# ADMINISTRATIVE LAW


BY

THE LATE

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# 1

# INTRODUCTION

## GOVERNMENT, LAW, AND JUSTICE

### THE ADMINISTRATIVE STATE

'Until August 1914,' it has been said, 'a sensible law-abiding Englishman could pass through life and hardly notice the existence of the state, beyond the post office and the policeman.'[1] This worthy person could not, however, claim to be a very observant citizen. For by 1914 there were already abundant signs of the profound change in the conception of government which was to mark the twentieth century and which was to continue into the twenty-first century. The state schoolteacher, the national insurance officer, the job centre, the sanitary and factory inspectors, and, as the twentieth century progressed, the executive agency and the official regulator (complete with unattractive acronym), with their necessary companion the tax collector, were among the outward and visible signs of this change. The modern administrative state was taking shape, reflecting the feeling that it was the duty of government to provide remedies for social and economic evils of many kinds. This feeling was the natural consequence of the great constitutional reforms of the nineteenth century. The enfranchised population could now make its wants known, and through the ballot box it had acquired the power to make the political system respond.

The advent of the welfare state might be dated from the National Insurance Act 1911. But long before 1911 Parliament had imposed controls and regulations by such statutes as the Factories Acts, the Public Health Acts, and the railway legislation.[2] By 1854 there were already sixteen central government inspectorates.[3] The period 1865–1900 had been called 'the period of collectivism'[4] because of the outburst of regulatory legislation and the tendency to entrust more and more power to the state.[5] The author of that remark would have been hard put to it to find words for the period since the Second World War, which is as different from his own as his own was different from that of the Stuart kings. As his generation came to recognise the need for the administrative state, they had also to devise more efficient machinery. The Northcote-Trevelyan Report (1854) on the civil service was one milestone; another was the opening of the civil service to competitive examination in 1870. The modern ministerial department was taking shape and the doctrine of ministerial responsibility was crystallising, with its correlative principles of civil service anonymity and detachment from politics. Thus were laid the foundations of the vast and powerful bureaucracy which is the principal instrument of administration

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[1] A. J. P. Taylor, *English History, 1914–1945*, 1.

[2] For the growth of the central government's powers and machinery in the nineteenth century see Holdsworth, *History of English Law*, xiv. 90–204.

[3] Parris, *Constitutional Bureaucracy*, 200.

[4] Dicey, *Law and Opinion in England in the Nineteenth Century*, 64.

[5] In 1888 Maitland wrote (*Constitutional History of England*, 1955 reprint, 501): 'We are becoming a much governed nation, governed by all manners of councils and boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes.'

today. Scarcely less striking has been the expansion of the sphere of local government, extending to education, town and country planning, and a great many other services and controls. The devolution of power has now been carried to new levels with the grant of substantial law-making powers to Scotland and Wales.

If the state is to care for its citizens from the cradle to the grave, to protect their environment, to educate them at all stages, to provide them with employment, training, houses, medical services, pensions, and, in the last resort, food, clothing, and shelter, it needs a huge administrative apparatus. Relatively little can be done merely by passing Acts of Parliament. There are far too many problems of detail, and far too many matters that cannot be decided in advance. No one may erect a building without planning permission, but no system of general rules can prescribe for every case. There must be discretionary power. If discretionary power is to be tolerable, it must be kept under two kinds of control: political control through Parliament, and legal control through the courts. Equally there must be control over the boundaries of legal power, as to which there is normally no discretion. If a water authority may levy sewerage rates only upon properties connected to public sewers, there must be means of preventing it from rating unsewered properties unlawfully.[6] The legal aspects of all such matters are the concern of administrative law.

## ADMINISTRATIVE LAW

A first approximation to a definition of administrative law is to say that it is the law relating to the control of governmental power. This, at any rate, is the heart of the subject, as viewed by most lawyers. The governmental power in question is not that of Parliament: Parliament as the legislature is sovereign and, subject to one apparent exception,[7] is beyond legal control. The powers of all other public authorities are subordinated to the law, just as much in the case of the Crown and ministers as in the case of local authorities and other public bodies. All such subordinate powers have two inherent characteristics. First, they are all subject to legal limitations; there is no such thing as absolute or unfettered administrative power. Secondly, and consequentially, it is always possible for any power to be abused. Even where Parliament enacts that a minister may make such order as he thinks fit for a certain purpose, the court may still invalidate the order if it infringes one of the many judge-made rules. And the court will invalidate it, a fortiori, if it infringes the limits that Parliament itself has ordained.

