Fashioning an Administrative Law System

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> For forms of government, let fools contest:
> Whate'er is best administer'd is best...

So wrote the poet over two hundred years ago.[1] It cannot be denied that there are those at the present day who share his view. At the same time, many people, not all of them fools by any means, would take sharp issue with Pope's couplet. For them, administration is only a means, not an end; far more important than mere efficiency in the operation of government are the ends towards which government is directed. To them the form of a particular government is of supreme consequence. Rejecting the view that administration, in and of itself, is the "be all and end all" of politically-organized society, they also repudiate the notion that administration should be a law unto itself. Administrative power must, like all other governmental power, be exercised in subordination to law. Even though they may concede that such power must, under contemporary conditions, be conferred to an ever-increasing degree, they insist that it must be subject to the checks and balances which should restrain all exercises of governmental authority.

To adherents of the view expressed in Pope's couplet, those who reject their simple notion that administration must be the *primus motor* in the polity, possessed of any and all powers which at any time it thinks it requires, are the victims of ignorant and insular prejudice. They consider themselves to be supporters of the most modern and up-to-date political theory, destined to be the "wave of the future." Those who look to representative assemblies to fetter administrative prerogative and courts to subject it

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[1] A. Pope, *Essay on Man* (1733) III, 303. See E.S. Corwin, *Constitutional Revolution Ltd.* (Claremont, California: Claremont Colleges, 1941) 1.

to the restraints of law are said to advocate an outmoded conception of the state, which leads to governmental inefficiency, at best, and to anarchy, at worst. To these modern advocates of a theory of absolutism much older than they care to admit, the rule of law over men is to be replaced by the administration of things. Unrestrained administration is to take the place of law as the instrument of social control: "The more consistently the principle of authoritative regulation, excluding all references to an independent autonomous will, is carried through, the less room remains for an application of the category of law."[2] In their state, there is to be no law and but one rule of law, namely, that there are no laws but only administrative orders for the individual case.[3]

This extreme view of the proper place of administration in the political order has not by any means been confined to the totalitarian part of the world. Not so many years ago it was common for Anglo-Americans themselves to look on their system as an obsolete survival of an easier age, when every practical activity was embarrassed by cumbersome ceremonial and checks. "Not so long ago," Justice Felix Frankfurter informs us, "it was fashionable to find our system of checks and balances obstructive to effective government." "It was easy to ridicule that system as outmoded — too easy."[4] More recently we have come to see that the system of restraints on government laid down by the American Constitution is not a mere dogmatic product of 18th-century political theory. Developments in other parts of the world highlighted the dangers inherent in uncontrolled administration: "The experience through which the world has passed in our own day has made vivid the realization that the Framers of our Constitution were not inexperienced doctrinaires."[5] The instructive example of those governments we disparage as totalitarian, with their omnipotent administrations unrestrained by checks on their all-pervasive activities, has certainly not led us to desire to create our administration in their image. Contemporary foreign experience may be inconclusive on many points; but it certainly counsels us that vast administrative powers are consistent with free government only when effective control of them is lodged elsewhere than in the administration which exercises them.

In a constitutional republic based on common-law concepts and traditions like the United States, there is a twofold control of administrative authority from outside the executive branch itself. First, there is the vital task of oversight which must be performed by the legislature. As the source of delegated administrative power, the legislature can and must exercise direct supervision over the manner in which such power is employed. Legislative control must necessarily be based on policy, not legality. It must be complemented by legal control, to ensure that administrative authority is exercised in accordance with law. Indeed, the very essence of the rule of law as it has developed in English-speaking countries has been the subordination of administration to the law of the land as administered by the ordinary courts. The historic phrase "rule of law" epitomizes the distinguishing character of our political society. When the blood, sweat, and toil of our forbearers made that phrase the basis of our

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[2] E. Paschukanis (a leading Soviet jurist) quoted in E. Bodenheimer, *Jurisprudence* (New York: McGraw-Hill, 1940) 90.

[3] R. Pound, "Fifty Years of Jurisprudence" (1938) 51 *H.L.R.* 781.

[4] *Youngstown Sheet & Tube Co.* v. *Sawyer* (1952), 343 U.S. 579 at 593.

[5] *Ibid.*

polity, they were not indulging in mere rhetorical flourish. Supremacy of law has meant the rejection of rule by administrative fiat. Every act of administration may be challenged by an appeal to law, as finally pronounced by the highest court.

From a broader perspective, we need not necessarily agree with Lord Acton that great men are almost always bad men;[6] but our public law should clearly be based on some such assumption. In fact, our whole constitutional structure has been erected on the assumption that the King not only is capable of doing wrong but is more likely to do wrong than other men if he is given the chance. We must not judge those in possession of governmental power more favourably than did our ancestors, presuming that they can do no wrong. On the contrary, if there is any presumption, it should be against the holders of power, and increasing as the power increases. In the field of administrative law, a historic responsibility can never make up for the want of legal responsibility.

