Introduction

The first part of this chapter sketches the early growth of English public law. The second part tries to describe what it was like to be involved in the modern take-off of public law as it roused itself from its long sleep.

It seems surprising, given the modern prominence of judicial review of governmental acts, that no panoptic history of the public law of England and Wales exists.[1] By public law I mean the body of law, embracing both administrative and constitutional law, by which the state is regulated both institutionally and in its dealings with individuals.[2] This book does not fill that large space: it is, rather, a series of test drillings into a landmass. The vertical drillings are thematic attempts to trace their topic from early days to the present. The horizontal ones (which are not sequential) take a stratum of time and examine developments in public law within it.

The public law of Scotland does not form part of the history which this book examines. Neither the union of the two crowns in 1603 nor the union of the two states in 1707 brought the English and Scottish systems together. Rather than risk trivialising or misrepresenting Scottish public law, these essays treat it with a respectful silence.[3]

[1] Such a history is, however, coalescing in the still-emerging volumes of the *Oxford History of the Laws of England*: see, at the date of writing, vol. II (871–1216), Ch. 31; vol. VI (1483–1558), Chs. 2, 3 and 4; vol. XI (1820–1914), Part II. After the unification of England and Wales by the statutes of 1536 and 1543, the public law of the two countries was effectively uniform until the passage of the Government of Wales Acts 1998 and 2006.

[2] Cf. the definition in M. Loughlin, *The Idea of Public Law* (2003), p. 1: "the constitution, maintenance and regulation of governmental authority".

[3] A full account of Scottish public law can be found in the Stair Memorial Encyclopaedia, A. W. Bradley and C. M. G. Himsworth (eds.), *The Laws of Scotland*, vol. I, Part IV, "Administrative Law" (2000 reissue). Since the partition of Ireland in 1921, the public law of Northern Ireland has generally tracked that of England and Wales but from time to time has moved ahead of it.

HISTORY AND LAW

The distinction between the writing of legal history and the making of it was astutely described by Geoffrey Wilson:

> [T]he courts do not operate on the basis of real history, the kind of history that is vulnerable to or determined by historical research. They operate on the basis of an assumed, conventional, one might even say consensual, history in which historical events and institutions often have a symbolic value.[4]

That seems a harsh thing to say about a profession which sets great store by the accurate citation of precedent, but I think it is true. From Magna Carta[5] to *Anisminic*[6] by way of *Entick* v. *Carrington,*[7] the common law and the constitutional culture of which it forms part have adopted not the letter of the law but the meanings which it has become appropriate to find in it. The zeitgeist is at least as potent as the scholar.

History has neither beginnings nor endings, but in tracking the history of English public law it is difficult not to be struck by the modernity of the later Elizabethan and the early Jacobean judges, Edward Coke prominent among them,[8] and by the depth, breadth and – in the long term – continuity of the river of jurisprudence which flows from them to us. Elizabeth's reign saw a major increase in the volume of litigation and the emergence of an unprecedentedly high proportion of lawyers in the population.[9] But the late Tudor state was

[4] Postscript to M. Nolan and S. Sedley, *The Making and Remaking of the British Constitution* (1998), pp. 128–9

[5] See Ch. 4 [6] See Ch. 1 [7] See Ch. 3

[8] Although Coke (pronounced "Cook") features in this book in a generally favourable light, he had and still has many critics. He is the subject of a classic biography, *The Lion and the Throne* (1957) by Catherine Drinker Bowen. A scholarly account of the controversies between Coke, Ellesmere and Bacon, and the background to them, can be found in three articles by the former chief justice of New South Wales, James Spigelman, under the running title "Lions in Conflict": (2007) 28 *Aust. Bar Review* 254; (2008) 30 *Aust. Bar Review* 144; (2013) 38 *Aust. Bar Review* 1.

[9] "In the long history of the relationship between law and society in England, the later sixteenth century must be reckoned one of the most dynamic . . . It is not surprising that the first fifty years of the life of Sir Edward Coke . . . coincided almost exactly with the period from the accession of Edward VI to the death of Elizabeth, or that his law reports reflect so much of the social and economic life of middle England": C. W. Brooks, *Law, Politics and Society in Early Modern England* (2008), p. 93; see ibid. Chs. 4 and 7. The period has also been hailed as a high point of non-litigious dispute resolution: see D. Roebuck, *The Golden Age of Arbitration: Dispute Resolution under Elizabeth I* (2015).

itself the product of centuries of change. Its judges, heirs of a legal culture reaching back to and beyond early modern England, were sensing the first tremors of the constitutional earthquake which, by the end of the seventeenth century, was not only to settle into the foundations of the modern British state but to gestate ideas of individual rights and lawful governance which have helped to shape the modern world.