The primary purpose of administrative law, therefore, is to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse. The powerful engines of authority must be prevented from running amok. 'Abuse', it should be made clear, carries no necessary innuendo of malice or bad faith. Government departments may misunderstand their legal position as easily as may other people, and the law which they have to administer is frequently complex and uncertain. Abuse in this broad sense is therefore inevitable, and it is all the more necessary that the law should provide means to check it. It is a common occurrence that a minister's order is set aside by the court as unlawful, that a compulsory purchase order has to be quashed or that the decision of a planning authority is declared to be irregular and void. The courts are constantly occupied with cases of this kind which are nothing more than the practical application of the rule of law, meaning that the government must have legal warrant for what it does and that if it acts unlawfully the citizen has an effective legal remedy.

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[6] See *Daymond* v. *Plymouth City Council* [1976] AC 609; below, p. 726.

[7] European Community law; below, p. 162.

As well as power there is duty. It is also the concern of administrative law to see that public authorities can be compelled to perform their duties if they make default. HM Revenue & Customs may have a duty to repay tax, a licensing authority may have a duty to grant a licence, the Home Secretary may have a duty to admit an immigrant. The law provides compulsory remedies for such situations, thus dealing with the negative as well as the positive side of maladministration.

## FUNCTION DISTINGUISHED FROM STRUCTURE

As a second approximation to a definition, administrative law may be said to be the body of general principles which govern the exercise of powers and duties by public authorities. This is only one part of the mass of law to which public authorities are subject. All the detailed law about their composition and structure, though clearly related to administrative law, lies beyond the scope of the subject. So it is not necessary to investigate how local councillors are elected or what are the qualifications for service on various tribunals. Nor is it necessary to enumerate all the powers which governmental authorities possess. A great deal must be taken for granted in order to clear the field.

What has to be isolated is the law about the *manner* in which public authorities must exercise their functions, distinguishing function from structure and looking always for general principles. If it appears that the law requires that a man should be given a fair hearing before his house can be pulled down, or before his trading licence can be revoked, and before he can be dismissed from a public office, a general principle of administrative law can be observed. If likewise a variety of ministers and local authorities are required by law to exercise their various statutory powers reasonably and only upon relevant grounds, there too is a general principle. Although this book supplies some limited particulars about the structure of public authorities and about some of their more notable powers, this is done primarily for the sake of background information. The essence of administrative law lies in judge-made doctrines which apply right across the board and which therefore set legal standards of conduct for public authorities generally.

There are, however, some areas in which more attention must be paid to structure. This is particularly the case with special tribunals and statutory inquiries, and to some extent also with delegated legislation. They stand apart for the reason that the problems which need discussion relate as much to the organisation of the machinery for dispensing justice, and in the case of delegated legislation to the machinery of government, as to the role of the courts of law.

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## 'RED LIGHTS' AND 'GREEN LIGHTS'

This book's conception of administrative law has been said to typify a 'red light' theory of the subject, aimed mostly at curbing governmental power, as contrasted with 'green light theory' whose advocates favour 'realist and functionalist jurisprudence' designed to make administration easier and better.[8]

> What one person sees as control of arbitrary power may, however, be experienced by another as a brake on progress. While red light theory looks to the model of the balanced constitution, green light theory finds the 'model of government' more congenial.

[8] Harlow and Rawlings, *Law and Administration*, 3rd edn, 31.

> Where red light theorists favour judicial control of executive power, green light theorists are inclined to pin their hopes on the political process.[9]

The path of progress by green light, it is said, is through improved ministerial responsibility, more effective consultation, decentralisation of power, a reduced role for the judiciary (therefore rejecting human rights legislation), freedom of information and other reforms to be sought by political means.[10] But these objectives, whether or not desirable, are of a different order from those of this book, and there is no easy 'red or green' contrast between them. This book is concerned with the present realities of legislative, executive and judicial power and aims to analyse them in a way helpful to lawyers. There is an 'amber' element in that some subjects, such as devolution of power and freedom of information, are common ground between both approaches. But the purposes of the legal and the political approaches are so different that they cannot usefully be presented as a neat contrast of alternatives. 'Chalk or cheese' would be a better metaphor than 'red or green'.