What Should an Administrative Law System Include?

In recent years the need for legal controls on administrative power has come to be stressed even in countries with a tradition of well-nigh absolute administration. In 1986, I was invited to give a series of lectures on administrative law at four Chinese law schools. My hosts were interested in the subject because the excesses of the Cultural Revolution had made them painfully aware of the vital role of law in controlling governmental authority. The Cultural Revolution gave almost literal effect to the cry of Shakespeare's Dick the Butcher: "The first thing we do, let's kill all the lawyers."[7] The Chinese legal system was all but destroyed, the law schools closed down, and the profession relegated to virtual legal limbo. Now, with the Maoist nightmare finally over, there began the painful effort to rebuild the society's legal foundations. Law schools were reopened and new ones founded. Increasingly, emphasis came to be placed on the establishment of legal controls on governmental action to ensure that the excesses of the later Maoist years would not be repeated. To my Chinese hosts, this necessitated the creation of a system of administrative law which would impose the necessary legal restraints.

Listening to the Chinese call for administrative law I was reminded of the words of an outstanding American jurist, Elihu Root, during the early days of the American administrative process:

> The powers that are committed to these [administrative] agencies and which they must have to do their work carry with them great and dangerous opportunities for 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 administrative law must be developed.[8]

[6] J. Acton, *Essays on Freedom and Power* (Boston: Beacon Press, 1949) 364.

[7] Shakespeare, *2 Henry VI*, Act IV, Sc. ii.

[8] 41 *Am. Bar Asso. Rep.* 356 at 369.

My Chinese visit gave me the unique opportunity of being what Dean Acheson once termed "present at the creation"[9] — this time of a new system of administrative law. What made this thought of more than academic consequence was the fact that Chinese jurists have already begun to move ahead with steps that could lead to the creation of the new system: texts on administrative law have begun to appear;[10] law schools have established departments of administrative law to teach students, professors, judges, and government officials what they consider essential administrative law principles; and, most important of all, the discussion of a program for separating the Communist Party from the state's administrative apparatus[11] and the undertaking of a project by a leading law school[12] to prepare procedure requirements to be imposed on Chinese administrative agencies.

The Chinese interest in creating a system of administrative law led me to rethink basic administrative law principles and, in particular, to consider how a country goes about fashioning an administrative law system. Specifically, what should a properly functioning system of administrative law include? What basic principles should be given effect by it in order to hold administrative action to the rule of law? Perhaps at the risk of oversimplification, I have concluded that a developed system of administrative law should, like the ancient geographical area about which Julius Caesar wrote, include three essential parts:

1. Limits on the powers that may be delegated to administrative agencies and adherence to ultra *vires* restraints on the exercise of those powers;

2. A requirement of fairness in dealings between the citizen and the administrative agency;

3. The principle that an administrative agency does not have the last word on any action taken by it; instead that the citizen be able to challenge the legality of such action by an independent tribunal.

The remainder of this paper is devoted to a more detailed discussion of these three essential elements. The materials illustrating them are drawn from American administrative law, and the systems of other English-speaking countries, as well as from French administrative law.

Delegations and Inherent Power

The second half of the last century is usually considered one of the least creative periods of American law. "One might," wrote Henry Adams, "search the whole list of Congress, Judiciary, and Executive during the twenty-five years 1870 to 1895, and find little but damaged reputation." "The period was poor in purpose and barren in

[9]D. Acheson, *Present at the Creation: My Years in the State Department*, 1st ed. (New York: Norton, 1969).

[10]For example, Ying and Chu, *Outline of the Study of Administrative Law* (Beijing, 1985). Mention should also be made of the 1985 publication in Beijing of a translation of my *Administrative Law* (1976).

[11]*New York Times* (21 June 1987) 3.

[12]China University of Political Science and Law, Beijing.

results."[13] One important result of the period, however, which the famous contemporary skeptic could not possible estimate, was the rise of the modern administrative agency. It was in 1887 that the Interstate Commerce Commission — the archetype of the American administrative agency — was established.

The creation of the ICC by the *Interstate Commerce Act* of 1887 was based on the root principle of American administrative law: "An administrative agency...is a creature of the legislature."[14] This means that agencies are limited to the powers delegated to them by the legislature. The relationship of an administrative agency to its governing statute is comparable to that of a corporation to its charter; as the corporation is to its charter, the agency is to its enabling legislation.

