§ Law in Context

Law and Administration

THIRD EDITION

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CAROL HARLOW AND
RICHARD RAWLINGS

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Law and Administration

As the branch of law dealing with the exercise of governmental power, and so directly concerned with politics, policy issues and good governance values, administrative law can challenge even the advanced student. In response, this classic text looks at both the law and the factors informing it, elaborating the foundations of the subject. This contextualised approach allows the reader to develop a broad understanding of the subject. The authors consider the distinctive theoretical frameworks which inform study of this challenging subject. Case law and legislation are set out and discussed and the authors have built in a range of case studies, to give a clear practical dimension to the study. This new and updated edition will cement the title's prominent status.

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Third Edition

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M. Barthélemy, the Dean of the Faculty of Law in the University of Paris, relates that thirty years ago he was spending a week-end with the late Professor Dicey. In the course of conversation M. Barthélemy asked a question about administrative law in this country. 'In England', replied Dicey, 'we know nothing of administrative law; and we wish to know nothing.'

W. A. Robson, 'The Report of the Committee on Ministers' Powers' (1932) 3 *Political Quarterly* 346.

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Preface: Three decades of law and administration

Law and Administration has never been simply a textbook of administrative law. As its title signifies, our primary objective in writing it was to further the study of law in the context of public administration and politics: the 'law in context' approach. We need to remind the contemporary reader that the first edition reflected an era of legal formalism when the study of case law, largely divorced from its social context, was seen as the be-all-and-end-all of legal studies. The formalist approach was reflected both in the dominant casebook method of teaching and the leading administrative law textbooks: de Smith's *Judicial Review of Administrative Action* – a title that speaks for itself – and Wade's *Administrative Law*, a slimmer version of the current well respected text.[1] We saw formalism or legal positivism as largely obscuring both the plural character and the wide parameters of administrative law. Our preoccupations, spelled out clearly in the preface to the first edition, were 'process', 'legitimacy' 'competency' and a functionalist concern with effectiveness and efficiency. We made our points through lengthy case studies of administrative process, focusing especially on social security, immigration and planning law.

Our aim was to further a pluralist approach to the study of administrative law. Throughout our book we emphasised that public bodies possessed their own distinctive ethos, so too did the legal profession. Actors were also presented as individuals, holding different opinions and with differing styles; legal academics were likely to be similarly opinionated. We set out to convey this to our readers by allowing them so far as possible to speak in their own voices. This pluralist approach characterises every edition.

In respect of judicial review, we tried, by the inclusion of case studies, to free the case law from the formalist method that had smothered its political connotations and to re-establish the connections between judicial review and its political context. Judges, Sir William Wade acknowledged, were 'up to their necks in policy, as they had been all through history, and nothing could illustrate this more vividly in our own time than the vicissitudes of administrative

[1] Now H. W. R. Wade and C. Forsyth, *Administrative Law*, 10th edn (Oxford University Press, 2009). The main exception, Griffith and Street's *Principles of Administrative Law*, 5th edn (Pitman Paperbacks, 1973) was out of print and virtually unobtainable.

law.' Judicial review is inevitably controversial, fought out in numerous tiny battles between (as Sir Cecil Carr once put it) 'those who want to step on the accelerator [and] those who want to apply the brake'. Only by recognising this, we argued, could the legitimacy of the judicial transformation of judicial review (see Chapter 3) and its proper place in the unwritten constitution be evaluated. Public law, as Martin Loughlin has since expressed it, is a form of political discourse. This too is a theme of all three editions.

At the date of our first edition, judicial review had recently emerged from a 'period of backsliding' seen by Professor Wade as 'its lowest ebb for perhaps a century'. The step between Lord Reid's famous observation that we did not have 'a developed system of administrative law. . . because until fairly recently we did not need it' (*Ridge v Baldwin*, 1963) and Lord Diplock's assurance that 'this reproach to English law had been removed' (*O'Reilly v Mackman*, 1983) is a huge one, marking judicial review's rapid progression. This edition tracks further major change. The Human Rights Act 1998 has shown itself to be an added bedrock for a new and necessarily more inventive form of judicial review, constructed under the supervision of the Court of Human Rights at Strasbourg. The case law of the Court of Justice of the European Communities has also been increasingly important. Both can be seen today as embedded in the national legal order, forcing the domestic law of judicial review to move beyond its traditional common law framework. As we shall see in Chapter 15, procedural change to the domestic system has ushered in a 'multi-streamed' system of judicial review whose jurisprudential architecture is sometimes well, and sometimes ill, suited to the increasingly complex range of problems our courts are asked to resolve. All this has grounded new arguments, explored in Chapter 3, concerning the legitimacy and competency of judicial process, today expressed in the vocabulary of 'deference' and 'constitutionalism'.

We have never denied the place for judicial review in our constitution. We have on the other hand argued that adjudication is 'an expensive form of decision-taking whose competency ought not lightly to be assumed'. Our early exploration of alternative machinery for redress of grievance such as tribunals and ombudsmen has expanded over time to four chapter-long studies of alternative mechanisms of dispute resolution: from tribunals, inquiries, and ombudsmen to internal complaints-handling machinery more appropriate and proportionate than expensive courts (Chapters 10–13). Nor have we been against accountability and control. Our position is as it always has been that control of the executive and administration can and should be exercised in ways complementary to judicial review that may be more effective. Common to every edition therefore have been extended studies of lawmaking and bureaucratic rule-making, forms of control pioneered both by British 'green light theorists' and by the American writer Kenneth Culp Davies as an alternative to courts. In this edition such an emphasis is, we feel, amply justified by the growing phenomenon of 'juridification' or governance by rules that links the

bureaucratic world (Chapter 5) with that of the regulator (Chapters 6 and 7). The worlds of politics and Parliament have so far been affected to a lesser extent: there is as yet no requirement that the legislator should be rational! Chapter 4 nonetheless documents some of the changes undergone in recent years by the legislative process, partly under the influence of self-scrutinising parliamentary committees. Techniques developed in the administrative process or by regulators are today paralleled in Parliament where we find experiments with impact assessment, pre- and post-legislative scrutiny, public consultation, monitoring and evaluation.

Largely by happenstance, each of our three editions has gone to press on the cusp of a new political era. Looking back at the preface to the first edition, published in 1984, it seems unlikely that we had at that stage fully recognised the significance for administrative law of the 1979 election that had brought Margaret Thatcher's reforming Conservative government to power. It is indeed hard to recall the political background against which we were writing; the end of an era in which the state had happily combined steering and rowing, retaining the central position in a planned economy that it had come to occupy in the course of two world wars. Swathes of nationalised industry and state-run public services remained as yet to be privatised and liberalised. Not surprisingly perhaps, we largely overlooked the soon-to-be-expanded discipline of regulation. By then threatening to occupy the whole terrain of administrative law, this had to await the second, 1997, edition, where it occupied a central position. The second edition also focused on the replacement of traditional modes of 'club' or 'trust' government by 'the objective, Weberian model of standardisation and rules'. Under the label of 'a blue rinse', we tracked the reception into the public services of the methodology of 'New Public Management' and mentality of audit, noting the growing challenge posed to the values of administrative law.

There was some surprise that the election of Tony Blair's New Labour government did not bring paradigm change. 'Contracting out' of public services was not, for example, reversed, though its effects were softened. Public/private partnerships and public finance initiatives greatly increased, bringing pressure for control that the courts largely failed to meet, hence for new methods of accountability (see Chapters 8 and 9). There were further challenges for administrative law from the New Labour programme of constitutional reform: the process of devolution, for example, greatly complicated the structure of the lawmaking process, making it harder to know what is and what is not 'the law' (Chapter 4). Nor can we yet foresee what problems may flow from the process of continual administrative change instituted by New Labour under the rubric of modernisation. It has to be said that the picture which emerges in these pages is not one of competence or efficiency; administrative law has had to respond to failing administrative agencies, government departments declared unfit for purpose, whole-scale losses of government information and other serious failures. How far the constant restructuring of central government

departments and blocking up of agencies into hyper-agencies has contributed to these administrative catastrophes is hard to tell. Equally, how the overhaul of the piecemeal tribunal system in England and Wales by the Tribunals, Courts and Enforcement Act 2007, the recasting of the public inquiry system by the Inquiries Act 2005 and the restructuring of the courts system in the Constitutional Reform Act 2005 will work out in practice is, at the time of writing, far from clear.

Modernisation has been moving us fast into uncharted administrative territory of 'e-governance' empowered by ICT, bringing promise of greater administrative competence but also new threats to civil liberties and human rights. We ourselves see the pervasive New Labour slogans of 'inclusivity', 'responsive governance' and 'community empowerment' and recourse to the 'soft' terminology of openness, accountability, and participation, as deceptive. Equally, it is insufficient to leave everything to courts, a message driven home through the workings of the political process in the context of the so-called 'war against terror'. This is a lesson we need to remember.

At the same time as we have entered the world of 'public-plus-private', of 'governance through contract' and of 'decentred regulation' described in Chapters 6 to 9, we are moving into a larger world of globalized administration and governance. Here states must compete with governance through transnational agencies and networks of assorted public and private actors. Government, as Martin Shapiro defines it, where administration exists 'as a bounded reality' and administrative law 'prescribes behaviour within administrative organizations' and delineates relationships between 'those inside an administration and those outside it', has arguably broken down. No clear boundary exists (if one has ever existed) between the public and the private. New machinery of control and accountability is clearly necessary if the gains of greater political participation and greater transparency of decision-making associated by Alfred Aman with the administrative law of the 1960s and 1970s are not to be lost. To exemplify, the campaign for freedom of information that came to a head in the 1980s has to a certain extent been won; we now have to take on board and resolve the growing concerns over the emergent 'surveillance society' with its impact on privacy and data protection. Once again we seem to be standing on the cusp of a paradigm change, characterised this time by a rapid re-entry of the state into central areas of economic and financial affairs marked out by economic liberals in the last decade of the twentieth century as sacrosanct areas for private enterprise. We can only speculate on the changes that will be required from administrative law and the contribution administrative law will be able to make.

We cannot end without thanking the many people who have helped to bring this edition to press, starting with our families, who have had to suffer much inattention and, from time to time, some grumpiness. Susan Hunt helped with this, as with every, edition. Sylvia Lough played an equally valuable role. We also had much help and encouragement from Mark Aronson, Julia Black, Peter

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Carol Harlow,
Richard Rawlings,
March 2009.

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1

Red and green light theories

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1. Law and state

Behind every theory of administrative law there lies a theory of the state. As Harold Laski once said, constitutional law is unintelligible except as the expression of an economic system of which it was designed to serve as a rampart.[1] By this he meant that the machinery of government was an expression of the society in which it operated; one could not be understood except in the context of the other. In 1941, Sir Cecil Carr made a similar point in a series of lectures on administrative law given at Harvard University, in the course of which he said:

> We nod approvingly today when someone tells us that, whereas the State used to be merely policeman, judge and protector, it has now become schoolmaster, doctor, house-builder, road-maker, town-planner, public utility supplier and all the rest of it. The contrast is no recent discovery. De Tocqueville observed in 1866 that the State 'everywhere interferes

[1] H. Laski, *A Grammar of Politics* (Allen and Unwin, 1925), p. 578.

> more than it did; it regulates more undertakings, and undertakings of a lesser kind; and it gains a firmer footing every day, about, around and above all private persons, to assist, to advise, and to coerce them' (*Oeuvres*, III, 501). Nassau William Senior, a Benthamite ten years older than Chadwick, a colleague of his on the original Poor Law Commission, had justified this tendency. A government, he thinks, must do whatever conduces to the welfare of the governed (the utilitarian theory); it will make mistakes, but non-interference may be an error too; one can be passively wrong as well as actively wrong. One might go back much earlier still to Aristotle, who said that the city-state or partnership-community comes into existence to protect life and remains in existence to protect a proper way of living. What is the proper standard? That is an age-long issue which is still a burning question of political controversy. The problems of administrative law are approached in the light of that fire. Those who dislike the statutory delegation of legislative power or the statutory creation of a non-judicial tribunal will often be those who dislike the policy behind the statute and seek to fight it at every stage. On the one side are those who want to step on the accelerator, on the other those who want to apply the brake.[2]

In this passage, Carr placed the demise of the minimal state, or state as 'policeman, judge and protector', and the birth of state interventionism, in the early nineteenth century, attributing the change to the work of the economist Nassau Senior and Edwin Chadwick, social and administrative reformer. Barker set two momentous decades of state growth slightly later, in the 1880s, when the number of state employees increased significantly, and the 1890s, when state expenditure as a percentage of national expenditure began to rise. By the end of the nineteenth century all the major political parties had for practical purposes abandoned the ideal of limited government, and accepted the necessity for intervention. The old conception of government as minimal and static was being swept away by a new conception, which was:

> if not dynamic, then at least ambulatory. The old conception had viewed government as administering laws, keeping the peace and defending the frontiers. But it was not a part of government's function to act upon society, nor was it expected that legislation would do much more than sustain clear and established customs. In contrast the new conception was of government as the instigator of movement. This conception of movement was not restricted to the parties of progress or reform; the Conservative and Unionist Party at the beginning of the twentieth century was increasingly characterized, despite opposition, by a commitment to tariff reform, a programme of discriminatory trade duties designed to . . . provide funds for new military and social expenditure at home. Government was not merely to regulate society, it was to improve it.[3]

This was, in short, the beginning of the age of 'collectivism', as Dicey termed socialist theories that favoured 'the intervention of the State, even at some

[2] C. Carr, *Concerning English Administrative Law* (Oxford University Press, 1941), pp. 10–11.
[3] R. Barker, *Political Ideas in Modern Britain*, 2nd edn (Methuen, 1997), pp. 14, 18.

sacrifice of individual freedom, for the purpose of conferring benefit upon the mass of the people.'[4] Dicey acknowledged collectivism grudgingly, although presciently he foresaw its influence as likely to increase in force and volume.

What Carr was saying was hardly novel and, to his American audience, would probably have seemed unexceptional; the link between realist jurisprudence and the 'administrative state' was well established in the USA at the time Carr spoke.[5] English lawyers, on the other hand, might have found the idea unpalatable. The nineteenth-century legal scholars who had laid the foundation stones of English administrative law were certainly alive to the relationship between constitutional law and political theory and were themselves well grounded in both.[6] But this was an era when positivism dominated legal theory and case law was predominantly formalist in its focus on legal principles and concepts. English lawyers understood law as properly isolated from its social context, 'endowed with its own discrete, integral history, its own "science", and its own values, which are all treated as a single block sealed off from general social history, from politics, and from morality'.[7] Barker confirms that a similar outlook obtained amongst political scientists. While the political consequences of 'particular laws and particular legal judgments' met with occasional recognition, the character of the judicial system and the general assumptions of law and lawyers were 'little considered in debates about the political character and goals of the nation', and legal ideas were in general 'invisible'.[8] To question this – as Laski, by describing the judiciary as a branch of government had done and Griffith in *The Politics of the Judiciary*[9] was to do – seemed heretical.

