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7-22-2004

# 'Always Embedded' Administration: The Historical Evolution of Administrative Justice as an Aspect of Modern Governance

Peter Lindseth

*University of Connecticut School of Law*, [plindset@law.uconn.edu](mailto:plindset@law.uconn.edu)

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## Recommended Citation

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Forthcoming in Christian Joerges, Bo Stråth and Peter Wagner, eds, *The Political Construction of Modern Capitalism* (London: GlassHouse Press). This is a draft: Please do not cite, quote, refer to, etc., without the express permission of the author. Send comments to [plindset@law.uconn.edu](mailto:plindset@law.uconn.edu). © Peter L. Lindseth. All rights reserved

## ‘ALWAYS EMBEDDED’ ADMINISTRATION: THE HISTORICAL EVOLUTION OF ADMINISTRATIVE JUSTICE AS AN ASPECT OF MODERN GOVERNANCE

*Peter Lindseth\**

### I.

Positive law is the legal avatar of modernity. It is the expression, in legislative terms, of the will of the modern state to remake society – first by constructing, and then by regulating, national economies and national political communities. Positive law is not, however, self-executing. Rather it is, in many respects, merely the opening gambit in a complex process of negotiation between state and society over the form and substance of regulatory norms. To emphasize the diffuse character of this phenomenon, legal scholars now commonly use the term ‘governance’ – rather than the more traditional and hierarchical term ‘government’ – to refer to the manifold ways in which regulatory norms are actually formulated in modern society. General normative decisions are, of course, still made at the summit of the state, in a process that itself entails significant political negotiation between public and private interests. However, once those general policy directions are determined, the difficult work of negotiation then shifts to the administrative sphere, and it is there that the ideal of hierarchical government arguably begins to break down.

That ideal is undermined not simply by the *de facto* (and sometimes even *de jure*) autonomy of administrative agents from political control at the summit. Rather, it is undermined by the very nature of state-society interaction in the implementation of positive law. The administrative sphere is where ‘the rubber meets the road’ in the modern state. It is the point of contact between state and society where efforts to implement specific legislative goals generate the ‘friction’ of social and political resistance. As part of the effort to reduce or override

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\* Associate Professor of Law, University of Connecticut School of Law (USA); Jean Monnet Fellow, Economy as Polity Working Group, Robert Schuman Centre for Advanced Studies, European University Institute, January-June 2003. I would like to thank all the members of the working group but especially Pepper Culpepper, Christian Joerges, Bo Stråth, and Peter Wagner for their provocative questions and comments on earlier drafts.

that resistance, legislative norms are often redirected in any number of ways – the ultimate tribute, one might say, to the strength of diffuse ‘governance’ over hierarchical ‘government.’

Various kinds of resistance to state action have long been the object of scholarly analysis, but some forms have received less attention than others. This chapter focuses on one of the less studied forms: what the French call *le contentieux administratif*, or litigation initiated by private parties challenging the legality of administrative action. Through the mechanism of administrative litigation, private interests attempt to enlist the aid of judges in the counter-effort to check, or at least to participate in, the exercise of the state’s expanding regulatory power. Given the potential impact that this form of legal control can have on the effective content of legislative norms, the question of administrative justice has, unsurprisingly, been a contested one in the political and constitutional history of modern nation-states. This chapter looks at the historical experience of two such states, France and Britain (or more specifically England), from the 17th to the 20th centuries. The perspective offered here is admittedly a ‘top-down’ one, limiting itself to the ‘high politics’ of administrative litigation rather than describing the particular ways in which social interests have, over time, resorted to lawsuits in their effort to control state action. (A social history of administrative litigation is certainly something that historians might usefully undertake.) Nevertheless, within these self-imposed limits, the French-English comparison still presents a useful contrast, because the elites responsible for articulating the model of administrative justice in each country generally defined their approach – both in principle and in practice – in conscious opposition to the other.

The contrast is most stark on the level of principle. The guiding idea behind the French system of administrative justice (in theory at least) is *juger l’administration, c’est encore administrer* – ‘to judge the administration is still to administer.’ This phrase alludes to one of the most enduring principles in French public law – that the legal control of administrative action is itself a form of administration, one properly beyond the purview of the ordinary courts. Historically this exclusion reflected the suspicion (born of experience under the Old Regime) that ordinary judges were excessively wedded to the prerogatives of non-state actors and insufficiently sensitive to the needs of the ‘general interest’ defined by the administration. By contrast, at roughly the same point in history, the English Parliament explicitly rejected a similar effort on the part of the monarchy to establish a separate system of administrative justice. Rather, in England, the subjection of crown officials to the jurisdiction of the common-law courts, like all other litigants, came to be regarded (again, at least in theory) as a fundamental characteristic of the

'Rule of Law,' in which the idea of 'private property' and not the 'general interest' would predominate. This rejection extended to substantive law as well, reflected in the insistence that there be no special body of law – a *droit administratif* – governing official conduct in England.

How these contrasting ideological premises were translated into institutional reality over time, however, presents an even more interesting comparison. Despite different ideological starting points, ultimately in England just as in France the demands of administrative efficiency ultimately prompted a 'dejudicialisation' of the process of administrative oversight and control. However, in both countries as well, this effort eventually provoked a counter-process of 'rejudicialisation,' which, although different once again in form, was arguably similar in its substantive aims, animated by a shared desire to subject official action to traditional norms of justice, whether enforced by common-law courts (in England) or the increasingly court-like *juridictions administratives* (in France).

As this reference to *juridictions administratives* suggests, however, the process of dejudicialisation was clearly more successful in France, leading to the creation of a separate system of administrative justice (at the summit of which sits the Conseil d'Etat) that, to this day, remains formally attached to the executive. But this historical particularity in the French model should not be overstated. As we shall see below, the ultimate survival of the French system of administrative justice depended critically on its further institutional separation from the 'active administration' – that is, from the bureaucracy responsible for actual policy implementation.<sup>1</sup> It further depended on the thorough incorporation of traditional notions and forms of justice into the substantive *droit administratif* over the course of the 19th century.

In the English case, after an initial attempt at dejudicialisation in the 17th century had failed (due to Parliament's successful assertion of supremacy over the crown culminating in the Glorious Revolution of 1688), dejudicialisation would return over the course of the 19th century, albeit *sub silencio* in tribute to the strength of the prevailing Rule-of-Law culture. By the early-20th century, with the dramatic expansion of the regulatory capabilities of the state, the ordinary English courts became more aware of the new reality and began to vigorously contest the preclusion of judicial review of administrative action. Ultimately, in the decade after World War II, English judges were forced to accept the reality of separate forms of administrative justice, but only after Parliament

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<sup>1</sup> The definitive history of this process remains Jacques Chevallier, *L'Elaboration historique du principe de séparation de la juridiction administrative et de l'administration active* (Paris: LGDJ, 1970).

inscribed in law the general right of appeal to the judicial courts in administrative disputes. Thus the essence of the old Rule-of-Law system was seemingly retained.