Although the radicals of the Civil War associated monarchical and aristocratic oppression with what they called the Norman yoke, counterposing it to the home-grown laws of the Anglo-Saxons, the Norman kings had in fact taken care to adopt and continue the Anglo-Saxon system of law.[10] Alfred's and Aethelstan's codes had been made not autocratically but on the advice of their counsellors.[11] Canute's code, four decades before the Conquest, undertook "to secure the whole people against what has hitherto oppressed them", including royal exactions. Such legislation can be intelligibly seen "not as expression of royal will but as royal concession".[12]

The continuity of this process with Magna Carta (and, at least formally, with modern legislative practice) is readily seen, though it may not be how successive monarchs and their ministers saw it. Chief Justice Fortescue in the mid-fifteenth century described the kings of England as ruling politically as well as regally, so that they were without power to tax their subjects without the latter's consent.[13] It was a continuity which, although disrupted by the anarchy of Stephen's reign, was severed neither by Henry VIII's autocratic conduct, which paradoxically depended on repeated Parliamentary endorsement,[14] nor by the Interregnum, which initiated reforms that took centuries to restore and consolidate.[15]

The laggard in this continuity has been democracy itself.[16] A parliament of knights of the shire and burgesses, or of merchants

[10] J. Hudson, *The Oxford History of the Laws of England,* vol. II , p. 487; D. Roebuck, *Early English Arbitration* (2008), Ch. 10.
[11] Hudson, *The Oxford History of the Laws of England*, vol. II, pp. 21 ff; pp. 498–9.
[12] Ibid., p. 25
[13] Fortescue, *De Laudibus Legum Angliae* (c. 1470, pubd. 1541), Ch. IX: "A king of England cannot, at his pleasure, make any alteration in the laws of the land, for the nature of his government is not only regal but political" – a principle traced by Brooks, *Law Politics and Society*, p.24) to Book III of Aristotle's *Politics.*
[14] See Ch. 11. [15] See Ch. 4.
[16] Not an unusual sequence: see Ch. 9, n. 11. But in a remarkable moment of history, though one not to be repeated, the so-called Good Parliament of 1376 had asserted its supervisory power over the King's ministers by impeaching four of them before the House of Lords for corruption and incompetence: see Ann Lyon, *The Constitutional*

and landowners, elected by a narrow and generally corruptible electorate, had little claim to the representative quality ringingly but vainly demanded by Colonel Thomas Rainborough at Putney in 1647:

> [T]he poorest he that is in England hath a life to live as the greatest he; and therefore truly, sir, I think it's clear that every man that is to live under a government ought first by his own consent to put himself under that government.[17]

Almost two centuries after the slow process of electoral reform was initiated in the United Kingdom, and more than a century after the Parliament Act 1911 announced itself as the first step in setting up an elected upper chamber, this is a road we are still travelling down with little in the way of maps or compasses.

The other jaw of the pincer which slowly closed on the monarchical power of making law and dispensing justice began to take shape in the twelfth century, when Henry I appointed a number of "justiciars of the whole of England" to whose judgment, according to William of Malmesbury, he entrusted "the administration of justice throughout the realm, whether he himself was in England or detained in Normandy".[18] While England remained administratively divided into Wessex, Mercia and the Danelaw, each with its own customs enforceable at the level of shire, hundred or borough, the *Leges Henrici* boasted that "the king's court ... keeps its usages and customs always and everywhere with singular immutability", and commentators now spoke of "the law of the land"[19] – a common law both in the sense that it was no longer the King's law and in the sense that it was the same wherever the King's courts sat.

It was the Angevin kings who, attempting to bring order to a sometimes ungovernable state, brought the beginnings of an independent

History of the United Kingdom (2003), pp. 105–6. It was by deputing Sir Peter de la Mare to speak for them in presenting the bill of impeachment that the Commons inaugurated the office of Speaker.

[17] A. S. P. Woodouse (ed.), *Puritanism and Liberty (The Army Debates 1647–9),* (1938), p. 58. Major-General Ireton, a lawyer in civilian life, whose regard for private property had prompted Rainborough's call for a universal male franchise, turned Leveller ideology back on its proponents by asserting that the property-owning franchise itself predated the Conquest. "If you make this the rule," he pointed out, "I think you must fly for refuge to an absolute natural right." In the event, that is what the Levellers did.