The basic doctrine of administrative law, as of corporation law, is thus the doctrine of *ultra vires*. The jurisdictional principle is the root principle of administrative power. The statute is the source of administrative authority as well as of its limits. If an administrative act is within statutory limits (*intra vires*) it is valid; if it is outside them (*ultra vires*), it is invalid. No statute is needed to establish this; it is inherent in the constitutional position of American agencies and courts. It follows that if an agency possesses substantive powers, it does so because of a delegation from the legislature. There is no inherent administrative power to issue regulations or take other action deemed by the administrator to be in the public interest. "The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress."[15]

This principle, which rejects the notion of inherent administrative power, is observed in Britain and the other English-speaking countries.[16] But it has been rejected in the French system, where the administrator possesses the constitutional *pouvoir réglementaire* to make regulations, even though such power has not been delegated by the legislature.[17] A general rule-making authority has been specifically derived from the French executive's "inherent powers." This was the term used by the *Conseil d'Etat* (the supreme French administrative court) in a famous case in which executive power was expressly stated to be based on the constitutional charge to ensure the execution of the laws[18] — a holding, it should be noted, directly contrary to that of the U.S. Supreme Court in the leading analogous American case.[19]

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[13]H. Adams, *The Education of Henry Adams*, (1907) (New York: Modern Library, 1931) 294.

[14]*Brown County* v. *Department of Health and Social Services* (1981), 307 N.W. 2d 247 at 250 (S.C. Wis).

[15]*Chrysler Corp.* v. *Brown* (1979), 441 U.S. 281 at 302.

[16]See H.W.R. Wade, *Administrative Law*, 4th ed. (Oxford: Clarendon Press, 1977) 709.

[17]*Ibid.*

[18]Labonne (8 August 1919). The same principle governs today. See J. Rivero, *Droit Administratif*, 11th ed. (Paris: Dalloz, 1985) 57-62.

[19]*Youngstown Sheet & Tube Co.* v. *Sawyer* (1952), 343 U.S. 579.

Why, it may be asked, should we include the principle against inherent administrative power as one of the foundations of the system of administrative law that we are fashioning, when one of the leading Western systems — the *droit administratif* — has been built on a rejection of that principle?

It is not enough today to answer this question with a "Dicey-like" denial of *droit administratif's* consistency with the rule of law[20] and hence its lack of relevancy to a comparative discussion. To the contemporary Anglo-American administrative lawyer, however, the French experience does not counsel against the principle denying inherent administrative power. The abuses that have occurred in the French executive's exercise of the inherent *pouvoir réglémentaire* [21] should caution the comparative lawyer against following the *droit administratif* in this respect.

This caution is even more apposite when we consider the subject of delegation of powers. Students of the French system, including the present writer, have pointed out the dangers inherent in the authority of the French executive to promulgate so-called "decree laws."[22] As recently defined, the decree-law technique is that of passing "laws of plenary powers, by which Parliament confers on a government, for a period of time, the power to accomplish through regulations, all changes in the laws in force which redressing the situation [calling forth delegation] may require."[23] Since the regulations issued may amend statutes themselves, they have the full character of laws passed by the legislature: "That is why practice gives it the name of decree-law."[24] If ever laws provided for wholesale delegations, they were the statutes authorizing decree-laws. Those laws were a result of a failure of legislative nerve in the post-World War I period — itself a result of the widespread belief that the legislator was no longer able to deal adequately with the successive crises of the day.

The French themselves came to realize that the widespread use by the executive of the authority to promulgate decree-laws was among the factors that facilitated the transition to the totalitarian Vichy regime in 1940. The desire to prevent a repetition of such delegations running riot in the post-war France led to inclusion in the Constitution of 1946 of a formal prohibition against the delegation of legislative power. "The Parliament alone may vote laws," reads Article 13 of that instrument. "It may not delegate that right."

The intent of Article 13 was to prohibit the decree-law procedure.[25] In practice, however, the situation did not change. The very first parliament under the Constitution of 1946 passed an act which authorized the executive to take by decree any measures deemed necessary to deal with the economic situation. As in the decree-law delega-

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[20]A.V. Dicey, *Law of the Constitution*, 8th ed. (London: MacMillan, 1915).

[21]See B. Schwartz, *French Administrative Law and the Commonlaw World* (New York: University Press, 1954) 92-101.

[22]*Ibid.* at 97-99.

[23]Rivero, *supra*, note 18 at 58.

[24]*Ibid.* at 57.

[25]*Ibid.* at 59.

tions, it was expressly stated that the decrees promulgated might modify or replace existing legislative texts. More recently the French Constitution of 1958 appears specifically to authorize the decree-law practice.[26]

The French decree-law practice had no difficulty in passing constitutional muster. The *Conseil d'Etat* specifically rejected the claim that a law authorizing decree-laws provided for an unconstitutional delegation of power to the executive.[27] The same was not true in the American system, where a Congressional counterpart of the French statutes authorizing decree-laws was held invalid in *Schechter Poultry Corp.* v. *United States*. [28]As interpreted by the U.S. Supreme Court, the *National Industrial Recovery Act* of 1933, like the French laws we have been considering, empowered the executive, in the exercise of its rulemaking authority, to take any measures that it deemed necessary to aid in the economic recovery of the nation. Under the *Recovery Act* "the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered."[29] As Mr. Justice Benjamin Cardozo stated, "This is delegation running riot." "No such plenitude of power is capable of transfer."[30]

