

## THE TASK OF ADMINISTRATIVE LAW\*

The widening area of what in effect is law-making authority, exercised by officials whose actions are not subject to ordinary court review, constitutes perhaps the most striking contemporary tendency of the Anglo-American legal order. The massive volumes of Statutory Rules and Orders, published annually since 1890,<sup>1</sup> testify to the pervasive domain of delegated legislation in Great Britain. The formulation and publication of executive orders and rules and regulations are in this country still in a primitive stage, which only serves to render more portentous the operation of these forms of law. But the range of control conferred by Congress and the State legislatures upon subsidiary law-making bodies, variously denominated as heads of departments, commissions and boards, penetrates in the United States, as in Great Britain<sup>2</sup> and the Dominions, the whole gamut of human affairs. Hardly a measure passes Congress the effective execution of which is not conditioned upon rules and regulations emanating from the enforcing authorities. These administrative complements are euphemistically called "filling in the details" of a policy set forth in statutes. But the "details" are of the essence; they give meaning and content to vague contours. The control of banking, insurance, public utilities, finance, industry, the professions, health and morals, in sum, the manifold response of government to the forces and needs of modern society, is building up a body of laws not written by legislatures, and of adjudications not made by courts and not subject to their revision. These powers are lodged in a vast congeries of agencies. We are in the midst of a process, largely unconscious and certainly unscientific, of adjusting the exercise of these powers to the traditional system of Anglo-American law and

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<sup>1</sup> See J. A. Fairlie, *Administrative Procedure in Great Britain*, 13 UNIVERSITY OF ILLINOIS, STUDIES IN SOCIAL SCIENCES No. 3 (Sept. 1925).

<sup>2</sup> See, e. g., Arthur Lourie, *Administrative Law in South Africa*, 44 S. A. L. J. 10 (1927).

courts. A systematic scrutiny of these issues and a conscious effort towards their wise solution are the concerns of administrative law. The broad boundaries and far-reaching implications of these problems may be indicated by saying that administrative law deals with the field of legal control exercised by law-administering agencies other than courts, and the field of control exercised by courts over such agencies.

But administrative law is hardly yet given *de jure* recognition by the English-speaking bar although the term has now established itself in the vocabulary of the United States Supreme Court. Until very recently even scholars treated it as an exotic. Thus, Dicey in his classic "Law of the Constitution," thanked God like a true Briton that *le droit administratif* of the tyrannized French had no counterpart on English soil. But in his "Introduction" to the last edition, he showed himself painfully aware that the channel which separates tendencies in English law from the system and precepts which the French call *droit administratif* is constantly narrowing. Before that "Introduction" reached the public, he had made still handsomer concessions. Again like a true Briton, facing facts eventually and not forever denying them, Dicey was jolted by the famous *Arlidge* case<sup>3</sup> into writing an exposition of its deep significance. The very title of his essay—"The Development of Administrative Law in England"<sup>4</sup>—must have roused many an unsuspecting reader. The development to which Dicey so strikingly directed attention in April, 1915, has since then luxuriantly unfolded, and English writers<sup>5</sup> have analyzed acutely the deep forces it reflects. Yet the Lord Chief Justice only the other day<sup>6</sup> inveighed against it as though it were an alien and wholly avoidable phenomenon!

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<sup>3</sup> Local Government Board v. *Arlidge*, [1915] A. C. 120.

<sup>4</sup> 31 LAW Q. REV. 148 (1915).

<sup>5</sup> See, for instance, CARR, *DELEGATED LEGISLATION* (1921); Sir Lynden Macassey, *Law-making by Government Departments*, 5 JOURNAL OF COMPARATIVE LEGISLATION, 3d series (1923) 73; Laski, *Growth of Administrative Discretion*, 1 JOURNAL OF PUBLIC ADMINISTRATION 92; Sir Josiah Stamp, *Recent Tendencies Towards Devolution of Legislative Functions to the Administration*, 2 *ibid.* 23; Introductory Chapter by J. H. Morgan in G. E. ROBINSON, *PUBLIC AUTHORITIES AND LEGAL LIABILITY*.

<sup>6</sup> See London Times, Dec. 11, 1926, p. 14.

