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The state and administrative law

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1. Law and administration

Behind every theory of administrative law there lies a theory of the state. As Harold Laski once said, constitutional law is unintelligible except as the expression of an economic system of which it was designed to serve as a rampart.[1] By this he meant that the machinery of government was an expression of the society in which it operated; one could not be understood except in the context of the other.

The opening lines of the first edition of *Law and Administration*, published in 1984 – light years away in administrative law terms – express our aims in

[1] H. Laski, *A Grammar of Politics* (Allen and Unwin, 1925) 578.

writing the book very clearly. Ours was to be a 'Law in Context book' in which the contribution made by law and lawyers to the practice of government and administration would be set in the context in which they operated. The term 'context' was construed widely. We hoped to open up the study of administrative law by setting law in an interdisciplinary context of politics and public administration, as Sir Cecil Carr had done in 1941 in a lecture at the University of Harvard where he said:

> We nod approvingly today when someone tells us that, whereas the State used to be merely policeman, judge and protector, it has now become schoolmaster, doctor, house-builder, road-maker, town-planner, public utility supplier and all the rest of it. The contrast is no recent discovery. De Tocqueville observed in 1866 that the State 'everywhere interferes more than it did; it regulates more undertakings, and undertakings of a lesser kind; and it gains a firmer footing every day, about, around and above all private persons, to assist, to advise, and to coerce them' (*Oeuvres*, III, 501). Nassau William Senior, a Benthamite ten years older than Chadwick, a colleague of his on the original Poor Law Commission, had justified this tendency. A government, he thinks, must do whatever conduces to the welfare of the governed (the utilitarian theory); it will make mistakes, but non-interference may be an error too; one can be passively wrong as well as actively wrong. One might go back much earlier still to Aristotle, who said that the city-state or partnership-community comes into existence to protect life and remains in existence to protect a proper way of living. What is the proper standard? That is an age-long issue which is still a burning question of political controversy. The problems of administrative law are approached in the light of that fire. Those who dislike the statutory delegation of legislative power or the statutory creation of a non-judicial tribunal will often be those who dislike the policy behind the statute and seek to fight it at every stage. On the one side are those who want to step on the accelerator, on the other those who want to apply the brake.[2]

In this passage, Carr places the demise of the minimal state, or state as 'policeman, judge and protector', and the birth of state interventionism in the early nineteenth century, attributing the change to the work of the economist Nassau Senior and Edwin Chadwick (1800–90), social and administrative reformer. Although Carr does not say so, this was the era in which modern administrative law was born, emerging across Europe alongside the new discipline of public administration in the aftermath of the French Revolution and Napoleonic Wars as part of the machinery of new liberal states with new and broader functions.[3] By the end of the nineteenth century in Britain, Barker tells us that 'all the major political parties had for practical purposes abandoned the ideal of limited government and accepted the necessity for

[2] C. Carr, *Concerning English Administrative Law* (Oxford University Press, 1941) 10–11.
[3] See B. Sordi, 'Revolution, *Rechtsstaat* and the Rule of Law: Historical Reflections on the Emergence and Development of Administrative Law' in Rose-Ackerman, Lindseth and Emerson (eds.), *Comparative Administrative Law* (2nd edn, Edward Elgar, 2017). And see M. Loughlin, 'In Search of the Constitution', LSE Law, Society and Economy Working Papers 19/2019.

intervention. The old conception of government as minimal and static was swept away by a new conception of government as the instigator of movement, which was if not dynamic, then at least ambulatory.'[4] Government was not merely to regulate society; it was to improve it. This involved a set of political and administrative processes with many of which we are still familiar, administered by a more effective and professional public service.