Two things should be borne in mind in assessing the present impact of the *Schechter* decision. The first is the widespread assumption that the *Schechter* restrictions on delegation are essentially "moribund."[31] It should, however, be noted that in several cases the American court went out of its way to indicate that the restrictions on delegation may not be entirely *passé*. In one case, the court implied that "the requirements of *Schechter*" were still hurdles for statutes to overcome.[32] In two more recent cases, the court expressly restated the *Schechter* requirement as a limitation on delegations.[33] Both judgements declared that a delegation of power must be accompanied by discernible standards — a view reinforced by a 1980 statement that a 'sweeping delegation of legislative power' that it might be unconstitutional under the court's reasoning in...*Schechter*."[34]

Even more significant may be two recent opinions of Justice William Rehnquist, in which he asserted that a 1970 statute contained an invalid delegation. As Rehnquist put it, "I have no doubt that the provision at issue...would violate the doctrine against uncanalized delegations of legislative power."[35] The Rehnquist opinions may sound like a voice from another world in their reliance on doctrine so seemingly outmoded.

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[26]*Ibid.* at 66.

[27]Arrighi (6 November 1936).

[28](1936), 295 U.S. 495.

[29]*Ibid.* at 542.

[30]*Ibid.* at 553.

[31]Marshall J., dissent in *National Cable Television Association* v. *United States* (1974), 415 U.S. 336 at 353.

[32]*Ibid.* at 342.

[33]*Eastlake* v. *Forest City Enter.* (1976), 426 U.S. 668 at 675; *F.E.A.* v. *Algonquin S.N.G. Inc.* (1976), 426 U.S. 548 at 559.

[34]*Industrial Department* v. *American Petroleum Institute* (1980), 448 U.S. 607.

[35]*Ibid.* at 675. The second opinion referred to was Justice Rehnquist, dissenting in *American Textile Mfrs Inst.* v. *Donovan* (1981), 452 U.S. 490 at 543.

Yet, as Rehnquist points out, in recent years, "a number of observers have suggested that this Court should once more take up its burden of ensuring that Congress does not unnecessarily delegate important choices of social policy to politically unresponsive administrators."[36] Calls for revitalization of the delegation doctrine have been heard from those on both extremes of the political spectrum, including those at its opposite end from Rehnquist.[37] The Rehnquist opinions may indicate that such calls will be sounded increasingly within the Marble Palace itself — especially now that its author has himself been elevated to the chief justiceship.

The second point to be made here is that constitutionality is not necessarily synonymous with desirability. The French decree-law practice may, unlike the delegation stricken in *Schechter*, be constitutional. But that does not mean that such wholesale delegation is consistent with the requirements of a sound administrative law system. In England, as in France, the delegation of what the American system would consider excessive power raises no constitutional problem in view of the doctrine of Parliamentary supremacy. Certainly even the most extreme English delegations — those under the so-called Henry VIII clause[38] — were not subject to constitutional challenge. But the Henry VIII-type of delegation was subjected to such uniform criticism by English jurists that Parliament gave up the practice and the Henry VIII clause has all but disappeared from the legislation.[39]

Hence, despite the French example, then, we must conclude that the principle that an administrative law system should impose limits on the powers that may be delegated by the legislature remains sound. One can go further and say that the French experience proves the validity of the principle. It was the decree-law practice that made the transition to the government of Vichy in 1940 less difficult than it might otherwise have been. "The developments already discussed show us that the serious alterations made in the Constitution in July 1940 were not without their precursors."[40] The vesting of complete legislative power in the Chief of State in Vichy was not such an innovation for a country already accustomed to conferring plenary powers on the executive to promulgate decree-laws. "After having again and again delegated its legislative powers, Parliament could, without the risk of shocking public opinion, attempt to delegate its constituent power and by this process destroy the Constitution by quasi-constitutional means."[41]

True, the vesting of plenary powers in the leaders of Vichy was not the same thing as conferring them on the leaders of the Third Republic, whose mandate in office depended on the confidence of the nation's elected representatives. Personal confidence in the delegate is, however, no answer to the question of restrictions on

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[36] *Industrial Department* v. *American Petroleum Institute* (1980), 448 U.S. 607 at 686.

[37] See for example W.O. Douglas, *Go East Young Man* (1974) 217; J.S. Wright, "Beyond Discretionary Justice" (1972), 81 *Y.L.J.* 575 at 582-86.

[38] See B. Schwartz, *Law and the Executive in Britain* (New York: New York University Press, 1949) at 57-61.

[39] *Ibid.* at 61.

[40] M. Waline, *Traite élémentaire de droit administratif*, 6th ed. (Paris: Sirey, 1951) 29.