## ALLIANCE OF LAW AND ADMINISTRATION

It is a mistake to suppose that a developed system of administrative law is necessarily antagonistic to efficient government. Intensive administration will be more tolerable to the citizen, and the government's path will be smoother, where the law can enforce high standards of legality, reasonableness and fairness. Nor should it be supposed that the continuous intervention by the courts, which is now so conspicuous, means that the standard of administration is low. This was well observed by Sir John Donaldson MR:[11]

> Notwithstanding that the courts have for centuries exercised a limited supervisory jurisdiction by means of the prerogative writs, the wider remedy of judicial review and the evolution of what is, in effect, a specialist administrative or public law court is a post-war development. This development has created a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration.
>
> With very few exceptions, public authorities conscientiously seek to discharge their duties strictly in accordance with public law and in general they succeed. But it must be recognised that complete success by all authorities at all times is a quite unattainable goal. Errors will occur despite the best of endeavours. The courts, for their part, must and do respect the fact that it is not for them to intervene in the administrative field, unless there is a reason to inquire whether a particular authority has been successful in its endeavours. The courts must and do recognise that, where errors have, or are alleged to have, occurred, it by no means follows that the authority is to be criticised. In proceedings for judicial review, the applicant no doubt has an axe to grind. This should not be true of the authority.

Provided that the judges observe the proper boundaries of their office, administrative law and administrative power should be friends and not enemies. The contribution that the law can and should make is creative rather than destructive.

The connecting thread which runs throughout is the quest for administrative justice. At every point the question is, how can the profession of the law contribute to the improvement of the technique of government? It is because all the various topics offer scope for this missionary spirit that they form a harmonious whole. Subject as it is to the

[9] Ibid. [10] See (1979) 42 *MLR* 1, [1985] *PL* 564, [2000] *MLR* 159 (J. A. G. Griffith).
[11] *R* v. *Lancashire CC ex p Huddleston* [1986] 2 All ER 941 at 945.

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vast empires of executive power that have been created, the public must be able to rely on the law to ensure that all this power may be used in a way conformable to its ideas of fair dealing and good administration. As liberty is subtracted, justice must be added. The more power the government wields, the more sensitive is public opinion to any kind of abuse or unfairness. Taken together, the work of judiciary and legislature amounts to an extensive system of protection. It has its weaknesses, but it also has great strengths.

## PUBLIC LAW AND POLITICAL THEORY

It would be natural to suppose that there must be intimate connections between constitutional and administrative law and political theory. The nature of democracy, governmental power, the position of the Crown—these and many such subjects have foundations which are first and foremost political and only secondarily legal. Yet legal exposition and analysis normally inhabits a world of its own, paying due respect indeed to history but little or none to theories of government. Despite some brave attempts which have been made from the legal side,[12] most students of public law feel no need to explore the theory which forms its background; or, if they do, they find little illumination.

Yet it is possible to claim that 'the nature and content of constitutional and administrative law can only be properly understood against the background of political theory which a society actually espouses, or against such a background which a particular commentator believes that a society ought to espouse'.[13] This is of course true in the sense that every lawyer will carry his own ideas of the political and social environment in which he works, and the better he understands it, the better will be his service to the community. But that need not involve political theory in the abstract. Legal antipathy to political theory is likely to be motivated by instinctive belief in the virtue of objectivity in law, the belief that law should be kept as distinct as possible from politics, and that there is positive merit in keeping a gulf between them. A judge or an advocate may be a conservative, a socialist or a Marxist, but he will be a good judge or advocate only if his understanding of the law is unaffected by his political theory; and the same may be true of a textbook writer.

The most obvious opportunities for theory lie on the plane of constitutional law. Does the law provide a coherent conception of the state? Is it, or should it be, based on liberalism, corporatism, pluralism, or other such principles? What are its implications as to the nature of law and justice? More pragmatically, should there be a separation of powers, and if so how far? Is a sovereign parliament a good institution? Is it right for Parliament to be dominated by the government? Ought there to be a second chamber? The leading works on constitutional law, however, pay virtually no attention to such questions, nor can it be said that their authors' understanding of the law is noticeably impaired. The gulf between the legal rules and principles which they expound, on the one hand, and political ideology on the other, is clear and fundamental, and the existence of that gulf is taken for granted.

