Law and Administration

Law and Administration takes a contextual approach to administrative law, setting law and legal rules in the context of the social, political and economic forces that shape the law, and of the complex constitutional framework in which contemporary administrative law operates. This book contains a full account of judicial review, the traditional heartland of administrative law, and adds to this by taking into account the concerns of government, officials and agencies who operate and shape the law. It also looks at the possible future of administrative law in an increasingly automated and digitalised world.

A fully revised and updated new edition, this book includes new case studies of regulatory agencies and government contracting to develop understanding of law in practice.

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Fourth Edition

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M. Barthélemy, the Dean of the Faculty of Law in the University of Paris, relates that thirty years ago he was spending a week-end with the late Professor Dicey. In the course of conversation M. Barthélemy asked a question about administrative law in this country. 'In England', replied Dicey, 'we know nothing of administrative law; and we wish to know nothing.'

W. A. Robson, 'The Report of the Committee on Ministers' Powers' (1932) 3 *Political Quarterly* 346, 346

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Preface

Law and Administration is a book written by lawyers and largely for lawyers, but it has never been solely about administrative law. As its title signifies, our primary objective in writing it was to encourage lawyers and, more especially, law students to think about the relationship of administrative law with government and the role played by law in the administrative process. We saw administrative law as a complex web of laws, rules and procedures operating within a framework of public administration and politics. We aimed to further the study of administrative law as a social science subject that reflected the society and economy in which we lived.

At this point, we need to remind the contemporary reader that the first edition of *Law and Administration* was published in 1984, towards the end of an era when the study of case law, mainly divorced from its social context, was typically seen as the be-all and end-all of legal studies. We saw the plural nature of administrative law as largely obscured by a long tradition of legalism, in which 'law' was presented as a non-permeable system of formalistic reasoning and autonomous rules and principles, which were largely the work of courts. We wished to draw attention to an alternative tradition pioneered by Laski, Robson, Jennings and Griffith at the LSE, and to link ourselves with the 'Law in Context' movement as one of a series of books designed to treat law and legal phenomena critically. Our primary interest lay in the way that administration operated, the uses made of law by the administration and the interplay with law generated by courts. We thought of ourselves as 'functionalists'.

A first objective was therefore to direct attention from case law to rule-making as the centrepiece of contemporary administrative law, as it is of public administration and bureaucracy. We have always defined law inclusively to take in statute law as well as executive legislation, but *Law and Administration* highlighted 'bureaucratic rule-making' or 'soft law'. We made our points through lengthy case studies of administrative process, focusing especially on the operation of the social security system, the secret rules in immigration and on planning law. We tried too, by the inclusion of case studies, to free the case law from the formalist method that had shielded its societal connotations and to re-establish the connections between judicial review and its political and administrative context. In our plural approach to the study of administrative

law, we emphasised that public bodies possessed their own distinctive ethos, as do judges and members of the legal profession. Actors in public affairs are individuals, holding different opinions and with differing styles; so are legal academics. We set out to convey this to our readers by allowing them, so far as possible, to speak in their own voices. The case studies in the first edition featured extracts from parliamentary papers and other public documents that were available at the time only in a handful of libraries. Thanks to the internet, this approach is no longer necessary, but, in different ways, the plural approach has characterised every edition.

Later editions have appeared infrequently but timed to surface when political change was in the air. The first edition was conceived when Labour was in power, though fast running out of steam. It was published in the early days of Margaret Thatcher's Conservative government, which we described in Chapter 1 as a 'paradigm shift': from 'big government' to economic liberalism, privatisation and outsourcing. This allowed us to contemplate two very different governance styles.