[41] M.A. Sieghart, *Government by Decree* (London: Stevens & Sons, 1950) 303.

delegations. "It is not your dictatorship of which I am afraid, Mr. Prime Minister," stated a legislative opponent of one of the laws conferring on the French government the authority to promulgate decree-laws. "Other men may replace you."[42]

Fundamental Fairness

The second vital requirement of a system of administrative law is that which the U.S. Supreme Court has recently termed "fundamental fairness"[43] between government and citizen. This means essentially that, before an administrative decision adversely affecting an individual is made, he should be given notice of what may be done and afforded an opportunity to show why the decision should not be made. In the American system this requirement of fundamental fairness rests on an express constitutional foundation — the Due Process Clause. This means that the right to the "fundamentals of fair play"[44] in American administrative law is more than a hortatory principle; it is a basic constitutional right. The literal meaning of due process is "fair procedure," guaranteeing that the state will treat individuals fairly. No person is to be deprived of life, liberty, or property without an opportunity to be heard in defense of his rights.[45] The U.S. Supreme Court has said that this is a principle of universal obligation.[46]

Procedural due process is essentially a requirement of notice and hearing. "Notice and opportunity to be heard are fundamental to due process of law."[47] Before an American administrative agency takes action that adversely affects particular rights and obligations, those affected must be given notice and an opportunity to present their side of the case in a full and fair hearing. But more is required of agencies than minimal compliance with the "hear the other side" principle. Building on the due process foundation, American courts have constructed an imposing edifice of formal adjudicatory procedure. The consequence has been extensive judicialization of the administrative process. Administrative procedure in the United States has acquired many of the attributes of courtroom procedure.

The right to fair play is, however, far older than the American Constitution. Indeed, the adversary hearing tradition goes back to the very origins of Anglo-American law. "When we speak of *audi alteram partem* — hear the other side — we tap fundamental precepts that are rooted deep in Anglo-American legal history."[48] That "a party is not to suffer in person or in purse without an opportunity of being heard" is the oldest established principle in Anglo-American administrative law.[49] In 1723, an English judge traced the principle to divine law itself: "even God himself did not pass sentence

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[42]Quoted in *ibid.* at 308.

[43]*Walters* v. *National Association of Radiation Survivors*, 473 U.S. 305 (1985).

[44]*FCC* v. *Pottsville Broadcasting Co.* (1940), 309 U.S. 134 at 143.

[45]See *Ray* v. *Norseworthy* (1875), 23 Wall. 128 at 136 (U.S.).

[46]*Earle* v. *McVeigh* (1876), 91 U.S. 503 at 510.

[47]*Joint Anti-Fascist Refugee Committee* v. *McGrath* (1951), 341 U.S. 123 at 178.

[48]In *Re. Andrea B.* (1978), 405 N.Y.S. (2d) 977 at 981 (Fam. Ct.).

[49]*Painter* v. *Liverpool Gas Co.* (1836), 3 Ad. & El. 433 at 449 (K.B.).

on Adam before he was called on to make his defence." "Adam (says God) where art thou? Has thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat?"[50]

This means that the right to fundamental fairness need not be based on constitutional provisions. English judges do not have any formal constitutional provision on which to base their law of administrative procedure. But this has not stopped them from imposing procedural requirements on administrative action. They have accomplished this through the concept of "natural justice," which thus "plays much the same part in British law as does 'due process of law' in the Constitution of the United States."[51]

Of course, the natural-justice concept poses difficulties if it is used as the foundation for the law of administrative procedure. In the first place, the term itself contains a logical inconsistency: "justice is far from being a 'natural' concept. The closer one gets to a state of nature, the less justice does one find."[52] Then, too, as Lord Reid pointed out in his now-classic *Ridge* v. *Baldwin* opinion, "opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless."[53] But that does not mean that natural justice is an unworkable concept in administrative law. Referring to the view that natural justice is meaningless because it lacks precision, Lord Reid counters, "I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist."[54] A similar vagueness in the constitutional concept of due process has not prevented the American judges from building their law of administrative procedure on it. The same is true in English administrative law.

Even more interesting in some respects has been the comparable experience in French administrative law. As all comparative jurists know, France is the home *par excellence* of the civil law — that system which "rests upon the absolute sovereignty of the written law"[55] and in which legal principles are deduced from the law laid down by the legislator. Despite this the *Conseil d'Etat* has imposed the *audi alteram partem* rule on the French administration even where no procedures were required by any written text. It has done so by a natural-law approach not unlike that followed by the English judges. Instead of "natural justice," the French tribunal has relied on what it has called the general principles of law. Since the Liberation, the *Conseil d'Etat* has affirmed the existence of these principles and has ruled that they have an obligatory character in French administrative law; administrative acts which violate them will be annulled.[56]

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[50]*R.* v. *University of Cambridge*, [1723] Str. 557 at 567 (K.B.).

[51]H.W.R. Wade, *Administrative Law*, 5th ed. (Oxford: Clarendon Press, 1982) at 413.

[52]*McInnes* v. *Onslow-Fane*, [1978] 1 W.L.R. 1520 at 1530.

[53][1964] A.C. 40 at 64.

[54]*Ibid.* at 64-65.