This convergence between the French and English systems of administrative justice, despite their formal differences, is not coincidental. Rather it is directly linked, I would suggest, to the central topic of this volume: the political construction of modern capitalism, particularly through the agency of the state. Dejudicialisation and rejudicialisation can be understood as a legal manifestation of the more general ‘double movement’ described by Karl Polanyi in his classic work on the historical development of the market economy, *The Great Transformation* (1944).<sup>2</sup> Rather than creating a ‘self-regulating’ market economy by removing it from overtly political control (Polanyi’s thesis), the aim of dejudicialisation was to create, in effect, a ‘self-regulating’ administrative sphere disembedded from traditional values of justice, guided by its own sense of policy rationality and its own estimation of the public interest in the construction and regulation of the market. Rejudicialisation, on the other hand, tracked the process of ‘reembedding’ of the economy; that is, like the more general ‘counter-movement’ of which it was a part, rejudicialisation was a concrete expression of the cultural belief that administrative governance, no less than the market economy itself, must remain ‘always embedded’ in the values of justice and legitimacy inherited from the past.

I will return to this argument in greater detail in Part IV of this essay. At this point, however, it is useful to point out another aspect of Polanyi’s thesis that dovetails with my own – one which may shed light on the relationship between the ‘varieties of capitalism’ and its legal-historical counterpart, the ‘varieties of administration.’ In *The Great Transformation*, Polanyi effectively claims that the state has historically served as a neutral instrument, equally available to the movement seeking to create a self-regulating market economy as well as to the counter-movement seeking to re-impose on that economy a public-regulatory regime.<sup>3</sup> The comparative history of administrative justice in France and England provides some additional support for what we might call the ‘state-neutrality thesis.’ In France, the effort to dejudicialise administrative justice was directly tied to the movement to construct a national market economy (state-led in the French case), whereas in England it was much

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<sup>2</sup> Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (1944) (Boston: Beacon Press, 2001).

<sup>3</sup> Cf. Fred Block and Margaret R. Somers, ‘Beyond the Economistic Fallacy: The Holistic Social Science of Karl Polanyi,’ in Theda Skocpol, ed., *Vision and Method in Historical Sociology* (Cambridge: Cambridge Univ. Press, 1984), 68 (‘Thereby the state acted in the interests of society as a whole when it passed protective legislation, and

more linked to the counter-struggle to subject the economy to political control. In French history, the detachment of state administration from judicial oversight was central to the political effort from the 17th to the 19th centuries to make the state a more effective agent for the construction of a national market economy and a cohesive national political community (both of which French elites regarded as essential to the projection of state power on the international level, particularly in competition with the British and, later, the Germans). In English history, the effort to dejudicialise would only be taken up in earnest with the emergence of the ‘Social State’ at the end of the 19th and beginning of the 20th centuries. Although this later quest for dejudicialisation in England would also reflect a desire to make the state a more effective agent of social intervention, that intervention would now be aimed at circumventing the judicial courts as regulatory bodies because they were perceived as excessively attached to traditional prerogatives of private property and *laissez-faire*.

In other words, the English experience in the late-19th and early-20th centuries paralleled the French experience in the 17th and 18th centuries in that each reflected the desire to circumvent the judicial courts in the legal control of administrative action. However, in the earlier French case, administrative dejudicialisation was ultimately in service of very different policy goals, and it is to that French experience that I turn first.

## II.

Among Alexis de Tocqueville’s most important insights in *The Old Regime and the French Revolution* (1856) concerned the origins of administrative hierarchy and centralisation in the French tradition.<sup>4</sup> The 19th-century model of administration so prevalent in France, with its decision making chain stretching downward from the central bureaucracy in Paris to the prefect, subprefect, and ultimately to the local mayor and municipal council, owed its birth not to Napoleon or the Revolution, as was often supposed in Tocqueville’s time, but to the Old Regime. Faced with the challenges of war, religious and political division, economic decline, and social unrest, the French monarchy in the 17th century created a separate administrative apparatus (members of the Conseil du Roi, the provincial intendants, their subdelegates) unencumbered by corporatist and venal privileges, whose agents did not own their offices and consequently owed their loyalties primarily to the King. The driving force behind

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yet the same was true when it passed promarket laws; it clearly did not ‘belong’ to either of these forces.”)  
<sup>4</sup> Alexis de Tocqueville, *L’Ancien régime et la révolution* (1856) (Stuart Gilbert trans., *The Old Régime and the French Revolution*, New York: Doubleday, 1955), Part II, ch. 2 (‘How administrative centralization was an

bureaucratic centralisation was, as Tocqueville put it, ‘the instinctive desire of every government to gather all the reins of power into its own hands.’<sup>5</sup> Venal office holders could not be ‘dispossessed’ of their property – that is, removed from office – thus depriving the crown of an essential means of control of its agents. The French monarchy sought to address this principal-agent problem by creating a competing administrative system, internalising administrative functions within the state while also creating an elaborate system of *tutelle*, or the right of administrative approval or control over the actions of corporate bodies, whether communal, ecclesiastical or professional.

There was an important jurisdictional dimension to this phenomenon. In the 17th and 18th centuries, as a means to give it a freer hand in achieving its social and political aims, the French monarchy sought to insulate its agents from the legal control of ordinary judicial courts; that is, from judges who were, by virtue of ownership of their offices, judicially independent of the crown. This preclusion found its initial expression in the Edict of Saint-Germain of February 1641, which prohibited the *parlements* and other ‘sovereign courts’ of the Old Regime from reviewing any matter ‘which may concern the state, administration or government.’<sup>6</sup> The edict specified that the King delegated to the sovereign courts the power solely to act as ‘judges of the life of men and the fortunes of our subjects’ – that is, over matters of private interest – while reserving ‘to our sole person and for our successor kings’ the right to rule on matters concerning administration and public affairs. The principle of administrative autonomy from judicial control would be reaffirmed throughout the Old Regime, as well as during the Revolution, ultimately attaining expression in the Napoleonic constitution of Year VIII (1799). A half century later, in the early years of the Second Empire, Tocqueville would lament the continued existence of “‘exceptional’ courts for the trial of cases involving the administration or any of its officers.’<sup>7</sup>

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institution of the old regime and not, as is often thought, a creation of the Revolution or the Napoleonic period.”).<sup>5</sup> *Ibid.*, Part II, chap. 5: 58. Tocqueville’s internalisation-of-functions argument anticipated by nearly a century the views of modern organizational theorists on the origins and nature of bureaucracies generally. The most important contribution to the literature in this century has been Ronald Coase, ‘The Nature of the Firm,’ *Economica*, vol. 4 (1938), 386. Although Coase was concerned chiefly with the economic determinants of organizational form and behavior in private firms, his article has spawned a large body of social-science scholarship that explores, both with regard to private and public organizations, the different incentives facing principals and their agents and the cost structure (the ‘agency cost problem’) of various strategies for seeking to maximize the principal’s benefits. For an overview, see Bernard S. Silberman, *Cages of Reason: The Rise of the Rational State in France, Japan, the United States and Great Britain* (Chicago: University of Chicago Press, 1993), ch. 1.