In the United States, the pioneer scholarship of Frank J. Goodnow and Ernst Freund long remained caviar not merely to the general. Their work was for many years unheeded by bench and bar, a fact which is not too surprising when it is recalled that legal education hardly took note of it. But the prophetic scholar has his amused revenge when practice propounds theory. Necessity *is* the mother of discovery. And so, this illegitimate exotic, administrative law, almost overnight overwhelmed the profession, which for years had been told of its steady advance by the lonely watchers in the tower. Hardly a volume of bar association proceedings is now without some reference to this new phenomenon. Brute fact compels resort to despised philosophy. Isolated cases, in their multitudinous and varying recurrence, require correlation and creative direction. Thus, we find this weighty recognition of the exigency of our problem in Senator Root's presidential address to the American Bar Association for 1916:

“There is one special field of law development which has manifestly become inevitable. . . . The Interstate Commerce Commission, the state public service commissions, the Federal Trade Commission, the powers of the Federal Reserve Board, the health departments of the states, and many other supervisory offices and agencies are familiar illustrations. Before these agencies the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight. There will be no withdrawal from these experiments. We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrong-doing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation. Yet the powers that are committed to these regulating agencies, and which they must have to do their work, carry with them great and dangerous opportunities of oppression and wrong. If we are to continue a government of limited powers, these agencies of regulation must themselves be regulated. The limits of their power over the citizen must be fixed and determined. The rights of the citizen against them must be made plain. A system of administra-

tive law must be developed, and that with us is still in its infancy, crude and imperfect.”<sup>7</sup>

Similar appeals have been made by Charles E. Hughes,<sup>8</sup> Mr. Justice Sutherland<sup>9</sup> and William D. Guthrie. One passage in Mr. Guthrie’s address before the New York State Bar Association in 1923 strikingly illustrates how far we have traveled from the conventional conception entertained by English-speaking lawyers of *droit administratif*, as an essential denial of the Rule of Law:

“I am not prepared to say that the time has yet come for the creation of special courts similar to the French administrative courts, although I am convinced that this will ultimately be found to be advisable.”<sup>10</sup>

One could hardly find more emphatic evidence, than this utterance by a distinguished common law lawyer, of the gradual approach of different systems of law in fashioning similar covenants and similar swords in order to regulate similar situations.

It is idle to feel either blind resentment against “government by commission” or sterile longing for a golden past that never was. Profound new forces call for new social inventions, or fresh adaptations of old experience. The “great society,” with its permeating influence of technology, large-scale industry, and progressive urbanization, presses its problems; the history of political and social liberty admonishes us of its lessons. Nothing less is our task than fashioning instruments and processes at once adequate for social needs and the protection of individual freedom. The vast changes wrought by industry during the nineteenth century inevitably gave rise to a steady extension of legal control over economic and social interests. At first, state intervention manifested itself largely through specific legislative directions, depending for enforcement generally upon the rigid, cumbersome

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<sup>7</sup> 41 A. B. A. REP. (1916) 355, 368-69.

<sup>8</sup> Charles E. Hughes, *Some Aspects of the Development of American Law*, 39 N. Y. B. A. REP. (1916) 266, 269-70.

<sup>9</sup> George Sutherland, *Private Rights and Government Control*, 42 A. B. A. REP. (1917) 197.

<sup>10</sup> 46 N. Y. B. A. REP. (1923) 169, 187; GUTHRIE, *THE LEAGUE OF NATIONS AND MISCELLANEOUS ADDRESSES* 352, 377-78.

and ineffective machinery of the criminal law. By the pressure of experience, legislative regulation of economic and social activities has turned to administrative instruments. Inevitably this has greatly widened the field of discretion and thus opened the door to its potential abuse, arbitrariness. In an acute form and along a wide range of action, we are confronted with new aspects of familiar conflicts in the law between rule and discretion.

Because of the danger of arbitrary conduct in the administrative application of legal standards (such as "unreasonable rates," "unfair methods of competition," "undesirable residents of the United States"), our administrative law is inextricably bound up with constitutional law. But after all, the Constitution is a *Constitution*, and not merely a detailed code of prophetic restrictions against the ineptitudes and inadequacies of legislators and administrators. Ultimate protection is to be found in the people themselves, their zeal for liberty, their respect for one another and for the common good—a truth so obviously accepted that its demands in practice are usually overlooked. But safeguards must also be institutionalized through machinery and processes. These safeguards largely depend on a highly professionalized civil service, an adequate technique of administrative application of legal standards, a flexible, appropriate and economical procedure (always remembering that "in the development of our liberty insistence upon procedural regularity has been a large factor"<sup>11</sup>), easy access to public scrutiny, and a constant play of criticism by an informed and spirited bar. They are still to be achieved, for we have hardly begun to realize deeply their need. Particularly in the field of so-called minor interests, administrative technique and traditions demand study and improvement. The vast interests confided to bodies like the Interstate Commerce Commission, the Federal Trade Commission and State public service commissions, just because they are so vast, are not likely to suffer much nor long from incompetence or injustice in our legal system. The incidence of law, as former Secretary Nagel has reminded us,<sup>12</sup> is most significant at the lowest point

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<sup>11</sup> Brandeis, J., dissenting in *Burdeau v. McDowell*, 256 U. S. 465, 477 (1921).

of contact. The experience of the mass of men with law's relation to their small concerns is the most important generator of that confidence in law which is its ultimate sanction.