[55]R. Alibert, *Le controle jurisdictionnel de l'administration* (1926) 15.

[56]Rivero, *supra*, note 18 at 77-78.

The basic French approach in this respect was stated some years ago by the President of the judicial section of the *Conseil d'Etat*: "We consider that certain unwritten rules of law exist which have legislative status, and which consequently must be followed by those exercising administrative authority, so long as they have not been contradicted by a positive provision of the statute law."[57] Among these general principles is that of the right to be heard. "It requires the administration to institute an adversary procedure and to call forth the view of the individuals affected, before serious measures that modify their legal positions are taken, where the agency concerned bases such measures on certain grounds of complaint against such individuals."[58] Hence, as the *Conseil d'Etat* put it in an important case, "it results...from the general principles of law that are applicable even in the absence of a legal text that a penalty cannot be pronounced legally unless the individual concerned has been given an opportunity adequately to present his defence."[59]

Establishment of the right to fair procedure, with or without a constitutional foundation by both the Anglo-American and French systems is of great significance in our effort to state the essential requirements of an administrative law system. It indicates that fair procedure is a vital component of such a system, if not of the rule of law itself.

To be sure, the details of the procedural requirements which must be followed by administrative agencies will not necessarily be the same in different systems. Thus, in the United States the law has gone far to impose on the administrative process the main elements of judicial procedure and foreign observers at times confuse the principle federal agencies with the courts themselves.[60] The trend in this direction, as I explained to a Canadian audience a few years ago, has culminated in the creation of an administrative judiciary with a corps of independent judges set up to hear cases decided by the American administrative process.[61]

In the English and French systems, the basic theme is that once stated by Lord Shaw: the methods of administrative justice need not *ex necessitate* be those of courts of justice.[62] But both systems have imposed the basic requirements of fair procedure — if not the detailed demands of judicial procedure. Both English and French judges require administrative conformity to the fundamentals of fairness, from a requirement of adequate notice to one of reasoned decisions.[63]

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[57]M. Bouffandeau, Address on the occasion of the one hundred and fiftieth anniversary of the *Conseil d'Etat* (1950).

[58]*Ibid.* For a good discussion, see Maxime Letourneur, *Les principes generaux du droit dans la jurisprudence du Conseil d'Etat*, Conseil d'Etat, Etudes et documents (1951) 19.

[59]Avanne (26 October 1945).

[60]Compare Mulhearn v. Federal *Shipbuilding Co.* (1949), 66 A.2d 726 (S.C. N.J.).

[61]B. Schwartz, "Recent Developments in American Administrative Law" (1980) 58 *Can. Bar Rev.* 319 at 330

[62]*Local Government Board* v. *Arlidge*, [1915] A.C. 120 at 138.

[63]See B. Schwartz, *supra*, note 21 at 211.

Nor is it enough to deride the fashioning of a law of administrative procedure in the systems discussed as resort to a revival of "natural law."[64] Those who assert that a concept such as natural justice is a matter of judicial caprice fail to distinguish between the forms of justice and its underlying inherent principles. "It is one thing to depart from the procedure adopted at common law, and another, and a very different thing, to adopt a procedure which is inconsistent with the principles of natural justice on which the English common law is based."[65] As Roscoe Pound once pointed out, "there are certain fundamentals of just procedure which are the same for every type of tribunal and every type of proceeding."[66] It is for systems of administrative law to ensure adherence to these fundamentals — whether through the constitutional concept of due process or the ethico-legal device of natural justice or its French equivalent. "The heart of the matter," Justice Frankfurter reminds us, "is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights."

Independent Review

The final essential element of any administrative law system is that of provision for independent review of administrative action. In many ways, this is the most important of the administrative law requirements. All the other requirements become but "as sounding brass or a tinkling cymbal" if the administration has the last word on whether it has complied with them. If there were no independent review, the only practical restraint would be the self-restraint of the administrator. Such a result would be contrary to the rule of law itself. One is reminded here of the remark attributed to Napoleon: "I do not see how there could be property owners in France if a man could be deprived of his field by a mere administrative decision."

Some years ago, the U.S. Supreme Court "referred to the distinction between American law, in which one system of law courts applies both public and private law, and the practice in a Continental country such as France, which administers public law through a system of administrative courts separate from those dealing with private law questions."[71] It is well known that the French system of review by special administrative courts, was roundly condemned by A.V. Dicey. Indeed his famous denunciation of the *droit administratif* was largely based on the assertion that administrative action in France is not subject to any judicial control. "The slightly increasing likeness

[64]Paraphrase of Rochin v. *California* (1952), 342 U.S. 165 at 171.

[65]*R.* v. *Local Government Board*, [1914] 1 K.B. 160 at 176.

[66]R. Pound, *Administrative Law* (Pittsburgh: University of Pittsburgh Press, 1942) 75.

[67]*Joint Anti-Fascist Refugee Committee* v. *McGrath* (1951), 341 U.S. 123 at 170.