[18] Hudson, *The Oxford History of the Laws of England*, vol. II, p. 262

[19] Hudson, *The Oxford History of the Laws of England*, vol. II, p. 491

system of justice into being. The process may with hindsight appear as one of progressive reform, but in its time was regarded as one of consolidation and restoration.[20] Nevertheless, wittingly or unwittingly, the change came.

> Final concords record at least seventy [men] sitting at the Exchequer as justices between 1165 and 1189 . . . The chief justiciars and twelve other justices account for roughly two-thirds of the named appearances. Thus a core group of justices had emerged . . . The group's influence on the court and its law must have been considerable.[21]

From 1176 the occasional dispatch of justices to try important cases regionally was succeeded by their routinely travelling out in eyre – that is to say on circuit – having first taken an oath to do the King's justice to everyone.[22] By the end of the twelfth century, sheriffs were barred (though not always effectively) from sitting as justiciars in their own shrievalties. By the end of the thirteenth, all the judges had served their time as professional lawyers, and justice was on the way to becoming an independent function of the state.[23]

[20] See D. Roebuck, *Mediation and Arbitration in the Middle Ages* (2013), pp. 17–18, esp. n. 4. Roebuck makes the point that "reform" did not acquire its modern connotation of progress or innovation until the end of the Middle Ages; indeed Raymond Williams, *Keywords:A Vocabularly of Culture and Society* (2014), allocates the change in usage to the eighteenth century. Its original meaning was repair or restoration – a return to a more orderly past.

[21] Hudson, *The Oxford History of the Laws of England*, vol. II, p. 503. Roebuck, *Mediation and Arbitration in the Middle Ages,* p. 23, cites a contemporary account of a royal justiciar of the early thirteenth century "so sedulous and practised" that his colleagues "are overpowered by the labour of Pateshull, who works every day from sunrise until night", making other justiciars redundant. Such judges still exist.

[22] Hudson, *The Oxford History of the Laws of England*, vol. II, p. 505

[23] It was not until much more recent times, however, that the administrative and judicial functions of local justices of the peace were separated from one another. For centuries JPs administered most of the Elizabethan Poor Law (with the consequence, according to E. G. Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (1963), p. 143 that "much of the early development of modern administrative law is to be found in the cases on the poor law"). From the Statute of Artificers 1562 until the late nineteenth century JPs were empowered to fix wage rates and punish workers for absenteeism or substandard work, as well as to redress certain grievances against employers. Until the reform of municipal corporations in 1835, much of the government of the shires was conducted at their quarter sessions: see W. R. Cornish and G. de N. Clark, *Law and Society in England 1750–1950* (1989), pp. 19–21; S. Anderson, *The Oxford History of the Laws of England*, vol. XI, pp. 454–61. JPs continued to license pubs and betting shops until the late twentieth century.

Law as reported

It has been suggested more than once that in the sixteenth century the training of lawyers in the Inns of Court, dependent as it was on the oral transmission of legal doctrine, did not furnish a stable basis for the development of a precedent-based system. It was supposed that a void in law reporting was astutely filled by Coke with his reports, in large part recording his own decisions and giving him an undeserved influence on the development of the common law. Modern scholarship[24] questions the premise: it is now known that a considerable variety of printed and manuscript reports of cases supplemented the oral transmission of the common law both before and in Coke's time. The Year Books, blackletter reports of cases in law French, ran from the early fourteenth century to the mid-sixteenth, and Chaucer's serjeant-at-law, in the late fourteenth century, owned both statutes and law reports.[25] In such a context Coke's most significant decisions are legitimately regarded both as weathervanes of legal history and as a source of constitutional principle. Coke had a chequered career,[26] both in and out of royal favour, but he did not plough a lone furrow.

The growth of public law

The developments I have touched on were not simply the conditions from which public law, as part of the common law, was to emerge. They were themselves public law developments, restructuring the state and the individual's relation to it as drastically as anything in the succeeding centuries to which the essays in this book relate. They may have initially changed little, but they created the conditions for change.

[24] See J. Baker, *The Oxford History of the Laws of England*, vol. VI, Ch. 26.

[25] "In termes hadde he caas and doomes alle
That from the tyme of kyng William were falle" (*Canterbury Tales, Prologue,* Folio edn, p. 20).