Undoubtedly, a reading of the current law reports gives a just sense of the confusion and incoherence, of the rampant empiricism, which characterize the present state of administrative law. But we must be on our guard against an undue quest for certainty, born of an eager desire to curb the dangers of discretionary power. For the problem of rule *versus* discretion is far broader than its manifestations in administrative law. There are fields of legal control where certainty—mechanical application of fixed rules—is attainable; there are other fields where law necessarily means the application of standards—a formulated measure of conduct to be applied by a tribunal to the unlimited versatility of circumstance.<sup>13</sup> To be sure, the application of a standard to individual cases opens the door to those abuses of carelessness and caprice and oppression against which we cannot be too alert. But resort to standards avoids the oppression and injustice due to abstractions (*e. g.*, “freedom of contract” instead of a working girl), whereby individual instances are tortured into universal molds which do not fit the infinite variety of life.

In administrative law we are dealing pre-eminently with law in the making; with fluid tendencies and tentative traditions. Here we must be especially wary against the danger of premature synthesis, of sterile generalization unnourished by the realities of “law in action.” Administrative law is also markedly influenced by the specific interests entrusted to a particular administrative organ, and by the characteristics—the history, the structure, the enveloping environment—of the administrative to which these interests are entrusted. Thus, “judicial review” and “administrative discretion” cannot be studied in isolation. “Judicial review” is not a conception of well-defined scope, operative wherever the courts review the action of administrative bodies. The

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<sup>13</sup> See ERNST FREUND *et al.*, GROWTH OF AMERICAN ADMINISTRATIVE LAW 175, 185-6.

<sup>14</sup> See Roscoe Pound, *Administrative Application of Legal Standards*, 44 A. B. A. REP. (1919) 445.

problems subsumed by "judicial review" or "administrative discretion" must be dealt with organically; they must be related to the implications of the particular interest that invokes a "judicial review" or as to which "administrative discretion" is exercised. Therefore, a subject like "judicial review," in any scientific development of administrative law, must be studied not only horizontally, but vertically, *e. g.*, "judicial review" of Federal Trade Commission orders, "judicial review" of postal fraud orders, "judicial review" of deportation warrants. For judicial review in postal cases, for instance, is colored by the whole structure of which it forms a part, just as in land office cases, or in immigration cases, or in utility valuations, or in insurance license revocations, it derives significance from the nature of the subject matter under review as well as from the agency which is reviewed.

What we need, above all else, is to know what is happening by objective demonstration of intensive scientific studies, instead of merely speculating, even wisely speculating, or depending on partisan claims of one sort or another. Research to no small measure is a painful means of proving what the insight of a few suspects or feels. There is need also for a technique of appraising the work of administrative agencies, and of establishing the utility of such scientific appraisals. The generalizations, the philosophizing will gradually emerge from specific studies. Intensive studies of the administrative law of the States and the Nation in practice will furnish the necessary prerequisite to an understanding of what administrative law is really doing, so that we may have an adequate guide for what ought to be done. Here, as in other branches of public law, only here probably more so, we must travel outside the covers of lawbooks to understand law.

Only a physiological study of administrative law in action will disclose the processes, the practices, the determining factors of administrative decisions, and illumine the relation between commissions and courts, now left obscure by the printed pages of court opinions. Thanks to the Commonwealth Fund, Mr. Henderson gave us such a study of the Federal Trade Commission,<sup>14</sup> and Professor Patterson has now laid bare the complicated

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<sup>14</sup> HENDERSON, FEDERAL TRADE COMMISSION (1924).

system of administrative control of the stupendous human and financial interests that are implied in the business of insurance.<sup>15</sup> While the tendencies with which we are concerned are new in their pervasiveness and proportions, the long story of state regulation of insurance serves to remind us that these seemingly very modern problems are rooted in history. The shaping of our administrative law thus calls for students trained in the common law and familiar with its history. But, in addition, the inquirer must have a sympathetic understanding of the major causes which have led to the emergence of modern administrative law, and must be able to move freely in the world of social and economic facts with which administrative law is largely concerned. Above all, he must have a rigorously scientific temper of mind. For we are seeking the formulation of a body of law based upon objective criteria when, in truth, studies like Professor Patterson's must themselves largely formulate and even create the criteria which scientific inquiry assumes.

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<sup>15</sup> In a forthcoming study, also aided by the Commonwealth Fund, on The Insurance Commissioner, Harvard University Press.