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[12] Notably the books by P. P. Craig, *Public Law and Democracy in the United Kingdom and in the United States of America*; T. R. S. Allan, *Law, Liberty, and Justice*; M. Loughlin, *Public Law and Political Theory*; and articles by Sir John Laws, [1995] *PL* 72, [1996] *PL* 622 and Sir Stephen Sedley, (1994) 110 *LQR* 270, [1995] *PL* 386; Paul Craig and Richard Rawlings (eds.), *Law and Administration in Europe: Essays in Honour of Carol Harlow* (2003); 'Theory and Values in Public Law' [2005] *PL* 48 (M. Loughlin). See also Harlow and Rawlings, *Law and Administration*, 3rd edn, ch. 1, for discussion and references. See, further, Craig, 'Political Constitutionalism and Judicial Review' in Forsyth, Elliott, Jhaveri and Scully-Hill (eds.), *Effective Judicial Review: A Cornerstone of Good Governance* (2010), 19–42, and Adam Tomkins, *Our Republican Constitution* (2005).

[13] Craig, *Public Law and Democracy*, 1.

On the plane of administrative law the openings for political theory are even fewer. Where the emphasis falls, as it does in this book, upon the central body of legal rules which regulate the use of governmental power, the focus is narrower. Those rules are based upon elementary concepts of legality, reasonableness and fairness which are self-evident in their own right and are even further detached from politics than are the principles of constitutional law. Although their natural home is in a liberal democracy, there is no necessary reason why they should not be observed under any regime, even if illiberal or undemocratic. The central part of administrative law, as presented in this book, has a neutrality which is lacking in constitutional law. Constitutional law and administrative law are subjects which interlock closely and overlap extensively. The rule of law, for instance, is a basic concept which runs through them both and which offers scope for political theory as well as for the discussion of its practical features which will be found below. But other such universals are not easily found in the field of administrative law, and the lack of them limits the assistance which political theory can provide.

## CHARACTERISTICS OF THE LAW

### THE ANGLO-AMERICAN SYSTEM

The British system of administrative law, which is followed throughout the English-speaking world, has some salient characteristics, which mark it off sharply from the administrative law of other European countries. Although in the United States of America it has naturally followed its own lines of evolution, it is recognisably the same system.[14] This is true also of Scotland, although it must never be forgotten that Scots law may differ materially from English.[15]

The outstanding characteristic of the Anglo-American system is that the ordinary courts, and not special administrative courts, decide cases involving the validity of governmental action. The ordinary law of the land, as modified by Acts of Parliament, applies to ministers, local authorities, and other agencies of government, and the ordinary courts dispense it. This is part of the traditional concept of the rule of law, as explained in the next chapter. This has both advantages and disadvantages. The advantages are that the citizen can turn to courts of high standing in the public esteem, whose independence is beyond question; that highly efficient remedies are available; that there are none of the demarcation problems of division of jurisdictions; and that the government is seen to be subject to the ordinary law of the land. Its disadvantages are that many judges are not expert in administrative law: that neglect of the subject in the past has seriously weakened it at times; and that its principles have sometimes been submerged in the mass of miscellaneous law which the ordinary courts administer. These disadvantages have recently become less menacing as the judiciary has become both more specialised and more determined to find remedies for any kind of governmental abuse.

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[14] The British and American systems are compared in Schwartz and Wade, *Legal Control of Government*.

[15] For the Scots system see Mitchell, *Constitutional Law*, 2nd edn, pt 3; Scottish Law Commission's Memorandum No. 14 (1971, A. W. Bradley); *The Laws of Scotland* (Stair Memorial Encyclopaedia), i (A. W. Bradley).