The dominance of positivism in thinking about public law is largely due to the influence of two great men: in the nineteenth century, Albert Venn Dicey (1835–1922), to whom must go the credit of the first sophisticated attempt 'to apply the juridical method to English public law';[10] in the twentieth century, H. L. A. Hart (1907–92), whose *Concept of Law*[11] is a masterpiece of legal positivism. Like Jeremy Bentham (1748–1832) and John Austin (1790–1859), legal philosophers who saw themselves as rationalists and were concerned to excise mysticism and the doctrines of natural law from legal philosophy, Dicey believed that law was capable of reduction to rational, scientific principles. Hart set out 'to understand the legal order in terms of governance through

4 A. V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century*, 2nd edn (Macmillan, 1914), pp. 64–5.

5 See R. Gordon, 'Willis's American counterparts: The legal realists' defence of administration' (2005) 55 *UTLJ* 405.

6 F. Maitland, 'A historical sketch of liberty and equality' in *Collected Papers*, vol. 1 (Cambridge University Press, 1911). p. 1; F. Pollock, *Essays in the Law* (Macmillan, 1922), Nos. 2 and 3.

7 J. Shklar, *Legalism* (Harvard University Press, 1964), pp. 2–3.

8 Barker, *Political Ideas in Modern Britain*.

9 J. Griffith, *The Politics of the Judiciary* (Fontana, 1977).

10 W. I. Jennings, 'In praise of Dicey (1885-1935)' (1935) 13 *Pub. Admin.*123, 133.

11 H. L. A. Hart, *The Concept of Law*, 2nd revised edn (Clarendon Press, 1997).

rules', working with the tools of analytic and linguistic philosophy. His work set in place an established legal hierarchy of primary and secondary rules. It is important not to underestimate these achievements. Formalism and conceptual reasoning are essential building blocks of a legal system, which structure judicial decision-making and help to maintain consistency.[12] This in turn helps to underpin the rule of law.[13]

This is not the place to debate the many degrees of positivism. It is, however, helpful to refer to Coyle's recent division of contemporary English jurisprudence into main groupings: (i) a moderate legal positivism, which maintains that 'law can be elucidated without reference to morality, and that it is the duty of judges to determine the content of and apply the law without recourse to moral judgments'; and (ii) liberal idealism, where law is viewed as an open-textured set of principles, rooted in rights derived from 'shared assumptions and beliefs which prescribe for law a particular moral content'.[14] In the evolution of liberal idealism, the 'interpretivist' work of the American theorist Ronald Dworkin[15] has been influential. The two approaches should not, however, be seen as monopolising the field of administrative law. Even if they infuse case law studied in later chapters more radical positions frequently emerge.

2. The Diceyan legacy

(a) Dicey and the rule-of-law state

Dicey's *Introduction to the Law of the Constitution,* published in 1885, acts almost as a substitute for a written constitution. His ideas lock up together to form the ideal-type of a 'balanced' constitution, in which the executive, envisaged as capable of arbitrary encroachment on the rights of individual citizens, will be subject, on the one side, to political control by Parliament and, on the other, to legal control through the common law by the courts. As expressed by Dicey in terms of the twin doctrines of the rule of law and parliamentary sovereignty, the balance necessarily tips in favour of representative government.[16]

The ancient philosophical ideal of the rule of law can be traced to Aristotle's government of 'laws not men' and has been explored by generations of political philosophers. It provides the basis for the idea of 'limited government' and 'constitutionalism' (government limited by law and by a constitution or

[12] N. MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press, 1994).

[13] See C. Forsyth, 'Showing the fly the way out of the flybottle: The value of formalism and conceptual reasoning in administrative law' (2007) 66 *CLJ* 325.

[14] S. Coyle, 'Positivism, idealism and the rule of law' (2006) 26 *OJLS* 257, 259 citing T. Campbell, *The Legal Theory of Ethical Positivism* (Dartmouth, 1996), p. 1.

[15] R. Dworkin, *Taking Rights Seriously* (Duckworth, 1967) and *Law's Empire* (Fontana, 1986).

[16] M. Vile, *Constitutionalism and Separation of Powers* (Clarendon Press, 1967), pp. 230–3; J. Griffith, 'The common law and the political constitution' (2001) 117 *LQR* 42. See generally on Dicey's legacy, M. Loughlin, *Public Law and Political Theory* (Clarendon Press, 1992), pp. 140–62.

constitutional principles). Below, Martin Shapiro, an American political scientist, nicely encapsulates the conception of 'bounded and billeted' government, central to Anglo-American public law:

> Administrative law as it has historically been understood presupposes that there is something called administration. The administrator and/or the administrative agency or organization exist as a bounded reality. Administrative law prescribes behaviour within administrative organizations; more importantly, it delineates the relationships between those inside an administration and those outside it. Outside an administration lie both the statutemaker whose laws and regulations administrators owe a legal duty to faithfully implement and the citizens to whom administrators owe legally correct procedural and substantive action.
>
> More generally, the political and organization theory that inform our administrative law have traditionally viewed public administration as a set of bounded organizations within which decisions are made collectively. On this view, these 'organs of public administration' are coordinated with one another, subordinated to political authority, and obligated to respect the outside individuals and interests whom they regulate and serve.[17]

In the work of Friedrich Hayek, economist and political theorist, there was a close link between the rule of law and his own strong belief in the limited, minimal or 'night-watchman' state mentioned by Carr. In a passage that looks forward to contemporary faith in the market, Hayek in his early classic, *The Road to Serfdom*, drew a 'general distinction between the rule of law and arbitrary government':

> Under the first, government confines itself to fixing rules determining the conditions under which the available resources may be used, leaving to the individuals the decision for what ends they are to be used. Under the second, the government directs the use of the means of production to particular ends. The first type of rules can be made in advance, in the shape of *formal rules* which do not aim at the wants and needs of particular people . . . Economic planning of the collectivist kind necessarily involves the very opposite of this. The planning authority cannot confine itself to providing opportunities for unknown people to make whatever use of them they like. It cannot tie itself down in advance to general and formal rules which prevent arbitrariness. It must provide for the actual needs of people as they arise and then choose deliberately between them.[18]

Hayek here assumes that, in a rule-of-law state, there must be as much individual freedom as is compatible with the freedom of others, reflecting the ideal of a liberal democratic society, which expects '*freedom from* the state,

[17] M. Shapiro, 'Administrative law unbounded' (2001) 8 *Indiana Journal of Global Legal Studies* 369.

[18] F. Hayek, *The Road to Serfdom* (Routledge, 1944), p. 10. See also F. Hayek, *The Constitution of Liberty* (Routledge and Kegan Paul, 1960) and *Law, Legislation and Liberty* (Routledge and Kegan Paul, 1973-79).

demanding that some individual freedoms, or rights, should be protected from the state and from majority decisions.'[19] This 'thin' rule of law excludes by definition a planned economy or welfare state and is the context for what we have called 'red light theories' of administrative law, where the emphasis is on citizens' rights and on law as a brake on state action. This is a highly contestable proposition which has become the centre of much political controversy.

The emphasis on formal, predictable rules makes the rule-of-law idea attractive to lawyers. Lawyers have willingly adopted the rule-of-law paradigm as a constitutional justification for the judicial power to 'review' governmental and administrative acts and to declare them lawful or unlawful and in excess of power. Dicey's late nineteenth-century restatement of the rule-of-law doctrine comprised three elements – (i) that the state possesses no 'exceptional' powers and (ii) that *individual* public servants are responsible to (iii) the ordinary courts of the land for their use of statutory powers:

> When we say that the supremacy of the rule of law is a characteristic of the English constitution we generally include under one expression at least three distinct though kindred conceptions.
>
> [First] that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary or discretionary powers of constraint . . .
>
> [Secondly], not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.
>
> In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen . . .
>
> [Thirdly] that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.[20]

Dicey's articulation of the rule-of-law principle is so quintessentially English that its opponents readily dismiss it as chauvinistic. Yet Allan thinks Dicey:

[19] P. Dunleavy and B. O'Leary, *Theories of the State: The politics of liberal democracy* (Macmillan, 1987), p. 5.

[20] A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, E. C. S. Wade (ed.),10th edn (Macmillan, 1959) (hereafter *Introduction*), pp. 187–196.

> wise to seek an interpretation of the rule of law which reflected the traditions and peculiarities of English common law. Whatever its faults, Dicey's work recognised the importance of expounding a constitutional philosophy, which could serve as a basis for the systematic exposition and consistent development of legal principle. More recent efforts to give analytical precision to the concept of the rule of law have not always been wholly successful – at least in Britain – and constitutional law has perhaps been weakened in consequence, because its foundations have come to seem uncertain and insecure . . .
>
> At the heart of the problem lies the difficulty of articulating a coherent doctrine which resists a purely formal conception of legality – according to which even brutal decrees of a dictator, if formally 'valid', meet the requirements of the rule of law – without instead propounding a complete political and social philosophy. The formal conception, which serves only to distinguish the commands of the government in power (whatever their content) from those of anyone else, offers little of value to the constitutionalist theorist. And the richer seams of political theory – ideal versions of justice in the liberal, constitutional state – are inevitably too ambitious (because too controversial) to provide a secure basis for practical analysis . . . It seems very doubtful whether it is possible to formulate a theory of the rule of law of universal validity . . . But it does not follow that we cannot seek to elaborate the meaning and content of the rule of law within the context of the British polity – exploring the legal foundations of constitutionalism in the setting of contingent political institutions. That was, of course, Dicey's purpose in *The Law of the Constitution*.[21]

In an exploration of the rule-of-law principle popular with lawyers, Lord Bingham breaks the idea down into eight sub-rules:[22]

1. The law must be accessible and so far as possible intelligible.
2. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.
3. The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.
4. The law must afford adequate protection of human rights.
5. Means must be provided for resolving disputes, without prohibitive cost or inordinate delay.
6. Ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purposes for which the powers were conferred and without exceeding the limits of such powers.
7. Adjudicative procedures provided by the state should be fair.
8. The state must comply with its obligations in international law.

Dicey's procedural prerequisites, slightly modernised, all make an appearance but with three significant additions: Principle 6, which purports to include most of the modern principles of judicial review which, given their fluidity and

[21] T. Allan, *Law, Liberty and Justice: The legal foundations of British constitutionalism* (Clarendon Press, 1993), pp. 20–1.

[22] T. Bingham, 'The rule of law' (2007) 66 *CLJ* 67 (slightly paraphrased).

rapidly changing nature, might be thought over-ambitious; and Principles 4 and 8, which pull international and human rights law into the compass of the rule of law. The last two are highly controversial. They cross – or invite us to cross – the boundary between procedural and substantive versions of the rule of law.[23]

The case made for this 'thick' rule of law by those of a liberal persuasion is that law cannot 'serve a bad master'; a rule of law without values is not a true rule of law. A slightly different road to the same end is to incorporate the 'thick' rule of law as a constituent element of democracy.[24] This leads to a still more bounded view of government according to which majoritarian institutions are debarred from overriding normative values of the rule of law (see Chapter 3). As Raz has cogently argued, the danger here is that in seeking to encapsulate a complete social and political philosophy within a single principle, liberals have deprived the rule of law of any useful role independent of their dominant philosophy.[25] Dicey's prioritisation of parliamentary sovereignty has been reversed, tipping the balance in favour of the rule of law (and law courts). As Dicey insisted and Raz is affirming, the core of the rule of law is procedural: it is 'a necessary, but not sufficient condition of other vital, civic virtues – freedom, tolerance and justice itself'.[26]

(b) 'The English have no administrative law'

At the heart of Dicey's exposition of the rule of law lay the concept of formal or procedural equality: the submission of ruler and subject alike to the jurisdiction of the *same* courts of law. Dicey set his face against the French system, where separate and autonomous tribunals attached to the administration handle cases involving the state. Dicey gave a specific and peculiar meaning to the term *droit administratif*, which he maintained had no proper English equivalent:

> Anyone who considers with care the nature of the *droit administratif* of France, or the topics to which it applies, will soon discover that it rests, and always has rested, at bottom on two leading ideas alien to the conceptions of modern Englishmen.
>
> The first of these ideas is that the government, and every servant of the government, possesses as representative of the nation, a whole body of special rights, privileges, or prerogatives as against private citizens, and that the extent of these rights, privileges, or prerogatives is to be determined on principles different from the considerations which fix the legal rights and duties of one citizen towards another. An individual in his dealings with

[23] See P. Craig, 'Formal and substantive conceptions of the rule of law: An analytical framework' [1997] *PL* 467; R. Cotterell, *Law's Comunity. Legal theory in sociological perspective* (Clarendon Press, 1995), pp. 160–77, discussing variant continental conceptions of the rule of law.

[24] J. Jowell, 'Beyond the rule of law: Towards constitutional judicial review' [2000] *PL* 671.

[25] J. Raz, 'The rule of law and its virtue' (1977) 93 *LQR* 195.

[26] J. Laws, 'The rule of law - form or substance?' [2007] 4 *Justice Journal* 24.

> the State does not, according to French ideas, stand on anything like the same footing as that on which he stands in dealings with his neighbour.
>
> The second of these general ideas is the necessity of maintaining the so-called 'separation of powers' (*séparation des pouvoirs*), or, in other words, of preventing the government, the legislature, and the courts from encroaching upon one another's province. The expression, however, separation of powers, as applied by Frenchmen to the relations of the executive and the courts, with which alone we are here concerned, may easily mislead. It means, in the mouth of a French statesman or lawyer, something different from what we mean in England by the 'independence of the judges', or the like expressions. As interpreted by French history, by French legislation, and by the decisions of French tribunals, it means neither more nor less than the maintenance of the principle that while the ordinary judges ought to be irremovable and thus independent of the executive, the government and its officials ought (whilst acting officially) to be independent of and to a great extent free from the jurisdiction of the ordinary courts. [27]

It was only towards the end of his long career that Dicey admitted the capacity of the separate French system of administrative courts to control abuse of power. Later still he conceded 'a considerable step towards the introduction among us of something like the *droit administratif* of France', though maintaining that the jurisdiction of 'ordinary law courts' in cases of breach of the law by public officials 'is fatal to the existence to true *droit administratif*'.[28] Dicey's preference was for a unitary court structure, in which administrative cases are handled by 'ordinary' courts and judges and public officials stand at least theoretically on an equal footing with private persons. Underlying this arrangement is the principle strongly favoured by Dicey that relationships of citizens with public officials are not – and should not be – radically different from relations between citizens and private bodies.

(c) State and Crown

But a gaping hole was left in Dicey's theory of equality by the existence of substantial areas of monarchical prerogative power. When Dicey wrote, the Crown was immune from civil proceedings in the 'ordinary courts', a fact that somewhat undercut his argument. The Crown had to be pursued by the special procedure of 'petition of right', a form of *droit administratif* that lasted until the Crown Proceedings Act 1947. The state does not need to possess special powers 'in its own name' if those powers are held by government ministers acting in the name of the Crown.

[27] Dicey, *Introduction*, pp. 336–8. For further exposition, see J. Allison, *A Continental Distinction in the Common Law: A historical and comparative perspective on English public law*, revised edn (Clarendon Press, 2000).

[28] A. V. Dicey, '*Droit administratif* in modern French law' (1901) 18 *LQR* 302 and 'The development of administrative law in England' (1915) 31 *LQR* 148; and see F. Lawson, 'Dicey revisited' (1959) 7 *Political Studies* 109, 207.

Dicey himself defined prerogative power widely, maintaining that 'every act which the executive government can lawfully do without the authority of an Act of Parliament is done in virtue of this prerogative'.[29] This unnecessarily broad definition conflates the Crown's prerogative and common law powers. As we shall see in Chapter 8, this has had serious effects on the law of government contracting. Nevertheless, it is important to understand that the prerogative powers are not merely powers confined to emergency or national security; in the British constitution, the Crown fills the place filled in other constitutions by the notion of executive power.[30] Even on Blackstone's view of prerogative power as 'exceptional',[31] which brings much Crown activity within the ambit of public law and renders it justiciable, this is a matter of some importance.