<sup>6</sup> Reprinted in François-André Isambert, et al., eds., *Recueil général des anciennes lois françaises* (Paris: Belin-Leprieur 1829), XVI: 529-35.

<sup>7</sup> Tocqueville, *OR&FR* (above n.4), Part II., ch. 5, 57.

As Tocqueville's reference to exceptional *courts* implies, however, French public law was not without its own system of administrative justice, even if, to the consternation of aristocratic-minded lawyers like Tocqueville, that system operated outside the jurisdiction of the judicial courts. In his hostility to the autonomous French system of administrative justice, Tocqueville was a remnant of the 'party of total suppression' of the 18th century – those who objected in principle to separate system of administrative justice and demanded the transfer of all administrative litigation to the ordinary courts – 'as in Anglo-Saxon countries.'<sup>8</sup> The most historically prominent member of this party was Montesquieu, who, in his famous chapter on the English constitution in *De l'esprit des lois* (1748), argued strongly that the combination of executive and judicial power was a formula for despotism.<sup>9</sup> In the last decades of the Old Regime, this theme became a rallying cry of the judicial opposition to the monarchy rooted in the *parlements* and other sovereign courts. As Keith Baker has pointed out, by the mid-18th century the administrative monarchy had come to symbolise, for the ordinary courts, 'unaccountability and inaccessibility to public scrutiny: the secret domination exercised by men who could not be called to account, because they lacked any formal standing within the juridical order of the ancien régime.' As Baker continues, the emergent administrative monarchy

meant arbitrariness: the capricious application of laws and regulations. In a word, it meant a hydra-headed despotism, the subversion of all lawful authority by the tyrannical power of petty wills. Denunciations of the bureaucracy therefore underlined the problematic status of the new system of administrative authority that had grown up within the traditional institutional system of the ancien régime, and the increasingly vociferous demands that this system be made responsible to the public for its actions.<sup>10</sup>

This pressure for public accountability was in direct reaction to the changes in the structures of public governance in France that took place over the century stretching from the 1640s to the 1740s. In that period, a fundamental opposition emerged in French public life pitting the central government's exercise of police power to remake society in the 'general interest' (through the agency of the Conseil du Roi and the intendants) against the judicial power embodied in the *parlements* and other sovereign courts, which saw themselves as defenders of ancient prerogatives, both venal and corporate. During this period the monarchy acquired vast jurisdiction over

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<sup>8</sup> Maurice Hauriou in *Recueil Sirey*, 25 March 1903, Note on the *Terrier* Decision of the Conseil d'Etat of 6 February 1903. [fix cite]

<sup>9</sup> Charles Louis de Secondat, baron de Montesquieu, *De l'esprit des loix...*, 2 vols. (Genève, 1748); *De l'esprit des lois*, 2 vols. (Paris: Flammarion, 1979) Livre XI, chap. VI, 'De la Constitution d'Angleterre,' 1:294-95; see also Livre VI, chap. VI, 'Que, dans la monarchie, les ministres ne doivent pas juger,' 1:207-08.

<sup>10</sup> Keith Michael Baker, 'Science and Politics at the End of the Old Regime,' in Baker, *Inventing the French Revolution: Essays on the French Political Culture in the 18th Century* (Cambridge, Eng.: Cambridge University



administrative litigation involving taxation, customs duties, expropriation, public works, administrative *tutelle*, and infractions of police regulations in a whole range of areas (traffic and navigation, agriculture, commerce, and manufacturing). The Conseil du Roi maintained appellate jurisdiction over these disputes, as it did over actions against ordinances of the lieutenant-general of police of Paris and those made against press and book trade regulations.<sup>11</sup>

Over the course of the 18th century, the monarchy's increasing insistence on its exclusive judicial powers in the administrative domain would 'bring us to the very heart of the gravest political and constitutional debates' of Old Regime France.<sup>12</sup> After 1750, as one contemporaneous observer described, there was a 'fairly continuous and often too intense war between two powers, the *juridictionnel* and the *ministeriel*.'<sup>13</sup> The *parlements* and other sovereign courts, in a conscious appeal to public opinion, began to challenge the claimed judicial powers of the royal administration with ever greater frequency and ferocity, opening up a crisis of authority from which the crown would never fully recover. The leading example could be found in the famous remonstrances of Malesherbes, the first president of the *Cour des aides* in Paris, written between 1756 and 1775.<sup>14</sup> Aside from challenging the idea of administrative justice in principle, Malesherbes challenged the execution of administrative justice in fact as a fiction and a sham, utterly dominated by the 'active administration' (notably the Controller-General of Finances and the intendants), lacking both publicity and procedural protections for individual claimants that one found in the 'regulated justice' before the judicial courts.

Perhaps inevitably, attacks on the legitimacy of administrative decisions of royal agents eventually called into question, in the eyes of an increasingly assertive public opinion, the legitimacy of the sovereign principal himself, the King. Over time, in the face of intense criticisms from the likes of Montesquieu, Malesherbes, and other representatives of educated (often judicial) public opinion, the monarchy attempted to reform itself, but as with

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Press, 1990), 161.

<sup>11</sup> See generally Jean-Louis Mestre, *Introduction historique au droit administratif français* (Paris: PUF, 1985), 192-93; see also Tocqueville, *OR&FR* (above n.4), Part II, chap. 4: 53.

<sup>12</sup> Michel Antoine, *Le Conseil du roi sous le règne de Louis XV* (Genève: Droz, 1970), 596.

<sup>13</sup> Antoine-Jean-Baptiste Auger de Montyon, 'Des agents de l'administration,' Archives de L'Assistance publique de Paris, Fonds Montyon, carton 8: section entitled 'Des intendants de province,' quoted in Keith Michael Baker, 'Representation redefined,' in Baker, *Inventing the French Revolution: Essays on the French Political Culture in the 18th Century* (Cambridge UP, 1990), 228.

