§ Law in Context

Law and Administration

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The changing state

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1. The Trojan horse

In Chapter 1 we focused on the political dimension of administrative law, an unfashionable approach in 1983, when the first edition of this book appeared. At that time we felt the need to assert at the outset our view of administrative law as neither neutral nor objective but as reflecting the expectations that society has of

'the state'. We did not, on the other hand, feel the need to include in our book a structural account of British government. We were writing for readers who were relatively informed about British history and politics, many of whom had undergone a course in public law or British government. This could, we felt, be relied upon as a satisfactory foundation for the study of administrative law. Moreover, British government seemed to us at the time relatively simple. We thought of the state as unitary and highly centralised. Central government was made up of the great departments of state, some like the Home and Foreign Offices with eighteenth-century roots, others modern statutory additions. A few major public services were operated directly by central government, notably the National Health Service (NHS), but more usually, as with housing or social services, they were the responsibility of local government, the only democratically elected competitor to Parliament. Some nationalised industries were, like British Rail, still on the scene but most were on their way out. Few concessions were made to regionalism, regional government was not on our radar screen and although the European Communities Act was on the statute book, to have looked outside the territorial boundaries of our nation state would not have crossed our minds! Declining to define the term 'state', not then in general use amongst lawyers, all that we felt it necessary to say was that 'most people would associate the state with central government, many would include local authorities, some would go on to provide a catalogue of nationalized industries and public enterprises like water authorities, public services like the NHS, boards committees, commissions and inspectorates, the police, all the multifarious public authorities which make up the "public sector" of our complicated society'.

This pragmatic treatment of British government was, we suggested, an historical legacy, reflecting a characteristic British dislike of theory. As Prosser once remarked, Britain has an extended and powerful state apparatus yet lacks a theory of the state: 'There is no systematically developed legal concept of the state as a sort of moral unifier standing above the struggles of civil society.'[1] The apparatus of the modern state has simply grown up around us, starting with a raft of important nineteenth-century reform measures, Lord Shaftesbury's Factory Act 1833, Edwin Chadwick's Poor Law Act 1834 and some very salutary public health legislation in which Chadwick (the father of modern public administration) also played a significant part.[2] The effect of the reforms was both regulatory and centralising, setting a pattern from which we have never since departed:

> The first stage was the discovery of some 'intolerable' evil, such as the exploitation of child labour. Legislation was passed to prevent this. In the second stage, however, it was

[1] T. Prosser, 'The state, constitutions and implementing economic policy: Privatization and regulation in the UK, France and the USA' (1995) 4 *Social & Legal Studies* 507, 510. See also K. Dyson, *The State Tradition in Western Europe* (Martin Robertson, 1980).

[2] O. MacDonagh, *Early Victorian Government 1830-1870* (Weidenfeld and Nicolson, 1977), Ch. 6. Many of the institutions of government are, as indicated, older.

> discovered that the legislation was ineffective. New legislation was passed with stronger provisions and inspectors were employed to ensure enforcement. Third, many of the new groups of professionals recruited to enforce legislation themselves became lobbyists for increases in the powers of their agencies. Fourth, this growing corps of professional experts made legislators aware 'that the problems could not be swept away by some magnificent all embracing gesture but would require continuous slow regulation and re-regulation'. Finally, therefore, a quite elaborate framework of law was developed with a complex bureaucratic machine to enforce it. The professionals helped to transform the administrative system into a major organization with extensive powers, almost without Parliament realizing it.[3]

This is a political process with which we are still familiar.

Hill reminds us that the reforming zeal of the nineteenth century was not directed solely at substantive social evils; this was a time of substantial administrative reform when the apparatus of the regulatory state, which we have come to take for granted, was being established. The modern British civil service was set in place and its character determined by the 1853 Northcote-Trevelyan Report, whose lines endured for more than a century.[4] There was substantial local-government reform, starting with the Municipal Reform Act 1835, which set in place a structure that has largely survived later efforts at radical reform.[5] And the state was extending its coercive powers. Chadwick's Poor Law Act 1834 acted as Trojan horse for a raft of public-health measures that made, according to Hill, a potent contribution to the state's regulatory coercive powers. Peel's Metropolitan Police Act 1829, introduced to deal with threatened public disorder, was followed by county, borough and metropolitan police Acts in 1856, which firmly established the principle of professional policing.[6] There were waves of legal reform throughout the century. Common law procedure was reformed in 1854 and Dicey's beloved unitary jurisdiction established with the Judicature Act 1870.[7] It is surprising how much of the machinery by which these nineteenth-century reforms were implemented – boards, committees, commissions, and inspectorates – remains in place today (though naturally remodelled). Boards of Visitors, now the Independent Monitoring Board, still act as 'watchdog' to the prison system; Her Majesty's Inspectorate of Constabulary (HMIC) exercises a supervisory role over police forces; everywhere committees proliferate.[8] Providing familiar landmarks in the institutional landscape, these structures give a comforting sense of stability

[3] M. Hill, *The State, Administration and the Individual* (Fontana, 1976), pp. 23–4.

[4] The Northcote-Trevelyan *Report on the Organisation of the Permanent Civil Service* (C 1713, 1853) is reprinted with the *Fulton Report on the Civil Service*, Cmnd 3638 (1968).

[5] By the Local Government Act 1972, following the *Redcliffe-Maud Report: Reform of Local Government in England*, Cmnd 4276 (1970).

[6] H. Parris, 'The Home Office and the provincial police in England and Wales, 1856-1870' [1961] *PL* 230.

[7] W. Cornish and G. Clark, *Law and Society in England, 1750 -1950* (Sweet and Maxwell, 1989).

[8] K. Wheare, *Government by Committee* (Clarendon Press, 1955).

and continuity, which helps to disguise the fact that the structure of British government, like the countryside, follows no particular pattern or principle; it is changing and contingent and evolves in an ad hoc fashion. The haphazard structure is also comforting in the very different sense that the 'bits and pieces' of which it is made up help to disguise the increasingly regulatory and coercive character of the modern state.

2. Bureaucracy and central government

In Hill's account the onward march of bureaucracy, which underpins the complex public services that are the hallmark of a modern state, is briefly noted. Without a substantial bureaucracy, the modern regulatory welfare state would be impossible; its services would simply fall apart. For analysis of this modern phenomenon we still turn to the German sociologist Max Weber (1864–1920). Bureaucracy – identified by Weber as a phenomenon typical of mass industrial societies, occurring in both public and private sectors – entailed objectivity: business was discharged 'according to calculable rules' and 'without regard for persons'.[9] Both elements of the Weberian equation retain their resonance today and are indeed essential for the operation of our mass administrative welfare and social service systems. Administration 'without regard for persons' implies the principles of equal treatment and non-discrimination that underlie today's egalitarian democracy, culminating in the passage of the Equality Act 2006 and establishment by the New Labour Government of the Equality and Human Rights Commission in 2007 with a mandate to help eliminate discrimination, reduce inequality, protect human rights. And mass administration according to objective principles is best carried out through 'calculable rules': rules favour consistency and equal treatment; discretion involves choice, selection and discrimination. These central principles of public administration are discussed at length in Chapter 5.

The link made by Weber between bureaucracy and rules helps to explain why bureaucracy has become a significant factor in 'juridification' – an 'ugly word' coined by Teubner to describe the tendency of modern and post-modern societies to formalise and encapsulate all social relations in terms of law. Teubner regards juridification as the logical conclusion of bureaucracy, hence a universal feature of modern administration.[10] Much of the administrative law we shall study in later chapters concerns 'cycles of juridification', in which rules are set in place; courts are invoked to interpret and resolve disputes over verbal ambiguities invariably contained in rules; further rule-making,

[9] M. Rheinstein (ed.), *Max Weber on Law in Economy and Society* (Harvard University Press, 1954). See also D. Beetham, *Bureaucracy*, 2nd edn (Open University Press, 1996).

[10] G. Teubner, 'Juridification: Concepts, aspects, limits, solutions' in Teubner (ed.), *Juridification of Social Spheres* (de Gruyter, 1988). See also C. Hood and C. Scott, 'Bureaucratic regulation and new public management in the United Kingdom: Mirror-image developments?' (1996) 23 *JLS* 321.

directed at specific problems thrown up by judicial interpretation is stimulated; and further requests for judicial clarification are made. Juridification, Teubner predicted, would in time prove dysfunctional, leading to consequential 'depoliticization of the social environment' and (we would add) a shrinking private or deregulated sphere. Juridification and with it the shrinking area of pure discretion available to administrators are key issues for administrative law (see Chapter 5). The increasingly regulated and juridified societies that have emerged in the last half-century profess transparency but, we shall suggest, are far from transparent; profess to be participatory, though public participation is marginal; and demand accountability, though accountability is illusory. These problems resurface throughout this book.

The British civil service set in place by Northcote-Trevelyan was Weberian to a limited extent. At the apex was a small Whitehall elite (the Whitehall mandarins).[11] This made it very much a 'trust society', in which much responsibility was delegated and relationships were unwritten, based on trust and a shared work culture – a behavioural pattern that has, somewhat surprisingly, survived juridification and is still the norm.[12] The civil service saw itself as neutral and impartial: a servant to any master. The key principles on which it was based were integrity, political impartiality, objectivity, selection and promotion on merit, and responsibility through ministers to Parliament.[13] These understandings were a crucial part of the professional practices, ethical standards and ideology that evolved in the senior civil service. On one side of the political line, a sense of loyalty to the Government of the day went with an obligation to inform and advise; on the other stood the convention of ministerial responsibility, according to which a minister was (at least nominally) responsible to Parliament for what went on in his department.[14] A culture of secrecy obtained throughout the central civil service, only starting to break down with the introduction of freedom of information legislation that became operative in 2005 (see Chapter 10).

Serious modification of the traditional pattern started with the government of Margaret Thatcher, based on managerial ideas borrowed from the private sector. Changing career patterns in the higher echelons of the civil service, the introduction of short-term contracts and 'performance-related pay', led to a breakdown of traditional hierarchical arrangements, to some extent undercutting the 'trust' model of government. The process of erosion continued under Tony Blair with the growing practice of appointing political advisers, by definition not objective, to senior civil service posts. These new arrangements were

[11] F. Parris, *Constitutional Bureaucracy* (Allen & Unwin, 1951); P. Hennessey, *Whitehall* (Fontana, 1989).

[12] E. Page and B. Jenkins, *Policy Bureaucracy: Government with a cast of thousands* (Oxford University Press, 2005).

[13] Confirmed in *The Civil Service: Continuity and Change* Cm. 2627 (1994), pp. 8–9; Treasury and Civil Service Committee, *The Role of the Civil Service* HC 27 (1993/4).

[14] D. Woodhouse, *Ministers and Parliament: Accountability in theory and practice* (Clarendon Press, 1994); A. Tomkins, *The Constitution after Scott* (Clarendon Press, 1998), pp. 38–41.

perceived inside and outside the civil service as a threat to the unwritten ethos, shoring up demands for a formal, 'juridified' structure.

The terms of the Nolan Committee, set up in the wake of a 'sleaze' scandal involving MPs, was 'to examine current concerns about standards of conduct of all holders of public office'. Simply but magisterially, the Committee enunciated seven principles of public life – selflessness, integrity, objectivity, accountability, openness, honesty and leadership – and described them as applicable 'to all aspects of public life'. Set out by the Committee 'for the benefit of all who serve the public in any way', the Nolan principles form a set of 'good governance values', which today cover the civil service, local government, and other public bodies, including agencies and universities.[15] Nolan again urged replacement of the tacit understandings of British government by something more precise.

Written but non-justiciable codes of practice, available to the public on the Cabinet Office site and applicable to ministers as well as civil servants, now govern standards and questions of ethics and propriety in public life. These exhort civil servants to carry out their tasks 'with dedication and a commitment to the Civil Service and its core values: integrity, honesty, objectivity and impartiality':

- 'Integrity' is putting the obligations of public service above your own personal interests.
- 'Honesty' is being truthful and open.
- 'Objectivity' is basing your advice and decisions on rigorous analysis of the evidence.
- 'Impartiality' is acting solely according to the merits of the case and serving equally well governments of different political persuasions.

These core values are said to 'support good government and ensure the achievement of the highest possible standards in all that the Civil Service does, helping the Civil Service to gain and retain the respect of Ministers, Parliament, the public and its customers'. The standards are monitored by the Cabinet Secretary and Committee on Standards in Public Life, a permanent body responsible to Parliament, which now regulates standards. There is also a Commissioner for Standards. The Parliamentary Commissioner for Administration (PCA) has also published principles of good administration (see Chapter 12).

Despite these reforms, pressure mounted for legislation to acknowledge and protect the autonomy of the civil service. The House of Commons Select Committee on Public Administration (PASC), which has given itself the task of keeping administration and public services regularly under review, warned against taking the public service ethos for granted; it required 'nourishment and cultivation'.[16] PASC asked for a 'Public Service Code' approved by

[15] Lord Nolan, *First Report of the Committee on Standards in Public Life*, Cm. 2850 (1995), p. 14.

[16] PASC, *The Public Service Ethos*, HC 263 (2001/2).; Ninth Report of the Committee on Standards in Public Life, *Defining the Boundaries within the Executive: Ministers, special advisers and the permanent civil service*, Cm. 5775 (2003) with the *Government Response*, Cm. 5964 (2003).

Parliament to be adopted by all bodies providing public services, and a new Civil Service Act with a statutory public service code to govern standards of ethical behaviour, service delivery, administrative competence and democratic accountability.[17] The code would require civil servants to carry out their duties (a) efficiently; (b) with integrity and honesty; (c) with objectivity and impartiality; (d) reasonably; (e) without maladministration and (f) according to law. A further candidate for statutory protection was the independent Civil Service Commission, responsible for appointments to the civil service, in principle by merit and open competition.

PASC was also concerned with co-ordination: to see the 'extensive network of bodies concerned with the regulation of standards of conduct in public life' re-organised and structured. PASC warned that political trust could never be a matter merely of rules but, although a rule-based system should not be a substitute for 'a culture of high standards', it ought to be recognised that the protection of standards was an important objective in its own right. The machinery of ethical regulation 'is an integral and permanent part of the constitutional landscape. This makes it necessary to ensure that it is sensibly organised and securely based'.