[68]For judicial use of the phrase, see *N.L.R.B.* v. *Robbins Tire Co.* (1947), 161 F. 2d 798 at 804 (5th Cir.).

[69]Compare *Fleming* v. *Moberly Milk Co.* (1947), 160 F. 2d 259 at 265 (D.C. Cir.).

[70]Quoted in M. Goldenberg, *Le Conseil d'Etat: juge du fait* (1932) 130.

[71]*Garner* v. *Teamster Local* (1953), 346 U.S. 485 at 495.

between the official law of England and the *droit administratif* of France must not conceal the fact that *droit administratif* still contains ideas foreign to English convictions with regard to the rule of law and especially with regard to the supremacy of the ordinary Law Courts."[72]

Dicey was quite correct in assuming that freedom of administrative action from all legal control is inconsistent with the rule of law. That does not mean, however, that the French system involves the negation of the constitutional principle. In France, as in the common law world, review of administrative action is available before the courts. That they are termed administrative courts instead of law courts does not make them any less judicial than the courts set up to render justice in cases involving individual citizens. "It is very true that at the outset the *Conseil d'Etat* was in large measure a servile instrument of the Emperor, and there was thus some basis for Dicey's criticism....But after 1872, when the *Conseil* became an independent court, his criticism no longer had any basis. Since that time the *Conseil*, as every Frenchman knows, has shown its independence with respect to the government and has continually extended its control over the conduct of administrative authorities until today almost any act of administrative authority...can be annulled if it is *ultra vires*."[73]

Hence, the third crucial requirement that should be included in an administrative law system — independent review — can be met by judicial review patterned on either the Anglo-American or French system. Provided that review is available by judges who are wholly independent of the active administration, it makes little difference whether they sit in the same courts which hear ordinary civil and criminal cases or in separate courts which hear only administrative law cases. One can go further and accept a system in which review of administrative action is available in an independent administrative tribunal. Here the problem of compliance with the third requirement may be more difficult, for it is harder for a non-judicial tribunal to be vested with the essential element of full independence. If, however, that element is present, the administrative review tribunal may be enough to satisfy the third requirement. I am thinking here of a body such as the Administrative Appeals Tribunal which has had the power to review most decisions of Australian administrative agencies since it was established under a 1975 statute.[74] It is not, however, enough that the administrative law system make provision for independent tribunals vested with the jurisdiction to review the legality of administrative acts. For the rule of law to prevail in the system, review must be available over virtually all administrative acts which adversely affect private rights and obligations. This means that, as the US Supreme Court has put it, judicial review is to be the rule, with nonreview the extremely rare exception.[75] This is true even where the legislature has indicated its apparent intent that the administrative decision is to be the last word on the matter and that there shall be no review.

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[72]Dicey, *supra* at note 20.

[73]Garner, "La conception anglo-americaine du droit administratif," in *Melanges Maurice Hauriou* (1929) 360.

[74]See Flick, Federal *Administrative Law* (Sydney: Law Book Co., 1983) 5.

[75]*Bowen* v. *Michigan Academy* 106 S. Ct. 2133.

In both Anglo-American and French administrative law, provisions purporting to oust jurisdiction are not interpreted literally. Review is available despite the preclusion provision. In such a case, the *Conseil d'Etat* has said that the preclusive language "does not have the effect of precluding the action to annul the grant of the license before the Council of State, an action available even in the absence of legislative provision therefor, the goal of which action is to ensure, in accordance with the general principles of our law, respect for the principle of legality."[76]

The courts in both the Anglo-American and French systems have bravely maintained that, in refusing to give literal effect to preclusive provisions, they were only interpreting the legislator's true intentions. In Lord Wilberforce's words in the leading case of this type, "The courts, when they decide that a 'decision' is a 'nullity', are not disregarding the preclusive clause....They are carrying out the intention of the legislature, and it would be misdescription to state it in terms of a struggle between the courts and the executive."[77] The disclaimer appears ingenuous. As Justice Oliver Wendell Holmes put it many years ago, "there is a plain and sufficient meaning for the words making their decision final — and that is that it shall be final where it is most likely to be questioned, in the courts."[78]

The real reason for the judicial refusal to read preclusion provisions literally is the devastating effect a different approach would have on the rule of law. To both the Anglo-American and French judges, the key factor is the overriding consideration "that administrative agencies and tribunals must at all costs be prevented from being sole judges of the validity of their own acts."[79] "What would be the purpose," asks Lord Wilberforce, "of defining by statute the limit of a tribunal's powers if, by means of a clause inserted in the instrument of definition, those limits could safely be passed?"[80] Giving literal effect to a preclusion provision, as Justice William O. Douglas once pointed out, "makes a tyrant out of every [administrative] officer." "He is granted the power of a tyrant though he is stubborn, perverse or captious. He is allowed the power of a tyrant though he is incompetent or negligent. He has the power...even though his decision is grossly erroneous."[81]

The English judges have used comparable language. An oft-quoted statement by Farwell, L.J., focuses on the fact that statutes delegating powers to administrative agencies lay down the limits within which those powers must be exercised: "the existence of the limit necessitates an authority to determine and enforce it: it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power

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[76]Lamotte (17 February 1950). For *Anglo-American cases see Shaughnessy* v. *Pedreiro* (1955), 349 U.S. 48; *Anisminic Ltd.* v. *Foreign Compensation Commission*, [1969] 2 A.C. 147.