Until relatively recently, it was accepted that a court faced with a claim of prerogative power could merely pronounce on its validity; the way in which it was exercised could not be reviewed. Not until the seminal ruling of the House of Lords in the *GCHQ* case[32] was it finally established that government is accountable to the courts for its use of prerogative power. In his striking and often-quoted speech, Lord Diplock not only asserted that the prerogative powers form part of the common law but broke new ground in saying that he could 'see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should *for that reason only* be immune from judicial review'. Accepting his view that no qualitative distinction could be made between statutory and prerogative powers, the House advised that both were subject in the same way to judicial review in respect of their use. In itself, the decision was no more than a warning shot, since the House of Lords endorsed the right of the Prime Minister in her capacity as minister responsible for the Civil Service to withdraw the privilege of joining a trade union from workers at the operational headquarters of the security services. The case, discussed on other grounds in Chapter 3, is a landmark in establishing the justiciability of prerogative power. In recent cases, the courts have tended to intensify the war against prerogative power. *M v Home Office*[33] involved the remnants of Crown

[29] Dicey, *Introduction*, p. 425.

[30] M. Sunkin and S. Payne (eds), *The Nature of the Crown: A legal and political analysis* (Oxford University Press, 1999); T. Daintith and A. Page, *The Executive in the Constitution: Structure, autonomy and internal control* (Oxford University Press, 1999); P. Craig and A. Tomkins (eds), *The Executive and Public Law* (Oxford University Press, 2006).

[31] For a strong rebuttal of Dicey's over-generous definition, see H. W. R. Wade, *Constitutional Fundamentals* (Stevens, 1980), pp. 46–9; and see B. Harris, 'The "third source" of authority for government action' (1992) 108 *LQR* 626; 'The "third source" of authority for government action revisited' (2007) 123 *LQ R* 225.

[32] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, see p. 107 below.

[33] *M v Home Office* [1994] AC 377, noted in Harlow, 'Accidental death of an asylum seeker' (1994) 57 *MLR* 620. A similar point arose in respect of Scotland after devolution and was settled pragmatically in the same way: see *Davidson v Scottish Ministers* [2005] UKHL 74; *Beggs v Scottish Ministers* [2007] UKHL 3.

immunity, enshrined in s. 21 of the Crown Proceedings Act. This provides that injunctions shall not be granted against the Crown in civil proceedings, an immunity thought previously to cover all mandatory legal remedies, including findings of contempt of court.

M, an asylum seeker, had made several consecutive applications for judicial review at the last of which counsel for the Home Office guaranteed that his removal from the UK would be postponed. Due to a mix-up, M was put on a plane to Zaïre, where he subsequently disappeared. When M's lawyers instituted proceedings, the Court of Appeal held the Home Secretary in contempt of court, circumventing the difficult issue of Crown immunity by holding that he had been acting in his personal capacity. On appeal to the House of Lords, the decision was upheld on the different ground that coercive orders, including findings of contempt, were available against the Crown. Moving decisively on to the constitutional high ground, Lord Woolf invoked the full force of Dicey's statement of the rule-of-law principle, citing it at length. To conceal the innovative nature of the opinion, he then used formalistic reasoning cleverly, distinguishing injunctions as awarded in 'civil proceedings' from the administrative law remedies first introduced by RSC Ord. 53 and later given statutory authority by s. 31 of the Supreme Court Act 1981 (see Chapter 16). In the name of the rule of law, a gaping hole had been blown in the remnants of Crown immunity, even if Lord Woolf took care to warn that the new jurisdiction to issue mandatory orders against the Crown should be used with great care:

> The Crown's relationship with the courts does not depend on coercion and in the exceptional situation when a government department's conduct justifies this, a finding of contempt should suffice. In that exceptional situation, the ability of the court to make a finding of contempt is of great importance. It would demonstrate that a government department has interfered with the administration of justice. It will then be for Parliament to determine what should be the consequences of that finding.

If it is hard to reconcile Crown prerogative power with Dicey's rule-of-law principle, it is harder still to reconcile it with the concept of representative government or doctrine of parliamentary sovereignty. Not surprisingly then, courts have, since the start of the twentieth century, asserted the primacy of parliamentary legislation over the prerogative powers. It is settled law that where statute governs a field of activity, the prerogative powers fall into in abeyance and cannot be used to fill gaps left by Parliament.[34] Whether the principle was truly in issue in the *Fire Brigades* case[35] is a moot point. To understand this famous case, it is necessary to know that the criminal injuries compensation scheme, set up to provide state compensation to victims of violent crime,

[34] *A-G v De Keyser's Royal Hotel* [1920] AC 508.
[35] *R v Home Secretary, ex p. Fire Brigades Union* [1995] 2 AC 513.

had been operated by successive governments under the prerogative power to make *ex gratia* payments, though the courts had, soon after its establishment, assumed jurisdiction to review.[36] There was some feeling that so large a scheme needed to be placed on a statutory footing and in 1988 amendments were introduced in the House of Lords to a criminal justice bill to effect this, in the face of government opposition. The Criminal Justice Act 1988 was stated to come into force 'on such day as the Secretary of State may appoint'. Instead, the Home Secretary introduced legislation to replace the 1988 statutory scheme, which failed to pass the House of Lords. Hoping to delay implementation indefinitely, he replaced the existing prerogative criminal injuries compensation scheme with a new, less generous, scheme, effectively by-passing the 1988 Act. Trade unions representing workers likely to be affected by the cuts in compensation challenged the legality of this action.

There are two different approaches to what had occurred. On the majority view in both the Court of Appeal and the House of Lords, the minister had used the prerogative scheme to stultify the express intention of the legislature; to have recourse to the prerogative power in such circumstances was an abuse of power. As Lord Lloyd put it:

> Ministers must be taken at their word. If they say they will not implement the statutory scheme, they are repudiating the power conferred on them by Parliament in the clearest possible terms. It is one thing to delay bringing the relevant provisions into force. It is quite another to abdicate or relinquish the power altogether. Nor is that all. The Government's intentions may be judged by their deeds as well as their words. The introduction of the tariff scheme, which is to be put on a statutory basis as soon as it has had time to settle down, is plainly inconsistent with a continuing power under section 171 to bring the statutory scheme into force . . .

On another view, the prerogative powers were not really in point. The minister had been exercising a discretionary power granted to him by Parliament, though the exercise of the power was seen by several of the judges as surprising to the point of being unreasonable; the minister had gone so far as to debar himself from exercising his power to make the requisite commencement order, which no reasonable minister would have done. On a third view, held by Lords Keith and Mustill dissenting, the decision was quite simply not justiciable; it was 'of a political and administrative character quite unsuitable to be the subject of review by a court of law':

> It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks

[36] *R v Criminal Injuries Compensation Board, ex p. Lain* [1967] 2 QB 864. The operation of the scheme is dealt with in Ch. 17 below.

> right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed. This requires the court on occasion to step into the territory which belongs to the executive, not only to verify that the powers asserted accord with the substantive law created by Parliament, but also, that the manner in which they are exercised conforms with the standards of fairness which Parliament must have intended. Concurrently with this judicial function Parliament has its own special means of ensuring that the executive, in the exercise of its delegated functions, performs in a way which Parliament finds appropriate. Ideally, it is these latter methods which should be used to check executive errors and excesses; for it is the task of Parliament and the executive in tandem, not of the courts, to govern the country. In recent years, however, the employment in practice of these specifically Parliamentary measures has fallen short, and sometimes well short, of what was needed to bring the executive into line with the law . . .
>
> To avoid a vacuum in which the citizen would be left without protection against a misuse of executive powers the courts have had no option but to occupy the dead ground in a manner, and in areas of public life, which could not have been foreseen 30 years ago. For myself, I am quite satisfied that this unprecedented judicial role has been greatly to the public benefit. Nevertheless, it has its risks, of which the courts are well aware . . .
>
> [S]ome of the arguments addressed [in the Court of Appeal] would have the court push to the very boundaries of the distinction between court and Parliament established in, and recognised ever since, the Bill of Rights 1688 . . . 300 years have passed since then, and the political and social landscape has changed beyond recognition. But the boundaries remain; they are of crucial significance to our private and public life; and the courts should, I believe, make sure that they are not overstepped.[37]

We shall find this division of opinion resurfacing in Chapter 4.

Some years later, the Government of the day attempted a similar manoeuvre in an epic case involving the expulsion of the islanders from their homes in the Chagos Islands in the interests of establishing an American air base. This time the ancient and little-used prerogative power to legislate by Order in Council in colonial territories was in issue. After expulsion orders that had been made against the islanders in 1971 were quashed by the High Court in 2000, the Foreign Secretary (Robin Cook) indicated that the islanders would be allowed to return home. Instead, the Government passed the British Indian Ocean Territory (Constitution) Order and British Indian Ocean Territory (Immigration) Order, which made unauthorised presence on the islands a criminal offence. These Orders were quashed by the High Court on the ground that they were irrational; the Government had failed to take the interests of the islanders into account. This decision was endorsed by the Court of Appeal on slightly different grounds but reversed by the House of Lords. At all three levels, however, there was agreement that the use of the prerogative powers,

[37] [1995] 2 AC 513 (Lord Mustill).

whether for administrative or legislative purposes, was subject to review by the courts.[38]

Now judges are fond of asserting that they 'will be very slow to review the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed services, and very slow to adjudicate upon rights arising out of transactions entered into between sovereign states on the plane of international law'.[39] But one by one the 'no-go areas' have become occupied territory. In the *Belmarsh* cases discussed in Chapter 3,[40] the courts made deep inroads into powers of detention without trial claimed by government in the name of defence and security of the state. In *Corner House*,[41] the discretionary powers of the Director of the Serious Fraud Office to conduct an investigation and of the Attorney-General to issue instructions that a prosecution be dropped came under scrutiny. An investigation into allegations of corrupt dealings with officials in Saudi Arabia was dropped when the Director concluded that serious damage to the public interest in relation to security and counter-terrorism was likely if the investigation were to continue. The legal challenge, which sought to prioritise the upholding of the rule of law, reached the House of Lords before collapsing. In the *Prague Airport* case discussed in Chapter 5,[42] the conduct of British officials working overseas came under review by the courts and domestic legislation was held to operate extraterritorially. In *Al-Skeini*,[43] the courts were asked whether acts of torture and atrocities allegedly committed by British soldiers in Iraq came under the jurisdiction of the British courts and, if so, whether they were covered by the Human Rights Act (HRA) and ECHR. By a majority, the House of Lords ruled that the HRA would be applicable when a public authority – in this case the army in Iraq – acted outside British territory but within Parliament's 'legislative grasp'. In the light of this ruling, the Defence Secretary accepted liability for violation of human rights resulting in the death of one of the appellants with a settlement of £3 million.

With the help of the European Convention, the area of immunity from the rule of the law courts is thus shrinking. The invocation of international law before British courts has also expanded very rapidly; domestic courts, as

[38] *R (Bancoult) v Foreign Secretary* [2001] 1 QB 1067 (*Bancoult (No. 1); R (Bancoult) v Foreign Secretary* (*Bancoult (No. 2*) [2006] EWHC Admin. 1038; [2007] EWCA Civ 498 (CA); [2008] UKHL 61 (HL). And see S. Farran, 'Prerogative rights, human rights, and island people: The Pitcairn and Chagos Island cases' [2007] *PL* 414.

[39] *R v Jones (Margaret)* [2006] 2 WLR 772, 783 (Lord Bingham); and see *R (Gentle and Clarke) v Prime Minister and Others* [2008] UKHL 20. The classic case is *Chandler v DPP* [1964] AC 763.

[40] *A and Others v Home Secretary* [2005] 2 AC 68; *A and Others v Home Secretary* [2006] 2 AC 221.

[41] *R (Corner House Research v Director of the SFO* [2008] UKHL 60, overruling the radical judgment of Moses J at [2008] EWHC Admin 714 [56].

[42] *R (European Roma Rights Centre) v Immigration Office at Prague Airport* [2005] 2 AC 1.

[43] *Al-Skeini and Others v Defence Secretary* [2007] UKHL 26. See also *R (Quark Fishing Ltd) v Foreign Secretary* [2006] 1 AC 529.

Lord Rodger recently remarked are finding themselves 'deep inside the realm of international law – indeed inside the very chamber of the United Nations Security Council itself'.[44] The common law is no longer insulated.[45]

Even if Dicey's rule-of-law requirements are now largely satisfied, confidence in our system of government as democratic and 'accountable' is not. The very concept of prerogative power undercuts the fundamental assumption of our parliamentary democracy that power is bestowed by Parliament and government is responsible to Parliament for its use of power. Without the need for parliamentary agreement, governments can sign treaties of great import, such as the Treaty of Accession to the European Communities; only after ratification of the UK Accession Treaty was legislation necessary to deal with incorporation of the Treaty into UK law (see Chapter 4).[46] In similar fashion, the Government can ratify international conventions, such as the ECHR, ratified in 1955 but with provisions not formally incorporated into domestic law until the Human Rights Act was passed in 1998.[47] War can be declared and troops sent into battle in the name of the Crown, though in practice Parliament is normally consulted, as was done in the cases of both the Falklands and Iraq wars. Parliamentary approval is typically necessary only at the point when financial levies or changes to the domestic legal system are required.[48]

In an age of popular democracy, when accountability is a prerequisite of government, this is coming to be seen as unacceptable.[49] The House of Commons Select Committee on Public Administration (PASC), which since the election of the New Labour Government in 1997 has taken upon itself the task of keeping the governance of Britain under regular review, has recently demanded action on ministerial prerogative powers.[50] It called for them to be listed and a parliamentary committee set up to frame appropriate legislation. To stimulate action, PASC listed three of the most important areas to be dealt with – decisions on armed conflict, treaties and passports – appending its own draft bill. One of Gordon Brown's first acts as Prime Minister in 2007 was to issue a Green Paper on the governance of Britain, with a view to making 'the executive, and Parliament, more accountable to the people and to reinvigorate

[44] *R (Al-Jedda) v Defence Secretary* [2007] UKHL58; and see *A and Others v HM Treasury* [2008] EWHC 869.

[45] See further, P. Sales and J. Clement, 'International Law in Domestic Courts: the Developing Framework' (2008) 124 LQR 388

[46] However the European Parliamentary Elections Act 2002 requires statutory approval for the ratification of a treaty increasing the powers of the European Parliament. See further, *R(Wheeler) v Prime Minister* [2008] EWHC 1409.

[47] J. Beatson *et al.*, *Human Rights: Judicial protection in the United Kingdom* (Sweet & Maxwell, 2008).

[48] See for a full survey, HL Constitutional Committee (hereafter CC), *Waging War: Parliament's role and responsibility*, HL 236 (2006) and *Follow up Report*, HL 51 (2007).

[49] A. Tomkins, *Public Law* (Clarendon Press, 2003), pp. 81– 90 and *Our Republican Constitution* (Hart Publishing, 2005).

[50] PASC, *Taming the Prerogative: Strengthening ministerial accountability to Parliament*, HC 422 (2004/05).

our democracy'.[51] This committed the Government to surrendering or limiting powers 'which it considers should not, in a modern democracy, be exercised exclusively by the executive (subject to consultation with interested parties and, where necessary, legislation).' Included in the proposals was a range of important prerogative powers: permitting deployment of troops abroad; requesting a dissolution or recall of Parliament; allowing ratification of international treaties without decision by Parliament; determination of rules governing entitlement to passports and granting of pardons; restriction of parliamentary oversight of the intelligence services; choosing bishops and appointment of judges; direction of prosecutors in individual criminal cases; and establishing the rules governing the Civil Service.