PASC recommended a new Public Standards Commission, established by statute to work with the constitutional watchdogs, and provide a framework in which there could be coherent development of the regulatory system. The best option was a statutory commission, which would encourage co-operation between the 'ethical auditors', and provide 'robust forms of both independence and accountability'. The report had been produced in the expectation that it would:

> generate constructive reactions from Parliament, Government, the watchdogs themselves, those who are subject to their scrutiny, and the public itself. The reform of ethical regulation in British public life should be undertaken openly, consensually, and on the basis of principle. There must be an end to ad hocery. It is time to recognise that machinery for the regulation of conduct in public life is a permanent part of our constitutional arrangements, and needs now to be put on a proper statutory footing.[18]

A draft Constitutional Renewal Bill[19] was promoted by the Government in 2008 to do some of these things. It would provide a statutory basis for the Civil Service Commission which handles public service appointments, though it notably stops short of assuring the Commission's financial independence. It requires it to publish guidelines. It would provide the minister for the civil service with powers to 'manage' the civil service and requires

[17] Cabinet Office, *A Draft Civil Service Bill*, Cm. 637 (2004); *Draft Civil Service Bill: A consultation document*, Cm. 6373 (2004); PASC, *A Draft Civil Service Bill: Completing the reform*, HC 128 (2003/4).

[18] PASC, *Ethics and Standards* [112–13].

[19] *The Governance of Britain – Draft Constitutional Renewal Bill*, Cm. 7342-ii (2008) noted in A. Le Sueur, 'Gordon Brown's new constitutional settlement' [2008] *PL* 21. And see PASC, *Constitutional Renewal: Draft Bill and White Paper*, HC 499 (2007/8).

him to publish a Code of Conduct for the national civil service, with separate codes for Wales and Scotland. As a minimum this must require civil servants – but not special advisers, who are to be covered by a separate code – to act with integrity, honesty, objectivity and impartiality. These terms are not defined. A complaints system must be provided. The three codes, for the civil service, diplomatic service and special advisers, would have to be laid before Parliament, though they would not require parliamentary approval.

The bill, which was hardly the new start that PASC had wanted, was scrutinised by two select committees, neither of which was entirely satisfied. The Joint Committee responsible for scrutiny was concerned at failure to define the term 'civil servant' and clarify who and which services would be covered by the bill. PASC, though favouring new civil service legislation that was 'focussed and limited to a few clauses', thought that 'a few clauses more [were] required to give adequate protection to the core values of the civil service'.[20] Claiming time was necessary to deal with the committees' suggestions, the Government held the bill back for 2009.[21]

We have looked at these changes in some detail as an illustration of the steady trend to 'juridification' in public life. In principle the change to statute was meant to reduce reliance on trust and unstructured discretion and, according to the White Paper, to ensure that the civil service was 'not left vulnerable to change at the whim of the Government of the day without proper parliamentary debate and scrutiny'. But as PASC was concerned to emphasise at every stage in the discussion, 'a rule based system should never substitute for a culture of high standards, rooted in the traditions of public life and shared by all those who participate in it.'[22] In response, the Government expressed its commitment to high standards in public life, as reinforced in the *Ministerial Code* of 2007 and the *Civil Service Code* of 2006. It endorsed the view that 'a rule based system should never substitute for a culture of high standards, rooted in the traditions of public life'. Hard law, as PASC concluded, is not always superior to soft law.

3. The blue rinse

The keywords of Margaret Thatcher's programme for public administration were management, regulation, contract and audit. The market creed extended deep into public administration as the collectivist welfare state was

[20] Joint Committee on Constitutional Renewal Bill, HC 166 (2007/8), Ch. 6; PASC, Constitutional Renewal: Draft Bill and White Paper, HC 499 (2007/8), Recommendation 4 and [15].

[21] HC Deb., col. 800, WA, (Mr V. Coaker) (29 January 2009).

[22] PASC, *Ethics and Standards: The Regulation of Conduct in Public Life*, HC 121 (2006/7); *Government Response*, HC 88 (2007/08) and *Further Report*, HC 43 (2008/9). For ministerial conduct, see PASC *The Ministerial Code: a case for independent investigation* , HC 1457 (2005/6); *Government Response*, HC 1088 (2007/8).

remodelled as a market in democratic goods and the notion of choice became a fetish.[23]

Hood has classified the wave of 'New Right' administrative reforms that swept through the public services (and subsequently through the English-speaking world during the 1980s) in terms of four mega-trends:[24]

1. attempts to *slow down or reverse government growth* in terms of overt public spending and staffing
2. a shift towards *privatisation and quasi-privatisation* and away from core government institutions, with renewed emphasis on 'subsidiarity' in service provision
3. the development of *automation,* particularly in information technology, in the production and distribution of public services
4. the development of a more *international* agenda, increasingly focused on general issues of public management, policy design, decision styles and intergovernmental co-operation, on top of the older tradition of individual country specialisms in public administration.

(a) Privatisation and the contract culture

The phrase 'contract culture' marks a cultural shift to an administrative model based on private-sector management, where contract operates to structure and confine discretion through the simulation of markets rather than through the panoply of regulation associated with administrative law. To successive Conservative governments market accountability became so important that a highly artificial form of 'market-mimicking' became the practice within publicly funded enterprises. The NHS, for example, was suddenly required to operate as a modified market in which fund-holding general practices were freed to purchase services from hospital trusts and other operators. Cleaning services, rubbish collection and even prisons were contracted out to private providers. Compulsory competitive tendering (CCT) compelled local authorities to outsource their services. These developments are explained in Chapter 8.

Contract was a means of enforcing standards in downloaded public services but it added layers of bureaucracy and legalism. Even in simple service contracts the quest for 'quality assurance' can prove an exacting task, demanding lengthy documentation. The same is true of EU public procurement procedures, applicable to public contracting throughout the European Community (see Chapter 9). In complex transactions, such as occurred during the privatisation of British Rail, the paperwork was extensive, while the network of contracts necessitated

[23] N. Lewis, *Choice and the Legal Order: Rising above politics* (Butterworths, 1996).

[24] C. Hood, 'A public management for all seasons' (1991) 69 *Pub. Admin.* 3; G. Drewry, 'The new public management' in Jowell and Oliver (eds.), *The Changing Constitution*, 4th edn (Clarendon Press, 2000).

by the multi-billion public/private partnerships is still more challenging as we can see from the case study of the London Underground in Chapter 9.

The 'contract culture' is not necessarily restricted to contract in the full legal sense of an agreement enforceable in the courts; it includes bargains and agreements 'intended to be binding' but lacking the full force of law. 'Pseudo-contracts' are introduced to underline the obligations of individuals, as with the Jobseeker's Allowance, or to specify service providers' obligations to the consumer. That these are not true contracts is immaterial, as we shall see in Chapter 8.

The Citizen's Charter, introduced by John Major as the start of a 'ten-year programme of radical reform', aimed at a steady improvement in standards. The White Paper mentioned a medley of interlocking 'themes, principles mechanisms and implementation vehicles', focusing on four: quality, choice, standards and value:

> **Quality** referred to a sustained new program for improving the quality of public services. **Choice** meant that wherever possible competing providers would be the best spur to improved quality. Choice also meant that, even where competition was not possible, the users of services would be consulted about the level and nature of those services. **Standards** evoked the notion that citizens must be told what the service standards are and be able to act where service is unacceptable. And last but not least, **value** referred to taxpayers' rights to receive public services on a value-for-money basis within a tax bill the nation can afford.[25]

The shift to contract was largely a deception. The charters, left unenforceable, were not true contracts and, as public lawyers noted, classical public law protections and direct citizen participation in the making of policies and rules might be seriously curtailed. On the credit side, however, both PASC and the New Labour Government have recognised the Citizen's Charter as having 'a lasting impact on how public services are viewed in this country. The initiative's underlying principles retain their validity nearly two decades on—not least the importance of putting the interests of public service users at the heart of public service provision.'[26]

(b) Managerialism and new public management

American public administration had traditionally been managerial, prizing efficiency, economy and effectiveness, the British Civil Service much less so. Civil service 'mandarins' were generalists, bringing the values of probity and consistency to the conduct of public policy. In the 1980s, Margaret Thatcher's 'New Right' government wanted something more entrepreneurial, driven by the

[25] *The Citizen's Charter: Raising the standard*, Cm. 1599 (1991), p. 2. See Barron and Scott, 'The Citizen's Charter Programme' (1992) 55 *MLR* 526.

[26] PASC, *Citizen's Charter to Public Service Guarantees: Entitlement to public services*, HC 411 (2007/8) [17] and *Government Response*, HC 112 (2007/8).

whip of 'customer satisfaction'. The thread running through her administrative reforms was a transformation of public law notions of citizenship and accountability through concepts of market and consumerism.[27] Public-choice theory demanded changes in the role of the state, a narrowing of its functions to maximise space for private interests; in Osborne and Gaebler's celebrated metaphor, 'The state steers, it does not row'.[28] This meant restructuring government:

> so as to strip away, through privatisation and contracting-out, functions that private profit or non-profit organisations can perform better, and to reorganise the functions that remain in the interest of greater effectiveness and efficiency ('new public management'). Privatisation and contracting-out not only reduce the scope of executive action, but promote its further diversification and fragmentation, by reason of the need to design specialised systems for the continuing regulation of privatised activity that offer better guarantees of expertise, fairness, predictability and independence than do traditional structures of administration.[29]

Breaking up the homogeneity of the state was one objective; rendering what remained more efficient the second. The term applied in Britain to this decisive change in administrative style was 'new public management' (NPM).

Essentially, NPM is a managerial technique of administration, characterised by rules, accountability and quantitative audit. Two aspects of the package are especially relevant to the development of administrative law. The first is a shift in dominant *values* associated with a more limited conception of government. The second is the shift from courts to auditors as external control machinery and the NPM methodology of standard-setting, measurement and control, evolving into 'value for money' (VFM) audit.[30]

(c) The audit society

Public audit has a long history, represented by the independent office of Comptroller and Auditor-General. The C&A-G is an officer of the House of Commons, responsible to the powerful Public Accounts Committee (PAC) for the audit of central government.[31] Central to the Thatcher reforms was the transformation of public audit into a proactive system entrusted with the duty of

[27] M. Freedland and S. Sciarra (eds.), *Public Services and Citizenship in European Law: Public and labour law perspectives* (Clarendon Press, 1998), pp. 9–10.

[28] Thatcher's administrative reform programme was strongly influenced by D. Osborne and T. Gaebler, *Reinventing Government* (Addison Wesley, 1992).

[29] T. Daintith, 'Book review' [2006] *PL* 645.

[30] Further explained in M. Mulreany, 'Economy, efficiency and effectiveness in the public sector: Key issues' in Hardiman and Mulreany, *Efficiency and Effectiveness in the Public Domain* (Irish Institute of Public Administration, 1991). And see P. Hoggett, 'New modes of control in the public service' (1996) 74 *Pub. Admin.* 9.

[31] See *The Role of the Comptroller and Auditor General,* Cmnd 8323 (1981); J. McEldowney, 'The control of public expenditure' in *Changing Constitution*, 6th edn (2007). The official title of the PAC is now Public Accounts Commission.

'auditing for change'. The audit process was to assume a position of central importance in public service delivery and throughout British public administration. A new institutional focus was provided by the National Audit Act 1983, which set in place a National Audit Office (NAO) to work under the Comptroller.[32] The Act empowered the NAO to examine and report on the economy, efficiency and effectiveness of public spending. This new professionalism greatly strengthened the arm of the PAC, already the most prestigious and powerful of the Select Committees, traditionally chaired by an Opposition backbencher.

At local level, the district auditor had long had powers to question expenditure, surcharge councillors and appeal where appropriate to the courts.[33] The Local Government Finance Act 1982 replaced the district audit service with a centralised Audit Commission, intended as 'a driving force in the improvement of public services', promoting good practice and helping those responsible for public services 'to achieve better outcomes for citizens, with a focus on those people who need public services most'.[34] Currently responsible to the Minister for Communities and Local Government, who appoints Commissioners and may give directions to the Commission, the Commission employs members (who are not necessarily accountants) and commissions audits from private sector firms. The Commission's main functions are: the appointment of auditors to local authorities, most local NHS bodies and foundation trusts, police and probation authorities; inspection of public housing authorities and associations; performance assessments of local authorities and fire and rescue authorities.[35] Crucially, the Commission also has powers to 'undertake national studies of economy, efficiency and effectiveness in local public services and housing associations' and, in the NHS, make studies of financial management, enabling value-for-money or VFM comparisons to be made. It oversees the development of performance indicators for local government to serve as the basis for league tables of performance with which we are all familiar in the education field. Initially greeted with suspicion as a tool to increase the central government grip on local government, the Audit Commission, like the NAO, has emerged as strikingly independent.

The key to audit's successful expansion was VFM. Unlike financial audit, which is merely a protection against corruption, obvious waste and illegality, VFM audit 'is intended both to evaluate and to shape the performance of the auditee in three dimensions: economy, efficiency and effectiveness'. The NAO's chosen definitions of these financial virtues show how audit has fanned out to cover policy issues:

[32] See also the Government Resources and Accounts Act 2000. There have been separate audit arrangements for Northern Ireland since 1921. The Scotland Act 1998 established the Scottish Commission for Audit (Audit Scotland) responsible to the Scottish Assembly and the Public Audit (Wales) Act 2004 established the Wales Audit Office.

[33] In its modern form the system dates back to the Local Government Act 1972.

[34] Audit Commission, *Annual Report and Accounts*, HC 808 (2007).

[35] Audit Commission Act 1998 as amended by the Local Government Act 2000, noted in Radford, 'Auditing for change: Local government and the Audit Commission' (1991) 54 *MLR* 912.