<sup>14</sup> Collected in Dionis du Séjour, ed., *Mémoires pour servir à l'histoire de Droit public de la France en matière d'impôts ...* (Bruxelles, 1779). On the eve of the bicentennial of the Revolution, Flammarion republished two of Malesherbes's more important remonstrances, those of February 18, 1771 and of May 6, 1775. See Elisabeth

much else in the decades preceding 1789, it was a case of too little, too late. Even members of the Conseil du Roi acknowledged that parties to administrative disputes were entitled to a hearing by a judge distinct from the ‘active administration,’ a view reflected in the creation within the Conseil du Roi of the *Comité contentieux des finances* in 1777, followed later by the *Comité contentieux des départements* in 1789.<sup>15</sup> As the edict establishing the *Comité contentieux des finances* implied, the royal bureaucracy well understood the broader political implications of this reform, recognizing that it was necessary to create a distinct body ‘to assure the observation of the rules and forms’ within the financial administration, in order to confer upon tax decisions a greater sense ‘of confidence and authority.’<sup>16</sup> The establishment of the *Comité contentieux des départements* in August 1789 extended these procedural reforms to disputes relating to all departments of the government, although few people were paying much attention to internal reforms in the Conseil in the midst of the dramatic upheaval of that summer.

Ironically, even as the remonstrances of sovereign judges like Malesherbes had done so much to foment public opinion in opposition to the ‘despotism’ of the crown, the judicial courts of the Old Regime were among the principal institutional victims of the monarchy’s eventual downfall during the Revolutionary decade. In part this was so because the *parlements* stood for a form of representation antithetical to the absolutist notion of political ‘sovereignty’ that the Revolution would inherit from the Old Regime. According to this notion, the King (and later the ‘Nation’ embodied in its representative Assembly) had the sole and exclusive power to determine the ‘general interest,’ free from particularist interference via the courts. Contrary to judicial claims, which depicted the courts as the ‘representative’ of the King to the Nation, as well as of the Nation to the King,<sup>17</sup> the central government regarded its own administrative agents as the exclusive intermediaries of *political* power to French society, and the resolution of administrative disputes was regarded as intimately related to the exercise of that political power (hence *juger l’administration, c’est encore administrer*). As Louis XV declared in the famous *séance de la flagellation* in 1766, the courts could not interpose themselves as ‘the judge between the King and his people.’<sup>18</sup> The judicial

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Badinter, ed., *Les ‘Remonstrances’ de Malesherbes* (Paris: Flammarion, 1985).

<sup>15</sup> See Aline Logette, *Le comité contentieux des finances près le conseil du roi (1777-1791)* (doctoral thesis in law, Université de Nancy, 1961); Anne Buot de l’Epine, *Du Conseil du Roi au Conseil d’Etat: Le Comité Contentieux des Départements (9 août 1789 - 27 avril 1791)* (Paris: PUF, 1972).

<sup>16</sup> Edict of June 1777, suppressing the corps of the *intendants des finances* and establishing the *Comité contentieux des finances*, in Isambert, *Recueil* (above n.6), XXV: 51-52.

<sup>17</sup> Baker, ‘Representation redefined’ (above n.13), 228, quoting Jules Flammermont and Maurice Tourneux, eds., *Remonstrances du parlement de Paris au XVIIIe siècle* (Paris: Imprimerie Nationale, 1895), 1:528.

<sup>18</sup> Louis XV to the parlement of Paris in *la séance de la flagellation*, March 3, 1766, in Flammermont,

notion of representation, because it effectively recast the courts as the judge not only of private rights and interests *amongst themselves*, but also of rights and interests of private parties *against the state*, would be found as objectionable after 1789 as before.

The reforms of administrative justice in the twilight of the Old Regime, however, reflected an awareness that the legitimate exercise of state power was in some sense dependent on the perceived fairness and independence of the system of legal control and oversight of administrative action. This lesson would not be lost on Napoleon, particularly after the upheaval of the Revolutionary decade. Although the dictatorship he established in 1799 would perpetuate the strict prohibition against judicial control of administrative action, Napoleon's innovations also laid the groundwork for the 'rejudicialisation' of French administrative justice in substance if not in form, something that would gain momentum over the course of the 19th century. By establishing the Conseil d'État in the constitution of Year VIII and later conferring upon it jurisdiction over *le contentieux administratif*, Napoleon hoped to create 'a half-administrative, half-judicial body [to] regulate the exercise of that portion of arbitrary power necessarily belonging to the administration of the state.'<sup>19</sup> Without such a body, Napoleon recognized, 'the government will fall into scorn.'<sup>20</sup>

With the Restoration, the advocates of outright suppression of the separate system of administrative justice (à la Montesquieu) would experience something of a revival, but in fact the notion of *juger l'administration, c'est encore administrer* arguably hardened in actual practice. It was not until mid-century that an intermediate view emerged between the extremes of total suppression on the one hand and the complete autonomy of 'active administration' on the other. This third view acknowledged the basic validity of the institutional separation of the administrative and judicial courts but also maintained, as one leading member of the Conseil d'Etat famously put it in 1852, that '*juger c'est juger*.'<sup>21</sup> This idea – in effect, that 'to judge is to render justice' – meant that even parties to administrative disputes were entitled to a procedurally fair hearing by an independent judge, even if that judge was, formally speaking, attached to the executive. In a seeming historical irony, it was under the initially repressive Second Empire that the Conseil d'Etat would refine the various procedural devices (*recours contentieux*) used to scrutinize the legality of executive power, most importantly the *recours pour excès de pouvoir*, or the claim that an

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*Remontrances* ... (above n.17), 2:557.

<sup>19</sup> Napoleon, March 1906, in Pelet de la Lozère, *Opinions de Napoléon* (Paris: F. Didot, 1833), 191.

<sup>20</sup> *Ibid.*

executive act should be annulled because it fell outside the authority granted under the controlling legislation.<sup>22</sup> In many respects this activism on the part of the Conseil d'Etat under the Second Empire would vindicate the notion of representation defended by the sovereign courts under the Old Regime, in which administrative litigation came to be seen as an important avenue of social representation before the state. A member of the Conseil under Napoleon III, Léon Aucoc, famously characterized the system of administrative justice as a 'safety-valve that should always remain open,' a specific allusion to the need to reinforce the legitimacy of the imperial regime in the absence of genuine democratic outlets.<sup>23</sup>

With the establishment of parliamentary government under the Third Republic in the 1870s, however, the Conseil d'Etat thought it necessary to reassess the proper scope of such representation via *le contentieux administratif*. As the Conseil d'Etat's most eminent member, Edouard Laferrière, explained in the second edition of his *Traité de la juridiction administrative* in 1896, after the fall of Napoleon III the Conseil 'asked itself whether the reestablishment of parliamentary control and ministerial responsibility did not remove some of the *raison d'être* from the mission that the Conseil d'Etat had pursued under the Empire, in the absence of guarantees of a political order.'<sup>24</sup> The need to find a proper balance between legal and parliamentary controls of executive power would remain a persistent concern for the remainder of the century. What is significant, however, is how the extreme jurisprudential caution of the Conseil d'Etat in the early years of the Third Republic steadily eroded in the period leading up to the turn of the century. Perhaps the most significant historical step (both symbolically and legally) was the *Cadot* decision of December 1889,<sup>25</sup> in which the Conseil declared that it had original jurisdiction to hear any administrative dispute from the moment it arose, thus dispensing with the requirement that a litigant appeal first up through the administrative hierarchy (the so-called doctrine of *le ministre-juge*).