A few of these commitments have already found their way into a draft Constitutional Renewal Bill, the subject of consideration by a Joint Committee of both Houses. This provides that treaties will in future have to be laid before Parliament for approval. They may, in exceptional circumstances, however, still be signed without that consent. So are we about to draw a line under a long history? The Joint Committee did not think so. As Lord Morgan, one of the members remarked: 'Does this not perhaps seem like an area where the Royal Prerogative, instead of being given a decent Christian or un-Christian burial, is in fact alive and well?'[52]

(d) The state and statutory authority

A far stronger criticism of Dicey is that he left English administrative law with a great mistrust of executive or administrative action but without any theoretical basis for its control. By refusing to accept the reality of state power and acknowledge 'the state' as a legal entity possessing inherent powers of government, his theory disguised the inevitable inequality between the state, monarch or government, and citizens. Dicey stultified the growth of a 'special' public law formulated for this basic inequality:

> The fallacy of Dicey's assumptions lies in his contention that the rule of law demands full equality in every respect between government and subjects or citizens. But it is inherent in the very notion of government that it cannot in all respects be equal to the governed, because it has to govern. In a multitude of ways, government must be left to interfere, without legal sanctions, in the lives and interests of citizens, where private persons could not be allowed to do so . . . The refusal of the courts to make planning or policy decisions of government the subject of legal action, also shows that the inequality of government and governed in certain respects is an indispensable fact of organized political life. Where the borderline between governmental freedom and legal responsibility has to be drawn,

[51] *The Governance of Britain*, Cm. 7170 (2007) [43–4]; *The Governance of Britain: Constitutional renewal*, Cm. 7342 (2008).

[52] Joint Committee on the Draft Constitutional Renewal Bill, HC 552 (2007/8), Q 737.

> is, indeed, a very difficult problem. It may be described as the key problem of administrative law. But we can only begin to understand it after having accepted, unlike Dicey, that inequalities between government and citizens are inherent in the very nature of political society.[53]

Dicey argued for the superiority of his individuated model on the moral ground that individuals, even when acting in an official capacity, ought not to be able to shuffle off responsibility for their own misdeeds. His theory of administrative and constitutional law sprang from his belief in liberal individualism and dislike of the collectivism that he saw beginning to flourish around him. Dicey refused to recognise that, in his dealings with the state, the individual does *not* stand on 'anything like the same footing as that on which he stands in dealings with his neighbour'.

> What Dicey suggests by equality is that an official is subject to the same rules as an ordinary citizen. But even this is not true. An official known as a collector of taxes has rights which an ordinary person does not possess . . . All public officials, and especially public authorities, have powers and therefore rights which are not possessed by other persons. Similarly, they may have special duties . . . Dicey was not referring to that part of the law which gives powers to and imposes duties upon public authorities. What he was considering . . . was that, if a public officer commits a tort, he will be liable for it in the ordinary civil courts.[54]

Dicey's polemical account skated lightly over the extent of statutory power, partly, but only partly, because the web of statute and regulation that today confines and structures government was still fragmentary when he wrote. As legislative activity increased and government obtained control of the legislative machinery, so Dicey's theory became less adequate. Dicey, for example, was able to conceptualise police powers, with which he was much concerned, as largely judge-made common law powers, incorporated in 'open textured' precedent. Today, these powers are mainly statutory, embodied for the most part in the Police and Criminal Evidence Act 1984, which empowers a further network of regulations, directives and administrative guidance. The notion of police powers as based on common law citizen arrest is today as unrealistic as the idea that members of the anti-terrorist squad are simply 'citizens in uniform'. This is not the way in which the present-day police force is organised or understood. The same is true of the state.

Like Hayek after him, Dicey condemned wide administrative powers because of their collectivist connotations. Because he viewed the constitution as 'an instrument for protecting the fundamental rights of the citizen, and not an instrument for enabling the community to provide services for the benefit of its citizens', he came to confuse 'discretionary' with 'arbitrary' powers. For Dicey,

[53] W. Friedmann, *Law in a Changing Society*, 2nd edn (Penguin Books, 1964), pp. 276–7.
[54] W. I. Jennings, *The Law and the Constitution* (Athlone Press, 1959), p. 312.

'the constitution excludes wide discretionary authority; therefore it forbids large administrative powers'.[55] The wide administrative powers feared by Dicey were to be restricted in two ways: on one side stood Parliament which, 'because it was still dominated by Whig ideas', would not tolerate administrative interference with individual rights; on the other stood the courts dominated by a similar ideology. Dicey's mistrust of discretionary power was to become, as we shall see in later chapters, a theme dominating administrative law in the second half of the twentieth century. It started administrative law on a collision course with governments that wish to use administrative law 'instrumentally' for socialist or welfare-oriented purposes (below).[56]

(e) Public and private law

Dicey, by setting his face against a 'special' administrative court, helped to set in place the so-called 'private law' model of public law, in which executive and administration are subject to the common law as administered by the ordinary courts. The model underpins Dicey's ideal of *equality*: a vision of government as:

> under the law, and not just any law, but the same law as applies to everyone else. In that way, government is denied the special exemptions and privileges that could lead to tyranny. Moreover, the application of the law to government is placed in the hands of the ordinary courts, who are independent of government, and who can be relied upon to award an appropriate remedy to the citizen who has been injured by illegal government action.[57]

Closely tied to this was Dicey's image of officials as 'citizens in uniform', responsible for their actions to the 'ordinary' courts through the civil law of tort and contract.

A counter-argument advanced forcefully by John Mitchell during the 1960s is that, absent a separate system of administrative law courts, principles appropriate for the control of state power could not evolve.[58] Mitchell coupled the case for a separate administrative jurisdiction with a case for special rules, contrasting the English system with that of France, where a public/private jurisdictional divide was intrinsic to the post-Revolutionary legal order. A separate administrative jurisdiction, staffed by jurists with a specialised training,

[55] Jennings, 'In praise of Dicey (1885–1935)', 132. For Dicey's views, see *Law and Public Opinion*.

[56] The extreme example is Lord Hewart's classic, *The New Despotism* (Ernest Benn, 1929). See further, M. Loughlin, 'Why the history of English administrative law is not written' in Dyzenhaus, Hunt and Huscroft (eds.), *A Simple Common Lawyer* (Hart Publishing, 2008).

[57] P. Hogg, *Liability of the Crown*, 2nd edn (Carswell, 1989), pp. 1–2. See also C. Harlow, '"Public" and "private" law: Definition without distinction' 43 *MLR* 241; J. Allison, *A Continental Distinction in the Common Law: A historical and comparative perspective on English public law*, revised edn (Clarendon Press, 2000).

[58] J. Mitchell, 'The causes and effects of the absence of a system of public law in the United Kingdom' [1965] *PL* 95.

knowledgeable about public administration and specialists in administrative law, had evolved since the nineteenth century. This in Mitchell's view had enabled sophisticated principles of administrative law to be developed appropriate for the control of state power.[59]

We got instead a typical English adjustment: 'droit public – English style'.[60] In a break with the common law tradition, the judges invoked the public/private distinction during the 1970s and 1980s to provide support for a stronger and more extensive system of judicial review, building on a new judicial review procedure introduced in 1978 to assume 'exclusive jurisdiction' in 'public law cases'.[61] In time, this troublesome distinction would largely fade away (see Chapter 15). The Administrative Court of England and Wales, which today handles judicial review applications, is effectively a glorified division of the High Court, from which appeal lies to the civil division of the Court of Appeal and House of Lords.[62] The Administrative Court operates inside the framework of the unitary legal system to which it remains firmly attached; it is, in short, a specialised ordinary court. Tribunals have followed a similar process of 'judicialisation from within and without'. There is no special administrative appeal tribunal like the Australian Appeals Tribunal or as called for by Robson (below). The umbilical cord between tribunals and the 'ordinary courts' is carefully maintained in recent reforms, as discussed further in Chapter 11.

The case for separate principles of public law is not only jurisdictional but also normative. It originates in a view of the state as 'different' and 'exceptional' – endowed with the qualities of Hobbes's 'Leviathan'.[63] The state exercises sovereign power, different in kind from the great powers in practice wielded by private corporations or multinational enterprises (MNEs). The state is seen to possess the monopoly of force; the use of force is illegitimate without state authorisation. The state has financial and economic prerogatives; it controls the currency and collects taxes; its regulatory powers can be used in such a way as to unbalance contractual relations.[64] The state possesses the ultimate power of legislation (see Chapter 4). It acts as representative of the common good in the collective public interest (below). Speaking of the Crown, a metaphor used

[59] See similarly, C. J. Hamson, *Executive Discretion and Judicial Control: An aspect of the French Conseil d'Etat* (Stevens, 1954).

[60] Lord Woolf, 'Droit public – English style' [1995] *PL* 57.

[61] *O'Reilly v Mackman* [1983] 2 AC 237 (Lord Diplock). See also H. Woolf, 'Public law – private law: Why the divide? A personal view' [1986] *PL* 220 and *Protection of the Public: A new challenge* (Stevens, 1990). Contrast D. Oliver, 'Public law procedure and remedies – do we need them?' (2002] *PL* 91.

[62] As provided for by the Constitutional Reform Act 2005, the UK Supreme Court is about to take the place of the House of Lords..

[63] C. B. Macpherson (ed.), *Thomas Hobbes' Leviathan* (1651) (Penguin Books, 1968). And see C. B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford University Press, 1962).

[64] T. Daintith, 'Regulation by contract: The new prerogative' [1979] *CLP* 41, explained in Ch. 8.

to symbolise the state in many of the common law jurisdictions, the Canadian Supreme Court once said:

> The Crown cannot be equated with an individual. The Crown represents the State . . . It must represent the interests of all members of Canadian society in court claims brought against the Crown in Right of Canada. The interests and obligations of the Crown are vastly different from those of private litigants making claims against the federal government.[65]

Thus the state is not the mere collection of private persons dressed up in official uniforms presented by Dicey; to equate the state with its 'subjects' is therefore profoundly misleading and arguably shows a wilful disregard for power imbalance.[66] Because it does not admit the imbalance, no private law system can provide appropriate answers for public law problems. The special character of the state needs to be matched by a special and distinctive public law.[67]

One reason why the waves of liberalisation, privatisation and managerialism that swept through the English-speaking world during the 1980s created concern amongst public lawyers was anxiety for the *normative* values of their discipline. It was feared that the underlying tendency for public law 'to be swamped and dissolved by the waters of English private law-based common law and statute law' would be accentuated. If the distinction between public law and private law were to be dismantled, it would be 'public law rather than private law which risks being swept away'.[68] Thus Cane describes the public/private division as embodying for its supporters, 'an attractive *normative* theory of the way power ought to be distributed and its exercise controlled'.[69]

One response to problems of inequality is offered by the concept of human rights. Pre-eminently, it may be thought, human rights are a public law concept, since they can be claimed only against the state. In line with this reasoning, the HRA does not have 'horizontal effect'; it is applicable only to public authorities and bodies carrying out public functions.[70] Procedurally the Act is ambivalent, however; it allows the acts of public authorities to be challenged – consonant with the common law tradition – in every type of proceeding. Increasingly too, arguments over human rights are raising normative questions, as the public/

65 *Rudolph Wolff & Co Ltd and Noranda Inc. v The Crown* [1990] 1 SCR 695, 69 DLR (4th) 392.
66 See J. Allison, 'Theoretical and institutional underpinnings of a separate administrative law' in Taggart (ed.), *The Province of Administrative Law* (Hart Publishing, 1999), p. 75.
67 See M. Loughlin, *The Idea of Public Law* (Oxford University Press, 2004) and the review by Allison (2005) 68 *MLR* 344.
68 M. Freedland, 'The evolving approach to the public/private distinction in English law' in Freedland and Auby (eds.), *The Public Law/Private Law Divide: Une entente assez cordiale?* (Hart Publishing, 2006), p. 107.
69 P. Cane, 'Accountability and the public/private distinction' in Bamforth and Leyland (eds.), *Public Law in a Multi-Layered Constitution* (Hart Publishing, 2003), p. 276. And see M. Taggart, 'The peculiarities of the English': Resisting the public/private law distinction' in P. Craig and R. Rawlings (eds.), *Law and Administration in Europe* (Oxford University Press, 2003), p. 119.
70 M. Hunt, 'The 'horizontal effect of the Human Rights Act' [1998] *PL* 423.

private division works in practice to produce outcomes that some think unjust. Why, it is asked, should it be wrong for a state-run nursing home to close its doors or turn away a patient, when a private home can do so with impunity?[71] Surely human dignity is a universal right? Questions like this put the public/private divide in issue.[72]

An alternative response, and one preferred by the authors, is to search for values common to public and private law, capable, if properly handled, of bridging the divide (p. 46 below). Common law principles and concepts are sufficiently flexible to provide appropriate answers to problems involving the state and public authorities.[73] We do not deny that the state has special functions. The legislative process is undoubtedly special, a fact acknowledged in the distinction drawn between lawmaking and administrative rule-making in Chapters 4 and 5. That the common law is holistic does not mean that identical rules should be applied automatically across the board. Specific situations call for thoughtful specific answers and not mechanical application of the totemic word 'public'.

Power has never been the monopoly of the state or its institutions. Today, as Cane wryly observes, 'It is not just that relations between the public and private spheres have become more complex and multi-faceted . . . Rather, the two spheres have become inextricably interwoven in a process better analogised to the scrambling of an egg than to the weaving of a two-stranded rope'.[74] Shapiro's sense of a 'bounded and billeted' administration is rapidly disappearing. Outside the boundaries of the nation state, fragmentation is still more pronounced: states, agencies, international institutions and multinational corporations mingle and exercise ambiguous forms of authority. Separate public and private law principles are hard to apply in the post-modern world of fragmented governmental structures; the outcome is the sterile jurisdictional disputes in which lawyers specialise.

Teubner has argued that 'neither public law, as the law of the political process, nor private law, the law of economic processes, has the capacity to develop adequate legal structures in relation to the many institutional contextures of civil society'.[75] He calls for 'polycontexturality', a frame of mind in which 'the simple distinction of state/society which translates into law as public law *v* private law needs to be substituted by a multiplicity of social perspectives which are similarly reflected in the law.' On just this note, Karen Yeung notes how competition law is:[76]

71 See *YL v Birmingham City Council* [2007] UKHL 27 discussed at p. 380 below.
72 See A. Clapham, *Human Rights in the Private Sphere* (Oxford University Press, 1993).
73 D. Oliver, 'The underlying values of public and private law', and M. Taggart, 'The province of administrative law determined?' in Taggart (ed.), *The Province of Administrative Law*; and see D. Oliver, *Common Values and the Public-Private Divide* (Butterworths, 1999).
74 Cane, 'Accountability and the public/private distinction', p. 248.
75 G. Teubner, 'The many autonomies of private law' (1998) 51 *CLP* 393, 396.
76 K. Yeung, 'Competition law and the public/private divide', in Freedland and Auby (eds), *The Public-Private Divide : Une entente assez cordiale?* (Hart Publishing, 2006), p. 163.

moving beyond its original focus on private economic power to encompass public power, at least in so far as it may impact on the competitiveness of markets. Thus, in its modern guise competition law provides an important means by which economic power, primarily private economic power but increasingly also public economic power, is controlled and restrained.

