

The judges have carried through a silent revolution which has weakened the power of government and extended the role of the courts.  
But it is by no means all bad news.

Stephen Sedley

## Administrative Law: A Tsar is Born?

So far as Britain can be said to have a constitution, it is to be found in the theory of the separation of powers — the doctrine that parliament, the civil service and the courts are each autonomous, subject only to the sovereign power of parliament to call ministers to account for the doings of the civil service and to pass laws which the courts are required to enforce. Judges, the theory runs, have no role in the business of government and in return are guaranteed freedom from political interference or control.

But within the framework, and sometimes straining against it, we have a historically active and inventive judiciary who do not always find it easy to forget that, like the rest of us, they know how the country should be run.

"What I want to show in this article is that over recent years, a century after the supposed decline of judicial activism and three centuries after the constitutional settlement which confirmed the supremacy of parliament, the judiciary has quietly taken over a key territory previously claimed by government and is now consolidating its position. I also want to suggest that this development, though to a marked degree reactionary in its motivation, is by no means a retrograde step.

### Administrative law

There is today an area of English law (Scotland has its own system) known as administrative law or public law. The procedure by which it is operated is known as judicial review. The basis of administrative law is the proposition, derived from the separation of powers, that administration must stay within the law and that the interpretation and enforcement of the law is the job of the courts alone. The modern state has a vast administrative apparatus at national and local levels, practically all of it set up under Acts of Parliament which give wide powers and large discretions to the elected and appointed bodies they create.

Administrative law is therefore the

means by which the courts adjudicate on the legality of administrative action taken by these branches of the state, from ministers and local authorities to petty officials. It is distinct from private law, which depends on the existence of individual legal rights and remedies, and from criminal law, which deals with individual acts prohibited by the state. In administrative law today, provided the applicant has a reasonable and tangible concern with an issue, the court will allow him or her or it to ventilate the issue by judicial review and will call the state to account without further regard to what the applicant personally stands to gain.

Most other countries have systems of public law, but they have come into existence through legislation or written constitutions, assigning to the judges their place in the system and defining their powers. In this country the system has been the invention of the judges: as one might expect, the place they have assigned themselves is central and their powers are considerable. But what is every bit as important is that, for reasons directly linked with the historical role of individualism in our society, they have accorded the individual a major role in initiating administrative law challenges to the state.

### A variety of motives

It is nevertheless important to remember that Britain has escaped one burden with which the positivism of written constitutions has saddled other capitalist democracies — a judicial power to strike down legislation as unconstitutional. One has only to see how the United States Supreme Court, packed with reactionary nominees of Nixon and Reagan, has sabotaged Congress's civil rights legislation in order to appreciate what we have been spared. But it is also necessary to remember that there is a militantly conservative element of our judiciary and of our political Right who would dearly like the judges to have such powers. As Lord Chancellor, Lord Hail-

sham has called for a Bill of Rights which would entrench certain liberties against anything a future parliament might do; and as Master of the Rolls, Lord Denning acted from time to time as if he already had such powers.

It would be unrealistic to think that a desire to trammel elected national or local governments — or to be able to if things became critical — has not played a



*Lord Hailsham: one of a militantly conservative element?*

substantial if silent part in motivating the judges to extend their domain. But it would be a mistake not to recognise that there are other motives. Some of the actions of modern bureaucracies are so high-handed that they offend any sense of justice, and most judges will find ways of undoing them if they can. At a deeper level the growth and power of the corporate state offends the high Tory individualism which characterises much of the judiciary. In this the traditional Right finds common ground in its concerns with those of the Left. They differ of course in their analysis: the Right sees the state machine as creeping socialism, preying on property and status; the Left sees in it the long-term growth of authoritarianism, stifling democratic rights. But both can and do join in characterising its worst manifestations as the denial of natural justice and the abuse of power. So the aim of administrative law to control and curb such forms of misgovernment com-

mands very general assent.

But in developing a system of law that can give effect to these concerns the judges have had to operate under one clear constraint: if they trespass visibly on the sovereignty of parliament they will jeopardise their freedom from overt political control, an asset which they rightly appreciate is invaluable to them and to the political system of which they are part.

For these reasons the courts when hearing administrative law cases do not claim to be sitting as a supreme constitutional arbiter. They acknowledge that parliament is always entitled to the last word. But within that necessary constitutional limit the courts have created and are now consolidating a powerful new position from which they can supervise significant areas of government.

### A matter of precedent

The most remarkable feature of the common law system is that it never admits

these elements into a distinct and coherent system with its own procedural rules, operated by specialist High Court judges and offering remedies not obtainable in any other part of the legal system.

