	Atlantic Provinces Reports
AR	Alberta Reports
B. & S.	Best & Smith's Queen's Bench Reports
BCR	British Columbia Reports
Can. BR	*Canadian Bar Review*
Cap.	chapter (i.e. of edition of laws)
Chit.	Chitty's Bail Court Reports
Chanc.	Chancery
Chanc. D.	Chancery Division
Civ. JQ	Civil Justice Quarterly
CLR	Commonwealth Law Reports
CLJ	*Cambridge Law Journal*
CLY	*Current Law Yearbook*
CMLR	Common Market Law Reports
Cmnd.	Command Paper
Co. Inst.	*Coke's Institutes*
Crim. LR	*Criminal Law Review*
DLR	Dominion Law Reports
Dowl.	Dowling's Bail Court (Practice) Cases
Eq.	Equity
ER	English Reports
Fam. Law	*Family Law*
FC	Federal Court
FLR	*Federal Law Review*
HCA	High Court of Australia
HCR	High Court Rules (Cwlth)
HL	House of Lords
HLE	*Halsbury's Laws of England*
HLR	*Harvard Law Review*
IA	Indian Appeals
ICR	Industrial Court Reports
ILJT	Irish Law Journal Times
ILT	Irish Law Times
Imm. App. Cas.	Immigration Appeal Cases
IR	Irish Reports

JPL	*Journal of Planning Law*
JP Jour.	*Justice of the Peace Journal*
Jur.	Jurist Reports
LGR	Local Government Reports
LGRA	Local Government Reports of Australia
LJKB	Law Journal King's Bench
LJMC	Law Journal Magistrates' Cases
LJQB	Law Journal Queen's Bench
Ll. Rep.	Lloyd's List Law Reports
LQR	*Law Quarterly Review*
LT	LawTimes
LTOS	Law Times Originating Summons
Melb. ULR	*Melbourne University Law Review*
MLJ	*Malayan Law Journal*
MPR	Maritime Provinces Reports
N & PEIR	Newfoundland and Prince Edward Island Reports
New Sess. Cas.	New Sessions Cases
NI	Northern Ireland
NLR	New Law Reports
NSR	Nova Scotia Reports
NZ	New Zealand
NZLR	New Zealand Law Reports
NZULR	*New Zealand Universities Law Review*
OLR	Ontario Law Reports
Ont.	Ontario
OR	Ontario Reports
P & CR	Property and Compensation Reports
QBD	Queen's Bench Division
QJPR	Queensland Justice of the Peace Reports
QL	Queensland Lawyer
Qld	Queensland
Qld R	Queensland Reports
Qld SR	Queensland State Reports
Que.	Quebec
Que. SC	Quebec Supreme Court
revd.	reversed
RSC	Rules of the Supreme Court
RTR	Road Traffic Reports
SA	South Australia
SASR	South Australian State Reports
SCC	Supreme Court of Canada
SCI	Supreme Court of Ireland
SCR	Supreme Court Reports
SLT	Scots Law Times
SR	State Reports (only with SR (NSW))
Tas. LR	Tasmanian Law Review
TLR	Times Law Reports

UQLJ	*University of Queensland Law Journal*
UTLR	*University of Tasmania Law Review*
Va. LR	*Virginia Law Review*
Vic.	Victoria (state)
VLR	Victorian Law Reports
VR	Victorian Reports
VUWLR	Victoria University of Wellington Law Review
WA	Western Australia
WALR	Western Australian Law Reports
WAR	Western Australian Reports
WIR	West Indian Reports
WLR	Weekly Law Reports
WN	Weekly Notes
WWR	Western Weekly Reports
Yale LJ	*Yale Law Journal*

We live in an age when Parliament has placed statutory duties on government departments and public authorities—for the benefit of the public—but has provided no remedy for the breach of them.

(per Lord Denning MR in *Attorney-General, ex rel. McWhirter v. Independent Broadcasting Authority* [1973] QB 629, 646)

'Tis clear,' cried they, 'our Mayor's a noddy;
And as for our Corporation—shocking
To think we buy gowns lined with ermine
For dolts that can't or won't determine
What's best to rid us of our vermin!
You hope, because you're old and obese,
To find in the furry civic robe ease?
Rouse up, sirs! Give your brains a racking
To find the remedy we're lacking,
Or, sure as fate, we'll send you packing!
At this the Mayor and Corporation
Quaked with a mighty consternation.

(Robert Browning, *The Pied Piper of Hamelin*, 21–34)

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I

Creation of Public Duties

I.I THE CONCEPT OF A PUBLIC DUTY

The concept of a public duty is an important but elusive one. It has been consistently ignored by jurists, avoided by public-law scholars, and rendered marginal for much of its history by the judges. It may be worthwhile considering why this has happened.

If we take the jurists first, we find that although much has been written about the nature of legal obligations, no important treatise on the subject has devoted attention to the problems of public duties in the sense of duties owed by the state to its citizens. Obligation is treated as something obtaining between individuals. Individuals have rights and obligations *inter se* and against the state, but the state has no obligations with regard to individuals except the negative obligation not, in the exercise of its powers, to trespass on his rights. It may be that command theories of law derived from Austin[1] bear some of the responsibility. If one conceives of law as something in the nature of a command given by a sovereign to his subjects the notion of a public duty is either incomprehensible or is used to describe the mundane obligations of the public servant to the sovereign in the execution of his wishes or else the obligations of the citizen to obey his laws. Hearn[2] writing in 1883 used the concept of a public duty in this sense only. Hohfeld[3] too with his right/duty correlation leaves entirely out of his calculations the sphere of public duties, where the correlation may exist or may not, depending on the kind of duty which is in question. Presumably this kind of view would dismiss public duties as duties without sanction and therefore lacking the force of law *stricto sensu*.