The *Cadot* decision reflects the ultimate realisation on the part of the members of the Conseil d'Etat that there was still a place in the republican order for independent legal control of executive power, and that hierarchical

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<sup>21</sup> Alexandre-François Vivien, *Etudes administratives*, 2d. ed (1852), 130.

<sup>22</sup> The best history of this process remains Edouard Laferrière, *Traité de la juridiction administrative et des recours contentieux*, 2 vols. (Paris: Berger-Levrault, 1887-88) (2e ed. 1896) (reprinted Paris: LGDJ, 1989).

<sup>23</sup> Quoted in Pierre Lampué, 'Le développement historique du recours pour excès de pouvoir depuis ses origines jusqu'au début du XXe siècle,' *Revue internationale des sciences administratives*, no. 2 (1954), 380; and in Jean-Marie Auby and Roland Drago, *Traité de contentieux administratif*, vol. 2 (Paris: LGDJ, 1962), 419.

<sup>24</sup> Laferrière, *Traité de la juridiction administrative* (2d. ed. 1896) (above n.22), 2:273.

<sup>25</sup> C.E., 13 déc. 1889, *Cadot*, *Rec.* 1148, concl. Jagerschmidt.

political control by parliament or government ministers was not enough.<sup>26</sup> The result of this realisation, in the two decades preceding the outbreak of the First World War, was an increasingly sceptical body of case law concerning the ‘absolute parliamentarism’ of the Radical Republic.<sup>27</sup> It was against this historical backdrop that one of the greatest French administrative scholars of the early 20th century, Maurice Hauriou – whose otherwise liberal inclinations would have placed him in the tradition of Tocqueville – called the French system of administrative justice an ‘admirable institution’ and a ‘precious corrective to centralisation.’<sup>28</sup> Even if it was still organically attached to the executive in a formal sense, French administrative justice was no longer to be feared, Hauriou insisted, as an instrument of hierarchical political control indifferent to concerns of individual justice.

Indeed, over the course of the 20th century, the system of administrative justice would gain an almost legendary reputation as a protector of individual rights against the state. As one observer put it in the early 1960s: ‘Political liberalism has produced two *chefs-d’oeuvre*, both of which result not from the *a priori* elaboration of an intellectual construction, but from the natural and fortunate culmination of a particular historical evolution: parliamentarism in Great Britain and administrative justice in France.’<sup>29</sup> French administrative lawyers were clearly proud of what they regarded as their distinctive contribution to the development of the liberal state. They could take satisfaction that France, in this regard at least, offered a seemingly more advanced model as compared to what was offered across the Channel, the supposed cradle of political liberalism.

### III.

Just as the reputation of the French system of administrative justice had fully consolidated itself by the early-20th century, the burgeoning field of administrative adjudication was becoming an increasingly contested political question in England. The intensified debate in England over administrative justice coincided especially with the vast expansion of the British state’s control over economic and social life during the First World War and

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<sup>26</sup> A modern historian of French administrative law has ascribed the Conseil’s increased activism during this period to a broad dissatisfaction among its members with the intense politicization of all aspects of the state apparatus by the Radical Republicans who gained political ascendancy during the Dreyfus Affair. François Burdeau, *Histoire du droit administratif (de la Révolution au début des années 1970)* (Paris: Presses Universitaires de France, 1995), 257-59. The judicial decisions of the Conseil during this period were motivated ‘by a certain idea of the State, ... the dignity of which [the members of the Conseil] intended to defend against the governments themselves.’ *Ibid.*, 258.

<sup>27</sup> *Ibid.*, 259.

<sup>28</sup> Hauriou, Note on *Terrier* (above n.8).

<sup>29</sup> Pierre Sandevour, *Études sur le recours de pleine juridiction* (Paris: LGDJ, 1964), 11.

immediately after. It was during this period that Parliament adopted a wide-range of statutes dealing with such matters as unemployment, health insurance, housing conditions, and local government. Three new ministries were created in the immediate post-war period – Labour, Transport and, perhaps most importantly, Health – the latter acquiring a vast jurisdiction over local housing plans, taxation, local government structure, and a new poor law.

As one commentator aptly summarized in 1933, however, the British administrative state did not emerge out of whole cloth in the aftermath of the First World War. Rather, it went through ‘[a] long period of imperceptible growth’ in the 19th century, followed in the early-20th century by ‘a quickening to meet the needs of the new Social State,’ then ‘a sudden flowering during the War, and after the War the full fruition ...’<sup>30</sup> It was this ‘sudden flowering’ and ‘full fruition,’ however, that provoked a political response that the ‘long period of imperceptible growth’ had not. Although some voices in Parliament were raised against the evils of ‘bureaucracy,’ the most vocal source of constitutional opposition actually came from the British judiciary. Lord Hewart, the Lord Chief Justice of England, famously published a book in 1929 – a kind of modern day remonstrance in the spirit of Malesherbes – provocatively entitled *The New Despotism*.<sup>31</sup> Hewart argued that delegation of legislative and adjudicative powers to the executive posed a grave threat to ‘the two leading features’ of the British constitution, ‘the Sovereignty of Parliament and the Rule of Law.’<sup>32</sup> Delegation to the executive was, in his estimation, ‘an ingenious and adventurous’ way ‘to employ the one to defeat the other.’<sup>33</sup>

*The New Despotism* was simply the most notorious example of the simmering tensions between the common-law courts and the new administrative state in Britain in the aftermath of the First World War. To grasp why judges like Lord Hewart felt especially threatened by the rise of modern administrative governance, one must consider certain of the conventional understandings of English constitutional history (and the place of the courts in that history) from which these views emerged. The political conflict of the 17th century between crown and Parliament that destroyed the ‘old despotism’ (culminating in the revolution of 1688) definitively established parliamentary sovereignty as the central principle of the English constitution. Bound up in this revolutionary process was a related triumph: the defeat of the crown’s attempt to claim a monopoly over administrative disputes,

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<sup>30</sup> John Willis, *The Parliamentary Powers of English Government Departments* (Cambridge, Mass.: Harvard University Press, 1933), 5.