Her conclusion is that 'the elusive and uncertain public/private divide is unlikely to provide any real assistance'; for relevant principles and values, we must turn to economic theory. Much the same is true in respect of corporations, which should not be free to operate as predators on behalf of their owners or shareholders.[77] Increasingly, they are subject to a range of new regulatory disciplines, seen as the most effective way to tame anti-competitive and predatory behaviour (see Chapter 6).[78] Again, 'good governance' values obtaining in the public sector are gaining ground nationally as principles of 'corporate governance' while on the international scene 'an ethical floor of responsibilities that MNEs should observe is coming into being'.[79]

Used descriptively, the public/private distinction has to be accepted: it is simply a fact, for example, that the HRA is a public law measure applicable only to public authorities and many further examples of rules based on a public/private distinction will be found throughout this book. A procedural distinction, though *not* an exclusive public law jurisdiction, is convenient and sometimes necessary.[80] The model of public law that we owe to Dicey is, like much in English law, incomplete, incoherent and inconsistent. But even when particular outcomes are – as they often are – disappointing, Dicey's equality principle 'conforms to a widely-held political ideal and preserves us from many practical problems'.[81] Quite simply, it is the most practical 'take off point'.[82]

3. Dicey and 'red light theory'

Dicey spoke disparagingly of the French theory of *séparation des pouvoirs* but Vile reminds us that the idea of the balanced constitution, in which executive

77 As in *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277.

78 J. Braithwaite and P. Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000), p. 531; J. Braithwaite, 'The limits of economism in controlling harmful corporate conduct' (1982) 16 *Law and Society Review* 481; 'Corporate control: Markets and rules' (1990) 53 *MLR* 170.

79 P. Muchlinski, 'International business regulation: An ethical discourse in the making?' in Campbell and Miller (eds.), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations* (Kluwer Academic, 2004), p. 99.

80 C. Harlow, 'Why public law is private law: An invitation to Lord Woolf', in Cranston and Zuckerman (eds.), *The Woolf Report Reviewed* (Clarendon Press, 1995).

81 Hogg, *Liability of the Crown*.

82 See J. Allison, 'Variations of view on English legal distinctions between public and private' (2007) 66 *CLP* 698, 711.

power is constantly subject to checks and balances from both Parliament and the law courts, is itself a variant on the theme of separation of powers. Noting its peculiar attraction for lawyers, Vile called this 'the theory of law'.

> The 'executive' must act according to the law, the 'government' must exercise leadership in the development of policy; but if the government was subject to the control of parliament, and the executive to the control of the courts, then a harmony could be established between the two roles of the ministers of the Crown. Ministerial responsibility, legal and political, was thus the crux of the English system of government. Whilst it remained a reality the whole edifice of constitutionalism could be maintained; should it cease to be a workable concept the process of disintegration between the legal basis and the operation of the government would begin.[83]

The 'balanced constitution' was an ideal-type. It never really existed and, given the present state of fusion between executive and Parliament, the idea of a constitution held in balance by a *triadic* division of functions is quite simply untenable. It has been tipped hopelessly out of kilter by the rise of political parties and popular democracy.[84] The significance of the balanced constitution lies in its influence on public law.

As administrators gained powers to make regulations and to adjudicate upon matters affecting the state's subjects, lawyers and administrators pulled in opposite directions. Lawyers, trained in the Diceyan mode of thought, regarded these developments as threatening both Parliament and the courts. In consequence, the breakdown – or perceived breakdown – of the doctrine of ministerial responsibility, which formed the political arm of Dicey's balance, brought cries of 'elective dictatorship'.[85] It is not surprising, therefore, to find many authors believing that the primary function of administrative law should be to *control* excesses of state power and, more precisely, subject it to the rule of the law courts. Light-heartedly, we have called this conception of administrative law 'red light theory' because of its emphasis on control. Professor Wade's approach is unequivocal. In the first edition of his leading textbook, he used the metaphor of 'constant warfare between government and governed' to justify a narrow focus on 'the *manner* of the exercise of power'.[86] He expressed overt suspicion of the 'vast empires of executive power' coupled with the expectation that government would 'run amok'. His later definition

[83] Vile, *Constitutionalism and Separation of Powers*, pp. 230, 231.

[84] See the debate between S. Sedley, 'The sound of silence: Constitutional law without a constitution' (1994) 110 *LQR* 270 and Griffith, 'The common law and the political constitution'.

[85] Lord Hailsham, *The Dilemma of Democracy: Diagnosis and prescription* (Collins, 1978), especially Ch. XVI. See also R. Brazier, *Constitutional Reform: Re-shaping the British political system* (Clarendon Press, 1991).

[86] H. W. R Wade, *Administrative Law* (Clarendon Press, 1961), p. 3. This short and incisive text is the basis for H. W. R. Wade and C. Forsyth, *Administrative Law*, 9th edn (Oxford University Press, 2004) (hereafter Wade and Forsyth).

of administrative law as 'the law relating to *the control* of governmental power' hardly comes as a surprise:

> A first approximation to a definition of administrative law is to say that it is the law relating to the control of governmental power. This, at any rate, is the heart of the subject, as viewed by most lawyers. The governmental power in question is not that of Parliament: Parliament as the legislature is sovereign and, subject to one exception [European Community law] is beyond legal control. The powers of all other public authorities are subordinated to the law, just as much in the case of the Crown and ministers as in the case of local authorities and other public bodies. All such subordinate powers have two inherent characteristics. First, they are all subject to legal limitations; there is no such thing as absolute or unfettered administrative power. Secondly, and consequentially, it is always possible for any power to be abused. Even where Parliament enacts that a minister may make such order as he thinks fit for a certain purpose, the court may still invalidate the order if it infringes one of the many judge-made rules. And the court will invalidate it, *a fortiori,* if it infringes the limits which Parliament itself has ordained.
>
> The primary purpose of administrative law, therefore, is to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse. The powerful engines of authority must be prevented from running amok. 'Abuse', it should be made clear, carries no necessary innuendo of malice or bad faith. Government departments may misunderstand their legal position as easily as may other people, and the law which they have to administer is frequently complex and uncertain. Abuse is therefore inevitable, and it is all the more necessary that the law should provide means to check it . . .
>
> As well as power there is duty. It is also the concern of administrative law to see that public authorities can be compelled to perform their duties if they make default . . . The law provides compulsory remedies for such situations, thus dealing with the negative as well as the positive side of maladministration.
>
> *Function distinguished from structure*
>
> As a second approximation to a definition, administrative law may be said to be the body of general principles which govern the exercise of powers and duties by public authorities. This is only one part of the mass of law to which public authorities are subject. All the detailed law about their composition and structure, though clearly related to administrative law, lies beyond the proper scope of the subject as here presented.
>
> What has to be isolated is the law about the manner in which public authorities must exercise their functions, distinguishing function from structure and looking always for general principles.[87]

Wade, perhaps Dicey's greatest and certainly his most influential heir, once described the spirit of Dicey's work as 'enduring' and so, as this chapter demonstrates, it has proved to be. We have chosen to focus on it as an encapsulation

[87] Wade and Forsyth, pp. 4–5 (emphasis ours).

of the red light tradition in English administrative law. The liberal-democratic view of administrative law's objectives, which strongly emphasises freedom *from* the state, derives directly from Dicey, whose account of the British constitution was never, as he seems to have believed, simply a description. It was an *interpretation,* inspired by his own values as well as those of the society in which he lived and worked. The ideology that formed the 'background theory' of his great works included an ardent belief in individualism, in laissez-faire economic policy and in the value of the common law. He showed no apparent interest in other functions for administrative law, such as regulation of relationships between public authorities that today it is increasingly asked to do. Dicey, along with many of his successors, felt that the 'harmony' of the British constitution was under threat from a shift of power away from Parliament and by greatly increased governmental powers (see Chapter 2).[88] Insofar as he recognised and feared the trend to collectivism but suggested no alternative structures by which it might be countered, Dicey must bear some responsibility for the individualistic, citizen-versus-state approach in English administrative law.

4. Ouster clauses and the rule of law

Central to red light theory, as we have taken care to emphasise, is the idea of the rule of law. Closely linked is the view that law courts are the primary weapon for protection of the citizen and control of the executive. Reflecting these sentiments, a leading textbook asserts:

> In matters of public law, the role of the ordinary courts is of high constitutional importance. It is a function of the judiciary to determine the lawfulness of the acts and decisions and orders of the Executive, tribunals and other officials exercising public functions, and to afford protection of the rights of the citizen. Legislation which deprives them of these powers is inimical to the principle of the rule of law.[89]

Whether the Government, acting through the legislature, should be able to exempt governmental activities from judicial oversight or drastically curtail the ambit of judicial review is therefore a crunch constitutional question, crucial to maintenance of the rule of law.

Under the doctrine of parliamentary sovereignty, it is open to Parliament to restrict or entirely exclude judicial review. There are various ways to do this.

[88] See M. Loughlin, *Public Law and Political Theory* (Clarendon Press, 1992), pp. 153–9, where the author calls Dicey's philosophy 'conservative normativism'. And see the debate between E. Barendt, *An Introduction to Constitutional Law* (Clarendon Press, 1998) and A. Tomkins, 'Review article: Of constitutional spectres. Review of Eric Barendt: An Introduction to Constitutional Law' [1999] *PL* 525.

[89] de Smith, Lord Woolf and J. Jowell , *Judicial Review of Administrative Action*, 6th edn (Sweet & Maxwell, 2007) [5-016].

The most extreme is a total 'ouster', 'privative' or 'preclusive' clause, designed to deprive the courts of jurisdiction. Ousters that render decisions wholly unchallengeable in the courts impinge on the constitutional allocation of functions, raising the question whether access to the courts is, as courts are fond of asserting, truly a 'constitutional right'.[90] Less drastic, though still suspect, is retrospective legislation, which has the effect of nullifying a court decision. This may operate either to deprive a litigant of the fruits of a successful lawsuit – a form of retaliation censured by Wade in the context of the *Burmah Oil* case as an 'unusual measure of retaliation'.[91] Slightly less opprobrious is legislation designed to confine the benefits of a successful case to those who fought it, common in social security litigation.[92] Such measures are hotly resented and often provoke judicial retaliation as attacks on the rule of law. Limitation clauses such as the six-week period for challenge frequently found in planning and compulsory purchase statutes are more acceptable.

Judges have developed various strategies to emphasise their opposition to ouster. Ouster clauses are restrictively interpreted. A common law presumption has evolved whereby access to the courts is not to be denied save by clear statutory words;[93] equally, it may be proclaimed a 'constitutional' or 'fundamental' right. The culmination of these approaches came in the celebrated *Anisminic* decision,[94] where Lord Reid showed how an ouster clause can skilfully be 'read down', laying the foundation stone of modern judicial review.

Before we read his speech, it is necessary to understand how limited at that date were the grounds for judicial review. In the case of tribunals such as the Foreign Compensation Commission (FCC), review lay in respect of 'jurisdictional errors' or errors of law concerning the competence of the tribunal to accept jurisdiction in a given case. (This very technical area of law is further discussed in Chapter 11). The effect of judicial invalidation of a decision was an elusive question. Thus Lord Reid in *Anisminic* describes a decision struck down for jurisdictional error as 'a nullity' and 'void', which amounts to saying that it is of no effect whatsoever. In other cases, decisions have been held 'voidable', meaning broadly that they are valid until set aside by a court.[95] The distinction may have important consequences. A void decision has no legal effects, invalidates further decisions dependent upon it, and may create rights to compensation. The rights of third parties will, on the other hand, be frozen out if the decision is merely voidable.

[90] *R v Lord Chancellor, ex p. Witham* [1997] 2 All ER 779 is discussed with further cases at pp. 114, 118 below.

[91] Wade & Forsyth, p 803, discussing *Burmah Oil v Lord Advocate* [1965] AC 75 and the War Damage Act 1965.

[92] T. Prosser, *Test Cases for the Poor* (Child Poverty Action Group, 1983); and see below, Ch. 16.

[93] *Pyx Granite Co Ltd v Minister of Housing and Local Government* [1960] AC 260. And see de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* [4.014–020].

[94] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

[95] H. W. R. Wade, 'Unlawful administrative action: Void or voidable?' (1967) 83 *LQR* 499 and (1968) 84 *LQR* 95.

The decision in issue in *Anisminic* came from the FCC, a statutory body set up under the Foreign Compensation Act 1950, which from time to time is asked to allocate funds received from foreign governments in respect of losses suffered by British nationals in overseas territories, in this case, after the Suez crisis. Anisminic, a British company claiming compensation, had been nationalised by the Egyptian government and sold to an Egyptian concern, raising the question whether it was a 'British national', for whom the funds were reserved. The FCC made a 'determination' ruling out Anisminic's claim. On appeal, the House of Lords ruled by a majority that an error of law had been made. There was however an obstacle in the form of an ouster clause reading: 'The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law.' By a majority (Lord Morris dissenting), the House went on to decide that the FCC had committed a jurisdictional error against which the ouster offered no protection; the determination was a 'purported determination':

> *Lord Reid:* If the draftsman or Parliament had intended to . . . prevent any inquiry even as to whether the document relied on was a forgery, I would have expected to find something much more specific than the bald statement that a determination shall not be called in question in any court of law. Undoubtedly such a provision protects every determination which is not a nullity. But I do not think that it is necessary or even reasonable to construe the word 'determination' as including everything which purports to be a determination but which is in fact no determination at all. And there are no degrees of nullity. There are a number of reasons why the law will hold a purported decision to be a nullity. I do not see how it could be said that such a provision protects some kinds of nullity but not others; if that were intended it would be easy to say so . . . There are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But . . . if it is entitled to enter on the inquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law . . . [If] they reach a wrong conclusion as to the width of their powers, the court must be able to correct that – not because the tribunal has made an error of law, but because as a result of making an error of law they have dealt with and based their decision on a matter with which, on a true construction of their powers, they had no right to deal. If they base their decision on some matter which is not prescribed for their adjudication, they are doing something which they have no right to do and their decision is a nullity.

The Government reacted swiftly. It tacked onto a bill, coincidentally before the House of Commons, an amendment designed to nullify the decision prospectively. But faced by angry letters to *The Times* from eminent lawyers and a hostile amendment, supported by the Law Lords and carried in the Lords, the Government backtracked. Section 3 of the Foreign Compensation Act 1969 provides for direct appeal to the Court of Appeal on a question of law concerning the construction of an Order in Council made under the Act. No further appeal lies to the House of Lords. Otherwise, save in cases of breaches of natural justice, a determination (including a purported determination) is not to be called in question in any court of law.

The *Anisminic* issue resurfaced suddenly and unexpectedly more than thirty years later in the contentious context of asylum and immigration. As we shall see in later chapters, there had been a continual flow of appeals to tribunals and courts in immigration cases, many of which the Home Office had lost. It was not therefore especially surprising that the bill set out to reform the appeals system; it was surprising to find in it a draconian ouster clause, designed to replace the High Court's jurisdiction with final appeal to a newly constituted Asylum and Immigration Appeals Tribunal (AIT).[96] The motivation was said by the Home Office sponsors to be the need to relieve pressure on the courts from repetitive and unmeritorious appeals – an explanation undercut when the Home Secretary, David Blunkett, announced himself to be 'personally fed up with having to deal with a situation where parliament debates issues and the judges then overturn them'. It was 'time for judges to learn their place'; they did not 'have the right to override the will of the House, our democracy or the role of Members of Parliament in deciding the rules'.[97] A gauntlet had been thrown down to the judges.