- Economy: minimising the cost of resources used or required – **spending less**
- Efficiency: the relationship between the output from goods or services and the resources to produce them – **spending well**
- Effectiveness: the relationship between the intended and actual results of public spending – **spending wisely.**

Audit machinery gained ground during the 1990s through promising *control*. Power argued, however, that the promise was illusory. What in fact resulted from the primacy of 'The Three Es' was an 'audit explosion', characterised by a 'certain set of attitudes or cultural commitments to problem solving' and dominated by a cluster of technical values – independent validation, efficiency, rationality, visibility. And because audit was 'an idea as much as . . . a concrete technical practice and there is no communal investment in the practice without a commitment to this idea and the social norms and hopes which it embodies', Britain was rapidly transformed into 'an audit society'.[36] Take the 'league tables' authorised by the Education (Schools) Act 1992 with a view to allowing parents to exercise their power of choice in education. These arguably had the effect of substituting easily calculable examination results for community knowledge and first-hand experience of a school's environment – one reason why reliance on VFM and performance indicators as governing principles of public administration has proved controversial.

On the credit side, statistical comparison, like rules, favours transparency, consistency and equal treatment. It may act as 'a wake up call' or trigger an inquiry into a potential problem. (Compare here the managerial use of complaints to improve unsatisfactory areas of administration discussed in Chapter 10.) Many would see the overriding of local autonomy, knowledge and community as a small price to pay when measured against greater efficiency and the norm of equal treatment that dominates politics in the twenty-first century. Yet quantification has limitations as a tool for evaluation. Crude performance indicators may be misinterpreted – a high surgical death rate may indicate a hospital that handles difficult cases rather than institutional negligence – or fear of the consequences of publicity may deter the quest for improvement and become 'a new form of image management rather than a basis for substantive analysis'.[37] Audit may also bring perverse consequences, as when a target to meet all police calls within fifteen minutes brings a rise in traffic accidents; in order to free-up hospital beds patients are discharged into conditions of inadequate care, resulting in further illness or even death; or train timetables are manipulated to ensure that the target maximum of trains arriving on time can be reached. Power's conclusion was that audit shapes activities in significant ways, bleaching out alternative value systems:

[36] M. Power, *The Audit Society: Rituals of verification* (Oxford: Oxford University Press, 1997), p. 4.
[37] M. Power, *The Audit Explosion,* (London: Demos, 1994), p. 48.

> The most influential dimension of the audit explosion is the process by which environments are made auditable, structured to conform to the need to be monitored ex post . . . The standards of performance themselves are shaped by the need to be auditable . . . At the same time, organisations may be encumbered with structures of auditability embodying performance measures which increasingly do not correspond to the first order reality of practitioners' work . . . The general point is that the system of auditing knowledge is increasingly self-referential. It models organisations for its own purposes and impacts to varying degrees upon their first-order operations . . . Concepts of performance and quality are in danger of being defined largely in terms of conformity to auditable process.[38]

Audit, with its central government standard-setting obligations, inspectorates and centrally appointed auditors, also exacerbates tension between the desire for centralisation and for local community, an equation that Power felt needs re-balancing by 'a new respect for local specificity'.[39] Another effect of audit is to impoverish the discipline of public administration, substituting a single form for multiple forms of accountability. Audit impinges too on the primacy of public law as the principal mechanism for control of public administration, imposing itself even on judicial process (see Chapter 3). Like the public/private distinction discussed in Chapter 1, this is not merely a procedural but a normative question of values.

(d) Agencification 1: downloading

The 1980s saw a series of efficiency studies of central government, with some delegation of financial responsibility to 'accountable units'. The Ibbs or 'Next Steps' Report recommended 'a quite different way of conducting the business of government':

> The central Civil Service should consist of a relatively small core engaged in the function of servicing Ministers and managing departments, who will be the 'sponsors' of particular government policies and services. Responding to these departments will be a range of agencies employing their own staff, who may or may not have the status of Crown servants, and concentrating on the delivery of their particular service, with clearly defined responsibilities between the Secretary of State and the Permanent Secretary on the one hand, and the Chairmen or Chief Executives of the agencies on the other.[40]

The core of the Ibbs Report is recognition of 'two (or perhaps many more) Civil Services. Essentially, on the one hand, there are top people we all think

[38] *Ibid*., p. 8.

[39] *Ibid*., p. 43. There has been a response to this fear in the White Paper, *Citizens in Control*, Cm. 7427 (2008). And see p. 86 below.

[40] Efficiency Unit, *Improving Management in Government: The next steps. Report to the Prime Minister* (HMSO, 1988) (hereafter *The Ibbs Report*) [44]; G. Drewry, 'Forward from FMI: The next steps' (1988) *PL* 505 and 'Next steps: The pace falters' (1990) *PL* 322.

we know about, now about 3,500, to be entitled the Senior Civil Service, plus their supporters; on the other hand, about 500,000 invisible people, who do the work.'[41] Ibbs recommended hiving off the invisible people to Next Steps Agencies (NSAs), a new type of administrative agency that was emphatically *not* autonomous: indeed, it lacked legal personality to contract. An NSA was, however, closely tied into its parent department by a Framework Document, defining its functions and goals, plus a network of 'contracts' and 'performance indicators', in which departmental policy was embedded. Performance indicators were to act as:

> instruments of hands-off managerial control and democratic accountability: central departments, particularly the Treasury, need PIs to exercise control without breathing down the necks of the new chief executive. Parliament and the public need PIs to ensure that agencies are delivering the desired services efficiently and effectively.[42]

The underlying assumption that two types of executive function, policy-making and implementation, could easily be identified proved incorrect. Research shows that, at every level of the Civil Service, policy and execution are inextricably linked; even junior officials make policy decisions in the implementation of statutory schemes and are often responsible for ministerial policy choices.[43] Clean severance is equally impossible with NSAs. Cracks and gaps appear and serious accountability issues flow from the division of functions between agency chief executives appointed by ministers and the minister, notionally responsible to Parliament.[44] There is moreover no very clear view of what ministerial responsibility entails. The Crichel Down inquiry had established that a civil servant was 'wholly and directly responsible to his minister';[45] later governments, however, sought to distinguish 'responsibility' (where a minister is responsible for ministerial acts and omissions that contribute to a policy or operational failure) from 'accountability' (where a minister, though not directly culpable, has a duty to explain to Parliament what went wrong). Not surprisingly, the distinction does not recommend itself to House of Commons committees.[46]

Using the Home Office (HO) as our example, let us look a little more closely at the problems, feeding in changes and events that have occurred during the twelve-year period of New Labour Government. The HO had been allowed to

[41] P. Kemp, 'The mandarins emerge unscathed' (1994) 2 *Parliamentary Brief* 49.

[42] N. Carter, 'Learning to measure performance: The use of indicators in organisations' (1991) 69 *Pub. Admin.* 85, 87.

[43] Page and Jenkins, *Policy Bureacracy*.

[44] R. Baldwin, 'The next steps: Ministerial responsibility and government by agency' (1988) 51 *MLR* 622; G. Drewry, 'The executive: Towards accountable government and effective governance?' in *Changing Constitution*, 5th edn (2004); D. Oliver and G. Drewry, *Public Service Reforms: Issues of accountability and public law* (Pinter, 1996).

[45] HC Deb., vol. 530, col. 285 (Sir David Maxwell-Fyfe).

[46] See especially Public Service Committee, *Ministerial Accountability and Responsibility*, HC 313 (1995/6); PASC, *Politics and Administration: Ministers and civil servants*, HC 122 (2007).

grow into a 'hyper-ministry', where the Home Secretary, with the help of three ministerial secretaries of state and three parliamentary secretaries, ruled over an empire of 70,000 staff working in six directorates. It had acquired a set of sometimes incompatible functions centred on criminal justice, immigration and prison administration. Four executive agencies and thirteen further NDPBs had been added, including inspectorates of prisons, probation and police. Until the reforms of 2007 (see Chapter 11) the HO was responsible for eight sets of tribunals. There was no particular rationale for these arrangements; they had simply evolved as part of the haphazard progression of British government.

Of the major HO responsibilities, immigration and nationality remained for the time being an in-house directorate (IND), though shortly afterwards it was superseded by the UK Borders Agency. As we shall see in later chapters, the performance of IND with its pendant tribunals provided much of the staple fare of judicial review. Policing has remained a largely local function, for which the HO has supervisory responsibility. Forty-three police forces remain in England and Wales, each under the control of a tripartite police authority, composed of magistrates, local councillors and independent members. The police authority shares responsibility for policing with the chief constable of the force. The Home Secretary's substantial supervisory powers, however, include responsibility for efficiency, and the central government inspectorate (HMIC) is situated in the HO. Appointment of a chief constable requires approval of the Home Secretary and the Police Act 1996 allows the Home Secretary to dismiss a chief constable in the interests of efficiency. The HO sets standards and performance targets and issues guidance on the interpretation of the law. These powers are underpinned by the fact that most of the policing budget comes from central government rather than from local government funds; in addition, substantial special grants can be made for specific purposes, reflecting central-government policies and priorities.

There are two main justifications for retaining local control of police forces: the first stresses the need for community consent to policing policy and co-operation with police; the second is constitutional, viewing localism as a safeguard against the evils of the police state. But as 'law and order' has crept higher up the political agenda to figure prominently in party manifestos and bring powerful ministers down, the motives for centralisation have strengthened. In practice every major post-war reform has been a move towards centralisation. The Police Act 1996 was preceded by a fierce argument over centralisation, which was resisted. A decade later, centralisation was once more on the agenda after an HMIC report concluded that the current structure was 'no longer fit for purpose'; a majority of forces 'do not provide adequate levels of protective service, such as counter terrorism activity and dealing with serious organised crime'.[47] Strongly supported by John Reid, then Home Secretary, proposals

[47] HMIC, *Closing the Gap: Review of the "fitness for purpose" of the current structure of policing in England and Wales* (August, 2007)

for amalgamation to around seventeen forces met strong resistance from the police; amalgamations could not be agreed; the proposals had to be abandoned and were referred back for further consultation. Suggesting a turnaround, recent proposals emphasise the value of local and community policing and talk of 'empowerment' and the need to give the public a stronger say in holding the police to account locally.[48]

Prison management had been partly hived-off under the previous Conservative governments to the Prisons Agency (PA) and partly privatised. In two separate episodes involving maladministration, the cracks in the accountability system became obvious. In the first, a series of high-profile escapes from high-security prisons led to a very public dispute between Michael Howard, then Home Secretary, and Derek Lewis, chief executive of the PA. Refusing to resign, Howard blamed the agency for 'operational' maladministration, distinguishing this from his responsibility for 'policy issues'. Lewis also rejected responsibility, arguing that financial decisions taken by the HO had closed off his policy options. Ironically it was Lewis, who possessed no public law accountability function, who had to resign.[49] This split responsibility led the Treasury and Civil Service Committee to recommend that agency chief executives should be personally answerable to a parliamentary committee.[50] A recent think-tank report wants to dig more deeply. It blames the 'anachronistic and inadequate accountability arrangements' for a civil service that is 'still too often amateur and insular, poor at strategic thinking, leadership and performance management' – a severe judgement lent some credence by the chronicle of breakdowns and malfunctions documented in this book.[51]

The second set of problems involved the HO more directly. It erupted under New Labour, when discovery of a serious backlog of asylum claims was followed by disclosure of a number of escapes from open prisons and further media revelations that over 1,000 foreign nationals, who should on their release from prison have been considered for deportation, were at large in Britain, their whereabouts unknown to the police. The response was in terms of classical ministerial responsibility: Charles Clarke was axed and replaced by John Reid. Before his own resignation could be demanded, Dr Reid quickly announced reforms and, a few weeks later, laid his action plan in the House of Commons library.[52] The HO would be split in order better to focus on its core

[48] Sir R. Flanagan, *The Review of policing: Final report* (Home Office, 2008); Home Office, *From the Neighbourhood to the National: Policing our communities together*, Cm. 7448 (2008). And see Policing and Crime Bill 2008–9.

[49] See *Review of Prison Service Security in England and Wales and the Escape from Parkhurst Prison on Tuesday 3rd January 1995*, Cm. 3020 (1995); A. Barker 'Political responsibility for UK prison security: Ministers escape again' (1998) 76 *Pub. Admin* 1.

[50] *The Ibbs Report* [46]; *The Role of the Civil Service*, HC 27 (1993–4) [171].

[51] G. Lodge and B. Rogers, *Whitehall's Black Box: Accountability and performance in the senior civil service* (IPPR, 2006).

[52] *From Improvement to Transformation: An action plan to reform the Home Office so it meets public expectations and delivers its core purpose of protecting the public* (Home Office, 2006).

purpose of protecting the public. It would be radically reshaped, with responsibility for prisons passing to the DCA (now the Ministry of Justice). The IND would be hived-off as an executive agency, with a second new executive agency, the National Policing Improvement Agency, assuming responsibility for police modernisation and improvement. Inside the Home Office, there would be a new top team with a reshaped Home Office Board and fifteen immediate changes at director level. A new 'contract' would be developed between ministers and officials, 'clarifying respective roles and expectations in relation to policy, operational delivery and management'.

Two points are relevant here. First, a hyper-ministry had been broken up in response to claims of inefficiency and lack of co-ordination; this has implications for 'joined up government', a policy priority for New Labour. Secondly, the venerable Home Office had, by virtue of Crown prerogative, been transmuted by ministerial fiat into a 'department of homeland security' focusing on terrorism, security and policing (for which it still has only supervisory responsibility). Only in response to an Opposition 'urgent question' did the Home Secretary make a short statement to the House of Commons, provoking a fiery and largely unsympathetic debate.[53] To complaints about the way in which the reforms had been handled and announced, Dr Reid replied only that 'it was not and has never been the normal practice of Administrations to make oral statements on the machinery of government. It certainly was not the practice of the last Conservative Government. Indeed, proposals were often announced by way of press release from Downing Street.'

(e) Agencification 2

The usual justification for quangos (an acronym for quasi-autonomous non-governmental organisations) is the need for protection from direct government control and ministerial intervention. Gordon Brown's first act as Chancellor of the Exchequer was to promote the Bank of England Act 1998, freeing the Bank of England from government control (though we do not usually think of the Bank as an agency). The significance of this change became evident during the 'credit crunch' of 2008. The British Broadcasting Corporation (BBC) was granted a Royal Charter in 1927 as an independent corporation with a Board of Directors and Director-General to act as the monopoly purveyor of broadcasting inside the country. The design was adopted specifically to denote independence from interference by government and day-to-day scrutiny by Parliament. The structure has been largely successful. After the Hutton Inquiry (see Chapter 12), however, changes were made. Following the resignation of the Director-General, nominal changes saw the BBC Board restructured as a 'Trust'.