Thus when the borough of Bromley challenged the GLC's right to pass on some of the cost of cheaper fares, nobody doubted that the courts had power to interpret the transport legislation, to say what powers and duties it and the rating laws created, to decide whether the GLC and London Transport were acting within the law and to strike down any decision or activity not permitted by law. It was the result, overturning a manifestly rational policy on which Labour had actually gone to the polls, which shook people.

### The challenge of Labour

Lord Diplock, the senior Law Lord and the engineer, if not quite the architect, of the new system has described it as the most important development of his judicial

individual liberty) has been made plain by a string of judgements from the early years of the century. But these tended to be one-off decisions, probably corresponding with a feeling that Labour was not a long term or fundamental threat. After 1945 no Tory could be so complacent, not so much because of the Attlee government's social reforms — although to many Tories they looked like Bolshevism — but because the magnitude of the electoral victory reflected a depth and strength of popular political will which the establishment was not equipped to confront. This fear has never gone, and from time to time it has been stoked up again to panic level, most recently with the return of a left-led Labour GLC.

Now the credibility of the law, which demands a reasonable degree of consistency, cannot survive repeated excursions to deal specifically with troublesome socialist administrations. A means has had to be found of dealing consistently with legal questions of administration and local government. It was in 1948, in an unremarkable case about cinema licensing,\* that the then Master of the Rolls set about systematising the principles on which the courts could interfere with decisions of executive or local government. Three years later the then Lord Chief Justice led the way in prising open the closed books of the administrative tribunals which the welfare state was spawning in great numbers<sup>2</sup>: if the courts could be shown an error made by such a tribunal in applying the law, they could quash the tribunal's decision even though there was no right of appeal against it.

It is important, for this reason, to appreciate the difference between judicial review and appeal. The right to appeal is a statutory right to have a decision taken afresh by a higher court. Judicial review is limited to ensuring that a body entrusted with making a decision goes about it in a lawful way. In this way administrative law can claim to stay out of the actual business of making political or administrative decisions. In practice, however, its effect on political administration is substantial: it is not simply that it has enabled the courts to bar certain important paths to socialist goals — it has also enabled the courts to give the seal of legitimacy to other, often reactionary, activities by refusing to halt them.

<sup>1</sup> *Associated Provincial Picture Houses v Wednesbury Corporation* (1948) 1 KB 223.

<sup>2</sup> *R v Northumberland Compensation Appeal Tribunal, ex parte Shaw* (1951) 1 KB711, (1952) 1KB 338.



*The Fares Fair campaign — a manifestly rational policy overturned*

inventing anything. If a direct precedent cannot be found to deal with a new case, established principles will be extended to fill the gap. So to an uninquiring observer the modern system of administrative law contains on the face of it very little that is new. The power of the courts to interpret the law; the duty of the administrative branches of government (the executive) and of local authorities to obey the law; the right of the judges to strike down administrative decisions which do not conform to the law: all these have existed in principle for centuries. What is new is the assembly of

lifetime. Why? Perhaps the most important reason is that, however little enduring change the Left might feel its national and local administrations have brought about, the Right has been seriously alarmed at the prospect of socialism in Whitehall and town hall. Its alarm has been magnified by the failure of its less clever analysts to understand the difference between social democracy and socialism. The judiciary's abiding opposition to things like rent control, slum clearance and fair wages policies (all of them seen as interferences with the free market and therefore with

### A temptation too great

The wiser judges have always appreciated that if administrative law is used to obstruct political initiatives which the courts happen to dislike, the system's reputation will be irreparably damaged. But there are too many judges who have been unable to resist the temptation to use the doctrines of administrative law to achieve results which to them seem merely reasonable but which strike the people who thought they had voted for something different as perverse and politically motivated. It is significant that many of the landmark cases have been decisions against Labour national or local administrations, because it is at these points that the judges have had to expand the existing law in order to decide the cases satisfactorily.

The casualty list is familiar to the Left. In 1968 a minister did what his predecessors had always done — rejected a request for an inquiry because it would probably have led to an inconvenient result. The difference was that he was a Labour minister and the people he had upset were a powerful group of farmers. The House of Lords struck down his decision.<sup>3</sup> The minister did not have a free hand, they said: his duty was only to carry out the policy and objects of the relevant Act, and it was for the courts to decide what those were. He could not shelter behind the fact that he had no obligation to give any reasons for his decision and had given none: if he gave no reasons the court

### The GLC decision did much to undermine the political reputation of the courts for being non-political...

could infer that he had none.