## THE CONTINENTAL SYSTEM

In France, Italy, Germany and many other countries there is a separate system of administrative courts which deal with administrative cases exclusively. As a natural consequence, administrative law develops on its own independent lines, and is not enmeshed with ordinary private law as it is in the Anglo-American system. In France droit administratif is a highly specialised science, administered by the judicial wing of the Conseil d'État, which is staffed by judges of great professional expertise, and by a network of local tribunals of first instance.[16] Courts of this kind, whose work is confined to administrative law, may have a clearer view of the developments needed to keep pace with the powers of the state than have courts which are maids of all work. Certainly the Conseil d'État has shown itself more aware of the demands of justice in respect of financial compensation,[17] in contrast to the English reluctance—as Lord Wilberforce has observed.[18] But the French system is not without its disadvantages. Its remedies are narrow in scope and not always effective, and the division of jurisdictions between civil and administrative courts is the subject of technical rules which can cause much difficulty.

Although the structure of the courts is so different, many of the cases that come before the Conseil d'État are easily recognisable as the counterparts of familiar English situations. Review of administrative findings of fact and determinations of law, abuse of discretion, ultra vires—all of these and many other English rubrics can be illustrated from the administrative law of France. There is also the similarity that both English and French systems are contained in case law rather than in any statutory code. French authorities are by no means out of place when precedents are being sought for guidance on some novel issue.

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## EUROPEAN UNION LAW

The European Communities, now the European Union, of which Britain became a member in 1973, have their own legal system, which has been vigorously developed by the European Court of Justice in Luxembourg in accordance with a series of treaties (Rome (1957) to Lisbon (2009)) and the legislation made under them by the Community authorities. It is a condition of membership, fulfilled in Britain by the European Communities Act 1972,[19] that Community law takes precedence over national law, and many rules of Community law have direct effect in the Member States, so that they must be applied and enforced by national courts. A brief general account of this system will be found below.[20] Community law contains its own administrative law, under which the Court of Justice can annul unlawful acts of the Community authorities and award compensation against them. The Court's constitution and powers are modelled on those of the French Conseil d'État. The subordination of all the law of the Member States to Community law as declared by the Court makes the Court an extremely powerful tribunal.

The impact on British administrative law, which came slowly at first, has now made itself felt dramatically. Community law has revolutionised one of the fundamentals of constitutional law, as explained later, by demanding that an Act of our sovereign Parliament must be 'disapplied' by a British court if held to be in conflict with Community law;[21] and ministerial regulations have been invalidated by judgments given in Luxembourg.[22]

[16] See Brown and Bell, *French Administrative Law*, 5th edn.

[17] As noted below, p. 285.

[18] In *Hoffmann–La Roche & Co* v. *Secretary of State for Trade and Industry* [1975] AC 295 at 358, contrasting 'more developed legal systems'.

[19] s. 2. See below, p. 162.

[20] See p. 156.

[21] Below, p. 163.

[22] As in the *Bourgoin* case, below, p. 663.

Wide categories of government liability, enforceable in British courts, have been created similarly, as will later be explained.[23] The incoming tide, as Lord Denning once described it,[24] may percolate into any creek or backwater of our law, which will then be submerged by its superior power.

## EUROPEAN HUMAN RIGHTS

Another European system which our law is now absorbing is that of the European Convention on Human Rights and Fundamental Freedoms, to which Britain acceded as one of the founder members in 1950 but to which it gave domestic legal force only in 2000. During the intervening half-century the government accepted the obligations of the Convention as interpreted by the European Court of Human Rights in Strasbourg but refused to make them enforceable in British courts. That anomaly was ended by the Human Rights Act 1998 which came into force in 2000. As explained later,[25] that Act provides that the decisions and practice of the European Court are to be followed by British courts in enforcing the human rights set out in the Convention and incorporated in the Act. Here therefore is another non-indigenous source of law, which is both fundamental and far-reaching.

## HISTORICAL DEVELOPMENT

Administrative law in England has a long history, but the subject in its modern form did not begin to emerge until the second half of the seventeenth century. A number of its basic rules can be dated back to that period, and some, such as the principles of natural justice, are still older. In earlier times the justices of the peace, who were used as all-purpose administrative authorities, were superintended by the judges of assize, who on their circuits conveyed instructions from the crown, dealt with defaults and malpractices, and reported back to London on the affairs of the country. Under the Tudor monarchy this system was tightened up under the authority of the Privy Council and of the provincial Councils in the North and in Wales.[26] This was a long step towards the centralisation of power in a state of the modern type. The Privy Council's superintendence was exercised through the Star Chamber, which could punish those who disobeyed the justices of the peace, and reprove or replace the justices themselves. But the powers of the state were not often challenged at the administrative level. A freeman of a borough might resist unlawful expulsion by obtaining a writ of mandamus ('a mandatory order' in modern parlance)[27] and a writ of certiorari (now 'a quashing order') might lie against the Commissioners of Sewers if they usurped authority.[28] But it was on the constitutional rather than on the administrative plane, and notably on the battlefields of the civil war, that the issues between the Crown and its subjects were fought out.