As government took on more functions, quangos proliferated. When Margaret Thatcher came to power, around 2,400 'official bodies' existed and more than

[53] See HC Deb., cols. 1639–52 (29 March 2007).

30,000 'quangurus' were appointed by ministers.[54] Elected with a mandate for 'quangocide', Mrs Thatcher set up the Pliatzky Committee to advise[55] and a handful of quangos bit the dust. Yet her own management programme gave birth to new types of agency: NSAs, which became the standard way to download service-delivery functions; and a new type of regulatory agency, the 'Ofdogs'.

At a time when almost all of state industry has been transferred from the public to the private sector, it is hard to remember that management of industry and commerce were once recognised state functions. But as Friedmann observed, the distinction between the control of government over nationalised industry and the indirect control of regulation might be largely nominal:

> The mixed economies which today characterize the political and economic systems of many States . . . have a combination of managerial and regulatory administrative functions. Certain industries and public utilities are operated by the State itself – either through government departments or with increasing frequency through semi-autonomous public corporations, responsible to government but equipped with more or less far-reaching managerial autonomy . . . At the same time, the bulk of industry and business, which remains in private ownership, is subject to varying degrees of public supervision and regulation, while another set of public authorities administers the various social services.[56]

As swathes of state-run nationalised industry were returned to the private sector, a crop of regulators, the 'Ofdogs', sprang up. These semi-autonomous public bodies, hybrid entities poised uneasily between public and private law, were initially set up to represent the public interest in privatised public services with substantial powers to regulate prices and protect competition.[57] The first Ofdogs were highly individual with a single regulator at the helm. This left room for much individual discretion and also led to complaints that relationships with ministers by whom the regulator was appointed were too cosy and lacked transparency. Partly for such reasons, the model has today been changed. Single regulators have been replaced by Boards composed of 'stakeholders', on which consumers typically have representation (see Chapter 6).

The regulatory state showed itself an aggressive coloniser and regulators were soon functioning throughout the public sector, replacing not only publicly owned industry and government departments but also traditional inspectorates. Ofsted, the Office for Standards in Education, for example, replaced a departmental inspectorate with an independent agency. The 'new Ofsted' or Office for Standards in Education, Children's Services and Skills, which came into being on 1 April 2007, is a 'super-regulator' combining the work of four separate inspectorates. Its mandate, to carry out 'a comprehensive system of

[54] P. Holland, *The Governance of Quangos* (Adam Smith Institute, 1981), p. 7; C. Hood, 'the politics of quangocide' (1980) 8 *Policy and Politics* 247.

[55] *Report on Non-Departmental Public Bodies*, Cmnd 7797 (1980).

[56] W. Friedmann, *Law in a Changing Society* 2nd edn (Penguin Books, 1964), pp. 273–4.

[57] M. Moran, *The British Regulatory State: High modernism and hyper-innovation* (Oxford University Press, 2003), p. 2.

inspection and regulation covering childcare, schools, colleges, children's services, teacher training and youth work', crosses the public/private border, extending to the inspection and registration of childminders and some independent schools.[58] Its powers should not be underrated: Ofsted can directly close down a failing school and indirectly determine the shape of local education when its reports spark ministerial intervention. Its view of the national syllabus, or the way that reading should be taught, may mean that history *must* stop at World War II or that reading *can only* be taught through phonics. Ofsted justifies these powers with the claim that it is a 'non-ministerial government department' accountable to Parliament. It stresses its 'impartiality and integrity', promising to 'report impartially, without fear or favour'. These are questionable claims, which seek to divert attention from its awkward 'quasi-autonomous' status; the link between agencies and their sponsoring departments is still close, bringing complaints of ministerial interference. Yet only ministers and through them the departments for which they take responsibility, are accountable in a real sense to Parliament.[59]

As with NSAs, the relationship between Parliament and non-departmental public bodies (NDPBs) is problematic. Officially, an NDPB is 'a body which has a role in the processes of national government, but is not a government department or part of one and which accordingly operates to a greater or lesser extent at arm's length from ministers.' [60] This definition begs most of the questions about accountability. NDPBs spend large sums of public money (which is of course audited) yet are widely perceived as unaccountable. There is no 'firm or clear theoretical framework that dictates which functions should rest directly under the control of elected politicians or quasi-autonomous bodies.'[61] There is a contrast here with devolved government. The Public Appointments and Public Bodies etc. (Scotland) Act 2003 regulates appointment procedure[62] and in Wales, where corruption in non-accountable quangos was a very sore point before devolution, those that have not been abolished are brought directly under the control of the Welsh Assembly.[63]

In the post-war period, the growing numbers of 'quanguru' appointments greatly increased the scope for political patronage, creating complaints of 'sleaze' and corruption. Minimum standards have now been set by the Committee on Public Standards:[64]

[58] S. 162A of the Education Act 2002; the Education and Inspections Act 2006; Ofsted Strategic Plan 2007–2010, *Raising standards, improving lives*.

[59] PASC, *Quangos*, HC 209 (1998/9); and see S. Weir and D. Beetham, *Political Power and Democratic Control in Britain* (Routledge, 1999).

[60] *Public Bodies: A Guide for Departments* (2008) [2.1], available on the civil service website.

[61] PASC, *Government by Appointment: Opening up the patronage state*, HC 165 (2003/4).

[62] Scottish Executive, *Public Bodies: Proposals for change* (2001).

[63] R. Rawlings, *Delineating Wales: Constitutional, legal and administrative aspects of Welsh devolution* (University of Wales Press, 2003), pp. 355–61.

[64] Second Report of the Committee on Standards, *Local Public Spending Bodies: Vol. 1*, Cm. 3270 (1996).

- Appointment should be open and nominations encouraged from a wide range of people.
- Management should be transparent.
- A code of conduct should be published for guidance of quangos' members.
- There should be clear statements on complaints and on 'whistleblowing'.

The Office of the Commissioner for Public Appointments (OCPA, a new, one-person quango) was set up in 1995 to oversee appointments, to be joined after devolution by regional OCPAs. The OCPAs monitor ministerial appointments to ensure they are made on merit. Codes of practice were put in place. There are around 11,000 appointments annually to quangos, ranging from BBC trustees to tribunal members and members of expert agencies, such as NICE, the National Institute for Clinical Excellence (see below). The majority remain in the hands of ministers, leaving significant opportunities for government patronage and raising concerns over accountability and expertise. Gordon Brown has undertaken to 'explore the scope for improving appointments processes in line with the best practice of the Commissioner for Public Appointments', promising a wider role for Parliament in public appointments.[65] In line with this promise, a list of sixty suitable appointments has been agreed with the Liaison Committee and a pilot of pre-appointment hearings for key public appointments is being trialled.[66]

The Blair government tried to pass responsibility for scrutiny to select committees of the Westminster Parliament but, as their chairmen have objected, select committees were not created for this purpose and are unequal to the task.[67] As Flinders cynically observes:

> the whole constitutional framework of the British state was designed to ensure that Parliament adopted a passive rather than an active role in relation to the administration. The role of Parliament was, and remains today, to hold ministers responsible for the way in which they steer the ship of state – venturing into the scrutiny of detailed administration only in response to serious policy failures where the link between policy and operations is unclear.[68]

[65] *The Governance of Britain*, Cm. 7170 (2007) [72–81]. See also PASC, *Public appointments: Confirmation hearings*, HC 731-i (2006/7), evidence given by Ms Gaymer, the Commissioner for Public Appointments (19 June 2007); Sixth Report of the Committee on Public Standards, *Reinforcing Standards,* Cm. 4557 (2000); PASC, *Quangos*, HC 219 (1998/9) and 1st Special Report, HC 317 (1999/2000).

[66] Liaison Committee, *Pre-appointment Hearings by Select Committees: Government response to the Committee's first report of session 2007-08*, HC 594 (2007/8).

[67] Liaison Committee, *Shifting the Balance? Select Committees and the Executive*, HC 300 (1999/2000).

[68] M. Flinders, 'MPs and icebergs: Parliament and delegated governance' (2004) 57 *Parliamentary Affairs* 767, 778; and see M. Flinders, 'Distributed public governance in Britain' (2004) 82 *Pub. Admin*. 883.

NDPBs may have decreased numerically since Tony Blair vowed to 'sweep away the quango state'[69] but culling has largely been achieved through amalgamation, as with the inspectorates taken into Ofsted, or the Commission for Equality and Human Rights (CEHR). In the name of 'joined-up government', this new 'super-agency' brings together the existing Commission for Racial Equality, Disability Rights and Equal Opportunities Commission, with new human-rights responsibilities tacked on. Whether super-agencies will prove any more effective in handling their varied tasks than 'hyper-ministries' such as the Home Office, is very doubtful. In time, like hyper-ministries, they may have to be broken up. Agencies are, however, unlikely to disappear; they have too many advantages for government. Agencification allows the inexorable growth of public power to be screened behind a fictional 'rolling back' of the state. By combining powers of regulation with a 'hands-off' look, they also allow government to be more interventionist, permitting an unparalleled extension of social engineering, such as we have seen with the 'new Ofsted' – and, indeed, the new Department for Children, Schools and Families. Finally, in an era of globalisation, agencies play a crucial part in the 'policy networks' through which states co-ordinate their policies and co-operate, making up in global space for the absence of a permanent administration, as they are beginning to do in the European Union.[70] In the present globalised state of world affairs, with global trade and finance, energy, security and environmental problems now at the apex of political agendas, the progression towards agencification can only accelerate.

4. The risk and security society

(a) The 'third way'

Mrs Thatcher's reforms marked a paradigm shift (a notion used by Kühn to describe a radical transformation of an existing order). When in 1997 New Labour replaced the long period of Conservative government, the expectation was that the transformation would be reversed. Giddens summarised the positions:[71] 'the neo-liberals want to shrink the state; the social democrats, historically, have been keen to expand it. The third way argues that what is necessary is to reconstruct it – to go beyond those on the right "who say government is the enemy", and those on the left "who say government is the answer".' No new paradigm shift occurred. The floor of Thatcher's reforms remained in place, to be reconstructed but not demolished – new themes modified without jettisoning the Thatcher blueprint for public service delivery. To the chagrin of

[69] Cabinet Office, *Opening up Quangos* (1997); *Quangos: Opening the* doors (1998). In 2008, there were 790 NDPBs, of which 198 were executive agencies and 410 advisory NDPBs: Cabinet Office, *Public Bodies* (2008). And see Cabinet Office, *Executive Agencies: A guide to departments* (2008), both available on the Cabinet Office website.

[70] See D. Geradin *et al.*, *Regulation Through Agencies in the EU: A new paradigm for European governance* (Edward Elgar, 2005).

[71] T. Giddens, *The Third Way* (Polity Press, 1998), pp. 47–8.

many, privatisation was not reversed; as we shall see, public utilities are still in private ownership, competitive but subject to regulation. Private sponsorship was welcomed in 'city academies' (specialised schools established with participation from the private sector) and in the private finance initiative (PFI), which provides – or until recently provided – investment capital for capital-intensive projects such as airports or hospitals (see Chapter 9). The 'contract culture' continues to flourish: consumer choice remains a fetish[72] and 'pseudo-contracts' thrive, notably in the field of education and youth opportunity (see Chapter 8). Audit and other NPM techniques, in place throughout the public services, have widened and deepened – indeed, the New Labour Government has added to the toolkit available for the measurement and control of public services. Agreements between the Treasury and departments or public bodies set minimum standards against which the body is measured annually. The agreements act as a useful 'tin-opener', enhancing the capacity of the Treasury to delve inside departments and engage in direct policy-making and agenda control.[73] The Treasury has emerged with the Cabinet, Cabinet Office, Prime Minister and his staff as the 'core executive', which stands at the heart of the government machine and through which modern government is conducted.[74]

The visible sense of continuity did not mean that New Labour lacked ideas for the reform of government institutions: very much the reverse. To New Labour, 'reform of the state and government should be a basic orienting principle of third way politics – a process of the widening and deepening of democracy'.[75] Where Thatcher's keywords had been choice, management, regulation, contract and audit, Tony Blair's were modernisation, reform, responsiveness, accessibility and voice, inclusion and equality. The challenge would be to achieve these objectives in the context of an economic revolution comprising skills, technology and work practices; the social revolution comprised in amplifying women's life chances; and a political revolution caused by the demand for a 'new relationship' between citizens and government. The slogan of 'third-way politics' implied consensus, co-operation and inclusiveness: 'bringing everyone into the tent'. The state envisioned by New Labour was a 'strategic and enabling' state able, in an age of globalisation to 'avoid the pitfalls of the big or small state argument and reinvent the effective state', its overt purpose being to redistribute power to the people.

Ten years later, *Building on Progress*, a Cabinet Office policy document published just before Gordon Brown took office as Prime Minister, described the 'core idea of the strategic and enabling state':

[72] PASC, *Choice, Voice and Public Services* HC 49 (2004/5).

[73] D. Judge, *Political Institutions in the UK* (Oxford University Press, 2005), p. 159; PASC, *On Target*, HC 62-2 (2002/3), p. x. See also C. Thain, 'Economic policy', in Dunleavy *et al.*, *Developments in British Politics 6* (Macmillan, 2000).

[74] R. Rhodes and P. Dunleavy, *Prime Minister, Cabinet and Core Executive* (Palgrave, 1995); M. Birch and I. Holliday, 'The Blair government and the core executive' (2004) 39 *Government and Opposition* 1.

[75] Giddens, *Third Way*, p. 69; T. Blair, 'Introduction', *Modernising Government*, p. 4.

> Enabling citizens to take power is both right in itself and also indispensable to meeting the objectives of government that cannot be met in any other way.
>
> The modern state needs to work in a new way – less about command and control and more about collaboration and partnership. This reflects the kind of citizen we have today: inquiring, less deferential, demanding, informed.
>
> The core idea of the strategic and enabling state is that power is placed in the hands of the people. It is a vision of the state in which we increase the range of opportunities for engagement; we empower citizens to hold public institutions to account; and we ensure that citizens take joint responsibility with the state for their own well-being.