What Carr was saying was hardly novel and to his Harvard audience would probably have seemed unexceptional; the link between realist jurisprudence and the 'administrative state' was well established in the USA at the time Carr spoke.[5] British lawyers, on the other hand, might have found the idea unpalatable. The nineteenth-century legal scholars such as Dicey and Maitland who had laid the foundation stones of English administrative law were certainly alive to the relationship between constitutional law and political theory and were themselves well grounded in both.[6] But this was an era when positivism dominated legal theory and case law was predominantly formalist in its focus on legal principles and concepts. British lawyers understood law as properly isolated from its social context, 'endowed with its own discrete, integral history, its own "science", and its own values, which are all treated as a single block sealed off from general social history, from politics, and from morality'.[7] Barker confirms that a similar outlook obtained amongst political scientists. While the political consequences of 'particular laws and particular legal judgments' met with occasional recognition, the character of the judicial system and the general assumptions of law and lawyers were 'little considered in debates about the political character and goals of the nation', and legal ideas were in general 'invisible'.[8] To question this – as Laski, by describing the judiciary as a branch of government, had done and J. A. G. Griffith was to do in *The Politics of the Judiciary* – seemed heretical.

Not only did our 'law in context' approach implicitly challenge the widespread positivism of that time in which casebook teaching was the norm, but we also set out deliberately to challenge the dominant English model of administrative law in which the primary purpose of administrative law is to act as an instrument for the control of power and protection of individual liberty, with the emphasis on courts rather than on government as the

[4] R. Barker, *Political Ideas in Modern Britain* (2nd edn, Routledge, 1997) 14, 18.
[5] See notably the work of Ernst Freund in J. Landis, *The Administrative Process* (Yale University Press, 1938); O. Kraines, *The World and Ideas of Ernst Freund: The Search for General Principles of Legislation and Administrative Law* (University of Alabama Press, 1974); M. Horvitz, *The Transformation of American Law 1870–1960* (Oxford University Press, 1992) chs. 7–8.
[6] Notably F. Maitland, 'A Historical Sketch of Liberty and Equality' in *Collected Papers*, vol. 1 (Cambridge University Press, 1911); A. V. Dicey, *Comparative Constitutionalism*, ed. Allison (Oxford University Press, 2013). And see F. Pollock, *Essays in the Law* (Macmillan, 1922) Nos. 2 and 3.
[7] J. Shklar, *Legalism* (Harvard University Press, 1964) 2–3. And see P. Atiyah and R. Summers, *Form and Substance in Anglo-American Law* (Clarendon Press, 1987).
[8] Barker, *Political Ideas in Modern Britain*, 14, 18.

machinery for control. Because of its emphasis on restraint, we named this tradition of administrative law 'red-light theory', associating its dominance with the influence of the great Victorian constitutional writer, A. V. Dicey, whose work is more fully discussed below. Concerned to underline the pluralist tradition of our subject, our emphasis was on an alternative tradition, where administrative law was viewed as a vehicle for political progress and the administrative state was welcomed. This approach, which for obvious reasons we called 'green-light theory', we linked to the influence of American realism and the work of LSE scholars in the interwar years, though it was carried forward post-war into the era of the extended state, which, unremarked by us, was just coming to an end. These two opposing administrative law traditions formed the centrepiece of *Law and Administration* as they form the centrepiece of administrative law to this day.

(a) State and government

In treating with the nation-state as the great crucible of constitutional authority in which administrative law developed, we did not feel the need to include in our first edition a structural account of British government. Essentially unitary in mindset and highly centralised, British government seemed to us at the time relatively simple. Central government was made up of the big departments of state: some, like the Home and Foreign Offices, with eighteenth-century roots; others, like the (then) Departments of Employment and the Environment much more recent. A few major public services were operated directly by central government – notably, the National Health Service (NHS) – but more usually, as with housing or social services, they were the responsibility of local government, the only democratically elected competitor to Westminster. Some nationalised industries were, like British Rail, still on the scene but most were on their way out. Only limited concessions were made to regionalism and, although the European Communities Act was on the statute book, it was not until the *Factortame* affair that Parliament and public became aware of the magnitude of constitutional change.[9] Declining to define the term 'state', not then in general use amongst lawyers, all that we felt it necessary to say was that 'most people would associate the state with central government, many would include local authorities, some would go on to provide a catalogue of nationalized industries and public enterprises like water authorities, public services like the NHS, boards committees, commissions and inspectorates, the police, all the multifarious public authorities which make up the "public sector"'.