Four years later, when the Tory government used the Industrial Relations Act to stop the railwaymen's work to rule, the Court of Appeal showed a strikingly dissimilar lack of interest in the minister's reasons for believing, as he said he did, the ASLEF's members were not behind the work to rule.<sup>4</sup> They refused to quash his order for a cooling-off period and a ballot. Another four years on, a Tory council was obstructing a Labour government's policy on comprehensive education. The minister had power under the Education Act to overrule an unreasonable decision of a local education authority — but the House of Lords held that that did not entitle him to overrule a policy on which a local council had been elected merely because he disagreed with it.<sup>5</sup> The fact that the Labour

government had also been elected on *its* educational policy received no more credit than the electoral mandate of the Clay Cross councillors had received from the Court of Appeal some years before.<sup>6</sup>

The deepest wound was inflicted most recently, when the Tory-controlled borough of Bromley challenged the GLCs 'Fares Fair' policy, raising every political bogey from husbandry of the rates to municipal socialism. The two High Court judges who first heard the case realised that they were being asked to substitute their own political decision for the GLCs and threw the case out. Neither the Court of Appeal nor the House of Lords could restrain itself, and in the final appeal, in which the argument was widely felt to have gone overwhelmingly in the GLCs favour, the five law lords unanimously held that the policy must be struck down, but for five different and in places incompatible reasons.<sup>7</sup> The decision did much to undermine the public reputation of the courts for being non-political, and it was left to humbler judges to repair the damage by rejecting a number of further applications for judicial review of Labour council policies which followed hopefully in Bromley's wake.<sup>8</sup>

### A set of general principles

The principles which these decisions proclaim, however, are quite general. They are, for example, that the civil service must stay within the overall policy and objects of the legislation it is implementing — the spirit and not merely the letter of the law; or that a decision is not unreasonable merely because somebody in authority disagrees with it. And a major line of cases since 1964<sup>9</sup> has established that whenever administrative judgements are made which affect people's rights, such people have a right to know what is being said against them and to answer for themselves. Here too the principle is an old one,<sup>10</sup> but it has been expanded and systematised in recent years as a further check on the powers of the executive. It has also been adopted by the employment protection legislation (as the carrot which went with the stick in the Industrial Relations Act) and then whittled down by the use of administrative law techniques, so that industrial tribunals can no longer hold a dismissal to be unfair merely because they disagree with it.<sup>11</sup>

The most intriguing, and perhaps most revealing, step in the process of growth occurred in 1967 when the government — or more probably the civil service — decided to implement an old election promise to compensate victims of crimes of violence not by legislation but by using the

prerogative power of the Crown. That is to say, it was simply announced by the Home Secretary that he, as a Minister of the Crown, was setting up a body called the Criminal Injuries Compensation Board which would distribute compensation according to guidelines issued by him. When a policeman's widow went to court to challenge one of the Board's decisions, the Board claimed that they were not answerable to the court because nobody had any legal right to an award from them — they simply gave out money in the name

### We ought perhaps to be pleased that the judges have done a beneficial thing for whatever reason

of the Crown as they saw fit. The court, which at that time was not noted for its toughness towards government, saw the dangers: if the exercise of prerogative powers in areas other than foreign relations were to provide an escape from the control of the courts, there was practically no limit to what a future government, acting quite constitutionally, might arrange to do in the name of the Crown and beyond the reach of judicial review. How far they saw it as a threat of constitutional socialism and how far as a threat of arbitrary and authoritarian government (if indeed they distinguished the two) one can only guess. But they held that the Board was accountable to the court for the proper operation of the compensation scheme.<sup>12</sup>

In a remarkable perceptive judgement Lord Justice (now Lord) Diplock pointed out that the state was attempting to revert to a method of government which had been overturned though never formally abolished by the constitutional conflict and settlement of the seventeenth century. The judges were much too astute to let the executive re-establish a stronghold, immune from judicial review, from which governments might one day launch who knew what assaults on rights prized by the courts.

Two years later the judiciary carried the offensive deep into parliament's territory.<sup>13</sup> Parliament's last resort against judicial review had been thought to be those enactments which set up administrative tribunals and expressly provided that their decisions should not be called in question in any court of law. One such tribunal, the Foreign Compensation Commission, refused compensation to a company hit by the Suez crisis. The House of Lords held that the parliament's 'exclusionary clause' was

in sufficient to prevent the courts deciding whether the Commission had exceeded or misinterpreted its terms of reference and quashing any decision which ought not to have been reached.