The first point that we wish to make about this unfortunate episode concerns drafting. English statutory drafting is said to be both precise and specific and the ouster in Clause 11 of the bill is an especially skilful example. It first dealt directly with the jurisdiction of the courts by providing that 'No court shall have any supervisory or other jurisdiction (whether statutory or inherent) in relation to the [AIT].' It went on to double-bank the ouster:

> No court may entertain proceedings for questioning (whether by way of appeal or otherwise) –
>
> (a) any determination, decision or other action of the Tribunal (including a decision about jurisdiction). . .
> (c) any decision in respect of which a person has or had a right of appeal to the Tribunal. . .

In case any loopholes were left, the draftsman added that these provisions were to:

[96] See for a full account, R. Rawlings, 'Review, revenge and retreat' (2005) *MLR* 378.
[97] Quoted by A. Bradley, 'Judicial independence under attack' [2003] *PL* 397.

> (a) prevent a court, in particular, from entertaining proceedings to determine whether a purported determination, decision, or action of the Tribunal was a nullity by reason of -
>
> (b)
>
> (i) lack of jurisdiction,
> (ii) irregularity,
> (iii) error of law,
> (iv) breach of natural justice, or
> (v) any other matter . . .

Only decisions made in bad faith were excepted. Finally, the draftsman anticipated the gateway afforded by the ECHR, providing that the power to challenge a public authority (including the tribunal) for acting incompatibly with the Convention under s. 7(1) of the HRA would be 'subject to subsections (1) to (3) above'.

Publication of the bill created uproar amongst lawyers. A speech from Lord MacKay, a previous Lord Chancellor, in the House of Lords debate shows how the bill's opponents presented it as an attack on the rule of law:

> Those who are familiar with that branch of the law will recognise those words as coming from a speech of the late Lord Reid in the case of *Anisminic*. Those were the grounds on which he held that the decision of the Foreign Compensation Commission in that case was not protected by the statutory ouster, which was elaborate, because the statutory ouster purported to protect determinations of the commission. However broad that protection is, if there is no true determination of the commission, there is nothing to protect. Alert to that problem, those who have put the Bill together sought to avoid it.
>
> In my submission, that is a serious affront to the rule of law. Let me take a breach of natural justice. What the House of Commons has been asked to affirm by the Government – and has affirmed – is that the High Court should be prevented from intervening, even where there is a clear breach of natural justice on the part of the tribunal. . . In my submission, that strikes right at the very heart of the rule of law. Anyone who read the Bill should have appreciated that. . .
>
> [T]he Government were apparently willing to subvert the rule of law in relation to people who might well be at risk of their lives from persecution in a foreign land. [98]

As with *Anisminic*, the Government drew back to a compromise position, providing that parties to an appeal in the AIT may 'apply to the appropriate court, on the grounds that the Tribunal made an error of law, for an order requiring the Tribunal to reconsider its decision on the appeal'.[99] Appeal is, however, strictly limited. An order can be made only if the court 'thinks that the Tribunal may have made an error of law', and only once in relation to each appeal. We shall pick this point up in Chapter 11.

[98] HL Deb., vol. 659, col. 67.

[99] S. 26(1) and (2) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

The second lesson of this story is that the unwritten constitution is held together by understandings. As the Lord Chancellor, Lord Falconer, appearing before the House of Lords Constitutional Committee, explained:

> I think the rule of law also goes beyond issues such as specific black letter law. I think there are certain constitutional principles which if Parliament sought to offend would be contrary to the rule of law as well. To take an extreme example simply to demonstrate the point, if Parliament sought to abolish all elections that would be so contrary to our constitutional principles that that would seem to me to be contrary to the rule of law. The rule of law goes beyond specific black letter law; it includes international law and it includes, in my view, settled constitutional principles. I think there might be a debate as to precisely what are settled constitutional principles but it goes beyond, as it were, black letter law.[100]

Before we move on from the subject of ouster, we want to highlight a further constitutional development. *Anisminic* was decided long before the HRA 'domesticated' the European Convention in 1998, though after the UK ratified it. ECHR Art. 6(1) contains the important provision that:

> In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

This provision renders total ouster clauses highly suspect. It also requires government to look very carefully at administrative systems both to ensure that adjudicative machinery is in place where this is appropriate and also that the machinery is 'Strasbourg compliant'. We shall follow this important development in Chapter 14.

Again, *Anisminic* was decided before the UK acceded to the European Communities (see Chapter 4). In the years that followed, it was shown that EC law might have something to say on preclusive clauses. The point arose in *Johnston v Chief Constable of the Royal Ulster Constabulary*,[101] a case involving equal opportunities. An Order in force during the Northern Ireland emergency excluded the use of firearms by female members of the Royal Ulster Constabulary (RUC). Ms Johnston sued in an industrial tribunal, arguing that the policy was incompatible with the EC Treaty and Equal Treatment Directive. The RUC relied on a ministerial certificate certifying that the conditions for derogation from the principle of equal treatment had been met which, if accepted, would have ousted the tribunal's jurisdiction. The tribunal made a preliminary reference to the ECJ for an advisory opinion as to the compatibility of the Order with EC law. The ECJ replied:

[100] CC, *Relations between the Executive, Judiciary, and Parliament*, HL 151 (2007) [25].

[101] Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, [1986] 3 WLR 1038. The European Commission was an intervenor in the ECJ in support of Ms Johnston. In issue were s. 53(2) of the Sex Discrimination (Northern Ireland) Order 1976; TEC Art. 141 (ex 119) and Art. 6 of the Equal Treatment Directive (EC 76/207).

> *The right to an effective judicial remedy*
>
> 16. The Commission takes the view that to treat the certificate of a minister as having an effect such as that provided for in article 53(2) . . . is tantamount to refusing all judicial control or review and is therefore contrary to a fundamental principle of Community law and to article 6 of the directive. . .
> 18. The requirement of judicial control stipulated by that article reflects a general principle of law which underlies the constitutional traditions common to the member states. That principle is also laid down in articles 6 and 13 of the European Convention of Human Rights . . .
> 20. A provision which, like article 53(2) . . . requires a certificate such as the one in question in the present case to be treated as conclusive evidence that the conditions for derogating from the principle of equal treatment are fulfilled allows the competent authority to deprive an individual of the possibility of asserting by judicial process the rights conferred by the directive. Such a provision is therefore contrary to the principle of effective judicial control laid down in article 6 of the directive.

We have highlighted ouster clauses because of their great constitutional importance, not only to red light theorists. In national law, ouster clauses demonstrate the respective constitutional weightings of the rule of law and parliamentary sovereignty. The rule of law is, however, an ideal that transcends the national legal order. Our example therefore serves as a reminder that the UK is no longer an island. As we shall see in subsequent chapters, multi-level systems of law and governance are coming into being into which we are increasingly integrated.

5. 'Green light theory'

The red light view of English administrative law as an instrument for the *control* of power and protection of individual liberty, the emphasis being on courts rather than on government, did not go unchallenged. In the period between the two world wars an alternative tradition grew up, which we have called 'green light theory'. In using this metaphor, we do not wish to suggest that green light theorists favour unrestricted or arbitrary action by the state; what one person sees as control of arbitrary power may – as Carr suggested – be experienced by another as a brake on progress. But while red light theory looks to the model of the balanced constitution and favours strong judicial control of executive power, green light theory sees in administrative law a vehicle for political progress and welcomes the 'administrative state'. In saying this, we must remember that both red and green light theories originated in earlier eras and try to understand their historical context. Both were, as Taggart reminds us:

> forged on the anvil of the emerging welfare state. Green light theorists looked to the truly representative legislature to advance the causes of workers, women, minorities and the disadvantaged. For them, the role of law was to facilitate the provision of statutorily

> established programmes of public services. Parliament was trusted to deliver socially desirable results, and so giving effect to Parliament's intention comported with those theorists' ideological leanings . . . A corollary to this approach was a deep suspicion of judges, who as a class were seen as hostile to collectivism and the welfare state. Employing Victorian canons of statutory interpretation to read down and in some instances scuttle entirely, social welfare legislation, the judiciary were viewed often as the enemy.[102]

During Dicey's lifetime, the state grew exponentially. To some, including Dicey, this was frightening; it meant inroads into private property rights and individual freedoms and called for the protection of the law. To others it was unequivocally good. State action was necessary if the lot of the underprivileged in society was to be improved: pensions and unemployment benefit had to be funded; slum clearance required planning and compulsory purchase; and so on. Law was an essential tool in this crusade. As a green light was given to the interventionist state, law had to become proactive.

Writing at the London School of Economics in the interwar period, and conscious of the close relationship between law, politics and social policy, Laski, Robson and Jennings were able to draw inspiration from abroad. In the United States, where realist and sociological jurisprudence were influential, the gaps between law, politics and administration were narrower. Before the New Deal, the Supreme Court had on several occasions restricted federal government power to regulate economic activity, through the medium of the commerce clause of the US Constitution and their freedom of contract doctrine.[103] After the election of President Roosevelt in 1933, the Court showed every sign of reviving this case law.[104] Under the shadow of the President's happily unfulfilled threat to pack the Supreme Court, the Court gradually retreated, ceding economic power to the executive. The Supreme Court not only recognised the legitimacy of federal government intervention in the economy but also – and perhaps more importantly – 'all but abandoned the idea that it had some special role in enforcing a line between constitutional law and politics'.

> The modern economy's complexity and the wide range of public goals the national government could pursue . . . limited the contributions the Court could make. And, conversely, the political structure of Congress, in which states had substantial representation, made Congress better than the Court in determining whether any particular proposal crossed the line dividing national power from state power.[105]

[102] M. Taggart, 'Reinvented government, traffic lights and the convergence of public and private law. Review of Harlow and Rawlings: *Law and Administration*' [1999] *PL* 124, 125.

[103] *Lochner v New York* 198 US 45 (1905).

[104] *Schechter Poultry Corp v United States* 295 US 528 (1935).

[105] C. Sunstein, 'Constitutionalism after the New Deal' (1987) 101 *Harv. LR* 421 likens the change to a 'constitutional amendment'; G. Lawson, 'The rise and rise of the administrative state' (1994) 107 *Harv. LR* 1231 calls it 'unconstitutional'.

Roosevelt's New Deal had set in place a new 'administrative state', with which lawyers had eventually to come to terms; it had, in short, necessitated the new attitude to state interventionism for which radical scholars in England were working.

The new school of English administrative law writing was less insular and less hostile to collectivism than Dicey. Highlighting the international character of the movement, Gordon describes the voice of Canadian John Willis as 'instantly recognisable':

> He is clearly one of the gang – the legal realists who were concerned to expand the authority of administrative agencies to govern new areas of economic life; to promote their virtues as policy makers and adjudicators over those of their chief rivals, the courts; to defend them against charges of arbitrariness and absolutism; and to limit the scope of judicial review of their decisions. The voice is familiar in style as well as substance – the slashing sharp-pointed satirical barbs aimed to puncture the inflated claims of judicial 'formalism' and the blunt no-nonsense plain style used to highlight the virtues of civil servants' 'functionalism' . . . Willis and the American realists are evidently steeped in a common set of argumentative modes and rhetorics as well as common aims.[106]

Gordon goes on to underscore the significant fact that all the principal intellectual defenders of the administrative state in the US had at some time held important posts in the New Deal administration. Jaffé, another member of 'the gang', wrote in his memorial to Landis, who had launched the first comprehensive defence of the administrative state,[107] that 'our generation – that of Landis and myself – judged the administrative process in terms of its stunning performance under the New Deal'.[108] In Canada, Willis wrote that he wished 'to talk administrative law with a civil servant and political science accent,' to be a 'government man' and a 'what actually happens man'.[109]

A further influence in providing a new model in which green light theories of administrative law could flourish was the work of the French jurist, Léon Duguit (1859–1928). Duguit's theory was premised on a socialistic state in which strong government was a necessity[110] and whose activities stretched far

[106] R. Gordon, 'Willis's American counterparts: The legal realists' defence of administration' (2005) 55 *UTLJ* 405, 405-6.

[107] J. Landis, *The Administrative Process* (Yale University Press, 1938).

[108] L. Jaffé, 'James Landis and the administrative process' (1954) 78 *Harv. LR* 319, 322–3.

[109] J. Willis, 'The McRuer Report: Lawyer's values and civil servant's values' (1968) 17 *UTLJ* 351. And see L. Sossin, 'From neutrality to compassion: The place of civil service values and legal norms in the exercise of administrative discretion' (2005) 55 *UTLJ* 427. For an Australian parallel, see P. Bayne, 'Mr Justice Evatt's theory of administrative law: Adjusting state regulation to the liberal theory of the individual and the state' (1991) 9 *Law in Context* 1.

[110] Duguit's main works in this field were *Traité du droit constitutionnel*, 5 vols. (1911) and *Les transformations du droit public* (1913), tr. H. and F. Laski, *Law in the Modern State* (Allen and Unwin, 1921). Duguit developed his theory of public law under the influence of Emile Durkheim (1858–1917), whose great work on the *Division of Labour* (1893) started life as a dissertation on 'the relationship of individualism and socialism'.

beyond the traditional areas of law, order, justice and defence. He believed in a collectivist state whose function was to secure the provision of public services. These he defined as including 'any activity that has to be governmentally regulated and controlled because it is indispensable to the realisation and development of social solidarity . . . so long as it is of such a nature that it cannot be assured save by governmental intervention'.[111] The definition is broad enough to encompass all the main preoccupations of contemporary administrative law.

Duguit's theory laid the basis not only for a welfare state but also for a corporatist state in which planning and the control of private economic activity in the interests of the collectivity were legitimate state activities; he predicted indeed that transport, mining and electricity would ultimately become public services. Yet he rejected the idea of the state as a corporate entity with a legal life and legal powers of its own. The state was merely a collection of individuals 'interdependent upon one another even for their daily and elementary needs'. The state had 'duties' rather than 'rights' or 'powers'; sovereignty itself was a misconception.[112] In Duguit's 'modern theory of the state', 'the one governmental rule is the governmental obligation to organize and control public services in such a fashion as to avoid all dislocation. The basis of public law is therefore no longer command but organization . . . government has . . . a social function to fulfil.'[113]

Like the green light theorists who built on his work, Duguit did not believe in absolute power and was strongly anti-authoritarian.[114] Power was subject to inherent limitations, and the rulers, defined as those who possessed the power of implementing decisions, had only a limited mandate to act in the public interest or in the interests of social solidarity:

> In whatever manner the business of the state is managed, its fundamental idea is clear: government must perform certain definite functions. As a consequence a public service is an institution of a rigorously objective order controlled by principles equally imposed on the government and its subjects.[115]

In Duguit's ideal state, the function of public law was first and foremost to provide the framework inside which the efficient operation of the public services could at all times be assured. Administrative law limited state action in two distinct ways: (a) through the notion that the state can act only in the public interest and for the public good; and (b) through the principle that the state must observe the law. Regulation and rules, which set out the principles of

[111] Duguit, *Law in the Modern State*, p. 48.
[112] *Ibid*. See, similarly, H. Laski, *A Grammar of Politics* (Allen and Unwin, 1925), pp. 44–88.
[113] Duguit, *Law in the Modern State*, p. 49.
[114] H. Laski, 'M. Duguit's conception of the state' in Goodhart *et al*., *Modern Theories of Law* (Oxford University Press, 1933), p. 56.
[115] Duguit, *Law in the Modern State*, pp. 51–4.

operation, at once seemed more important than the adjudication of disputes. Duguit's theory does, of course, find a place for adjudication. In case of doubt, administrative courts pronounce on the legality of administrative action. They have a third function. Duguit believed that the state was fully responsible for its acts and that every citizen was entitled to equality of treatment. Where a citizen suffered abnormal loss in the interest of the collectivity, compensation was due; loss caused by a state enterprise must be repaired by the state. Disputes between citizen and state were to be referred to administrative courts. These two ideas formed a complete new theory of administrative liability.