The state had five main functions, as:[76]

- direct provider of services
- commissioner of services, where the state specifies the required outcome but pays a supplier to provide the service
- regulator, ensuring that standards are complied with
- provider of information so that citizens can make informed choices
- legislator to set down clear rules of behaviour.

(b) 'Modernising government'

Thus New Labour aimed to graft onto the managerial values of efficiency, effectiveness and customer satisfaction prioritised by previous Conservative governments the softer, more responsive and participatory values of public service, with a view to building an inclusive and egalitarian society. The goal was a system that was both responsive and accessible: a 'people's democracy' or 'stakeholder society'.[77] A White Paper published shortly after Blair came to power affirmed commitment to public service but stressed that 'public servants must be the agents of the changes citizens and businesses want'. Linking choice to improved service standards and delivery, it insisted on 'forward looking, inclusive and fair' policies. There were five key commitments:[78]

- to be forward looking in developing policies to deliver outcomes that matter, not simply reacting to short-term pressures
- to deliver public services to meet the needs of citizens, not the convenience of service providers
- to deliver efficient, high-quality public services and not tolerate mediocrity
- to use new technology to meet the needs of citizens and business, and not trail behind technological developments
- to value public service, not denigrate it.

[76] Cabinet Office Policy Review *Building on Progress: The role of the state* (May 2007) [1.10–15] (excerpts). Compare Giddens, *The Third Way*, pp. 46–7.
[77] Giddens, *The Third Way*, p. 1, quoting Blair, 1998.
[78] *Modernising Government*, Cm 4310 (1999).

The inevitable clash of values plays out in a PASC study of the effects of audit culture on public administration.[79] Five main justifications for the audit culture were identified by PASC: (i) targets provide a clear statement of what government is trying to achieve; (ii) they provide a clear sense of direction; (iii) they focus on results; (iv) they provide a basis for monitoring; (v) they provide better public accountability. PASC concluded that a clash of 'two cultures at work in the Government's approach to public service reform' was inhibiting progress. There was a lack of proper integration between 'the performance culture', where the focus was on 'the organic ingredients of durable change and improvement' and 'the measurement culture', which aimed to track quantitative achievement in the public services. The 'measurement culture' was typified by targets, its time frame shorter, its techniques more mechanistic. Both had their place, but it was important that 'the former is not crowded out by the latter'. Urging the Government to give consumers and stakeholders greater 'voice' – a consistent theme of New Labour administration – PASC asked that targets be as few as possible, focusing on key outcomes and reforming the way in which they were set, with a widened consultation process to involve professionals, service users, Parliament and select committees.

This new 'stakeholder style', first tried out in local government[80] emerged as a key feature of policy for public service delivery under Gordon Brown. The emphasis changed. Talk of efficient service provision gave way before a rhetoric of concern for the needs of users and user satisfaction. Information, consultation and involvement became the watchwords of a government that professed to see 'active citizenship, as well as being a good in itself . . . as a route to improving local public services and strengthening local accountability'. Under the rubric of 'transformational government', the greater emphasis on responsiveness to people was attributed to 'a logical extension of the public service reforms that have gone before'.[81]

(c) The risk society

The 'cradle-to-grave' welfare state had nourished a risk-averse society, increasingly preoccupied with protection against risk.[82] Citizens born in state hospitals and educated in state schools had come to believe that the state could and should wrap every citizen in a personal security blanket. 'Security' took on the extended meaning of 'being protected from or not exposed to danger. This involves protection against unwanted and damaging change – loss of income,

[79] PASC, *On Target? Government by measurement*, HC 62 (2002/3), *Government Response*, HC 1264. And see C. Hood *et al.*, *Regulation Inside Government* (Oxford University Press, 1999).

[80] Department for Communities and Local Government, *Unlocking the Talent of Our Communities*, n. 145 below.

[81] See PASC, *User Involvement in Public Services*, HC 410 (2007/8) and *Government Response*, HC 998 (2007/8).

[82] U. Beck, *Risk Society: Towards a new modernity*, tr. Ritter (Sage Publications, 1992). And see Organisation and Risk in Late Modernity, (2009) 30 *Organization Studies* (Special Issue).

livelihood or home, for instance'.[83] The state had come to be perceived as the main insurance against personal disaster, with consequences for administrative law. Any failure of risk regulation invariably brings public pressure for a public inquiry (see Chapter 13). There are invariably demands for compensation, exemplified in the ombudsman investigation into occupational pensions, a case study that forms the focal point of Chapter 12. Perhaps more significantly, government has drawn on the desire for security to legitimate an authoritarian and interventionist style of government (below).

New Labour's interest in risk regulation was signalled early on. Pragmatically, *Modernising Government* explained:

> Much government activity is concerned with managing risks, in the workplace, in what we eat and in protecting the environment. We need consistently to follow good practice in policy making as we assess, manage and communicate risks. Government needs to develop its capacity to handle risk by:
>
> - Ensuring decisions take account of risks;
> - Firmly establishing risk management techniques;
> - Organising to manage risk;
> - Developing skills; and
> - Ensuring quality.[84]

A decade later, risk has become 'the new buzzword of administrative governance', a 'risk commonwealth' has evolved, where 'the task of public decision-makers is increasingly being characterised in terms of the identification, assessment, and management of risk and the legitimacy of public decision-making is also being evaluated on such a basis'.[85] Every activity of government, from economic development to national security strategy, is defined in terms of risk.[86] Risk analysis is the core of managerial and regulatory practices;[87] risk and impact assessments are a mandatory element in all forms of management and rule-making (see Chapters 4 and 5). Risk triggers regulation, which becomes increasingly bound up with the control, identification and classification of degrees of risk (see Chapter 6).[88] The technical nature of the enterprise

[83] D. Oliver, 'The underlying values of public and private law' in Taggart (ed.), *The Province of Administrative Law* (Hart Publishing, 1997), p. 226.

[84] Cm. 4310 (1999). See also Cabinet Office, *Risk: Improving government's capability to handle risk and uncertainty* (HMSO, 2002), p. 4.

[85] E. Fisher, 'The rise of the risk commonwealth and the challenge for administrative law' [2003] *PL* 455. See also M. Power, *Organising a World of Risk Management* (Oxford University Press, 2007).

[86] See Sir David Omand, *The National Security Strategy: Implications for the UK intelligence community* (IPPR, 2008).

[87] J. Black, 'The emergence of risk-based regulation and the new public risk management in the United Kingdom' [2005] *PL* 512.

[88] C. Hood *et al.*, *The Government of Risk: Understanding risk regulation regimes* (Oxford University Press, 2001).

necessitates delegation of policy and standard-setting to expert bodies, often to 'networks' of rule-making committees and agencies established within the EU to which the UK is merely one contributor.

Power describes the 'risk management of everything' as the 'motif for one of the major public policy challenges of the early twenty-first century . . . Risk management is now at the centre stage of public service delivery and is a model of organisation in its own right.' Like the audit 'rituals' to which it is intimately connected:

> risk management is much more than a technical analytical practice; it also embodies significant values and ideals, not least of accountability and responsibility. Historically, a public politics of risk management, particularly in the field of health, has been concerned with the transparency and accountability of scientific expertise in decisions about risk acceptance. Since the mid-1990s, risk management and private corporative governance agendas have become intertwined, if not identical . . . [B]eing a 'good' organisation has become synonymous with having a broad and formal risk management programme. Risk analysis, the traditional home territory of risk management, has been subsumed within a larger accountability and control framework.[89]

Risk is an 'over-arching concept', a benchmark of 'good governance', straddling the border between public administration and corporate governance.

We should not assume, however, that as administration becomes more rule-bound, transparency and accountability increase. Rules become more technical and complex, diminishing transparency as 'all purpose' legislators, generalist judges and the public at large find themselves defeated by obscure technical language; accountability is diminished by the struggle to evaluate difficult scientific material. As public lawyers, we cannot admit the right of science and technology to stay outside democratic processes. 'Experts cannot be relied upon automatically to know what is good for us, nor can they always provide us with unambiguous truths; they should be called upon to justify their conclusions and policies in the face of public scrutiny.'[90]

(d) E-governance and the IT revolution

Drawing on Foucault's concept of 'governmentality', Morison sees e-governance as a weapon for deconstructing the classical model of 'bounded government' based on the concept of sovereignty, with power shared between the executive and legislature.[91] In tune with New Labour rhetoric, Morison argues for an open,

[89] M. Power, *The Risk Management of Everything* (London: Demos, 2004), pp. 10, 11.

[90] Giddens, *The Third Way*, p. 59. And see M. Shapiro, 'The problems of independent agencies in the United States and European Union' (1997) 4 *Journal of European Public Policy* 276.

[91] J. Morison, 'Modernising government and the e-government revolution' in Bamforth and Leyland (eds.), *Public Law in a Multi-Layered Constitution* (Hart Publishing, 2003). The term is borrowed from M. Foucault, 'Governmentality' and 'The subject and power', in Faubion (ed.), *Michel Foucault, Power: The essential works*, vol. 3 (Penguin Books, 2000).

pluralist and 'bottom up' governance system in which power and sovereignty are 'diffused through a diverse number of sites'. New Labour experiments with 'transformational government' (described earlier) may have similar roots.

This opens the possibility of a democratic control system premised on true participation. In the post-modern context of globalised governance, these ideas are important. Faced with a diverse population of many linguistic groups distributed in twenty-seven nations, the European Commission has, for example, put its faith in e-governance, constructing its plans for participatory democracy around a user-friendly website.[92]

(e) ICT and participation

At home, PASC, taking evidence for a report on public participation, was enthusiastic about the potential of e-governance: it saw 'the advent of e-government and the Internet [as] important opportunities for extending public participation. Some wholly new forms of participation could open up by offering the possibility of responding to questions at the click of a mouse.'[93] Not everyone was so keen; it was suggested that the beneficiaries would be well-organised pressure groups, 'poised and eager to step into the vacuum left by the decline in traditional political activity. [ICT] could therefore actually intensify the exclusion of groups which do not have physical or psychological access to it.' A further effect might be 'to make government seem joined up, when behind the scenes the reality was that the structures were disconnected'.[94] Cautiously, an international academic conference concluded that e-governance could foster and enhance accountability and legitimacy of public service by promoting interactive, participatory, open and good administration. It could 'dramatically transform' public-sector organizations and processes and impact on traditional Weberian bureaucratic organisations:

> E-governance serves as a strong catalyst for organizational change, namely networking and collaboration. It is also instrumental in facilitating re-engineering processes and integrated services for citizens . . . Bureaucracy may become more customer-friendly enterprise managed in a more businesslike manner . . . The government's operation of and management of e-governance depends on the performance of administrative changes [sic]. Otherwise, the government runs the risk of estranging itself from its citizens.[95]

[92] European Commission, *White Paper on European Governance*, COM (2001) 428 final [2001] OJ C287, p.1; and see C. Joerges, 'Deliberative supranationalism: Two defences' (2002) 8 *European Law Journal* 135.

[93] PASC, *Public Participation: Issues and innovations*, HC 373 (2001/2). See also R. Silcock, 'What is e-government?' (2001) *Parliamentary Affairs* 88; I. Snellen, 'Electronic governance; Implications for citizens, politicians and public servants' (2002) 68 *International Review of Administrative Sciences* 183.

[94] Evidence to PASC, HC 373-i.

[95] Pan Suk Kim, 'Introduction: Challenges and opportunities for democracy, administration and law' (2005) 71 *International Review of Administrative Sciences* 101-2. See also J. Morison, 'Online government and e-constitutionalism' [2003] *PL* 14.

(f) ICT and agency failure

At the practical level, British government's experiments with ICT have so far proved an abject failure. The vast sums lavished on it have not to date paid off; indeed, ICT now makes up a substantial proportion of the workload of complaint-handling services. The list of abandoned computer projects is said to total £2 billion, including a new benefits card sponsored by the Department of Work and Pensions based on outdated technology.[96] Expenditure on the National Programme for IT in the NHS launched in 2002 and designed to reform the way the NHS uses information, has so far totalled £3,550 million. Two reports from the NAO suggest that the programme is four years behind time and shows only modest returns.[97]

When the Inland Revenue (IR) made overpayments of over £2.2 billion in the tax-credit scheme, letters to more than 1.9 million families to claw back the overpayment were automatically generated. Because these could take no account of personal circumstances, great hardship was caused. Blaming the complexity of the system, the PAC warned that 'schemes that are intrinsically complex carry the risk of being too difficult for the intended beneficiaries to understand and for departments to handle'; this was not something that ICT could rectify.[98] The same point was made by the PCA:

> The cases I have investigated are striking in the sheer range and extent of processing errors affecting tax credit claims during the first two years, leading to overpayments for which customers were not responsible, but which they had to repay. A heavier burden was placed on customers than was reasonable to spot the wide variety of mistakes and omissions which occurred as a result of processing faults. . . . [This highlights] the importance, when designing new systems, of starting from the customer perspective and maintaining customer focus throughout the development of the programme. It also highlights the dangers of introducing a 'one size fits all' system. Such systems, whilst superficially providing a fair and consistent and efficient service for all customers can, by failing to pay sufficient regard to the different circumstances and needs of specific client groups, have entirely unintended harsh and unfair consequences for more vulnerable groups.[99]

The Child Support Agency (CSA) was a new NSA established in 1991[100] to take over responsibility for the collection of child maintenance from absent parents. From the start, its performance fell far below what was acceptable. Amongst its

[96] NAO, *Government on the Internet: Progress in delivering information and services online*, HC 529 (2006/7).

[97] NAO, *The National Programme for IT in the NHS*, HC 1173 (2005/6); *The National Programme for IT in the NHS: Progress since 2006*, HC 484 (2007/8).

[98] PAC, *Tax Credits and deleted tax cases*, HC 412 (2005/6); IR standard report: *New Tax Credits*, HC 782 (2005/6); *Tax Credits: Getting it wrong?*, HC 1010 (2006/7).

[99] PCA, *Tax Credits: Putting things right*, HC 124 (2005/6).