<sup>31</sup> Lord Hewart of Bury, *The New Despotism* (London: Ernest Benn, 1929)

<sup>32</sup> *Ibid.*, 17.

<sup>33</sup> *Ibid.* We will return to Lord Hewart’s critique of delegation in greater detail below.

akin to what the French monarchy had successfully established during the same period (and which would provide the foundation of the autonomous French system of administrative justice that persists to this day). In 1641 – the same year of the Edict of Saint Germain in France<sup>34</sup> – the English Parliament abolished the notorious Court of Star Chamber. And later, in 1688, it also abolished the remaining jurisdictions under the control of the Privy Council. This assertion of parliamentary power meant, henceforth, ‘the unchallenged dominance of the ordinary courts, the courts of common law,’ within which the concept of private property, and not the ‘general interest,’ would be the guiding principle.<sup>35</sup> This revolutionary settlement inherited from 17th-century thus involved ‘a double control of government activity: control of legality in the courts and political control in Parliament.’<sup>36</sup>

It was this seeming separation of powers, and in particular the separation of executive and adjudicative power, that Montesquieu celebrated as the central feature of the English constitution in *De l’esprit des lois* in 1748.<sup>37</sup> During the 19th century, however, questions began to be raised regarding how well Montesquieu’s construct actually corresponded to the English reality. As F. W. Maitland would note just over a century after Montesquieu: ‘It is curious that some political theorists should have seen their favourite ideal, a complete separation of administration from judicature, realised in England; in England, in all places in the world, where the two have for ages been inextricably blended.’ The mistake, Maitland continued ‘comes from looking just at the surface and the showy parts of the constitution.’<sup>38</sup> The deeper constitutional reality – despite the seeming achievements of 1688 – was that administrative officers in England, in execution of their legislatively-appointed authority, continued to make inquiries and render judgment on particular sets of facts in light of general legal norms – in other words, to adjudicate in everything but name – often without appeal to the ordinary courts.

This form of autonomous administrative adjudication became even more prominent as government intervention expanded over the course of the 19th and into the 20th centuries. According to one observer from the interwar period, state intervention gave rise to ‘a need for a technique of adjudication better fitted to respond to the

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<sup>34</sup> See above n.6 and accompanying text.

<sup>35</sup> J.D.B. Mitchell, ‘The Causes and Consequences of the Absence of a System of Public Law in the United Kingdom,’ *Public Law* (1965), 95, 97.

<sup>36</sup> *Ibid.*, 98.

<sup>37</sup> See above n.9 and accompanying text.

<sup>38</sup> Frederic William Maitland, ‘The Shallows and Silences of Real Life’ (1888), in *The Collected Papers of Frederic William Maitland: Downing Professor of the Laws of England*, vol. 1 (Cambridge, Eng.: Cambridge University Press, 1911), 478, quoted in William A. Robson, *Justice and Administrative Law: A Study of the British Constitution*, (London: Macmillan & Co., 1928), 26.

social requirements of the time than the elaborate and costly system of enforcement provided by litigation in the courts of law.’<sup>39</sup> While it would be wrong to say that the result was a ‘system’ of administrative justice akin to what France developed over the 18th and 19th centuries, there was nevertheless a kind of convergence with the French experience, in which a whole range of administrative conduct affecting the rights of private interests was excluded from the jurisdiction of the ordinary courts. The adjudicative decisions of British administrative officials were sometimes subject to judicial review but not necessarily; rather, it depended on the regulatory domain and the provisions of the governing legislation.<sup>40</sup> It was the increasing realisation of this state of affairs in the 1920s – ‘a growing consciousness that governmental organization no longer squared with legal theory’<sup>41</sup> – that led to the intense criticisms of ministerial powers from the bench.

The persistence of the notion that England lived under a system of a strict separation of powers, as well as its corollary – the Rule of Law – as enforced by the ordinary courts, was largely due to the extraordinary influence on the legal profession of Albert Venn Dicey’s *Law of the Constitution*, first published in 1885.<sup>42</sup> Dicey’s position had two principal elements: first, that the powers of the crown in England ‘must be exercised in accordance with ordinary common law principles which govern the relation of one Englishman to another’;<sup>43</sup> and second, that the very idea of a separate body of principles governing public action – a *droit administratif* – was ‘absolutely foreign to English law,’ because by definition the elaboration of such principles did ‘not lie within the jurisdiction of the ordinary courts.’<sup>44</sup> For Dicey, ‘[t]his essential difference’ – the exercise of adjudicative power by anything other than a judicial court – ‘render[ed] the identification of *droit administratif* with any branch of English law an impossibility.’<sup>45</sup>

By the end of Dicey’s long career, however, even he could not ignore the weight of the evidence that a form of autonomous administrative law was in fact emerging in England, the development of which was taking

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<sup>39</sup> Robson, *Justice and Administrative Law* (above n.38), 32.

<sup>40</sup> On the extraordinary variety of adjudicative procedures in the British administrative state in the early 20th century, see generally Robson, *Justice and Administrative Law* (above n.38), chapter III. See also *Memoranda Submitted by Government Departments in Reply to Questionnaire of November 1929 and Minutes of Evidence taken before the Committee on Ministers’ Powers* (London: Stationery Office, 1932).

<sup>41</sup> Willis, *The Parliamentary Powers of English Government Departments* (above n.30), 29.

<sup>42</sup> A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (1885), 10th ed. (London: Macmillan, 1959).

<sup>43</sup> *Ibid.*, 387.

<sup>44</sup> *Ibid.*, 388.