After the abolition of the Star Chamber in 1642, and the destruction of most of the Privy Council's executive power by the Revolution of 1688, a new situation arose. The old machinery of central political control had been broken, and nothing was put in its place. Instead, the Court of King's Bench stepped into the breach and there began the era of the control of administration through the courts of law. The King's Bench made its writs of

[23] Below, p. 662.
[24] *Bulmer (HP) Ltd* v. *J Bollinger SA* [1974] Ch 401 at 418.
[25] Below, p. 135.
[26] Holdsworth, *History of English Law*, iv. 71.
[27] As in *Bagg's Case* (1616) 11 Co Rep 93; below, p. 406.
[28] As in *Hetley* v. *Boyer* (1614) Cro Jac 336; *Smith's Case* (1670) 1 Vent 66; below, p. 293.

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mandamus, certiorari, and prohibition (now 'a prohibiting order'), as well as its ordinary remedy of damages, available to anyone who wished to dispute the legality of administrative acts of the justices and of such other authorities as there were. The political dangers of doing so had ceased to exist, and the field was clear for the development of administrative law. At first the justices had many administrative functions, but in the course of the nineteenth century most of these were transferred to elected local authorities. All through this time the courts were steadily extending the doctrine of ultra vires and the principles of judicial review. These rules were applied without distinction to all the new statutory authorities, such as county councils, boards of works, school boards and commissioners, just as they had been to the justices of the peace. As the administrative state began to emerge later in the nineteenth century, exactly the same rules were applied to central government departments. This is the same body of law which is still being developed today. The history of many of the detailed doctrines, such as the rules for review of jurisdictional questions, the principles of natural justice, and the scope of certiorari, will be seen in the treatment of them later in this book.

Administrative law, as it now exists, has therefore a continuous history from the later part of the seventeenth century. The eighteenth century was the period par excellence of the rule of law,[29] and it provided highly congenial conditions in which the foundations of judicial control could be consolidated. It is remarkable how little fundamental alteration has proved necessary in the law laid down two centuries ago in a different age. The spread of the tree still increases and it throws out new branches, but its roots remain where they have been for centuries.

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## TWENTIETH-CENTURY FAILINGS

Up to about the end of the nineteenth century administrative law kept pace with the expanding powers of the state. But in the twentieth century it began to fall behind. The courts showed signs of losing confidence in their constitutional function and they hesitated to develop new rules in step with the mass of new regulatory legislation. In 1914 the House of Lords missed an important opportunity to apply the principles of natural justice to statutory inquiries,[30] a new form of administrative procedure which ought to have been made to conform to the ordinary man's sense of fairness, for example by allowing him to know the reasons for the minister's decision and to see the inspector's report on which the decision was based. Not until 1958 were these mistakes corrected. Meanwhile the executive took full advantage of the weak judicial policy, and inevitably there were loud complaints about bureaucracy. Eminent lawyers, including a Lord Chief Justice, published books under such titles as *The New Despotism*[31] and *Bureaucracy Triumphant*.[32] At the same time, Parliament was losing its control over ministers, so making it all the more obvious that the law was failing in its task of enforcing standards of fairness in the exercise of governmental powers.

The report of the Committee on Ministers' Powers of 1932[33] was intended to appease the complaints about bureaucracy. It covered ministerial powers of delegated legislation and of judicial or quasi-judicial decision.[34] Although the Committee made some sound criticisms of the system of public inquiries which had come into use and recommendations for fairer and more impartial administrative procedures, these proved unacceptable

[29] See below, p. 90. [30] *Local Government Board* v. *Arlidge* [1915] AC 120; below, p. 412.
[31] By Lord Hewart CJ (1929). [32] By Sir Carleton Allen (1931). [33] Cmd 4060 (1932).
[34] See below, p. 31.

to the strongly entrenched administration.[35] In most respects it was little more than an academic exercise. It did not discuss the scope of judicial control, and although it called for the vigilant observance of the principles of natural justice, it did not consider how widely they should be applied.