[77]*Ibid.* at 208.

[78]*Pearson* v. *Williams* (1906), 202 U.S. 281 at 285.

[79]Wade, *supra*, note 51 at 605.

[80]*Anisminic Ltd* v. *Foreign Compensation Commission*, [1969] 2 A.C. 147 at 208.

[81]*United States* v. *Wunderlich* (1951), 342 U.S. 98 at 102.

to determine such limit at its own will and pleasure — such a tribunal would be autocratic, not limited."[82] Lord Denning made the same point, in even stronger language than that used by Justice Douglas, in a more recent case: "If tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end."[83]

To the English, as to the American judges, independent review is a constitutional fundamental on which the rule of law itself depends. "The supremacy of law," asserted Justice Louis Brandeis in a noted passage on review of agencies, "demands that there shall be opportunity to have some court decide whether an erroneous rule or law was applied and whether the proceeding in which facts were adjudicated was conducted regularly."[84] A more recent federal opinion goes even further, asserting that to frustrate the ability to obtain judicial redress would be to call into question the seriousness of American devotion to human rights and fundamental freedoms.[85] To construe a preclusion provision literally is to give the agency concerned a standing invitation to disregard the statutory requirements and to exceed the powers conferred. Only by making review widely available can we, in the already-quoted words of the *Conseil d'Etat*, "ensure, in accordance with the general principles of our law, respect for the principle of legality."[86]

Conclusion

I began this lecture by relating the desire of Chinese jurists to establish a system of administrative law in order to subject government to legal controls. This led me to an analysis of the three essential elements to be included in an administrative law system. These three elements have been included in the leading Western systems of administrative law, though with differences in detail, and jurists in those systems have characterized them as principle props of the rule of law itself. Yet, even if the essential elements of an administrative law system were to become a part of the formal law in a country like China, would that necessarily mean that the rule of law in the Anglo-American sense had become established in that country? Can the rule of law, indeed, exist in a system where all-pervasive power and prestige are vested in "the Party" which sits astride every aspect of the society and where there is no aspect of government or law removed from Party control?

Such a system gives poignant reality to a modified version of Dr. Johnson's famous couplet:

> How small of all that human hearts endure,
> That part which laws...can cause or cure.[87]

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[82] *R.* v. *Shoreditch Assessment Committee*, [1910] 2 K.B. 859 at 880.

[83] *R.* v. *Medical Appeal Tribunal*, [1957] 1 Q.B. 574 at 586.

[84] *St. Joseph Stockyards Co.* v. *United States* (1936), 298 U.S. 38 at 84.

[85] *Ralpho* v. *Bell* (1977), 569 F. 2d 607 at 626 (D.C. Cir.).

[86] *Supra*, note 76.

[87] Quoted in J. Wain, *Samuel Johnson* (New York: Viking Press, 1974) 275.

A system of administrative law enforced by independent courts may be an essential element of the rule of law. But such a system alone can scarcely be relied on to preserve us against harm. The rights of the individual can at best draw only limited strength from judicial guarantees. Courts can hardly be expected by themselves to preserve a society against its own excesses. It is no idle speculation to enquire which comes first, judicial enforcement of individual rights or a free and tolerant society. Must we, in Justice Robert Jackson's question, first maintain a system of free government to assure a free and independent judiciary, or can we rely on an aggressive, activist judiciary to guarantee free government?[88] Americans not infrequently forget the answer to this question. Without a doubt, the U.S. Supreme Court is of basic importance, particularly in molding public opinion to accept fully the implications of the rule of law; the law enunciated by it may have a definite educative as well as a normative effect. But it is the attitude of the society and of its organized political forces, rather than of its purely legal machinery alone, that is the controlling force in the character of free institutions.

The true relationship between a high court and the society in which it functions was stated on the 150th anniversary of the American Court, again by Justice Jackson: "However well the Court and its bar may discharge their tasks, the destiny of this Court is inseparably linked to the fate of our democratic system of representative government."[89] Is that not the way it should be? Democracy without the rule of law is a contradiction in terms. At the same time, judicial control, as we have evolved it, can be discharged only in a democratic society; it is that kind of society alone that is really willing to submit its conflicts to adjudication and to subordinate power to reason. Only in such a society can an administrative law system perform its basic function of protecting the individual against government.

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[88] R.H. Jackson, *The Supreme Court in the American System of Government* (New York: Harper, 1955) 81.

[89] (1940) 309 U.S. vii.