New chapters were introduced to the second edition as contract law crossed the legal border to become an important methodology of administrative law and to deal with the burgeoning discipline of regulation. We were fortunate with the second edition. It emerged in 1997, as Tony Blair brought a New Labour government into power, fired up with new ideas for constitutional and administrative reform. Devolution created a multipolar polity with multiple new sites for administrative law at sub-state level. A Human Rights Act, a new Supreme Court and new relationships with European courts helped to open up judicial review and, to a certain extent, change its character, while a Freedom of Information Act went some way to opening up the administration.

As the still-reforming government of Gordon Brown declined into a struggle with global financial crisis, we were ready with a third edition to meet David Cameron's Coalition government of Conservatives and Liberal Democrats. We shall remember the period as one of a government occupied with balancing the books and rescuing banks, and an administration mired in policies of austerity developed to deal with the financial crisis. Public services shrank and disappeared, outsourced to the private sector, while the authoritarian role of the state was disguised as the work of decentred regulatory agencies.

What is the context of the fourth edition, conceived in a period of austerity and considerable political unsettlement? The governing political alignments were splintered by the divisive Brexit referendum; the institutions of government, held together by conventions of mutual respect, fractured into open warfare between governments, Parliament and the courts. A burst of legislative activity signalled a demanding new role for domestic administrative law, as regulatory functions uploaded over the years to the European Union were hastily brought home, pointing domestic administrative law in new directions, provoking further disputes and occasioning a flurry of executive legislation.

But just as we were emerging cautiously onto dryish land from the tsunami of Brexit, we were swept away again by the coronavirus pandemic. There is a sense of the wheel turning full circle. The first edition was planned in a period of strong executive government but restricted judicial review born of wartime restraint. As this edition is going to press, we are experiencing a resurgence of executive government, underpinned by Brexit and by the Covid-19 crisis. Brexit brought calls for restraints on judicial review, and, as we write, pandemic legislation is provoking fears over authoritarian government and an erosion of civil liberties, while at one and the same time government is under attack for its underpowered enforcement. Public administration, which has become steadily more rule-bound, is now sharing its terrain with non-binding soft law and administrative discretion disguised as rules. Perhaps more significantly in the long term, Covid-19 is driving replacement of a public administration built around individuals working in offices with digitised public services in which decision-making is delegated to algorithms and disputes are adjudicated online.

As usual, we have many people to thank, starting with Caitlin Lisle and Marianne Nield of Cambridge University Press, who have been inordinately patient over the many delays. It has not been easy getting at books and verifying sources without physical access to a library. A survivor of the third edition, Jem Langworthy has again been a model copy-editor. Our thanks go too to our researchers: Lee Yin Ng, who provided us with an excellent literature survey at an early stage, and especially our friends and ex-students Kamilia Rozlan and Shukri Shahizam, who found time to contribute analysis, digital wizardry and graphics while achieving starry examination results. All three are now started on what we anticipate will be highly successful careers. Students Imogen Blakeley and Thomas Fairclough helped with particulars of tribunals structure and judicial review, and many other students have allowed us to test ideas at seminars. We are grateful too for the opportunity to present papers at workshops and seminars arranged by Peter Cane, Jeff King and Hayley Hooper at the IALS; by Elizabeth Fisher, Jeff KIng and Alison Young at Oxford; by Graham Gee and Joe Tomlinson in Sheffield; by Imelda Maher in Dublin; and by Jason Varuhas in Cambridge and Melbourne. Many friends and colleagues have helped us with ideas and discussion, commissioned papers, and have read and corrected numerous drafts. Thanks go to John Allison, Kenneth Armstrong, Peter Cane, Richard Ekins, Elizabeth Fisher, Tony Harlow, Tom Hickman, Jeff King, Richard Kirkham, Martin Loughlin, Sarah Nason, Colm O'Cinneide, Tom Poole, Maurice Sunkin, Robert Thomas, Joe Tomlinson, Jason Varuhas and Alison Young. Special thanks go to Mark Aronson for critically reading so many drafts.

And last, but never least, a loving smile to our families – especially to Gwen and Bella from Carol, and to little Leo from Rick.

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