**A silent revolution accomplished**

These have been some of the critical battles in a silent war in which the initiative and forward strategy has all been on one side. The results, in a state in which government constantly strives for secrecy and against accountability, are far from being negative or reactionary. They represent one of the few constitutional avenues of public challenge to authorities and tribunals whose decisions can crucially affect our lives. Indeed, the judges themselves have been careful to keep a back door open through which they can retreat from challenges to government for which they have no stomach. The form the retreat takes in law is twofold. There is a rule that where a statute provides for a minister to deal with complaints of non-implementation, the courts will abdicate in favour of the minister and refuse to consider the complaint. In this way the judges have, for example, washed their hands of cases where it was alleged the local authorities were failing to carry out their duties under the Chronically Sick and Disabled Persons Act. But with the developing confidence of the courts which try administrative law cases this rule is being modified into a much more rational practice that matters of detailed policy or political judgment will be left to the minister, but issues of law will be retained and decided by the courts.<sup>14</sup>

The second form of retreat is what is known as the judicial discretion — the power to refuse redress because of overriding considerations of administrative convenience for the state or moral unworthiness of the applicant.<sup>15</sup>

The judiciary now seems confident that a strong and flexible system of administrative

law exists on which it can rely. It has recently expressed that confidence by deciding that judicial review is not simply to be a way but is to be *the* way by which all administrative law cases — that is all challenges to the exercise of state power — are brought.<sup>16</sup> The procedure, which has been carefully systematised, contains a series of filters to sift out claims which are too embarrassing or troublesome — but the courts have now to be very careful how they use them for fear of displaying partiality.

Recent experience has been encouraging. The Hillingdon doctors who could not get an injunction to stop the closure of their hospital using private law rights to protect their contracts were successful in using public law to quash the closure decision on the ground that their contracts had been ignored in reaching the decision.<sup>17</sup> Prisoners, who years before in a private law case<sup>18</sup> had been denied a right to legal representation on disciplinary charges, have won a substantial range of protection by means of judicial review — that is to say a challenge through administrative law — directed against the Boards of Visitors which tried them.<sup>19</sup> Gypsies, who years before had failed to get any help in securing decent sites by private law proceedings,<sup>20</sup> have succeeded in invoking administrative law to stop a local authority abusing its powers by evicting them.<sup>14</sup> In fact it was in the latter case that the court refused to leave the issue to the minister whose statutory job was to supervise the provision of gypsy sites, and itself struck down the local authority's decision.

**A not unmingled blessing**

Only a moralist such as T S Eliot could describe it as:

'the greatest treason  
To do the right thing for the wrong reason'.

There are few absolute rights and wrongs in law or in politics, and no unmingled

blessings. But it is possible to see today that for reasons which are probably a complicated mix of the reactionary and the progressive, we have a system of administrative law which has grown organically out of and into our legal and political institutions and practices. Its intended role as a bulwark against radical political change is plain; but because like all law it has to operate according to neutral principles, its machinery is also available in many cases to those people who are the real victims of the contemporary British state's desire for power without accountability. We ought perhaps to be pleased that the judges have done a beneficial thing for whatever reason. •

<sup>3</sup> Padfield v Minister of Agriculture (1968) AC 997.  
<sup>4</sup> Secretary of State for Employment v ASLEF (No 2) (1972) ICR 19.  
<sup>5</sup> Secretary of State for Education v Tameside MBC (1977) AC 1014.  
<sup>6</sup> Asher v Secretary of State for the Environment (1974) Ch 208.  
<sup>7</sup> Bromley v GLC (1983) AC 768.  
<sup>8</sup> eg, R v Merseyside CC ex p Great Universal Stores (1982) 80 LGR 639; R v GLC ex p Kensington and Chelsea (*The Times* 7 April 1982).  
<sup>9</sup> Ridge v Baldwin (1964) AC 40.  
<sup>10</sup> eg, R v Chancellor of Cambridge University ex p Bentley (1723) 1 Str 557.  
<sup>11</sup> Vickers v Smith (1977) IRLR 11.  
<sup>12</sup> R v Criminal Injuries Compensation Board ex p Lain (1967) 2 QB 864.  
<sup>13</sup> Anisimic v Foreign Compensation Commission (1969) 2 AC 147.  
<sup>14</sup> R v Secretary of State for the Environment ex p Ward (*The Times*, 6 October 1983); cf Leigh v NUR (1970) Ch 326.  
<sup>15</sup> See Ward v Bradford Corporation (1972) 70 LGR 27, Glynn v Keele University (1971) 1 WLR 487: both cases in which students were denied redress against manifest injustices because of the court's view of their morals. See also Supreme Court Act 1981, s 31(6).  
<sup>16</sup> O'Reilly v Mackman (1983) AC237.  
<sup>17</sup> R v Hillingdon Health Authority ex p Goodwin (*The Times*, 13 December 1983).  
<sup>18</sup> Fraser v Mudge (1975) 1 WLR 1132.  
<sup>19</sup> R v Albany Board of Visitors ex p Tarrant (*The Times*, 9 November 1983).  
<sup>20</sup> Kensington and Chelsea v Wells (1974) 72 LGR 289.

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