[100] By the Child Support Act 1991; and see *Children Come First*, Cmnd 1263 (1990). For the full story of the problems, see G. Davis, N. Wikeley and R. Young, *Child Support in Action* (Hart Publishing, 1998).

many problems were serious IT failures. For the next fifteen years it became a 'repeat player' in every one of administrative law's main accountability forums and the subject of many adverse reports. Three years after it became operative, a Special Report from the Parliamentary Accounts Committee (PAC) revealed that the CSA's operating costs (some £224.52 million) routinely exceeded the maintenance collected (£206.78 million, of which £96.46 million went to the DSS and £110.31 million to parents with care). Uncollected debt from parents stood at over £1,127 million, less than 5 per cent of which was thought to be collectable.[101] The scale of the problems is demonstrated by the caseload of the CSA's Independent Case Examiner (ICE) who, on appointment in 1998, received 28,000 complaints.[102] Consequential problems for the complaints-handling machinery are dealt with in Chapter 10.

IT was not of course the only cause of the CSA's breakdown. Some of the problems flowed from badly thought-through policies and badly drafted legislation (see Chapter 4). Mundane maladministration was noted by the various watchdogs, such as widespread delays, poor communication and inaccurate information to clients, badly trained staff, and failures of communication with other agencies. Time and again, these are shown in reports from the 'watchdogs' to be problems endemic to British public administration. There was a general failure, noted by two PCAs, to learn from previous mistakes. Sir William Reid criticised the hurried way in which the scheme had been implemented:

> Maladministration leading to injustice is likely to arise when a new administrative task is not tested first by a pilot project; when new staff, perhaps inadequately trained, form a substantial fraction of the workforce; where procedures and technology supporting them are untried; and where quality of service is subordinated to sheer throughput.[103]

But driven to review the matter separately, the Select Committee on Work and Pensions, (CWP) concluded that unsatisfactory IT provision in the CSA was the root of the problem.[104] In evidence, the CSA's chief executive said (before resigning):

> it is not possible to operate a large, complex business in today's world without having a sophisticated level of computer support, both for the processing activity, the client contact activity, and the management information needed to run the business. So if you wanted a summary of how I feel, it is that I am seriously disappointed over the last 18 months.[105]

[101] PAC, *Child Support Agency: Client funds account 1996-9,* HC 313 (1997/8).

[102] CSA Independent Case Examiner, First Report (1998). Of these, 1,078 were investigated. Complaints reduced in 2004–05, 2,973 complaints were received, of which 1,257 were accepted for investigation.

[103] PCA, *Investigation of Complaints against the Child Support Agency*, HC 135 (1994/5), p. iii.

[104] CWP, *DWP's Management of Information Technology Projects: Making IT deliver for DWP customers,* HC 311 (2004/5); *Government Response to the Committee's Third Report into the DWP's Management of Information Technology Projects*, HC 1125, (2004/5).

[105] CWP, *The Performance of the CSA*, HC 44-i (2004/5) [19].

The PCA reported a return to an older technology:

> The computer failings have meant that the CSA have had to deal with an increasing number of cases manually. We recognise the need to do so in order to ensure that individual claims are processed as quickly as possible. However, operating both electronic and manual systems alongside one another have given rise to concerns about the impact on standards of data recording. We are concerned that processing claims manually may generate problems of its own.[106]

A £486 million upgrade sanctioned by the New Labour Government in the hope of ending the sorry saga collapsed, forcing a £1 billion claims write-off. A new review was commissioned. The Government announced a redesign of the child support system; the CSA would be wound up and a new start made with a Child Support and Enforcement Commission.[107]

(g) Data protection issues

Collection and storage of private information raises issues other than efficiency; it has serious implications for data protection and privacy. Data may be collected from individuals in many ways: in immigration procedures at borders, in police fingerprint and DNA banks or in new identity cards. It may be stored for long periods of time,[108] accessed by many individuals and exchanged with other public bodies. The reported loss of computer 'smartcards' used to give access to the NHS database, for example, raised concerns over access to confidential patient records and identity fraud. Errors on the police DNA database are capable of causing wrongful convictions and of following innocent citizens from childhood into later life. Late in 2007, a junior official at Revenue and Customs (HMRC) lost two disks containing personal details of 25 million child-benefit claimants, an error compounded by the automated sending of 7.25 million personalised letters of apology containing the claimant's name, address, National Insurance and child-benefit numbers. There was public outrage; the head of department resigned; the Chancellor announced an immediate departmental review.[109] A subsequent trawl through government departments for information about data protection did nothing to lessen concern: an NHS agency had accidentally published on its website full details of the C.V.s of junior doctors applying for NHS positions; a private

[106] Parliamentary Commissioner for Administration, *Annual Report for 2004/5*.

[107] DWP, *A New System of Child Maintenance*, Cm. 6979 (2006). The change was effected by the Child Maintenance and Other Payments Act 2008, which established the Child Maintenance and Enforcement Commission, to which child maintenance functions are gradually being transferred.

[108] But see *S and Marper v United Kingdom*, App. No. 30562/04 [2008] ECHR 1581 (4 Dec. 2008), where the UK arrangements were held to violate ECHR Art. 8.

[109] HC Deb., 28, col. 308, November 2007 (Alistair Darling). This led on to a Cabinet Office report, *Data Handling Procedures in Government*, HC 984-I (2007/8).

contractor to the Driving Standards Agency had lost a hard disk from its secure facility based in Iowa containing just over 3 million records including names and postal addresses – a stark warning of the international dimension of e-governance. The incidents cast doubt both on a projected 'child register' or database containing details of every child or young person in the country under the age of eighteen and on the controversial £5 billion scheme for a National Identity Register.[110] Immediate changes to the law were announced to allow the Information Commissioner to carry out spot-checks on government departments and a 'wide ranging review of data sharing and data protection' by the Information Commissioner authorised (see Chapter 10). No concessions were made on identity cards.

5. The security state

A report made for the Information Commissioner sounded a note of alarm. IT warned that we were sleepwalking into 'a surveillance society', where surveillance encounters were now 'just part of the fabric of daily life. Unremarkable'.[111] It was possible to view this situation as progress towards efficient administration; an alternative viewpoint, however, was that it undermined key democratic values of transparency, accountability, choice, power and empowerment, leaving individuals at a serious disadvantage in controlling the effects of surveillance. Because surveillance varied in intensity geographically and in relation to social class, ethnicity and gender, it also raised issues of discrimination and social exclusion. The debate was too often seen as purely technological in character; these wider issues needed to be brought out into the open and openly debated. In a later response to a government proposal for a 'super-database' to monitor phone lines and internet usage, the Information Commissioner demanded 'the fullest public debate about the justification for, and implications of, a specially created database – potentially accessible to a wide range of law enforcement authorities – holding details of everyone's telephone and internet communications. Do we really want the police, security services and other organs of the state to have access to more and more aspects of our private lives?'[112]

These sombre warnings were taken up in a fuller report from the House of Lords Constitution Committee, which contains around forty precise recommendations. The report stressed the importance of personal privacy and the paramount need for:

[110] ICO, 'The Identity Cards Bill: The Information Commissioner's concerns', October 2005. The Bill became law in the Identity Cards Act 2006.

[111] *Report on the Surveillance Society made for the Information Commissioner by the Surveillance Studies Network* (September, 2006). See also House of Lords Science and Technology Committee, *Personal Internet Security* HL 165 (2006-07); Home Affairs Committee, *Inquiry into 'A Surveillance Society'*, HC 58 (2006/7).

[112] Address introducing the Annual Report for 2008 (15 July 2008), available on website.

> executive and legislative restraint to the use of surveillance and data collection powers as necessary conditions for the exercise of individual freedom and liberty. Privacy and executive and legislative restraint should be taken into account at all times by the executive, government agencies, and public bodies.
>
> Before introducing any new surveillance measure, the Government should endeavour to establish its likely effect on public trust and the consequences for public compliance.[113]

Essentially, the Committee was recommending extension of the administrative law protections dealt with in later chapters of this book: expansion of the remit of the Information Commissioner, whose functions are dealt with in Chapter 10; impact assessments and consultation with the Information Commissioner and with groups representative of the public at an early stage in policy formation (see Chapter 4); statutory regimes and codes of practice for the use of CCTV systems; judicial oversight of surveillance systems and so forth. The operation of the police DNA bank should be more tightly regulated and there should also be greater oversight of the powers of surveillance granted by the Regulation of Investigatory Powers Act 2000 and greater publicity of the tribunal set up under the Act. Compensation should be made to people subject to unlawful surveillance. An immediate response from the Home Secretary rejected claims of a surveillance society, claimed that surveillance was necessary to counter terrorism and called for 'common sense' guidelines on CCTV and DNA.

The *Report on the Surveillance Society* had also noted that cradle-to-grave health and welfare, 'once the proud promise of social democratic governments', had, with the help of data-retrieval systems, been 'whittled down to risk management'. Risk regulation provides a ready justification for an ever more intrusive and regulatory state (a point made earlier). A benevolent gloss is given to state regulatory power by the word 'welfare' but welfare has always had a darker side. Chadwick's nineteenth-century poor-law reforms aimed to make relief sufficiently unpleasant to minimise claims, and complaints were regularly heard of subsequent social assistance schemes that they were designed for the purpose of 'regulating the poor'.[114] The Conservative 'welfare-to-work' ideology, taken up and expanded by New Labour, was designed to force benefit-seekers into work.[115] The 'pseudo-contracts' signed by jobseekers on which benefits are conditional (see Chapter 8) are a form of social control that push benefit recipients back to work. But benefits may be forfeited not only by the work-shy but by those who have 'transgressed against legislative codes regulating human behaviour, whether in the form of non-fulfilment of the terms of an anti-social behaviour order (ASBO), failure to make child maintenance

[113] Constitution Committee, *Surveillance: Citizens and the State*, HL 18 (2008/9) [452].

[114] F. Piven and R. Cloward, *Regulating the Poor: The functions of public welfare* (Tavistock Publications, 1971), p. xvii.

[115] DWP, *Reducing Dependency, Increasing Opportunity: Options for the future of welfare to work* (2007).

payments as an absent parent, or being deemed an "anti-social neighbour", even though their behaviour may have no direct links with the social security system'.[116] Again, affirmative concepts of human rights, which cast positive duties on the state, have the effect of authorising state intervention into areas of private life such as parental discipline.[117] It sounds beneficent to say that 'in order to address inequality adequately, child rearing must be repositioned as a public rather than a private concern and the state must take responsibility for inculcating the practice of good parenting'. To announce 'intensive care sin bins' for 'reckless and disruptive families' or 'pre-birth intervention' to identify 'the kids and families that are going to be difficult in the future' is less benign. The implication in the term 'Respect Tsar' is of an 'increasingly coercive and authoritarian approach to family policy, which has seen ever greater use of compulsion, fines and imprisonment'.[118]

A heavy-handed use of criminal law for purposes of social engineering characterised Tony Blair's government, which in its nine-year tenure added 3,023 offences to the statute book – one for almost every day in power. Many were designed to force changes in conduct not widely considered criminal or even immoral, such as smacking children, failing to send them to school, not wearing seat belts, using mobile telephones while driving, smoking or dropping litter in a public place. More questionable was the use of civil law penalties such as ASBOs, a practice that intentionally undermines the rule of law procedural protections of criminal process. Breach of an ASBO is a criminal offence punishable with imprisonment.[119]

In the name of security, public-order powers became more stringent, controlling the way people behaved in public and vesting extensive discretionary powers in the police. The Crime and Disorder Act 1999 provided for 'dispersal areas' in which groups may be dispersed and for the removal of young people to their place of residence in areas where 'anti-social behaviour is a significant and persistent problem'. A challenge mounted to these provisions, on the ground that they give a near arbitrary power for police to remove to their place of residence any young person 'not in the control of a parent or

[116] P. Larkin, 'The "Criminalization" of Social Security Law: Towards a punitive welfare state?' (2007) 34 *JLS* 295, 299.

[117] See, e.g., *Williamson v Education Secretary and Others* [2002] EWCA 1926, which explores the right of parents to authorise corporal punishment in the light of s. 131 of the School Standards and Framework Act 1998, which extends the prohibition on corporal punishment to private schools.

[118] Citations from DfES, *Every Parent Matters* (2007); V. Gillies, 'Perspectives on Parenting responsibility: Contextualizing values and practices' (2008) 35 *JLS* 95, 98–9. See also C. Henricson, 'Governing parenting: Is there a case for a policy review and statement of parenting rights and responsibilities?' (2008) 35 *JLS* 150.

[119] See P. Ramsay, 'The responsible subject as citizen: Criminal law, democracy and the welfare state' (2006) 69 *MLR* 29. ASBOs were introduced by the Anti-Social Behaviour Act 2003. In 2007, plans were announced to extend this system with ASBO-type attendance orders for those who fail to turn up to school or training courses after the school leaving age is raised to eighteen; violators will face fines of up to £200.

responsible person aged 18 or over', failed.[120] Demonstrations within the vicinity of Parliament required notice to the police; authorisation and breach of the conditions was a criminal offence. The provisions have been used to inhibit an individual from camping outside Parliament in protest against the Iraq war; a woman has also been charged simply for reading out a list of the dead near the Cenotaph in Whitehall.[121]

Under s. 44 of the Terrorism Act 2000 the police may stop, search and detain any individual in an area designated as being at high risk of terrorism even if not suspected of a crime; challenge in the courts has failed.[122] Every piece of legislation in this area adds new criminal offences to the list. Gordon Brown as a new Prime Minister promised a new beginning, reminding his audience that 'liberty belongs to the people not governments'.[123] Less than a month later, he asked Parliament to extend police powers of detention without charge to 42 days. Such measures have not only exacerbated judicial relationships with the executive (see Chapter 3) but have made serious inroads on the concept of civil liberties as conceived in a supposedly liberal-democratic state.

6. 'Hollowing out of the state'

So far in this chapter we have been discussing the role and functions of the state. The implication is that the state is one and indivisible: a centralised and homogeneous single unit. Even in the post-war era of 'big government' this has never been the case. Rhodes coined the famous metaphor of 'hollowing out of the state'[124] to highlight the way that the functions of central government had apparently been depleted during the 1990s. They had been transferred sideways to agencies or the private sector or upwards from national governments to the EU, leaving a hollow centre. New Labour's devolution programme took the process further, adding potential rivals to central government.