<sup>45</sup> *Ibid.*



place largely outside the jurisdiction of the common law courts.<sup>46</sup> This realisation, published in 1915, did not mean that other lawyers raised on his orthodox teachings were ready to arrive at the same conclusion. Hewart himself, speaking to the American Bar Association in 1927, continued to assert that the common law did ‘not recognize any *droit administratif*. Every person, whatever position he might occupy within the State, is subject to the law of the land, and there are no special tribunals for the trial of matters in which public departments or Ministers of State are concerned.’<sup>47</sup> It was perhaps Hewart’s own uncomfortable realisation that this beloved maxim was no longer valid that led to write what might still lay claim to being the most famous (or perhaps infamous) book in the history of British administrative law in the early 20th century. What the modern advocates of executive power were trying to pass off as an emergent British system of ‘administrative law’ *à la française*, Hewart asserted was a system of ‘administrative lawlessness’ characterized by ministerial prerogatives to define the scope of their own jurisdiction, as well as an absence of procedural protections and rights of appeal to the judicial courts.<sup>48</sup>

This intensification of criticism directed at administrative justice resulted, one could argue, from the increasing encroachment of the administrative sphere onto the core province of the ordinary courts – the protection of the rights of private property as guaranteed at common law.<sup>49</sup> English housing law litigation is a good example.<sup>50</sup> Modern housing legislation interfered with common law rights of property owners (notably the freedom of contract) in any number of ways, imposing duties of repair and obligating landlords to conform to a whole range of standards, indeed even to transfer their property to the local authorities under certain circumstances. More importantly, the prevailing statutes conferred a whole range of legislative and adjudicative powers on local officials, ‘sometimes with and sometimes without the consent of the Minister of Health, and sometimes with and sometimes without an appeal to the courts.’<sup>51</sup> Advocates of this approach argued that the ‘highly individualistic and conservative’ outlook of the

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<sup>46</sup> A.V. Dicey, ‘The Development of Administrative Law in England,’ *Law Quarterly Review*, vol. 31 (1915), 148. See also W. J. L. Ambrose, ‘The New Judiciary,’ *Law Quarterly Review*, vol. 26 (1910), 203.

<sup>47</sup> *The Times*, Sept. 2, 1927 and Sept. 30, 1927, quoted in Robson, *Justice and Administrative Law* (above n.38), 30.

<sup>48</sup> Hewart, *The New Despotism* (above n.31), chapter IV.

<sup>49</sup> W. Ivor Jennings, ‘Courts and Administrative Law – The Experience of English Housing Legislation,’ *Harvard Law Review*, vol. 49 (1936), 443-44.

<sup>50</sup> In addition to *ibid.*, see also John Griffith, *Judicial Politics since 1920: A Chronicle* (Oxford: Blackwell, 1993), 18-24. The second and third editions (1947 and 1951 respectively) of Robson, *Justice and Administrative Law* (above n.38) also recount this history in detail as well.

<sup>51</sup> Jennings, ‘Courts and Administrative Law’ (above n.49), 437.

courts justified their exclusion from administrative oversight, because the judicial bias in favour of private property and individual rights ‘result[ed] in a tendency to give a restricted interpretation to the grant of powers.’<sup>52</sup>

Despite this hostility to the liberalism of the courts, the critics of the judiciary found a small measure of common ground with the courts’ defenders on the point that some form of independent legal control was necessary. On the one hand, W. Ivor Jennings, a leading critic of the courts, stated: ‘Administrative lawyers are as much concerned with private interests and the maintenance of just methods of control as private lawyers’; rather, his concern was over interpretations of statutes in the ordinary courts that were ‘against public policy in the interests of private property.’ On the other hand, Lord Hewart begrudgingly acknowledged that the ‘Continental system of “Administrative Law,”’ while ‘profoundly repugnant ... to English ideas,’ was ‘at least a system. It has its Courts, its law, its hearings and adjudications, its regular and accepted procedure,’ which stood in stark contrast to the evolving ‘administrative lawlessness’ in England.<sup>53</sup>

The real debate, therefore, was not over the necessity of independent legal control but rather over *which* judges could best balance the often conflicting interests of private rights and public welfare – those sitting on the ordinary courts or those who were a part of some hypothetical hierarchy of administrative tribunals in the French tradition. However, the establishment of a separate system of administrative justice on the French model was never a real likelihood, because of the fairly broad-based constitutional attachment to the ordinary courts as enforcers of the Rule of Law – an attachment too deep for it to be abandoned in favour of a wholly administrative system of adjudication. Evidence of this attachment can be found in the 1932 report of the Committee on Ministers’ Powers, a special parliamentary committee set up in 1929 to examine the entire question of delegated legislation and judicial review in response to the contentious debate that followed the publication of *The New Despotism*. The committee’s terms of reference, progressive critics believed, reflected too great a ‘devotion to Dicey’s memory’<sup>54</sup> because it asked ‘what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the Law.’<sup>55</sup> In other words, by emphasizing ‘the supremacy of the Law,’ the terms

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<sup>52</sup> *Ibid.*, 434.

<sup>53</sup> Hewart, *The New Despotism* (above n.31), 12-13.

<sup>54</sup> Cecil T. Carr, *Concerning English Administrative Law* (New York: Columbia University Press, 1941), 27.

<sup>55</sup> *Report of the Committee on Ministers’ Powers*, Cmd. 4060 (London: Stationery Office, 1932), 1.

of reference in some sense assumed its conclusion, and perhaps not surprisingly the committee ‘without hesitation, advise[d] against [the] adoption’ of a system of administrative justice on the French model.<sup>56</sup>

Nevertheless, the committee also recognized the changing nature of modern governance in Britain, notably the diffusion and fragmentation of normative power among national and subnational executive and administrative bodies, as well as among public, quasi-public and traditionally private entities.<sup>57</sup> There was a certain inevitability to this phenomenon, the committee claimed, in that it emerged out of ‘changes in our ideas of government which have resulted from changes in political, social, and economic ideas, and in the changes in the circumstances of our lives which have resulted from scientific discoveries.’<sup>58</sup> The legal and political formula for the legitimation of administrative action in the future, the committee asserted, should be a combination of direct legislative oversight, ministerial responsibility, as well as reinvigorated judicial review by the courts of law. Each element, working together, would best ensure that administrative officials would remain within the scope of their ‘essentially subordinate’ delegated authority, while acting reasonably and respecting private rights to the extent possible in the achievement of legislatively-defined public ends.

Although few of the committee’s specific proposals would actually make their way into law over the remainder of the 1930s,<sup>59</sup> the committee’s report would serve as the point of departure for post-1945 reform discussions on administrative power in Britain.<sup>60</sup> In the immediate post-war years, British academic commentators often wrote with embarrassment of the state of their country’s system of administrative justice. On the one hand, the prevailing mind-set was still said to suffer from the residual influence of Dicey’s inaccurate depiction of the administrative law ‘as a misfortune inflicted upon the benighted folk across the Channel.’<sup>61</sup> On the other hand, there was the reality of ‘a plethora of ad hoc tribunals,’ appointed by ministers, not necessarily sitting in public, sometimes excluding legal representation, with often highly informal procedural and evidentiary rules, not always

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<sup>56</sup> *Ibid.*, 110.

<sup>57</sup> ‘Ministers of the Crown are the chief repositories of such powers,’ the committee wrote, ‘but they are conferred also, in differing degrees upon Local Authorities, statutory corporations and companies, Universities, and representative bodies of solicitors, doctors and other professions.’ *Report of the Committee on Ministers’ Powers* (above n.55), 4.