This pragmatic treatment of British government reflected a characteristic British preference for the approach of Jeremy Bentham (1748–1832), famous

[9] D. Nicol, *EC Membership and the Judicialization of British Politics* (Oxford University Press, 2001).

for his dismissal of natural and human rights as 'nonsense upon stilts'[10] and who approached the concept of state in much the same way. For Bentham, 'what constitutes rulers is not normative and neither is it the product of political theory; it is a fact of power. He urged that we should focus on real powers and real people, and that we should avoid abstractions, such as King and Crown, which do not do any real work.'[11]

Thus, Britain had an increasingly powerful state apparatus, yet there was 'no systematically developed legal concept of the state as a sort of moral unifier standing above the struggles of civil society'[12] as there might be in a state with a written constitution. Public power had simply grown up around us, with much in the institutional dynamics beginning in Victorian times as Britain experienced an industrial revolution and widening franchise.[13] Hill suggests that the apparatus of the state insinuated itself, 'like a Trojan horse', into an unsuspecting society:

> The first stage was the discovery of some 'intolerable' evil, such as the exploitation of child labour. Legislation was passed to prevent this. In the second stage, however, it was discovered that the legislation was ineffective. New legislation was passed with stronger provisions and inspectors were employed to ensure enforcement. Third, many of the new groups of professionals recruited to enforce legislation themselves became lobbyists for increases in the powers of their agencies. Fourth, this growing corps of professional experts made legislators aware that 'the problems could not be swept away by some magnificent all embracing gesture but would require continuous slow regulation and re-regulation'. Finally, therefore, a quite elaborate framework of law was developed with a complex bureaucratic machine to enforce it. The professionals helped to transform the administrative system into a major organization with extensive powers, almost without Parliament realizing it.[14]

A raft of utilitarian – Benthamite – reforms in the poor law, factories, public health and education were both regulatory and centralising in effect. The Poor Law Amendment Act 1834 made a potent contribution to disciplinary power and social control: through use and threat of the workhouse,[15] a telling

[10] P. Schofield, 'Jeremy Bentham's "Nonsense upon Stilts"' (2003) 15 *Utilitas*, published online by Cambridge Core.

[11] J. McLean, *Searching for the State in British Legal Thought* (Cambridge University Press, 2012) 4.

[12] T. Prosser, 'The State, Constitutions and Implementing Economic Policy: Privatization and Regulation in the UK, France and the USA' (1995) 4 *Soc. & Leg. Stud.* 507, 510. See also K. Dyson, *The State Tradition in Western Europe* (Martin Robertson, 1980); and, latterly, J. Mclean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (Cambridge University Press, 2012).

[13] O. MacDonagh, *Early Victorian Government 1830–1870* (Weidenfeld and Nicolson, 1977) ch. 6.

[14] M. Hill, *The State, Administration and the Individual* (Fontana, 1976) 23–4.

[15] F. Piven and R. Cloward, *Regulating the Poor: The Functions of Public Welfare* (Tavistock Publications, 1971). See also E. Kamenka and E. Tay, *Law and Social Control* (St Martins Press, 1980).

example of social engineering, the Public Health Act 1848 inaugurated a system of local health boards tasked under central scrutiny with regulating offensive trades and conditions harmful to health.[16] The middle years of the nineteenth century 'transformed a loose old-fashioned polity with few central functions and little central power into a much more actively and nationally regulated society',[17] setting the scene, as McDonagh significantly observes, for the 'quasi-collectivist state' of the early twentieth century.

The reforming zeal of the Victorian age was by no means limited to tackling substantive social evils and schemes for public improvement. This was a time of substantial administrative reform. The modern British civil service was set in place and its basic character – permanent and politically disinterested – determined by the 1853 Northcote-Trevelyan Report.[18] There was substantial local government reform, starting with the Municipal Reform Act 1835, whose lines endured for more than a century.[19] The Metropolitan Police Act 1829, introduced to deal with threatened public disorder, was followed by county, borough and metropolitan Police Acts in 1856, which firmly established the principles of comprehensive and professional policing.[20] There were waves too of legal reform throughout the century: common law procedure was reformed in 1854 and Dicey's beloved unitary jurisdiction established with the Judicature Act 1870. It is noteworthy how much of the machinery by which these nineteenth-century reforms were implemented – boards, committees, commissions, inquiries and inspectorates – is still in use today (though naturally remodelled for contemporary purposes). Some bodies even have a clear lineage back to Victorian times. Boards of Visitors, now Independent Monitoring Boards, still act as 'watchdog' to the prison system; Her Majesty's Inspectorate of Constabulary (HMIC) exercises a supervisory role over police forces. Providing familiar landmarks in the institutional landscape, these structures give a comforting sense of stability and continuity, which helps to disguise the fact that the structure of British government is changing and contingent and evolves in an ad hoc and piecemeal fashion. The haphazard structure is also comforting in the very different sense that the 'bits and pieces' of which it is made up help to disguise the often regulatory and coercive character of public power.