(a) Local government

Before devolution, the only institution capable of rivalling the democratic credentials of Parliament was local government. Democratically elected and to an extent free from central-government intervention, local government constituted a 'quasi-autonomous source of political power in the British

[120] *R (W and PW) v Metropolitan Police Commissioner and Richmond LBC* [2006] EWCA Civ 458.

[121] Ss. 132–8 of the Serious Organised Crime and Police Act 2005; *R(Haw) v Home Secretary* [2006] 3 WLR 40. These sections are to be repealed by the forthcoming Constitutional Renewal Bill.

[122] *R(Gillan) v MPC* [2006] UKHL 12; *Austin v MPC* [2009] UKHL 5.

[123] Speech at the University of Westminster, 25 October 2007.

[124] R. Rhodes, 'The hollowing out of the state: The changing nature of the public service in Britain' (1994) 65 *Pol. Q.* 138.

system'.[125] This was a source of tension when different political parties controlled the different power levels. But as government became more centralised, local government slowly lost the essential attributes of self-government.[126] Lacking the legal protections of a written constitution,[127] local government is at the mercy of any government that can obtain a parliamentary majority for abolition – as Margaret Thatcher, angered by consistent opposition to her policies, did with metropolitan counties and the Greater London Council in the Local Government Act 1985. The devolution settlements discussed in the next section radically changed central–local relationships, with responsibility transferred to the three devolved governments.

There are two ways to analyse central–local relations in Britain. The first is as an *agency model*, in which local government has strictly limited powers and disposes of little autonomous discretion. In this model, power emanates from the centre and 'trickles down' to other public bodies, reflecting the traditional view of sovereignty as attaching to Crown and Parliament. 'Inferior parts of government' need specific sanction for any form of activity in which they wish to engage[128] and local government possesses only 'earned' autonomy, conditional on doing what central government wants, and – perhaps more important – doing it in ways approved by central government.[129] Not surprisingly, this 'ultra vires' perspective on local government finds favour with courts wedded to the doctrine of legal sovereignty. The judiciary has consistently downplayed local government's democratic credentials, ruling that it has no inherent powers over and above those contained in or necessarily ancillary to statute.[130]

A more positive way to look at central–local relationships is as a *partnership* in which high-policy decisions are taken centrally but the local partner has political input and some independent discretion. Which of the two models is operative largely depends on the attitude for the time being of the senior partner. In the immediate post-war period, the partnership model prevailed, with much of the service delivery in education, housing, social services and land-use planning entrusted to local authorities. For King, this was 'something

[125] A. King, *Does the United Kingdom Still Have a Constitution?* (Sweet & Maxwell, 2001), p. 27.

[126] M. Loughlin, 'The demise of local government' in V. Bogdanor (ed.), *The British Constitution in the Twentieth Century* (Oxford University Press, 2003).

[127] In 1998, the UK ratified the European Charter of Local Self-Government, 1985 but took no implementing steps.

[128] See M. Taggart, 'Globalization and administrative law' in Huscroft and Taggart (eds.), *Inside and Outside Canadian Administrative Law* (University of Toronto Press, 2006), p. 261.

[129] G. Jones and M. Stewart, 'Central–Local Relations since the Layfield Report' (2002) 28 *Local Government Studies* 7; S. Leach and M. Stewart, *Local Government: Its role and functions* (Joseph Rowntree Foundation, 1992).

[130] *Bromley London Borough Council v Greater London Council* (p. 103 below); *Wheeler v Leicester City Council* (local authority unable to develop and enforce an independent 'local' policy on race relations, see p. 114 below); *R v Lewisham LBC, ex p. Shell United Kingdom Ltd* (contract compliance, see p. 363 below); *R v Somerset County Council, ex p. Fewings* [1995] 1 WLR 1037 (local council bound to use land in the interests of all inhabitants unable to impose an anti-hunting ban). See V. Mehde, 'Steering, suporting, enabling: The role of law in local government reforms (2006) 28 *Law & Policy* 164

of a golden age for local authorities'; in terms both of independence from Whitehall and the scope of their activities, they operated virtually as 'local statelets'.[131] The 'golden age' ended abruptly with the election of Margaret Thatcher who, faced with the need to scale-down local government spending and borrowing, introduced restrictive financial controls. Central government reasserted its pre-eminence and, stripping local government of many of its powers and much of its capacity for independent action, accentuated its dependent position.[132] A cycle of juridification set in as relations between the two tiers of government worsened and courts were called in to adjudicate disputes and interpret the complex provisions of new legislation.[133] Under New Labour, the partnership model has been partially reinstated with the Central Local Partnership established for discussion of topics of mutual interest (including finance) and modification of the strict ultra vires rule in the Local Government Act 2000.[134]

The position of local government has always been undermined by inability to set its own taxes; indeed, the history of local government in the late twentieth century revolves around arguments over finance. Local taxes raise no more than 20 per cent of income and are subject to a cap by central government; the main source of local authority income is central government grants, some distributed according to a formula, others more specific – an invitation to control. No government has so far dared to redress the balance by introducing a locally administered council tax.[135] New Labour's Local Government Act 1999, applicable to England and Wales, to some extent loosened the financial corset, though much central government regulation of local authority finance remained in place. Loan applications by local authorities require ministerial permission; councils that have, in the view of central government, 'overspent' can have their vital central government grants reduced; and so on.[136] And although compulsory competitive tendering was replaced by 'best-value tendering', conditions remained onerous (see Chapter 8). Subjection to VFM quality audit by the independent Audit Commission further restrained policy choices. There were several thousand performance indicators, with reserve powers to intervene for failure to achieve 'best value'.

In *Modernising Government*,[137] the incoming government committed itself to 'making life easier for the public by providing public services in integrated,

[131] King, *Does the United Kingdom Still Have a Constitution*, p. 27.

[132] M. Loughlin, 'Central–local relations' in *Changing Constitution*, 4th edn (2000), p. 138 and 'The demise of local government' in Bogdanor (ed.), *The British Constitution in the Twentieth Century*.

[133] *Ibid*., pp. 149–60.

[134] I. Leigh, 'The new local government' in *Changing Constitution*, 6th edn (2007).

[135] See *Report of the Committee of Inquiry into Local Government Finance*, Cmnd 6453 (1976) (the Layfield Report) and *Place-shaping: A shared ambition for the future of local government* (HMSO, 2007) (the Lyons report).

[136] P. Vincent-Jones, 'Central–local Relations under the Local Government Act 1999: A new consensus?' (2000) 63 *MLR* 84. And see ss. 136–40 of LGPIHA 2007.

[137] *Modernising Government*, Cm 4310 (1999).

imaginative and more convenient forms like single gateways' (one-stop shops). The essence of 'joined-up government' was to:

> re-engineer governance processes so as genuinely to reunify or re-orientate them to meet the needs of the client groups being served. Ideally, joining-up should make the governance process as simple and transparent as possible instead of citizens or organisations having to deal on connected issues with a maze of different agencies.[138]

Concerned for 'the less articulate and more vulnerable', whose dependence on public services was greater, PASC in its report on audit stressed the need for *standardisation*, demanding common reporting standards and regular monitoring by the NAO.[139] Yet in the same year, the Education and Skills Committee in a report on English secondary education concluded that the policy of centrally set targets had 'now served its purpose'; each school should be left to set its own targets, subject to review by local authorities and OFSTED.[140] This minor divergence highlights the constant tension between the drive to centralise (equality, efficiency, and economy of scale) and the call for localism and community.

In his major review of local government,[141] Sir Michael Lyons, stressed the latter need, calling for 'greater local choice'. Dismissing concerns about 'post-code lotteries' and public calls for 'the same services and levels of service, to be delivered in all areas', he insisted that government targets should be fewer and better focused. *Strong and Prosperous Communities*,[142] a 'more streamlined and proportionate performance regime' was promised with 'more freedom and powers to bring about the changes they want to see'. The promise is implemented in Part 7 of the Local Government and Public Involvement in Health Act 2007(LGPIHA), which not only restricts the number of authorities affected by 'best value' requirements but abolishes the need for performance indicators in England; in respect of Wales, where the Welsh Assembly has made different policy choices, the Act bestows measure-making powers.[143]

More generally, New Labour presents local government through the lens of community empowerment and as a focal point for community renewal and 'voice'.[144] *Strong and Prosperous Communities*[145] promised to strengthen

[138] PASC, *Making Government Work: The emerging issues*, HC 94 (2001/2) [6].

[139] PASC, *On Target: Government by measurement*, HC 62 (2002/3); *Choice, Voice and Public Services*, HC 19 (2004/5).

[140] Select Committee on Education and Skills, *Secondary Education: Pupil Achievement*, HC 513 (2002/3).

[141] Sir Michael Lyons, *National Prosperity, Local choice and Civic Engagement* (May, 2006).

[142] Department for Communities and Local Government, *Strong and Prosperous Communities*, Cm. 6939 (2006) [2].

[143] See further, Welsh Assembly Government, *Making the Connections: Delivering better services for Wales* (2004); *Beyond Boundaries: Citizen-centred local services for Wales* (the Beecham Review) (2006).

[144] DTLR, *Modern Local Government In Touch with the People* (1998).

[145] DCLG, *Strong and Prosperous Communities*, Cm. 6939 (2006). And see Local Democracy, Economic Development and Construction Bill (2009).

the ability of councillors to act as champions for their community via a new 'Community Call for Action'; to increase community management and ownership of community assets to serve local communities better; and to download management and administration (for example, by setting up tenant management schemes and local parish councils). The LGPIHA provides for 'community governance petitions' to trigger policy reviews by a local authority and frees councils from the need for central-government approval of local bylaws. *Communities in control: Real people, real power* takes the process further, announcing (somewhat ironically, in view of its record) that the Government:

> want to shift power, influence and responsibility away from existing centres of power into the hands of communities and individual citizens. This is because we believe that they can take difficult decisions and solve complex problems for themselves. The state's role should be to set national priorities and minimum standards, while providing support and a fair distribution of resources.[146]

In line with this commitment, the Government is to introduce a statutory 'duty to promote democracy' and extend the existing 'duty to involve' local people in key decisions, which covers police authorities and key arts, sporting, cultural and environmental organizations. An Empowerment Fund of at least £7.5 million will go to the DWP to support voluntary organisations and volunteers, especially young people, the disabled and socially excluded. Alongside, government is working on proposals for a two-tier system of local government formed of counties and blocked-up districts and based on regional structures.

(b) Devolution

The centralising trends of the Thatcher government stimulated regional resentment. In Wales, administration was largely in the hands of the Welsh Office, which controlled the lion's share of public spending. Many functions had been transferred to agencies, notably the Welsh Development Agency, whose affairs had provoked much concern.[147] In Scotland, where nationalism was traditionally stronger, the fires were stoked by Thatcher's introduction of the hated 'poll tax'. Following advisory referendums in the two nations, legal force was given to Labour's longstanding promises of devolution by the Scotland and Government of Wales Acts 1998. The devolution settlements, like the Human Rights Act 1998, were crafted to take account of the ruling doctrine of parliamentary sovereignty: it is theoretically always open therefore to the Westminster Parliament to legislate for the devolved areas.

As introduced, the arrangements for devolution were 'asymmetric', based

[146] Executive summary, *Communities in control: Real people, real power* (July 2008).
[147] Rawlings, *Delineating Wales*, pp. 29–31.

on very different models and statutory provisions.[148] Limitations on the Welsh Assembly, restricted to passing secondary legislation, were lessened by the Government of Wales Act 2006, following the report of the Richard Commission.[149] But Acts of Parliament cover England and Wales except where otherwise indicated and the legal system remains technically that of England and Wales.[150] In Northern Ireland, where government had first been devolved in 1921, direct rule was restored in 1973 in response to escalating violence. In 1998, the New Labour Government succeeded in negotiating the Belfast or 'Good Friday' agreement between the major political parties, which set in place a new and complex 'consociational' model of devolved government;[151] devolution had once more to be shelved, however, and had in practice to await the Northern Ireland (St Andrews Agreement) Acts of 2006 and 2007. There have since been substantial moves to normal governance in the province.[152]

The fact that regional executives responsible to regional legislatures are now competent in internal matters (with important exceptions for human rights and EU affairs, where the UK government retains responsibility) has changed the remit of many central government departments, notably the Home Office and Departments of Health and Education. New complaints machinery, including changes to the existing ombudsman systems, was also necessary (see Chapter 10). Devolved government has opened the way to policy divergence of a kind not previously possible in the highly centralised British system, where government had at its disposal in the last resort the weapon of statute law.

According to Oliver, one effect of devolution has been to introduce 'more highly juridified political and administrative processes than operate at UK level'. This raises questions as to 'how rules governing political behaviour can be enforced, as to the implications of involving the courts in disputes abut breaches of norms, and the relative advantages and disadvantages of non-judicial mechanisms for resolving disputes where rules governing inter-institutional relationships have been breached'.[153] Some highly technical

[148] C. Turpin and A. Tomkins, *British Government and the Constitution*, 6th edn, (Cambridge University Press, 2007), Ch. 4; and see N. Burrows, *Devolution* (Sweet & Maxwell, 2000); A. Trench, *Devolution and Power in the United Kingdom* (Manchester University Press, 2007).

[149] *Report of the Commission on the Powers and Electoral Arrangements of the National Assembly for Wales* (2004). And see R. Rawlings, 'Law making in a virtual Parliament: The Welsh experience' in Hazell and Rawlings (eds.), *Devolution, Law Making and the Constitution* (Imprint Academic, 2005).

[150] Rawlings, *Delineating Wales*, pp. 317–21.

[151] *Agreement Reached in the Multi-Party Negotiations*, Cm. 3883 (1998). And see C. McCrudden, 'Northern Ireland' in *Changing Constitution*, 5th edn (2004); and 'Northern Ireland and the British Constitution since the Belfast Agreement' in *Changing Constitution*, 6th edn (2007).

[152] G. Anthony, 'The St Andrews Agreement and the Northern Ireland Assembly' (2008) 14 *EPL* 151.