New accounts of administrative law showing the influence of these various ideas began to appear in England. Essentially these were administration-centred and collectivist in character. As Ivor Jennings saw the task of the lawyer, it was not to declare that:

> modern interventionism is pernicious, but, seeing that all modern states have adopted the policy, to advise as to the technical devices which are necessary to make the policy efficient and to provide justice for individuals . . . The problem to be discussed is the division of powers between administrators and judges and, given that judges must exercise some functions, the kind of courts and the judicial procedure necessary to make the exercise of the functions most efficient.[116]

For Jennings, administrative law was all the law relating to administration:

> It determines the organisation, powers and duties of administrative authorities. Where the political organisation of the country is highly developed, as it is in England, administrative law is a large and important branch of the law. It includes the law relating to public utility companies, and the legal powers which these authorities exercise. Or, looking at the subject from the functional instead of the institutional point of view, we may say that it includes the law relating to public health, the law of highways, the law of social insurance, the law of education, and the law relating to the provision of gas, water, and electricity. These are examples only, for a list of the powers of the administrative authorities would occupy a long catalogue.[117]

One senses here the functionalist concern with how things actually work. Jennings saw a new, descriptive role for academic administrative law, with a growing emphasis on statutory and regulatory regimes rather than the general principles of case law; he himself published a sectoral study of housing law.[118] In extended studies of new and developing areas of administrative activity, vertical rather than horizontal studies were made. Typically interdisciplinary in nature, such studies drew on the ideas of non-lawyers to explain and provide

[116] W. I. Jennings, 'Courts and administrative law' (1936) 49 *Harv. LR* 426, 430.
[117] Jennings, *The Law and the Constitution*, p. 194.
[118] Jennings, 'Courts and administrative law'.

context for legal rules. They were to promote a 'hiving off' of administrative law into its component parts – welfare, planning, housing, immigration, etc. – which tends to disguise its true structure. It is easier to confine the definition of administrative law to the general principles governing control of the use of power if the component parts of public administration have been hived off and treated separately. It is important to remember, however, that 'the organisation of this complexity is itself a form of public law, and executive self-regulation is a source of rules as worthy of analysis by the public lawyer as are those made by courts and legislatures'.[119]

Citing Jennings's definition with approval in the first English textbook devoted to administrative law,[120] Griffith and Street explained that their book would focus primarily on three questions:

- First, what sort of powers does the Administration exercise?
- Secondly, what are the limits of those powers?
- Thirdly, what are the ways in which the Administration is kept within those limits?

This certainly does not suggest a permissive attitude to power – an unlikely stance for Griffith, who believed that 'societies are by nature authoritarian. Governments even more so.'[121]

If for red light theorists the answer lay in courts and the rule of law, green light theorists saw judges and lawyers differently. Openly advocating reform of the antiquated legal system, they viewed the legal profession as too old-fashioned to reform itself. Green light theory focused on *alternatives to courts*. Thus Robson described the Donoughmore Committee, set up in 1931:

> to consider the powers exercised by or under the direction of (or by persons or bodies appointed specially by) Ministers of the Crown by way of (a) delegated legislation and (b) judicial or quasi-judicial decision, and to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the law . . .[122]

as paralysed by 'the dead hand of Dicey'.[123] Attacking at the same time legal reasoning and the profession, he damned the Report for rejecting the opportunity of a 'boldly-conceived system of administrative courts' headed by an administrative appeals tribunal, in favour of accepting 'the patchwork quilt of ill-constructed tribunals which at present exists, and endeavour[ing] to remedy some of their more obvious defects'.

Robson was not complaining that lawyers are *wrong* in seeking to protect

[119] T. Daintith, 'Book review' [2006] *PL* 644, 646.
[120] J. Griffith and H. Street, *Principles of Administrative Law*, 5th edn (Pitman, 1973), p. 4.
[121] J. Griffith, 'The political constitution' (1979) 42 *MLR* 1, 2.
[122] *Report of the Committee on Ministers' Powers*, Cmnd 4050 (1932), p. 1.
[123] W. Robson, 'The Report of the Committee on Ministers' Powers' (1932) 3 *Pol. Q.* 346, 359.

individual rights – though green light theorists did undoubtedly query their narrow focus on the right of property. His complaint was that their conceptual tools were inadequate for the task. He alleged that a profession which was incapable of reforming the legal system ought not to be let loose on the administrative process:

> The disappointing feature of the Report is its failure to make any significant contribution to the structure of the system. Instead of endeavouring to increase the sense of responsibility and independence of the administrative tribunals, the Report relies on a hostile judiciary to provide 'checks and balances'. It recommends, accordingly, that the supervisory jurisdiction of the High Court to compel ministers and administrative tribunals to keep within their powers and to hear and determine according to law be maintained; and further, that anyone aggrieved by a decision should have an absolute right of appeal to the High Court on any question of law.[124]

Robson was not arguing for a robotic administrative law or a public administration devoid of values – very much the reverse. What he worked for was justice for the many – what Street would later call 'justice in the welfare state'.[125] What Robson would have thought of the contemporary restructuring of the system of administrative tribunals by the Tribunals, Courts and Enforcement Act 2007 is an interesting question (see Chapter 11).

6. 'Green light theory' and control

Because they look in at administration from outside, lawyers traditionally emphasise external control through adjudication. To the lawyer, law is the policeman; it operates as an external control, often retrospectively. But a main concern of many green light writers was, as already suggested, to *minimise* the influence of courts: courts, with their legalistic values, were seen as obstacles to progress, and the control that they exercise as unrepresentative and undemocratic. 'The lawyers', said Robson, 'still regard themselves as champions of the popular cause; but there can be little doubt that the great departments of state . . . are not only essential to the well-being of the great mass of the people, but also the most significant expressions of democracy in our time.'[126]

In the same mode, we find Hutchinson seeking to re-politicise the notion of 'control':

> [Courts] take an overly historical approach to deciding disputes; they rely on an adversarial process; they limit the amount of relevant information on which decisions can be made; they are ignorant of bureaucratic concerns and workings; they allow access to only a limited

[124] *Ibid*., pp. 360–1.
[125] H. Street, *Justice in the Welfare State*, 2nd edn (Stevens, 1975).
[126] W. Robson, *Justice and Administrative Law*, 3rd edn (Stevens, 1951), p. 421.

> number of individuals; they fail to monitor the impact of their decisions; they ignore the claims of collective interest; they adopt a negative cast of mind; and they are imbued with an individualistic philosophy. In short, the work of the courts is qualitatively incoherent and quantitatively ineffective. They engage in an inescapably political enterprise and function in a way that is incompatible with their self-imposed democratic responsibilities . . . [I]t will be necessary to give up on the courts entirely in the campaign to develop a better organisational ethic and democratic practice.
>
> In seeking to repoliticise the vast administrative regions of contemporary society and to oblige the ship of state to sail under democratic colours, it is necessary to throw liberalism overboard and cast off the moorings of the public/private distinction. On a democratic voyage of discovery there is no chart to follow and no grand manual of statecraft to consult. On the oceans of possibility, empowered citizens must be allowed to dream their own destinations and steer their own courses.[127]

Red light theory prioritises courts; green light theory prefers democratic or political forms of accountability. Thus Laski advocated citizen participation in the form of parliamentary advisory committees – a precursor of the modern, departmental Select Committees – to oversee the work of government departments. He also advised attaching to each department a 'users' committee of citizens affected by its operations plus a small, 'clearly impartial' investigatory committee to deal with serious charges against departments – a proposal with considerable resonance in the age of 'citizen participation' and 'focus groups'.[128] Committees were seen as an extension of the long tradition of lay participation in governance.[129] Griffith set out his personal creed in 'The Political Constitution',[130] where he caustically dismissed the idea of a justiciable and enforceable Bill of Rights, arguing for a collectivist view of 'rights' as group interests or 'claims' to be evaluated through the political process. On the other hand, Griffith stressed the need for access to information, open government, a free and powerful press, decentralisation through local government and a strengthened Parliament.

But if the red light 'model of law' is to be abandoned, many feel that something other than the traditional 'model of government' must take its place. Few would wish to set sail in a barque as frail as that of ministerial responsibility. And because it revealed the inadequacies of ministerial responsibility, Crichel Down is often described as the beginning of modern English administrative law. Briefly to revisit that forgotten controversy, Crichel Down had been acquired as a bombing range by the Air Ministry before World War II.

[127] A. Hutchinson, 'Mice under a chair: Democracy, courts and the administrative state' (1990) 40 *UTLJ* 374, 375–6, 403.

[128] W. Gwyn, 'The Labour Party and the threat of bureaucracy' (1971) 19 *Political Studies* 383, 389.

[129] K. Wheare, *Government by Committee* (Oxford University Press, 1955).

[130] Griffith, 'The political constitution'. See now G. Gee, 'The political constitutionalism of JAG Griffith' (2008) *Legal Studies* 20.

Subsequently, when no longer required for these purposes, it was transferred to the Ministry of Agriculture. A dispute arose when the Ministry, wishing to dispose of the land, tried to let it to a new tenant instead of allowing its original owners to buy it back. Fierce objections from the latter forced a public inquiry, which established the responsibility of civil servants both for the policy and also for its execution.[131] Controversially, the minister, Sir Thomas Dugdale, accepted responsibility and resigned.

To most commentators, Crichel Down exposed a world of administrative policy and decision-making apparently immune from political and parliamentary controls. To Griffith 'the fundamental defect revealed was not a failure in the constitutional relations of those involved nor the policy decisions nor even the length of the struggle [the complainant] had to wage. It was in the method and therefore in the mental processes of the officials'.[132] Content to rely on 'that personal integrity which is so much more than an absence of corruption', Griffith concluded that the civil service must be left to put its own house in order. For those who were less trusting, yet did not wish to tip the balance too far in the direction of judicial control, the challenge was to provide alternatives.

Discussing red light theories, we talked of 'control' through courts. We did not stop to unpack the word. Control can be symbolic or real; it can mean to check, restrain or govern. Griffith and Street clearly sensed latent ambiguities, remarking that 'A great deal turns on the meaning which is attached to the word "controls". Banks control a river; a driver controls his car. The influence of a parent over a child may be greater than the power of a prison guard over a convict.'[133] Here the 'controls' are direct and internal rather than indirect and external. To extend our metaphors, however, a river bank may be inspected by an officer of the water board – today more probably the official of a privatised water authority or regulatory agency – to see that it is in good repair; a policeman may stop the driver and caution him for speeding; a health visitor may advise the child's parents to exert a different kind of influence; and the prison guard may be questioned by the board of visitors. These are all external controls, but they are not judicial. Dicey's controls were also external, as the concept of 'checks and balances' implies.

The first control on administrative activity is (as Shapiro indicated) legislative. The second is internal, hierarchical and supervisory.[134] Consider the doctrine of individual ministerial responsibility, central to the argument over Crichel Down. One function of the doctrine is to require the minister, as head of his department, to supervise the activities of his subordinates by establishing

[131] *Report of the Inquiry into Crichel Down*, Cmnd 9176 (1954) and HC Deb., vol. 530, cols. 1182–302.

[132] J. Griffith, 'The Crichel Down Affair' (1955) 18 *MLR* 557, 569.

[133] Griffth and Street, *Principles of Adminstrative Law*, p. 24.

[134] See further T. Daintith and A. Page, *The Executive in the Constitution: Structure, autonomy and internal control* (Oxford University Press, 1999).

policies and checking the way in which they are implemented. The doctrine also provides for external control through responsibility to Parliament, but this is envisaged as a last resort. So Griffith hints at the superiority of internal control when he prescribes as a remedy for Crichel Down 'more red tape not less'.

A different distinction is between prospective and retrospective control. Legislation is prospective in that it controls administrative activity by prescribing its bounds. Judicial review of administrative action is primarily retrospective, although it also possesses a prospective dimension. Lawyers assume and administration tacitly accepts that judicial rulings set boundaries for future conduct.[135]

Lawyers like to assume that administrators approach law in the same way as lawyers, ranking it hierarchically and respecting its binding and boundary-setting nature. Dimock – a lawyer by training – suggests that law 'controls' the administrator in three different ways: (i) it tells him what the legislature expects him to accomplish; (ii) it fixes limits to his authority; and (iii) it sets out the substantive and procedural rights of the individual and group.[136] The order may be significant: administrators are necessarily policy-orientated or, to put this differently, interested in outcomes. Positively, administrators see law as a set of pegs on which to hang policies; negatively, as a series of hurdles to be jumped before policy can be implemented, in which sense law acts as a brake. If law conflicts with policy, the official tries to change the law and, if this proves impossible, may sometimes set it aside or ignore it. There is much evidence too that officials do not always respect the hierarchy of legal norms. Junior officials may follow policy directives from above in preference to legislation and they do not always know of the existence of case law or realise its significance. In short, the values and objectives of the two professions differ and they may be unsympathetic to each other's viewpoints. As public administrators, Rosenbloom and O'Leary complain that 'administrative law texts aimed at law students and legal practitioners lack a realistic grasp of what most public administrators actually do, the organisational settings in which they work, and the values that inform their activities. They [lawyers] focus on overhead and control functions, not on implementation and service delivery.'[137]

7. Allocation of functions

Discussing the allocation of functions in the English governmental and administrative system, Ganz criticised the way in which theories of the balanced constitution seek to distinguish 'legislative', 'judicial' and 'administrative' functions.[138] For Ganz, decision-taking is a spectrum, ranging from 'fixed rules at one end to a purely discretionary act at the other. No clear lines can be

[135] P. Atiyah, *Pragmatism and Theory in English Law* (Stevens, 1987).
[136] M. Dimock, *Law and Dynamic Administration* (Praeger, 1980), p. 31.
[137] D. Rosenbloom and R. O'Leary, *Public Administration and Law*, 2nd edn (Marcel Dekker, 1996), pp. vi, vii.
[138] G. Ganz, 'Allocation of decision-making functions' [1972] *PL* 215, 216.

drawn where the one activity stops and the other begins as they shade off into one another imperceptibly.' Lawmaking is, for example, a continuous process, starting normally in a government department, where policy is formulated and drafts made before they are submitted to Parliament, which technically 'makes' the law.[139] The process ends again with the executive, responsible for seeing the law brought into force. In terms of separation-of-powers theory, the action passes from one organ of government to another but the stages are not discrete. Every stage of the process involves value judgements and everything turns on the choice of the decision-maker:

> Rules are themselves value judgements whereas discretion is the power to make a value judgement. In practice the difference may not be very great . . . where the rule contains words such as 'reasonable' which amount to a delegation of discretion to make value judgements . . .
>
> When the problem arises of who should make decisions in a particular field the controversy should centre not on whether these involve the application of rules or discretion but on who should make the necessary value judgements. Looking at this from the point of view of the legislature there is a wide area of choice.
>
> Parliament may make the value judgements itself and embody them in reasonably precise rules in statutes. This narrows the area of discretion to be exercised by whoever is charged with the application of the rules but does not eliminate it. The choice has to be made between the courts, administrative tribunals and sometimes even ministers or independent statutory bodies as interpreters of the rules laid down.
>
> In many areas it is not, however, possible or even desirable to formulate value judgements in the shape of detailed rules. Especially in a new field it may be necessary to make value judgements on a case-to-case basis. This can be done by laying down rules embodying very broad standards or conferring wide discretionary powers. These powers may also be given to courts, administrative tribunals, Ministers or a specially created statutory body.[140]

Here Ganz makes two points which have proved central to the development of modern administrative law. The first concerns administrative discretion, a topic to which we return in Chapter 5; the second concerns the primacy of the democratically elected legislature. In common with other green light theorists, Ganz believed that judges should not interfere with the allocation of functions as established by statute; by so doing, they substituted the court for the rightful decision-maker chosen by Parliament. And she forcefully links the procedural question of allocation of functions with the question of *values*. Where courts cross jurisdictional boundaries to impose 'judicial' procedures on the administration, they are in fact substituting their own values for those of the administration. The argument advanced is two-pronged: on the one

[139] M. Zander, *The Law-Making Process*, 6th edn (Cambridge University Press, 2005).
[140] Ganz, 'Allocation of decision-making functions'.

hand, administrative procedures are more accessible and 'user-friendly' than courts; equally important, the new institutions are less imbued with old ideas and ideologies.