A variant of Hill's Trojan-horse theory is often used to explain the unsystematic development of English administrative law. The development of administrative tribunals exactly parallels what Hill says about the growth of the modern administrative state – though, as we shall see in Chapter 14, the

[16] W. Cornish and G. Clark, *Law and Society in England, 1750–1950* (Sweet and Maxwell, 1989).
[17] O. McDonagh, *Early Victorian Government, 1830–1870* (Weidenfeld and Nicholson, 1977) 1.
[18] *Report on the Organisation of the Permanent Civil Service*, 1854, q/JN 426 NOR.
[19] See Local Government Act 1972, following the *Redcliffe-Maud Report: Reform of Local Government in England*, Cmnd 4276 (1970).
[20] H. Parris, 'The Home Office and the Provincial Police in England and Wales, 1856–1870' [1961] *PL* 230.

process was halted and rationalised in 2007 – and a similar explanation – that Parliament simply did not notice what was happening – could be given of the practice of delegating rule-making powers to government departments described in Chapter 5. It was the realisation of this development that caused sufficient alarm in the interwar period to justify the establishment of the Donoughmore Committee.[21] But this Committee's incrementalist approach to reform allowed attrition of legislative power through overload to continue. Today, the delegation of legislative power to the executive has arguably become one of the most serious, yet unsolvable, problems of modern government.

(b) Stop and go

Red-light theorists believe that the primary function of administrative law should be to *control* excesses of state power and subject it to the rule of law. Professor Wade, in the first edition of his leading textbook, employed the metaphor of 'constant warfare between government and governed' and expressed overt suspicion of the 'vast empires of executive power' coupled with the expectation that government would 'run amok'. Abuse of power, which can occur when government departments 'misunderstand their legal position', is inevitable and it is 'all the more necessary that the law should provide means to check it'.[22] Green-light theorists, on the other hand, saw strong government as an unequivocal good. If the lot of the underprivileged in society is to be improved, pensions and social assistance have to be funded, education has to be provided and land-use planning is required. Where the boundaries are to be drawn is a political question, but law is an essential operational tool. As Ivor Jennings put it in the penurious 1930s, the task of the lawyer 'is not to declare that modern interventionism is pernicious, but, seeing that all modern states have adopted the policy, to advise as to the technical devices which are necessary to make the policy efficient and to provide justice for individuals'.[23]

We do not accept that, as Taggart once suggested, our light-hearted traffic-light metaphor 'has outlived its usefulness' and 'is not doing the job it was intended to perform'.[24] As welfare claimants, asylum seekers and would-be immigrants would no doubt tell us, there is nothing outdated in the concept of administrative law as a 'rights-based system',[25] designed to keep governmental power within its permitted boundaries, nor has an instrumentalist interpretation of law as a tool by which society is enabled to realise its collective goals

[21] *Report of the Committee on Ministers' Powers*, Cmd 4080 (1932).
[22] H. W. R. Wade, *Administrative Law* (Clarendon Press, 1961) 3. This short and incisive text is the basis for H. W. R. Wade and C. Forsyth, *Administrative Law* (11th edn, Oxford University Press, 2014).
[23] W. I. Jennings, 'Courts and Administrative Law' (1936) 49 *Harv. LR* 426, 430.
[24] M. Taggart, 'Reinvented Government, Traffic Lights and the Convergence of Public and Private Law' [1999] *PL* 124, 128.
[25] See the seminal article of C. Reich, 'The New Property' (1964) 75 *Yale LJ* 753.

