FOREWORD

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By FELIX FRANKFURTER †

Good wine needs no bush. But, since a cat may look at a king, one may, perhaps, express public appreciation of a solid contribution to scholarship.

Events, not men, have been the most powerful molders of Anglo-American law. To the extent that men have molded events, the great propulsions to legal development have come not from lawyers but from those outside the law who have changed the face of society, of which law is largely the mirror. Watt and Stephenson were much more responsible for undermining the dominantly feudal legal system expounded by Blackstone, than Bentham and Broughan. Edison and Ford have loosed forces more transforming to the law than did David Dudley Field and Mr. Justice Holmes. For the essential task of law—and its greatest triumph—is to devise peaceful accommodations, expressive of the dominant ideals of western democratic civilization, for the clash of interests and feelings in a dynamic society. Discordancy of law is largely due to the failure of legal processes to adapt themselves to changes in those interests and feelings. And this in turn is due partly to inertia and partly to lack of social inventiveness, but, above all, to the continuing habits of mind shaped by circumstances no longer relevant or only partly relevant. The erection of obsolete considerations into rigid rules characterizes all professions when pursued as ends in themselves, torn from the nourishing context of the society which they serve. But the consequences of such discordance between society and law are especially disastrous because of the peculiar rôle of law in society. These are generalities, but their implications at once summarize the history of modern Anglo-American administrative law and adumbrate its problems.

Since these issues touch off political feelings, they can, perhaps, best be studied in the unemotional atmosphere of their English manifestations. From which it will appear that administrative law is not the contrivance of self-seeking bureaucrats or the importation of a foreign institution by doctrinaire students. Science and technology cannot reshape society, while law maintains its Blackstonian essences. “The most distinctive indication of the change of outlook of the government of

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this country in recent times has been its growing preoccupation, irrespective of party, with the management of the life of the people."¹ Against the background of this basic alteration in the direction of British society the Macmillan Committee projected its classic Report on Finance and Industry. More recently Lord Macmillan took occasion to particularize this enveloping factor of Anglo-American law:

"The statute book is always a good index of the economic and social policies of any period, and its recent contents evidence the extraordinary growth of what are now officially known as the 'Public Social Services.'

"In contrast with former times Parliament now concerns itself with the regulation of the lives of the people from the cradle—indeed, even anti-natally—to the grave, and being unable itself to deal with all the details, it delegates to the Government departments the task of carrying out its policy by means of enumerable Statutory Rules and Orders. The most recent statistics (1933, Cmd. 4460) show that whereas the national expenditure under the Acts falling within this category was, in England, in 1900, £31,703,000, the figure for 1931 (or latest available year) was £429,854,000."²

Statistics are not succulent, but their meaning often reveals the nature of our sociological and legal problems. A few more figures may profitably be added to Lord Macmillan's. The public social service expenditure has increased from £0.19.2, per capita, in 1900, to £8.16.6, in 1934.³ "Between 1900 and 1934 total expenditure on the public social services increased nearly twelve times, and the expenditure per head of population increased over nine times."⁴

But this is merely a chapter of a longer history. The pace of social legislation both in England and here has doubtless been greatly accelerated since the twentieth century; it did not begin in 1901. While our Department of Labor is about to celebrate its twenty-fifth anniversary, the completion, last year, of Professor Sharfman's The Interstate Commerce Commission was an impressive reminder that the railroads have been under an administrative regime for half a century. Professor Goodnow had every justification for writing in 1893 that the "general failure in England and the United States to recognize an administrative law is really due, not to the non-existence in these countries of this branch of the law but rather to the well-known failure of English law-writers to classify the law."⁵ The Cullom Act of 1887 had a considerable body of forerunners in state legislation, and has itself become the

¹. REPORT, COMMITTEE ON FINANCE AND INDUSTRY (1931 Cmd. 3807) 4.
². 1 MACMILLAN, LOCAL GOVERNMENT LAW AND ADMINISTRATION (1934) xi-xii.
³. REPORT ON THE BRITISH SOCIAL SERVICES (1937) 53.
⁴. Id., at 54.
⁵. 1 GOODNOW, COMPARATIVE ADMINISTRATIVE LAW (1893) 6-7.
precursor of a vast network of national regulatory systems covering almost every field of economic enterprise and extended by every President and every Congress.

Administrative law has not come like a thief in the night. It is not an innovation; its general recognition is. As a result, we have had haphazard evolution instead of self-conscious direction. To be sure, that has been true of other branches of the law. As late as 1887 Sir Frederick Pollock had still to prove against "the weight of recent opinion" that the "Law of Torts . . . is a true living branch of the Common Law, not a collection of heterogeneous instances . . . " But the systematic development of the law of torts could prosper under the guidance of scholars like Ames, Holmes, Pollock, and Wigmore, without being distorted by political feelings. Since administrative law is enmeshed in affairs of government, the failure, with rare exceptions, to give it self-conscious direction has greatly hampered the effective response of society to some of its most exigent problems.