Discontent with administrative procedures therefore continued to accumulate. The practical reforms that were needed for tribunals and inquiries were not made until 1958, when the Report of the Committee on Administrative Tribunals and Enquiries (the Franks Committee)[36] led to the Tribunals and Inquiries Act 1958 and to a programme of procedural improvements, all to be supervised by a new body, the Council on Tribunals. The story of these reforms is told in later chapters.[37] They were of great importance in administrative law, but they were in no way due to the work of the courts.

## THE RELAPSE AND THE REVIVAL

During and after the Second World War a deep gloom settled upon administrative law, which reduced it to the lowest ebb at which it had stood for centuries. The courts and the legal profession seemed to have forgotten the achievements of their predecessors and they showed little stomach for continuing their centuries-old work of imposing law upon government. It was understandable that executive power was paramount in wartime, but it was hard to understand why, in the flood of new powers and jurisdictions that came with the welfare state, administrative law should not have been vigorously revived, just when the need for it was greatest.

Instead, the subject relapsed into an impotent condition, marked by neglect of principles and literal verbal interpretation of the blank-cheque powers which Parliament showered upon ministers. The leading cases made a dreary catalogue of abdication and error. Eminent judges said that the common law must be given a death certificate, having lost the power to control the executive;[38] that certiorari was not available against an administrative act;[39] that there was no such thing in Britain as droit administratif;[40] and that there was no developed system of administrative law.[41] The following are some of the aberrations of what might be called 'the great depression':

> The court's power to quash for error on the face of the record was denied.[42]
>
> The principles of natural justice were held not to apply to the cancellation of a licence depriving a man of his livelihood.[43]
>
> Statutory phrases like 'if the minister is satisfied' were held to confer unfettered and uncontrollable discretion.[44]
>
> Statutory restrictions on legal remedies were literally interpreted, contrary to long-settled principles.[45]
>
> The Crown was allowed unrestricted 'Crown privilege' so as to suppress evidence needed by litigants.[46]

[35] 'Few reports have assembled so much wisdom whilst proving so completely useless . . . its recommendations are forgotten, even by lawyers and administrators, and in no important respect did the report influence, much less delay, the onrush of administrative power, and the supersession of the ordinary forms of law which is taking place to-day.' Professor G. W. Keeton in *The Nineteenth Century and After* (1949), 230.

[36] Cmnd 218 (1957). The Act of 1958 has been replaced by the Tribunals and Inquiries Acts 1971 and 1992.

[37] Below, pp. 762, 794. [38] Lord Devlin in 8 *Current Legal Problems* (1956), 14.

[39] Lord MacDermott, *Protection from Power under English Law* (1957), 88. [40] Below, p. 18.

[41] Lord Reid in *Ridge* v. *Baldwin* [1964] AC 40 at 72, quoted below, p. 416. [42] Below, p. 225.

[43] Below, p. 414. [44] Below, p. 357. [45] Below, p. 625. [46] Below, p. 711.

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It was not even as if these were matters of first impression where the court had to consider questions of legal policy. Plentiful materials, in some cases going back for centuries, were available in the law, but they were ignored.

Fortunately, in the 1960s the judicial mood completely changed. It began to be understood how much ground had been lost and what damage had been done to the only defences against abuse of power which still remained. Already in the 1950s the courts had reinstated judicial review for error on the face of the record;[47] and there had been the statutory and administrative reforms of tribunal and inquiry procedures,[48] which helped to give a lead. Soon the courts began to send out a stream of decisions which reinvigorated administrative law and re-established continuity with the past. The principles of natural justice were given their proper application, providing a broad foundation for a kind of code of administrative due process.[49] The notion of unfettered administrative discretion was totally rejected.[50] Restrictions on remedies were brushed aside where there was excess of jurisdiction, in accordance with 200 years of precedent;[51] and the law was widened so as to make an excess of jurisdiction out of almost every error.[52] The citadel of Crown privilege was overturned and unjustifiable claims were disallowed.[53] In all these matters the rules for the protection of the citizen had been repudiated by the courts. All were now reactivated. Lord Reid's remark of 1963 that 'we do not have a developed system of administrative law' was countered in 1971 by Lord Denning's, that 'it may truly now be said that we have a developed system of administrative law'.[54] Both Lord Reid and Lord Denning had made conspicuous contributions to its development, but they had done so more by steering the law back onto its old course than by making new deviations.