[26] See Bowen, *The Lion and the Throne.* He also has a chequered reputation, principally because of the venom with which, as Attorney-General, he prosecuted Sir Walter Raleigh on what was without doubt a trumped-up charge of treason: "Thou art a monster! Thou hast an English face but a Spanish heart . . . Thou viper! . . . I will prove thee the rankest traitor in all England." But one wonders whether Coke's rancour was any worse in its time and place than that displayed in 1972 by Governor Reagan's special prosecutor, Albert Harris, towards the young university teacher Angela Davis: "Not only is there enough evidence to send this case to trial, there is enough to take this young woman and lock her in a green gas chamber and drop cyanide pellets into the acid and put her to death."

> [I]f we look closely at fifteenth-century England, we see a social world in which the rule of law as we know it played a relatively small part. The major common law courts were generally under-used . . . Private disputes were settled either by resort to violence or by informal arbitration, and there was no very highly developed public law to which constitutional disputes could be referred. By comparison, if we turn from the fifteenth to the mid-seventeenth century, there at first sight appears to be abundant evidence of change. . . . [T]he common law and common lawyers were deeply involved in many of the constitutional disputes of the early Stuart period.[27]

It is with that metamorphosis that most of the history examined by this book begins. It is a story with no clean breaks or fresh starts. The endeavours first of monarchs and then of their ministers to reserve legislative and judicial powers to themselves form a recurrent theme in it. But so does their eventual acceptance of the hard fact that they could not raise taxes or govern without the advice and consent of those who controlled land and trade, nor administer consistent law and justice except through a professional judiciary, nor themselves stand aside from or above the law.

Inhabiting and permeating these changing structures and institutions have been the substantive principles of public law. By the mid-seventeenth century a practice manual was able to say of what was now the Upper Bench:

> This Court hath authority to Quash Orders of Sessions, Presentments, Endictments &c made in inferior Courts, or before Justices of Peace or other Commissioners if there be cause, that is, if they be defective in matter or form . . . But this Quashing is by favour of the Court, for the Court is not tyed Ex Officio to do it . . .[28]

These and other principles of judicial review have waxed, waned, slumbered and woken, but in the long term matured in response to continuing change in the society and polity which law inhabits. By the beginning of the eighteenth century the reactive interventionism of the late Tudor

[27] Christopher W. Brooks, *Law, Politics and Society in Early Modern England* (2008), pp. 8–9

[28] Style, *Practical Register* (1657), quoted in Henderson, *Foundations of English Administrative Law*, p. 107. The King's Bench was renamed the Upper Bench during the Interregnum. Styles' account of the judicial review jurisdiction highlights two important facets of it: (a) the focus on judicial proceedings, which, until *Anisminic*, drove courts to look for quasi-judicial functions in order to render decisions justiciable, and (b) the discretionary character of relief.

judges was being developed and nuanced, notably by Chief Justice Holt, who, in a case decided in 1700 on the amenability to judicial review of Welsh justices of the peace who had been granted statutory powers for the upkeep of Cardiff bridge, said:

> [T]his court will examine the proceedings of all jurisdictions erected by Act of Parliament. And if they, under pretence of such Act, proceed to incroach jurisdiction to themselves greater than the Act warrants, this Court will send a certiorari to them, to have their proceedings returned here.[29]

In the centuries since then public administration has changed massively, and public law has changed with it. Whether it will be allowed to go on doing so is one of today's great questions.

AUTOBIOGRAPHY AS HISTORY

My own walk-on part in the more recent phase of this process has posed a problem in writing these studies. While it has been the stimulus for the entire exercise, it has also inexorably affected my view of events. As a barrister, although I sometimes acted for public authorities, the bulk of my public law work was bringing challenges on behalf of individuals to uses and abuses of state power. As a judge, I must have decided as many cases and applications in favour of public authorities as against them, though I have not counted. But it would be idle to claim that any judge goes into court with a blank mind (an open mind is something entirely different), any more than does a historian sitting down to write, and it would be disingenuous for me, as I believe it would be for any judge, to pretend that my own experience had no bearing on my thinking and my decision-making. But the bearing is rarely linear, and that is what makes both litigation and adjudication interesting.