passed its sell-by date.[26] There is room for both viewpoints and there has always been a middle ground. We certainly accept (as Partington once put it) the desirability and need for the exercise of public power. We thus reject the view that public law should be seen exclusively in terms of control of such power but willingly concede that 'forms of political control need to be buttressed by legal control'.[27] Both the stop and the go functions are essential dimensions of administrative law. We also need to remember that the origins of administrative law were in a 'go' function of a very different, monarchical order, in which administrative law operated as 'an instrument of public power' in an authoritarian fashion.[28] Long ago transferred to politicians, remnants of this authoritarian weaponry remains in place today.

It would nonetheless be ignorant to treat these two stop/go approaches as exhausting the field of administrative law theory.[29] Since we first wrote, attitudes to and expectations of the state have changed, sometimes quite dramatically. Our second edition noted 'the blue rinse' that had washed over the state with its programme of privatisation and managerialism throughout the public services, ushering in a new ethos of 'economy, efficiency and effectiveness', which was disseminated through the public services by new 'value for money' audit processes. Audit emerged as a rival to law, to assume a position of central importance in public service delivery and throughout British public administration that it has never since lost.[30] Deficiencies of the 'private' law of contract became a key concern, with privatisation, outsourcing, competitive tendering and franchising all areas for disquiet.[31] We turn to these changes in Chapter 2.

The 'blue rinse' was a paradigm change powered by economists like F. A. Hayek and Milton Friedman and by politicians determined to 'roll back the boundaries of the state'. It evoked a vigorous response from public lawyers, afraid that the frontiers of public law were retracting and 'public law values' were at risk. The debate revealed a clear ideological dimension; it was very much an attack on political values couched in legal terminology. Private law was characterised as a shield for selfish, profit-oriented individualism and censured for its failure to take account of the collective public interest.[32] Querying the view that 'only a public law response is appropriate for an

[26] S. Cassese, '"*Le Droit Tout Puissant et Unique de la Société*": Paradoxes of Administrative Law' (2010) 22 *ERPL* 171.
[27] M. Partington, 'The Reform of Public Law in Britain: Theoretical Problems and Practical Considerations' in McAuslan and McEldowney (eds.), *Law, Legitimacy and the Constitution* (Sweet & Maxwell, 1985) 191.
[28] Cassese, '"*Le Droit Tout Puissant*"', 175–6.
[29] See P. Cane, 'Theory and Values in Public Law' in Craig and Rawlings (eds.), *Law and Administration in Europe* (Oxford University Press, 2003).
[30] M. Power, *The Audit Society, Rituals of Verification* (Oxford University Press, 1997).
[31] M. Freedland, 'Government by Contract and Public Law' [1994] *PL* 86.
[32] P. McAuslan, 'Administrative Law, Collective Consumption and Judicial Policy' (1983) 46 *MLR* 1.

issue involving public power', Aronson argued that the better way to accountability and control might be through 'the adaptation of private law doctrines, such as contract or tort law', and foresaw an 'inter-penetration of state and private sector power'.[33] The so-called 'private law model of public law', in which officials and public authorities are subject to the jurisdiction of a single judicial hierarchy, is, as we shall see, part of our Diceyan heritage. We follow the model in Chapter 10, which deals with the development of contract law against a background of liberal-economic theory, and Chapter 12, which looks at the application of private law to questions of compensation and the civil liability of the state. The intention had been for privatised industry to be regulated by the market; regulation, 'if needed at all, would only be needed for a transitional phase'.[34] But as the deficiencies of the market model were recognised, supervisory bodies were set in place to protect the public interest. By the turn of the century, the state had received a regulatory reshape. A new 'regulatory state' had emerged from the crucible of privatisation, bringing with it an abundance of regulatory theory as a new rival for administrative law. We look more closely at this relationship in Chapters 8 and 9.