In retrospect it can be seen that the turning-point in the judicial attitude came in 1963 with the decision of the House of Lords which revived the principles of natural justice.[55] From then on a new mood pervaded the courts. It was given still further impetus by a group of striking decisions in 1968–9, one of which, Lord Diplock said,[56]

> made possible the rapid development in England of a rational and comprehensive system of administrative law on the foundation of the concept of ultra vires.

Since then the judges have shown no reluctance to reformulate principles and consolidate their gains. They have pressed on with what Lord Diplock in a case of 1981 described as[57]

> that progress towards a comprehensive system of administrative law that I regard as having been the greatest achievement of the English courts in my judicial lifetime.

So conspicuous has that progress been that he said in the same case that judicial statements on matters of public law if made before 1950 were likely to be a misleading guide to what the law is today.

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## A DEVELOPED SYSTEM?

Had the materials not been neglected, a developed system could have been recognised long beforehand. In 1888 Maitland had percipiently remarked:[58]

[47] Below, p. 224. [48] Below, p. 800. [49] Below, p. 375. [50] Below, p. 295.
[51] Below, p. 612. [52] Below, p. 219. [53] Below, p. 713.
[54] *Breen* v. *Amalgamated Engineering Union* [1971] 2 QB 175 at 189.
[55] *Ridge* v. *Baldwin* (above).
[56] In the *Racal* case (below, p. 220), referring to the *Anisminic* case (below, p. 219).
[57] In the *Inland Revenue Commissioner's Case* (below, p. 586). See likewise Lord Diplock's remarks in *O'Reilly* v. *Mackman* [1983] 2 AC 237 at 279 and in *Mahon* v. *Air New Zealand* [1984] AC 808 at 816.
[58] *Constitutional History of England* (1955 reprint), 505.

> If you take up a modern volume of the reports of the Queen's Bench Division, you will find that about half the cases reported have to do with rules of administrative law; I mean such matters as local rating, the powers of local boards, the granting of licences for various trades and professions, the Public Health Acts, the Education Acts, and so forth.

And he added a caution against neglecting these matters, since otherwise a false and antiquated notion of the constitution would be formed. But his advice was not taken. No systematic treatises were published.[59] The decisions on housing, education, rating, and so on were looked upon merely as technicalities arising on some isolated statute, and not as sources of general rules. Tennyson's description of the law as a 'wilderness of single instances'[60] exactly fitted the profession's attitude. So far from undertaking systematic study, generations of lawyers were being brought up to believe, as Dicey had supposedly maintained, that administrative law was repugnant to the British constitution.[61] This belief was misconceived, as explained below,[62] but it blighted the study of the law in what should have been a formative period. Even Lord Hewart, despite his protests in *The New Despotism* and elsewhere against bureaucracy and its devices for evading judicial control, referred disparagingly to 'what is called, in Continental jargon, "administrative law" '.[63]

Whether a developed system or not, administrative law is a highly insecure science so long as it is subject to such extreme vacillations in judicial policy as have taken place since the Second World War. One of the arguments for a written constitution and a new Bill of Rights is that they should give the judiciary more confidence in their constitutional position and more determination to resist misuse of governmental power, even in the face of the most sweeping legislation. At the present time the courts are vigorously asserting their powers, now augmented by the Human Rights Act 1998, and there seems to be no danger of another judicial relapse.

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[59] Port, *Administrative Law*, appeared in 1929. But there was no full-scale treatment of judicial review until Professor de Smith's pioneering work, *Judicial Review of Administrative Action*, was first published in 1959. The treatment in *Halsbury's Laws of England* was fragmentary and inadequate until a title on Administrative Law, by Professor de Smith and others, appeared in the 4th edn, 1973.

[60] 'Aylmer's Field', line 441.

[61] In 1915 Dicey published a short article on the *Rice* and *Arlidge* cases (below, pp. 408–9) entitled 'The Development of Administrative Law in England', 31 *LQR* 495. But this did not remove the misconceptions which he had caused.

[62] Below, p. 18.

[63] *Not Without Prejudice*, 96.