Ganz's position typifies green light theory. It is also a mirror image of a statement from a very different source. In the celebrated *Wednesbury* case,[141] the Sunday Entertainments Act 1932 empowered local authorities to license cinemas for Sunday performances, subject to such conditions 'as the authority think fit to impose'. The defendants banned entry to children under 15 and the cinema sought a declaration that the condition was ultra vires:

Lord Greene MR: When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case . . . it must always be remembered that the court is not a court of appeal. When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles . . .?

The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there are to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters . . .

I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty – those of course, stand by themselves – unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word 'unreasonable' . . . [a word which] has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in *Short v Poole Corporation* [1926] Ch 66 gave the example of the red-haired teacher, dismissed because she had red hair. That

[141] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. And see M. Taggart, 'Reinventing administrative law' in Bamforth and Leyland (eds.), *Public Law in a Multi-Layered Constitution.*

> is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another . . .
>
> It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming, and, in this case, the facts do not come anywhere near anything of that kind. [The] proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really [means] that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether. If it is what the court considers unreasonable, the court may very well have different views to that of a local authority on matters of high public policy of this kind. Some courts might think that no children ought to be admitted on Sundays at all, some courts might think the reverse, and all over the country I have no doubt on a thing of that sort honest and sincere people hold different views. The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority that are set in that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion, cannot interfere.

Controversy surrounds the meaning of this famous passage. Are there two tests contained within it?

1. that the authority must act only after consideration of relevant factors (the ultra vires test)
2. that the authority must not act 'unreasonably'.

Or did Lord Greene intend a single test? If the first interpretation is correct, then, after all procedural factors have been exhausted, the court is left with an overriding discretion to intervene whenever it sees extreme unreasonableness: 'if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere'. If the second interpretation is correct, the court can oversee the range of factors which the decision-maker must take into consideration or must not consider – for example, he should not take into account wholly irrelevant questions, such as a school-teacher's red hair – but must stop short either of dictating the weight to be given to the various factors or of evaluating the final decision. In later chapters, we shall see how the courts have grappled with these issues.

We might compare the operation of the classical *Wednesbury* test to a plot of land, whose boundaries it is the court's duty to patrol. Provided the decision-maker does not put a toe outside the plot he is protected from judicial review. In the classical English formula, the decision-maker must not exceed 'the four corners of his discretion'; in the terminology of the ECtHR, this is the decision-maker's 'margin of appreciation'. The judge, who cannot review the merits of a decision, retains less discretion than if he possessed an independent power of evaluation. Yet this distinction is not really as clear as it seems. As the court

sets the boundaries, it can in practice adjust them virtually at will by adding or subtracting factors which the decision-maker should have considered or not considered.

Shortly before Lord Irvine (New Labour's first Lord Chancellor) introduced the Human Rights Bill into Parliament, he found it expedient to affirm the true sense of the *Wednesbury* test. Irvine called it 'shorthand for that constitutional school of thought which advocates self-restraint in public law matters. Moreover, it is shorthand which the vast majority of lawyers would still acknowledge to be the guiding principle of our system of judicial review'. He wrote that Lord Greene had:

> outlined substantive principles of judicial review which truly reflect the constitutional basis which he ascribed to them. First that a decision-maker has a broad discretion as to the factors which are to be taken into account before a decision is made, a discretion which is only restricted if the governing statute clearly requires that a particular factor *must* be considered, or *must not* be considered. Second, the celebrated principle of *Wednesbury* unreasonableness, that once the decision-maker has properly determined the range of relevant considerations, the weight to be given to each consideration is a matter within its discretion and a decision will only be struck down as unreasonable where it is so unreasonable that no reasonable decision-maker could have made it.[142]

We shall return to this debate in Chapter 3.

8. Towards consensus?

Our objective in the first edition of this book was to reinstate the link between public law and politics, restoring an essential dimension of administrative law which had temporarily been mislaid. Identifying two sharply contrasted positions, we labelled them red and green light theory, distinguishing their opposing attitudes to the functions of state, government and judiciary:

> Red light theorists believed that law was autonomous to and superior over politics; that the administrative state was dangerous and should be kept in check by law; that the preferred way of doing this was through adjudication; and that the goal should be to enhance liberty, conceived in terms of the absence of external constraints. Green light theorists . . . believed that law was not autonomous from politics; that the administrative state was not a necessary evil, but a positive attribute to be welcomed; that administrative law should seek not merely to stop bad administrative practice, and that there might be better ways to achieve this than adjudication; and that the goal was to enhance individual and collective liberty conceived in positive and not just negative terms.[143]

[142] Lord Irvine, 'Judges and decision-makers: The theory and practice of *Wednesbury* review' [1996] *PL* 59, 63.

[143] The convenient summary comes from A. Tomkins 'In defence of the political constitution' (2002) 22 *OJLS* 157.

At one level, these differences reflect an accepted theoretical division in Anglo-American legal theory;[144] at another, a political divide. It is no coincidence that so many green light theorists were supporters of Roosevelt's New Deal or, like Laski and Griffith, avowed supporters of the British Labour Party. It is this which made their views controversial.

Times change and politics change with them. Attitudes to the state and the way the state is organised changed very sharply in the last decades. The New Deal policies in which green light theory was rooted came to be superseded in their country of origin by a liberal economic revolution worthy of being termed a 'new constitutional order'.[145] Today, this new order is itself under threat of demolition by an emergent 'New, New Deal'. In the UK, a Conservative 'blue rinse' caused concern, as indicated earlier, for the values of public law; New Labour substituted new values and embarked, as we shall see in the next chapter, on a quiet constitutional revolution and mission to modernise. The 'law/government' divide recorded in this chapter has given ground before the notion of 'governance' – a 'new process of governing; or a changed condition of ordered rule; or the new method by which society is governed'.[146] This idea is further unpacked in Chapter 2. We shall find Teubner's theme of hybridisation or 'polycontexturality' echoed in a shift away from 'state-centred' to 'decentred' regulation (see Chapter 6). What changes will be necessary in light of the financial disasters of 2008 it is too soon to say.

Perhaps red and green light theory has had its day? We do not think so. Even if the battle has migrated, the old opponents are still squaring up. The law-versus-democracy battle rages in the context of the HRA, as courts, empowered by the Act, have moved centre stage (see Chapter 4). Red and green light theories are both well represented in the European Union, where the search for 'bounded and billeted' government continues.[147] The idea captures an inevitable tension between administrative law's two main functions. The problem of balance finds expression in an administrative lawyer's simple definition as 'the control of power, and the maintenance of a fair balance between the competing interests of the administration (central government, local government or specialised agencies) and the citizen'.[148] It was also articulated by Richard Crossman, an avowed socialist who, as a Cabinet minister in Harold Wilson's

[144] See further P. Atiyah and R. Summers *Form and Substance in Anglo-American Law: A comparative study of legal reasoning, legal theory and legal institutions* (Clarendon Press, 1987); M. Horwitz, *The Transformation of American Law, 1780-1860* (Harvard University Press, 2006) and *The Transformation of American Law 1870-1960: The crisis of legal orthodoxy* (Oxford University Press, 1992); N. Duxbury, *Patterns of American Jurisprudence* (Clarendon Press, 1995).

[145] M. Tushnet, *The New Constitutional Order* (Princeton University Press, 2003), p. 36.

[146] R. Rhodes, *Understanding Governance* (Open University Press, 1997), p. 6.

[147] C. Harlow, 'European administrative law and the global challenge', in Craig and de Burca (eds.), *The European Union in Perspective* (Oxford University Press, 1999).

[148] D. Yardley, *Principles of Administrative Law* (Butterworths, 1981), p. viii.

1964 Labour Government, was responsible for introducing a parliamentary ombudsman (see Chapter 13):

> The growth of a vast, centralised State bureaucracy constitutes a grave potential threat to social democracy. The idea that we are being disloyal to our Socialist principles if we attack its excesses or defend the individual against its incipient despotism is a fallacy . . . For the Socialist, as much as for the Liberal, the State Leviathan is a necessary evil; and the fact that part of the Civil Service now administers a Welfare State does not remove the threat to freedom which the twentieth-century concentration of power has produced . . .
>
> In Britain we are faced with the following dilemma. Since the abuses of oligopoly cannot be checked by free competition, the only way to enlarge freedom and achieve a full democracy is to subject the economy to public control. Yet the State bureaucracy itself is one of those concentrations of power which threaten our freedom. If we increase its authority still further, shall we not be endangering the liberties we are trying to defend?[149]

We have used the lens of red and green light theory to highlight a number of attitudes to this dilemma. Jennings admits that 'judges must exercise some functions'. Griffith acknowledges that the development of judicial review 'during this century, and especially over the last thirty-five years, has brought great benefits and has been a restraint on overweening princes'.[150] Are we to call Wade a green light theorist when he says that the detailed law about the composition and structure of administrative bodies is 'clearly related to administrative law'?

It would be wrong to leave the subject, however, without any mention of a growing consensus over administrative law values. This has crystallised around a trilogy of values – transparency, participation and accountability – that reflect the 'good governance' programmes of international institutions.[151] Taggart, for example, lists openness, fairness, participation, impartiality, accountability, honesty and rationality as core values of constitutional and administrative law.[152] The leading Australian textbook on judicial review calls for 'a legal system which addresses the ideals of good government according to law', including: openness, fairness, participation, accountability, consistency, rationality, accessibility of judicial and non-judicial grievance procedures, legality and impartiality.[153]

Harden gives accountability – in the sense of giving an account of one's conduct so that it may be evaluated and, in appropriate cases, sanctioned[154]

[149] R. Crossman, *Socialism and the New Despotism* (Fabian Tract No. 298, 1956).
[150] J. Griffith, *The Politics of the Judiciary*, p. xvii.
[151] C. Harlow, 'Global administrative law: The quest for principles and values' (2006) 17 *European J. of International Law* 187.
[152] M. Taggart, 'The province of administrative law determined' in Taggart (ed.), *The Province of Administrative Law*, p. 4.
[153] M. Aronson, B. Dyer and M. Groves, *Judicial Review of Administrative Action*, 4th edn, (Lawbook Co. of Australia, 2009), p. 1.
[154] See M. Bovens, 'Analysing and assessing accountability: A conceptual framework' (2007) 13 *ELJ* 447; D. Oliver, *Government in the United Kingdom: The search for accountability, effectiveness and citizenship* (Open University Press, 1991).

– the central place on any list of good governance values because there is no real possibility of 'exit' from public goods or from the 'obligations which public authorities are entitled to impose on individuals'.[155] With many red light theorists, Mulgan sees legal accountability as:

> in some respects the most powerful form of external review of executive action. Judicial hearings increasingly require the government to disclose publicly what it has done and why; they allow members of the public the right to contest such government actions, and they can force the government into remedial action. Indeed, an effective, independent judicial system is a fundamental prerequisite for effective executive accountability.[156]

Later chapters of this book, however, describe very varied forms of accountability machinery, ranging from formal parliamentary proceedings through public inquiries and ombudsman investigations to judicial review and, in Chapter 17, the sanction of liability.

As Mulgan suggests and Austin has argued more explicitly, 'government would only become truly democratic and accountable and its citizens would only have a meaningful right of participation in the making of decisions which affect them, if there was full access to governmental information.' [157] In this way, freedom of information crept onto the administrative law agenda during the 1970s, when 'government in the sunshine' became a fashionable catchphrase.[158] Government in the sunshine, however, cuts across the dominant British tradition of 'government behind lace curtains'. It was not until the Freedom of Information Act 2000 came into force in 2005, after much pressure and endless official prevarication, that we could begin to talk of a transparent government system in Britain. Even then, when we look at the Act's provisions in greater detail in Chapter 10, we shall find no ringing declaration or positive right of access to official information; instead, we shall find twenty-three specific exemptions from disclosure.

The parallel shift inside administrative law from individuated to participatory due process is normally associated with Stewart's powerful plea for the reformation of American administrative law.[159] Classical English administrative law was, on the other hand, very sparing in its protection of *collective* interests, as green light theorists were quick to point out. Prosser suggests, however, that citizen participation is the goal towards which public law should be working. 'However deficient participation may be in practice, it aspires to, and allows us

155 I. Harden, 'Citizenship and information' (2001) 7 *EPL* 165, 167.

156 R. Mulgan, *Holding Power to Account: Accountability in modern democracies* (Macmillan, 2003), pp. 75–6.

157 R. Austin, 'The Freedom of Information Act 2000: A sheep in wolf's clothing?' in *Changing Constitution*, 6th edn (2007).

158 I. Harden and N. Lewis, *The Noble Lie: The British constitution and the rule of law* (Hutchinson, 1986); R. Austin, 'Freedom of information: The constitutional impact' in *Changing Constitution*, 2nd edn (1989).

159 R. Stewart, 'The reformation of American administrative law' (1975) 88 *Harv. LR* 1667.

to work towards, the development of institutions for the expression of the ideal of discussion free from domination, with equal power to affect decisions given to all those affected'.[160] This view anticipates by many years the commitment of New Labour politicians to participatory, consultative and responsive governance (see Chapter 2), documented in a report from PASC.[161] The independent 'Power Inquiry' was more ambitious than PASC, whose report is notably short on ideas for citizen input. The Inquiry optimistically concluded that citizens were *not* apathetic; there was strong participation in areas from voluntary work to pressure politics. It needed to be downloaded, an ideal that has found expression in New Labour's plans for the restructuring of local government (see p. 86 below).[162]

Our own approach to problems of public administration and values is pragmatic. We 'do not demand consistency with some overarching theory of the administrative state'; we are 'prepared to accept new ways of addressing problems, even though they make a theoretical jumble of the legal culture'.[163] We have simply set out to show that there is no single finite question or set of questions for administrative law to answer, revolving around a single attitude to the state's relationships with its subjects. Similarly, there can be no finite list of values. Lawyers, we have argued, suffer from a professional deformation; they are too easily inclined to assume a judicial answer to every problem. Equally, they show a predisposition to leave the judicial branch of government unexamined.

[160] T. Prosser, 'Towards a critical public law' (1982) 9 *JLS* 1, 11.

[161] PASC, *Public Participation: Issues and innovations*, HC 373 (2001/2).

[162] *Power to the People: An independent inquiry into Britain's democratic system* (London: Rowntree Trust) 2006

[163] S. Shapiro, 'Pragmatic administrative law' in *Issues in Legal Scholarship: The reformation of American administrative law* (Berkeley Electronic Press, 2005).