Elsewhere, the search was on for a way to entrench as 'public law principles' the prevailing values of a liberal-democratic state.[35] New configurations of the rule of law came into fashion and with them inevitably a heightened role and stronger institutional place for courts.[36] By 2009, the date of our third edition, 'constitutionalism' was installed as the breakthrough doctrine with which to maintain liberal-democratic (public law) values and had become the subject of a substantial theoretical literature. Human rights law, at the time acquiring global recognition, was 'brought home' to Britain in 1998 by New Labour, helping to legitimate a new and expansive model of judicial review. 'Good governance values', also acquiring global recognition,[37] emerged inside public administration and found their way slowly into the public law vocabulary (see Chapter 2).

Under-theorised at the time of our first edition, administrative law is today the subject of much interdisciplinary and empirical research and of a flourishing theoretical literature of which we have tried to take account in the following chapters. But if this edition seems more legalistic than its predecessors, we see this as justified by contemporary techniques of public administration. The Diceyan legacy, the subject of the next section, was concerned to the point of obsession with the perils of executive and administrative discretion, which

[33] M. Aronson, 'A Public Lawyer's Responses to Privatisation and Outsourcing' in Taggart (ed.), *The Province of Administrative Law* (Hart Publishing, 1997) 51, 70.
[34] M. Moran, 'The Rise of the Regulatory State in Britain' (2001) 54 *Parl. Aff.* 15, 26.
[35] T. Allan, 'The Rule of Law as Liberal Justice' (2006) 56 *UTLJ* 283 (Review of A. Brudner, *Constitutional Goods* (Oxford University Press, 2004)).
[36] See notably Sir John Laws, 'Is the High Court the Guardian of Fundamental Constitutional Rights?' [1993] *PL* 59.
[37] C. Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 *EJIL* 187.

Dicey tended to conflate with authoritarian abuse of power. Contemporary public administration is, as already mentioned, infused with a managerial ethos imported from the private sector[38] and over the years the two have come together to produce a heavily rule-based administrative style, which is, we argue in Chapters 16 and 17, seeping slowly into judicial review. Administrative law, to put this differently, has become 'juridified', a term coined by the legal philosopher Gunther Teubner to describe the tendency of modern and post-modern societies to formalise and encapsulate all social relations in terms of law. Teubner regards juridification as the logical conclusion of bureaucracy and hence a universal feature of modern administration.[39] But it would in time, Teubner predicted, prove dysfunctional, leading to consequential 'depoliticization of the social environment' and (we would add) a shrinking deregulated sphere. We see the increasingly regulated and juridified society that has emerged in the last half-century as demonstrating the truth of Teubner's prophecy. Administration professes transparency but, we shall suggest, is far from transparent; it professes to be inclusive, though real public participation is marginal; and it demands accountability, though accountability is all too often illusory. These problems resurface throughout the book.

Law and Administration started its life in the context of a 'big state' and with the gradual dismantlement of draconian executive powers left over from World War II. For later editions, the background theory was very different. As explained in Chapter 2, the 'big state' shrank and was remodelled. It was 'hollowed out'[40] upwards to Europe and devolved downwards to new democratic institutions in Scotland, Wales and Northern Ireland, processes described in Chapter 3 that end as we write with a transfer of powers back to the UK. A globalised administrative law crept onto the agenda,[41] prompting Alfred Aman to suggest that if administrative law were to survive into 'the global era of administrative law', it would need to undergo a 'basic shift in focus'.[42]

Essentially, Aman was alerting administrative lawyers to the growing interconnectedness of public and private sectors at a global level and the need to develop an administrative law that could take account of the growing power of multinational corporations. He also touched on the part played by automation and information technologies in the public sector. At the time Aman wrote, this largely took the form of technological assistance, for example computerised form-filling, video links in courts and tribunals, communication by telephone, fax and email. As we write, twenty-plus years later, technology

[38] Power, *The Audit Society*.
[39] G. Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions' in Teubner (ed.), *Juridification of Social Spheres* (de Gruyter, 1988).
[40] See R. Rhodes, 'The Hollowing Out of the State: The Changing Nature of the Public Service in Britain' (1994) 65 *Pol. Q.* 138.
[41] S. Cassese (ed.), *Research Handbook on Global Administrative Law* (Edward Elgar, 2017).
[42] A. Aman Jr, 'Administrative Law for a New Century' in Taggart (ed.), *The Province of Administrative Law* (Hart Publishing, 1997).