[1] *The Province of Jurisprudence Determined* (1954 edn., with introduction by H. L. A. Hart), pp. 14–15. Austin saw duties as correlatives of commands.

[2] *The Theory of Legal Rights and Duties* (1883), pp. 28–9, 60.

[3] See *Lloyd's Introduction to Jurisprudence*, 5th edn. (1985), pp. 441–7; one could perhaps hold that the right/duty correlation exists wherever a court enforces a public duty at the instance of an individual. However, this is merely to describe a conclusion (and to describe it very misleadingly in some cases) rather than a reasoning process; see Harris, *Legal Philosophies* (1980), pp. 81–3, where the unhelpfulness of Hohfeldian analysis in this context is convincingly demonstrated; Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1919); Allen, *Legal Duties* (1931), pp. 156 et seq.

Public lawyers too have not expounded the concept of a public duty. This may be due to a particular view of the nature of constitutional law which would see the task of law as being one of circumscribing the legitimate field of activity of the legislative and executive branches. Positive public duties have no place in such a view except in so far as they may, interstitially, be necessary to support the operation of the constitutional system; this is dealt with in Chapter 2. One might none the less argue that some of the traditional notions of constitutional law do entail some propositions concerning public duties; for example the supremacy of Parliament and the hostility of the law towards the prerogative of suspension of laws, and the concept of equality before the law, entail the proposition that the laws must be enforced equally. This also is pursued in Chapter 2. If one is looking, however, for a general theory of public duties one will not find it in Dicey or the writings of any other constitutional jurist.

The source of public duties is to be found not in the law but in public policy.[4] The task of the law commences only when the duty has been imposed by legislation. This task has not, however, been adumbrated authoritatively either by judges or by academic writers.[5]

There is therefore no obvious starting-point for a study of this kind. I have taken as my premises in analysing the case law the propositions (1) that an effective law of public duties would be one which is prepared to recognize the existence of a duty where the intention of the legislature is plainly to that effect or where the social conditions of a modern democratic society would seem to demand it; (2) that the law should enable a public duty to be effectively enforced by individuals, provided that latitude is given for 'legitimate' administrative action according to the canons of the modern administrative-law system, which typically allows broad judicial scrutiny without usurpation of the functions of the executive branch.

The method adopted here of analysing public duties is as follows. Chapter 1 is concerned with the questions: What is a public duty? What kinds of public duty are there? When does a public duty arise? Chapter 2 deals with the question, what constitutes performance of a public duty, using the analysis indicated in Chapter 1. Chapters 3, 4, and 5 are concerned with enforcement: how in practice is a public duty enforced? Chapter 3 deals with mandamus, Chapter 4 with other available remedies, and Chapter 5 with the modern statutory procedures for judicial review. Chapter 6 deals with the problem of standing to enforce public duties: who has the right to invoke the

[4] See Cranston, *The Legal Foundations of the Welfare State* (1985), p. 2.

[5] Cranston's book does, however, deal with welfare duties; see below, Ch. 2.3.

remedies dealt with in Chapters 3, 4, and 5? Chapter 7 deals with the question of damages for failure to perform a public duty. A short summation sets out the main conclusions reached.

As is indicated above, the purpose of Chapter 1 is to examine the concept of a public duty, and it is therefore necessary to provide a skeletal definition which will be given greater content in Chapters 1 and 2. A public duty in the sense in which the term is used here, and indeed generally in law reports and legal literature, is simply a duty of a public body arising in public law, so that it is really the terms 'duty', 'public body' and, 'public law' which require definition.

The term 'public law' is a difficult one, because it can be used in many different senses. It can be used in a *substantive* sense to draw a distinction between legal rules applying to public bodies and legal rules applying to private persons; it can be used in a *procedural* sense to draw a distinction between the method of applying for relief against a public body and the method of applying for relief against a private person; or it can be used in a *jurisdictional* sense to indicate that a court has jurisdiction only over public bodies as opposed to private persons.[6] No doubt there are other senses, but these senses are probably the only ones which serve any practical purpose. There are of course books on 'public law' which deal with constitutional- and/or administrative-law questions, in which the term is useful merely for the purpose of exposition of the law relating to the organs of state, but has no practical legal consequences; to avoid confusion I shall use the terms 'constitutional law' and 'administrative law' when referring to public law in this sense. It appears that, in England at least, the term 'public law' is now a term of art with definite legal consequences,[7] and I shall therefore use it, in an English context, in a substantive and procedural sense. In relation to Australia the position is quite complex, and is discussed, together with the English concept of public law, in Chapter 5.[8]

Broadly speaking, however, the notion of public law does have a core meaning, at least in the context of public duties, because the law

[6] See Craig, *Administrative Law* (1983), pp. 12–14.

[7] See *O'Reilly* v. *Mackman* [1982] 3 WLR 604, and below Ch. 5. The important consequence of the designation is that all 'public-law' cases must be brought under O. 53 procedure.

[8] Not every jurisdiction uses the distinction between public and private law. In Australia federal law does in a sense use it, because the Administrative Decisions (Judicial Review) Act 1977 (Cwlth) provides a statutory code for judicial review and the courts are left with the task of deciding which decisions or acts are subject to it (see below Ch. 5.3). The jurisdictional sense of 'public law' is not so important in common-law jurisdictions as it is in civil-law systems, but of course jurisdictional problems may flow from the adoption of 'public law' in the procedural sense.