[153] D. Oliver, *Constitutional Reform in the UK* (Oxford University Press, 2003), p. 241. And see B. Winetrobe, 'Scottish devolution: Developing practice in multi-layer governance' in *Changing Constitution*, 6th edn (2007).

points have fallen to be decided by the House of Lords and Privy Council.[154] As for the formal mechanism for resolution of 'devolution issues',[155] the various actors have so far shown restraint and a willingness to make the system work. The general tendency, contrary to Oliver's prediction, has been not to resort to litigation and formal law change but to rely on understandings and 'soft law'.[156] No doubt this has been helped by the existence of national, political parties and the common formation, style and code of ethics of the public servants presently operating the system. In time this may change.[157] Or change might come about through a rise in nationalism, signalled by the election in 2007 of the first Scottish nationalist government committed to full independence or at least reform of the devolution settlement with greater control of the Scottish budget.[158] On the English side of the border, where some commentators feel that a 'gaping hole' exists in the constitutional arrangements for the largest country in the Union, a renewed interest in regional assemblies, for which the English have so far shown little appetite,[159] is possible. More likely, though undesirable, are attempts to change Parliament's lawmaking procedures to curtail the rights of Scottish representatives to vote on purely English measures.[160]

(c) The European Union

Regionalisation shares out the powers of the nation-state without necessarily diminishing the total. Transfer of state power to a supranational entity such as the European Union (EU) is a different type of 'hollowing out'. Although this may not at first be realised, powers are subtracted from the sum available to national governments and transferred to a 'higher' level, a process with direct impact on national sovereignty. Giddens catches the inherent tension between 'uploading' and 'downloading' in the globalised world of post-modern politics and governance:

[154] Notably *Somerville and Others v Scottish Ministers* [2007] UKHL 44, which concerns the very important relationship of the Scotland Act to the UK Human Rights Act 1998; and see G. Gee, 'Devolution and the courts' in Hazell and Rawlings (eds.), *Devolution, Law Making and the Constitution*.

[155] Competence is transferred to the new Supreme Court by s. 40 and Sch. 9 of the Constitutional Reform Act 2005.

[156] R. Rawlings, 'Concordats of the constitution' (2000) 116 *LQR* 257.

[157] See R. Rhodes (ed.), *Decentralizing the Civil Service: From unitary state to differentiated polity in the United Kingdom* (Open University Press, 2003).

[158] The Scottish Government, *Choosing Scotland's Future: A national conversation: Independence and responsibility in the modern world* (August 2007).

[159] A local referendum on an assembly for the north-east was defeated by nearly 80%: see R. Laming, 'The future of English regional government', Federal Union website.

[160] R. Hazell (ed.), *The English Question* (Manchester University Press, 2006) reviewed by Bogdanor [2007] *PL* 169; B. Hadfield, 'Devolution and the changing constitution: Evolution in Wales and the unanswered English question', in *Changing Constitution*, 6th edn (2007).

> Globalisation 'pulls away' from the nation-state in the sense that some powers nations used to possess, including those that underlay Keynesian economic management, have been weakened. However, globalisation also 'pushes down' – it creates new demands and also new possibilities for regenerating local identities . . . Globalisation also squeezes sideways, creating new economic and cultural regions that sometimes cross-cut the boundaries of nation-states.[161]

Since its inauguration as a common market, the EU has rapidly accumulated power. There has a steady upwards 'delegation' of national state functions, with a consequential impact on national sovereignty. Significant steps on the road have been the Single European Act 1986, which delegated wide powers to the European Commission in the interests of completing the single market; the Treaty of European Union (TEU), which formalised the co-operation beginning to take place in the areas of policing, immigration and justice and introduced the idea of co-operation in the field of foreign policy. The EU is a regime very prone to 'mission creep', often working through agencies, such as Europol, established to co-ordinate the transnational activities of national police forces, or Eurojust, which helps to co-ordinate the criminal and civil justice systems of member states. Few lawyers know, for example, about the programme for harmonisation of our civil law or that the Commission has programmes in the area of legal aid. This raises serious questions over accountability.[162]

More relevant to the subject matter of this book is the EU's growing regulatory power. We shall find in Chapter 6 that many of our national regulatory systems, in fields like competition, telecommunications and many others, should bear the label 'manufactured in Brussels'. Partly due to the technicality of much of the subject matter, people are only beginning to be aware of the role played by the EU in regulating food safety or horticultural and veterinary chemicals and agricultural production generally. And the less than transparent operation of EU rule-making processes means that probably only the 'Euro-elite', visiting Brussels regularly, and officials who meet constantly in the committees and corridors of the Commission, are fully conscious of the EU's upward pull. This again creates problems for political accountability.[163]

Many years ago, Lord Denning famously compared the Treaty of Rome to an 'incoming tide flowing into the estuaries and up the rivers'. The simile, with its notion of invasion, took hold. Since those early days, it has been customary to think of EU law as an outsider and to measure its impact on British law, or 'spill-over effect'.[164] Principles of judicial review, such

[161] T. Giddens, *The Third Way*, p. 31.

[162] D. Curtin, 'Delegation to EU non-majoritarian agencies and emerging practices of public accountability' in Geradin *et al.*, *Regulation Through Agencies in the EU*.

[163] C. Harlow, *Accountability in the European Union* (Oxford University Press, 2002).

[164] G. Anthony, 'Community law and the development of UK administrative law: Delimiting the "spill-over" effect' (1998) 4 *EPL* 253 and *UK Public Law and European Law: The dynamics of legal integration* (Hart Publishing, 2002). See also Turpin and Tomkins, *British Government and the Constitution*, Ch. 5.

as proportionality or legitimate expectation, have been imported from Europe. Structural change has been imposed on administrative systems, as with the EU public procurement directives that strictly regulate government contracting (see Chapter 8). The impact of EU law may sometimes be unexpected, unintentional and even unwelcome, as in *Watts*, where an NHS patient, upset by her long wait for a hip replacement, went to France for the operation and subsequently claimed reimbursement from the NHS. Ruling this to be permissible, ECJ took the opportunity to criticise NHS procedure, saying in the course of its judgment that a 'rationing system' was only legitimate if:

> based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily. Such a system must furthermore be based on a procedural system which is easily accessible and capable of ensuring that a request for authorisation will be dealt with objectively and impartially within a reasonable time and refusals to grant authorisation must also be capable of being challenged in judicial or quasi-judicial proceedings.[165]

As the 'spill-over effect' became more widely recognised, the approach to EU law changed. New books are appearing, which look on EU law as part of domestic public law to be drawn on when necessary. How British courts treat EU law is itself a subject of study.[166] Bamforth talks of the arrival of a 'multi-layered constitution' in which a 'multi-level jurisdiction' operates.[167] This idea is explored in Chapter 15. Sir Konrad Schiemann writes:

> The light in which a lawyer views a set of facts and the way he formulates the legal problem is very much conditioned by the legal system which he is applying. In this country the courts are now more often in a position where they can apply one or more of four legal systems which are interacting - public international law, the law of the European Union, the law of the ECHR and the common law as modified by Equity and statute.[168]

If the EU is a force for 'hollowing out' state power, it is equally a force for centralisation. The EU deals with its member states, responsible in EU law for implementing its policies (TEC Art. 10). This is reflected at national level by the reservation of legislative and policy-making powers in EU matters for the Westminster government. At the same time, the EU has committed itself to the doctrine of subsidiarity, whereby decisions should be taken as close as possible

[165] Case C-372/04 *R (Yvonne Watts) v Bedford Primary Care Trust and Health Secretary* [2006] ECR I-4325 [115-6]. In consequence of this judgment, the European Commission is preparing proposals to facilitate patient travel abroad in search of treatment.

[166] R. Gordon, *EC Law in Judicial Review* (Oxford University Press, 2007).

[167] N. Bamforth, 'Courts in a multi-layered constitution' in Bamforth and Leyland (eds.), *Public Law in a Multi-Layered Constitution*.

[168] K. Schiemann, 'Introduction' in Gordon, *EC Law in Judicial Review*, p. ix.

to the people.[169] In fact, the machinery is not in place for enforcement of the doctrine. Only recently have national parliaments begun to receive proper recognition in the EU's constitutional arrangements;[170] regional governments and sub-national parliaments have still more limited representation in EU law and policy-making processes.[171] The EU has nonetheless been a force for disaggregation, providing an alternative to national power structures that makes regional 'opt out' look feasible. It has helped to dismantle Shapiro's picture of 'bounded' government, responsible to a national legislature and billeted firmly in the national constitution (p. 5 above).

For better or worse, the UK has become a player in a multi-level system of governance,[172] in which the policy-making process is not only creeping steadily upwards but being dispersed amongst 'policy-making networks' of public and private players. National public servants work alongside EU officials, agencies, private corporations and the voluntary sector. Transparency has declined through the opacity of the EU treaty-making, lawmaking and policy-making processes. A worrying 'democratic deficit' has come into being, reducing opportunities for citizen participation.[173] A forceful transnational court (the ECJ) has impinged on national legal orders, changing the balance of power between courts and government.[174] This is a challenging context for public lawyers and one that threatens 'some of the most benign developments of modern administrative law'.[175]

7. A state of change

The contours of public administration have changed very rapidly in recent years. Constitutional change has come suddenly and sporadically. It has been disconnected and too little thought has been given to the possible consequences of some of the reform. Prosser's view of English public law as a 'journey without maps'[176] is vindicated in this chapter, which records a

[169] TEC Art. 5; and see A. Estella, *The EU Principle of Subsidiarity and its Critiques* (Oxford University Press, 2002); N. Barber, 'The limited modesty of subsidiarity' (2005) 11 *ELJ* 308; I. Cooper, 'The watchdog of subsidiarity' (2006) 44 *J CMS* 281.

[170] European Scrutiny Committee, *Democracy and Accountability in the European Union and the Role of National Parliaments*, HC 152 (2001/2); T. Raunio, 'Always one step behind? National legislatures and the European Union' (1999) 34 *Government and Opposition* 180.

[171] E. Bomberg and J. Petersen, 'EU decision-making: The role of sub-national authorities' (1998) 46 *Pol. Studies* 219.

[172] See K-H Ladeur (ed.), *Public Governance in the Age of Globalization* (Ashgate, 2004).

[173] S. Andersen and T. Burns, 'The European Union and the erosion of parliamentary democracy: A study of post-parliamentary governance', in Andersen and Eliassen (eds.), *The European Union: How democratic is it?* (Sage, 1996); R. Bellamy, 'Still in deficit: Rights, regulation and democracy in the EU' (2006) 12 *ELJ* 725.

[174] D. Wincott, 'Does the European Union pervert democracy? Questions of democracy in new constitutionalist thought on the future of Europe' (1998) 4 *ELJ* 411.

[175] A. Aman Jr, 'Administrative law for a new century', in Taggart (ed.), *The Province of Administrative Law*, pp. 75, 95.

[176] T. Prosser 'Journey without maps?' [1993] *PL* 346.

number of divergent attitudes to the state and its functions. Some of the differences have political origins: 'big state' socialism contrasted strongly with Margaret Thatcher's approach. Others are temporal in character, in the sense that they have to be accommodated. Thatcher's privatisation programmes and reforms to public administration were, for example, a revolution which subsequent governments have had to digest.

Later chapters consider the new administrative law that emerged and is still emerging from these changes. We shall find that regulation and regulatory theory have come to occupy the centre of our discipline (see Chapters 6 and 7); that contract has emerged from the shadows to become a powerful tool for service delivery and for 'steering' (see Chapters 8 and 9); and that a steady process of juridification is a marked feature of modern bureaucratic systems (see Chapter 5). This is partly due to the process of institutional fragmentation and 'hollowing out of the state' recorded in this chapter. Primarily, however, juridification is an aspect of computerisation. ICT has brought us to the edge of an age of 'e-governance' which we do not as yet know how to handle.

National politics are increasingly concerned with transnational or global issues. Policy-development is moving upwards. National economic policy is bound up with world trade, while the equality principle that has so rapidly gained ground at national level is beginning to encompass global poverty and development.[177] Nowhere is this more evident than in the environmental field. The Stern Review, commissioned by HM Treasury, reflects the new international dimension to environmentalism:

> The Review takes an international perspective. Climate change is global in its causes and consequences, and international collective action will be critical in driving an effective, efficient and equitable response on the scale required. This response will require deeper international co-operation in many areas – most notably in creating price signals and markets for carbon, spurring technology research, development and deployment, and promoting adaptation, particularly for developing countries.[178]

A government statement that sustainable development should become a cross-cutting basis for policy across government blends economic advance with environmentalism.[179] In response, we have seen a rapid 'greening of administrative law', with new regulatory machinery (see Chapter 7) and new cutting-edge principles.

We spoke of Margaret Thatcher's reforms as marking a paradigm shift, ushering in an era of economic liberalism. Globalisation, the progression of

[177] D. Trubek and A. Santos (eds.), *The New Law and Economic Development: A critical appraisal* (Cambridge University Press, 2006).

[178] HM Treasury, *Stern Review on the Economics of Climate Change* (Cambridge University Press, 2006).

[179] UK Cabinet Office, *Securing the Future: Delivering UK sustainable development strategy* (March 2005).

e-governance and, latterly, a new environmentalism, all pose serious challenges for our discipline. As optimist Alfred Aman Jr sees it, 'A major role for law in the global era is to help create the institutional architecture necessary for democracy to work, not only within the institutions of government but also beyond them in the sphere where the private sector governs'.[180] Taggart, recalling that 'old pictures of a political and legal scene remain current long after it has been dramatically altered', once criticised public lawyers for slowness in coming to grips with the challenges of 'the blue rinse'.[181] In time, however, they did respond and the chapters that follow deal with their responses.

Today, we stand on the edge of a new paradigm shift. Triggered by the 'credit crunch' in 2008, and the subsequent economic recession, nationalisation and quasi-nationalisation are at least on the agenda. There are cries for new regulators and new forms of regulation and talk at the political level of a 'New, New Deal'. For administrative law, this is undoubtedly a challenge but it is also an opportunity.

[180] A. Aman Jr, *The Democracy Deficit* (New York University Press, 2004), p. 136.

[181] M. Taggart (ed.), 'The Province of Administrative Law Determined' in M. Taggart (ed.), *The Province of Administrative Law* (Hart Publishing, 1997) p. 2. Taggart is citing Justice Felix Frankfurter, writing in the context of Roosevelt's New Deal. See now R. Stewart, 'US administrative law: A model for Global Administrative Law?' (2005) 68 *Law and Contemporary Problem*s 63, a Special Issue on the problems of global administrative law.