It is also why, in delivering the lectures which form the basis of this book, I resorted from time to time to anecdote. It helped, or so I hoped, to make the content a little more vivid and the topics a little more immediate. In editing them for publication I have eliminated most of

[29] *R* v. *Glamorganshire Inhabitants* (1700) 1 Ld. Raym. 580. See also *Groenvelt* v. *Burwell* (1700) 1 Ld. Raym. 454; Henderson, *Foundations of English Administrative Law*, pp. 101–16; W. Wade and C. Forsyth, *Administrative Law* (10th edn), pp. 509–21.

these minor vanities or relegated them to footnotes. In place of them, there follows here, segregated from what I have attempted to make a reasonably objective set of historical essays, an anecdotal sketch of my encounter with public law as it began, in the last three decades of the twentieth century, to stir into life after two generations of torpor. These were my formative years.

They were also, as it turned out, the formative years of the modern body of common law by which the machinery of state is still both regulated and guarded – for, as I have stressed elsewhere, public law is as much concerned with the protection and validation of good administration as it is with controlling abuses of power. A checklist of these developments, to a number of which I had the good fortune to contribute either at the Bar or on the bench, would include the duty to give reasons for decisions, the enforcement of policies which have generated legitimate expectations, the injection of fair procedures into public consultation, the recusal of decision-makers for apparent bias, the justiciability of decisions for error of fact, the proportionality of decision-making, the expansion of standing for public interest challenges – none of them dreamed of in the philosophy of *Wednesbury*.[30]

My present topic, however, is not these developments, nor the handful of high-profile cases which form the epistemic framework of modern public law – *Ridge* v. *Baldwin, Anisminic, Padfield, British Oxygen, O'Reilly* v. *Mackman* – but the largely unnoticed groundswell of judicial review applications heard from the early 1970s in the Queen's Bench Division of the High Court, and more rarely the Court of Appeal and the House of Lords, which filled the many spaces around the leading cases and gave shape and substance to today's public law jurisprudence.

The lion stirs

When I was called to the Bar in 1964, public law was not taught except as a footnote to constitutional law, and was not a recognised field of practice. Public law briefs went, if anywhere, to the town and country planning Bar, who at least had some knowledge of the workings of local authorities.[31] Challenges to central government or to statutory bodies were a novelty and a puzzle to most of the legal profession. Nevertheless,

[30] See Ch. 1.

[31] For a striking example, see the account of the genesis of *Bromley LBC* v. *GLC* [1983] AC 768 (H. B. Sales and A. W. Bradley, "The '*Fares Fair*' Case" [1995] PL 499).

the atmosphere at ground level was beginning to change. Three things, I think, were playing a part.

One was legal aid. The 1949 Legal Aid and Advice Act was a major element of the welfare state. In addition to paying for legal advice, it provided public funding for anybody who had a viable claim or defence but could not afford a lawyer. High street solicitors, the first stop for potential litigants, were surprisingly slow to recognise legal aid as a respectable source of income, but by the 1960s local firms were beginning to make use of it and the Bar was beginning to benefit from the briefs it generated. As a result, in my first few years at the common law Bar, publicly funded work for tenants paying excessive rents for substandard accommodation formed a significant part of my practice. Because only unfurnished tenants had Rent Act protection, how little furniture could deprive a tenancy of protection became a crucial question[32] in private law. But both the introduction of a statutory fair rent regime for unfurnished tenancies[33] and the innovative use of public health legislation to secure repairs to badly neglected private and council lettings[34] began to demonstrate how porous the frontier between public and private law was. Here too legal aid was able to help.

In 1968 the Society of Labour Lawyers published a slim book, *Justice for All*, which encouraged the setting up of law centres – non-profit legal practices funded by a combination of local funding and legal aid fees, and directed specifically to the needs of people who ordinarily had little or no access to law or lawyers. The law centres, of which the first was set up in North Kensington in 1970 and which within a decade had come close to fifty in number, were a second catalysing element in the revival of public law. Their work was backed up by voluntary bodies such as the Child Poverty Action Group, whose in-house lawyers operated at a high level of expertise.[35] Much of my work at the Bar in and after the 1970s came from law centres and specialist advice centres.

The years after 1968 saw a third phenomenon which contributed to the revival of public law: newly qualified lawyers who wanted to do socially useful work. The availability of local authority grants to enable students from less affluent backgrounds to enter universities or

[32] See *Woodward* v. *Docherty* [1974] 1 WLR 966.
[33] Rent Act 1965
[34] See *GLC* v. *LB Tower Hamlets* (1984) 15 HLR 54.
[35] See the entry in the *Oxford Dictionary of National Biography* on Henry (later Mr Justice) Hodge, the CPAG's first in-house solicitor. As the entry records, government eventually co-operated, to its own benefit, in selecting test cases to resolve complicated questions of benefit entitlement.