Traditional disregard of the existence of administrative law by bench and bar would have been sufficient restraint against its fruitful development. Unfortunately not only was it neglected, but, being deemed hostile to the Common Law, its very existence was denied. Few law books in modern times have had an influence comparable to that produced by the brilliant obfuscation of Dicey's *The Law of the Constitution*. Thirty years later, in his *Law and Opinion in England During the Nineteenth Century*, Dicey himself demonstrated the sociological sterility of his earlier chapter on the "Rule of Law." And ten years thereafter a course of decisions culminating in the *Arlidge* case made even Dicey face legal realities against which he was insulated in 1885. Generations of judges and lawyers were brought up in the mental climate of Dicey. Judgments, speeches in the House of Commons, letters to *The Times*, reflected and perpetuated Dicey's misconceptions and myopia. The persistence of the misdirection that Dicey had given to the development of administrative law strikingly proves the elder Huxley's observation that many a theory survives long after its brains are knocked out. As late as 1929 Lord Hewart attempted to give fresh life to the moribund unrealities of Dicey by garnishing them with alarm. Unfortunately, the eloquent journalism of this book carried the imprimatur of the Lord Chief Justice. His extravagant charges demanded authoritative disposition and they received it. The Report of the Lord Chancellor's Committee on Ministers' Powers, and its two supporting volumes, *Memo-

randa submitted by Government Departments and Minutes of Evidence, constitute, perhaps, the most illuminating analysis yet formulated of those processes of government which are the stuff of administrative law. After this Report it could no longer be gainsaid that controversies over a vast and sensitive range of human interest had long been committed, in the first instance and sometimes even in the last, to agencies other than the conventional courts, and had so to be committed if unchallenged social purposes were to be realized. At last real issues and most perplexing ones emerged. The wise extent of such commitments, how they were to be circumscribed, the means for their supervision, how to assure adequate administrators, the relation of administrative agencies to the legislature, to the judiciary and to the popular will—these were the problems that pressed for answer in myriad variations of their appearance. And there were no answers, certainly not out of hand. They had to come out of a critical continuous analysis of extensive experience and the gradual tentative synthesis of such analyses.

Dicey and Hewart crossed the Atlantic and they placed scholarship and authority behind uncritical American legal abstractions. Unfortunately the size, confusion, and complexity of the American legal scene, compared with the relative simplicity of the British situation, did not permit such an authoritative investigation and report as that made by the Lord Chancellor’s Committee, whereby here too a quietus would be put on the false issues of *The New Despotism*, the emergence of an indispensable administrative law frankly recognized, and its real problems generously faced. More than forty years ago Ernst Freund expressed the hope that the term, administrative law, “will become more familiar to the public, and especially to the legal profession, than it is at present, and that the subject itself will become one of the recognized branches of public law.” To this day administrative law has no rubric in the ordinary digests, and flickering cross-references to the subject first begin to appear in 220 United States Reports. Not until 280 United States Reports does the term appear to have established itself in the index. Yet the Supreme Court has in essentials been the ultimate dispenser of administrative law as truly as the great administrative courts of the Continent. For this I avouch several papers in this symposium. Digests and indices may not have caught up with fact, but the Supreme Court is certainly aware that a great stream of public law is flowing not entirely through the courts. Extra-judicial utterances on occasion vouchsafe us glimpses of judicial philosophy which seldom escape through the restraints of a collective opinion. In commenting on the work of his predecessor, Mr. Chief Justice Taft expressed with characteristic candor not only his

awareness of administrative law but also his understanding of its intimate relation to the workings of modern government:

"The Interstate Commerce Commission was authorized to exercise powers the conferring of which by Congress would have been, perhaps, thought in the earlier years of the Republic to violate the rule that no legislative power can be delegated. But the inevitable progress and exigencies of government and the utter inability of Congress to give the time and attention indispensable to the exercise of these powers in detail forced a modification of the rule. Similar necessity caused Congress to create other bodies with analogous relations to the existing legislative, executive, and judicial machinery of the Federal Government, and these in due course came under the examination of this court. Here was a new field of administrative law which needed a knowledge of government and an experienced understanding of our institutions safely to define and declare."

And the present Chief Justice was one of the first to recognize that administrative law arose out of

"a deepening conviction of the impotency of Legislatures with respect to some of the most important departments of law-making. Complaints must be heard, expert investigations conducted, complex situations deliberately and impartially analysed, and legislative rules intelligently adapted to a myriad of instances falling within a general class."  

After he became Chief Justice but before any political controversies were on the horizon, he indicated the reach of administrative law when he said: "A host of controversies as to private rights are no longer decided in courts."

Ultimately, then, the concerns of administrative law are not less than the power and resourcefulness of democratic constitutional government to fashion instruments and procedures capable of coping with some of the most perplexing but exigent problems of society. Legislative policies, under modern circumstances and in their different fields of operation, must, as the Chief Justice has recognized, be given concreteness and adaptation through administrative agencies. Considerable areas of discretion must inevitably, though in varying degree, be committed to these agencies, and, like all organisms, they must, in part evolve their own procedure. Therefore, as Mr. Justice Bradley as early as 1890 acutely

discerned,\textsuperscript{14} the development of American administrative law involves a potential conflict between legislature and the judiciary. In the latter's keeping are precious ultimate interests; but not less so are those entrusted to the administrative by legislatures. In humble realization by each of their respective functions lies in large measure the trembling hope for the maintenance of our democracy.

\textsuperscript{14} Bradley J., dissenting in Chicago, Milwaukee & St. Paul Ry. v. Minnesota, 134 U. S. 418, 462 (1890).