<sup>58</sup> *Ibid.*, 5.

<sup>59</sup> See Carr, *Concerning English Administrative Law* (above. n.54), Appendix, 175-76, for an overview.

<sup>60</sup> See, e.g., *Report from the Select Committee on Delegated Legislation, together with the Proceedings of the Committee, Minutes of Evidence and Appendices* (London: Stationery Office, 1953).

<sup>61</sup> S. A. de Smith, ‘Rule of Law’ [book review], *Harvard Law Review*, vol. 69 (1955), 396, 398.

bound to provide reasons for decisions, and not necessarily subject to appeal to a court on questions of law.<sup>62</sup>

Unfavourable comparisons were made not only with the French system of *droit administratif* but also with the

situation that prevailed in the United States, Britain's common law *confrère*, which had passed a far-reaching

Administrative Procedure Act in 1946. As an English law professor wrote in the *Yale Law Journal* in 1950:

'American administrative law is so much more developed than the British that there is little for an American lawyer to learn from the British experience – except to be on guard against a weakening of judicial control. Cannot

Marshall Plan Aid include "administrative law"?'<sup>63</sup>

Indeed, the widely recognized inadequacies of the British system of administrative justice in the late 1940s and early 1950s provided the terrain on which antagonists from the interwar period could now find a point of agreement.<sup>64</sup> The formation of Committee on Administrative Tribunals and Enquiries (the 'Franks Committee') in late 1955, and the issuance of its report in early 1957, signalled the consolidation of a new consensus.<sup>65</sup> The general question before the committee was how best to characterize administrative tribunals: Are they 'part of the machinery of justice' or are they 'mere administrative expedients'?'<sup>66</sup> This question – strongly reminiscent of the debate over *juger l'administration, c'est encore administrer* in France – was at the core of the constitutional struggle to stabilise administrative governance in Britain in the first half of the 20th century. Despite the arguments of government witnesses 'that tribunals should properly be regarded as part of the machinery of administration, for which the Government must retain close and continuing responsibility,' the Franks Committee emphatically found

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<sup>62</sup> *Ibid.*, 397.

<sup>63</sup> H. Street, 'Book Review,' *Yale Law Journal*, vol. 59 (1950), 590, 593 (reviewing Bernard Schwartz, *Law and the Executive in Britain: A Comparative Study* (1949)).

<sup>64</sup> On the right, see C.K. Allen, 'Foreword' to Marguerite A. Sieghart, *Government by Decree: A Comparative Study of the History of the Ordinance in English and French Law* (London: Stevens and Sons, 1950), xiii, in which Allen concluded that 'the time has come, in view of the great and increasing pressure of administrative problems,' to establish a system of administrative tribunals on the French model to hear administrative disputes. This suggestion was gladly welcomed on the left by William Robson, who wrote in the 1951 that Allen was simply calling for 'reforms in the direction I have long regarded as essential.' See William A. Robson, *Justice and Administrative Law: A Study of the British Constitution*, 3d ed. (London: Stevens & Sons, 1951), 465. For a similar proposal, this time again from the right, see Inns of Court Conservative and Unionist Society, *Rule of Law: A Study by the Inns of Court Conservative and Unionist Society* (London: Conservative Political Centre, 1955).

<sup>65</sup> *Report of the Committee on Administrative Tribunals and Enquiries*, Cmnd. 218 (London: H.M. Stationery Office, 1957); Committee on Administrative Tribunals and Enquiries, *Minutes of Evidence* (London: H.M. Stationery Office, 1956-57); Committee on Administrative Tribunals and Enquiries, *Memoranda submitted by Government Departments*, 6 vols. (London: H.M. Stationery Office, 1956).

<sup>66</sup> Bernard Schwartz and H.W.R. Wade, *Legal Control of Government: Administrative Law in Britain and the United States* (Oxford: Clarendon Press, 1972), 151.

to the contrary: Tribunals were ‘part of the machinery provided by Parliament for adjudication,’ responsible along with the courts for the enforcement of the Rule of Law.<sup>67</sup>

The reforms that resulted from the issuance of the report of Franks Committee – notably the passage of the Tribunals and Inquiries Act of 1958<sup>68</sup> – marked a key turning point in the emergence of a recognizable body of administrative law in Britain. Although constituted as part of the administrative sphere and structured accordingly, administrative tribunals were now recognized by Parliament as having a basic obligation to dispense justice in an independent fashion.<sup>69</sup> The Tribunals and Inquiries Act also provided for extended rights of appeal to judicial courts (reflective of the fundamentally subordinate character of these tribunals on questions of law), as well as a requirement that they publicly provide reasons for their decisions (essential to effective judicial review). It further established a ‘Council on Tribunals’ that, over the subsequent decade, established ‘a much clearer standard’ of the sorts of tribunal procedures that were minimally necessary consistent with fairness.<sup>70</sup>

Finally, and perhaps most importantly, the act served as a ‘catalyst for reform’ within the courts themselves, which became noticeably ‘more active and enterprising’ in the development of administrative jurisprudence after 1958.<sup>71</sup> For much of the immediate postwar decade, the courts of law had deferred to the political imperatives of Parliament and the government. This led to a series of disturbing precedents regarding the limited application of principles of procedural fairness (‘natural justice’),<sup>72</sup> deference to the discretionary powers of the administration,<sup>73</sup> and a broad reading of statutory provisions precluding judicial review.<sup>74</sup> Over the decade following the passage of the Tribunals and Inquiries Act, however, the courts would reverse this trend. A series of

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<sup>67</sup> *Report of the Committee on Administrative Tribunals and Enquiries* (above n.65), 9.

<sup>68</sup> 6 Eliz 2, c. 66.

<sup>69</sup> The committee placed a great deal of emphasis on the fact that the term ‘tribunal,’ as it appeared in the statutes, indicated an intent on the part of Parliament ‘for a decision outside and independent of the Department concerned.’ *Report of the Committee on Administrative Tribunals and Enquiries* (above n.65), 9. This reasoning is reminiscent of the evolving thinking regarding French administrative justice in the nineteenth century in which the *jurisdiction administrative* became distinct from the *administration active*. See Vivien, *Etudes administratives* (above n.21), 130.

<sup>70</sup> Schwartz and Wade (above n.66), 153.

<sup>71</sup> *Ibid.*, 5.

<sup>72</sup> *Nakuda Ali v. Jayaratne*, [1951] A.C. 66, and *R. v. Metropolitan Police Commissioner ex parte Parker*, [1953] 1 W.L.R. 1150. In these cases, the courts refused to apply principles of natural justice to a cancellation of a license even though the holder’s livelihood depended on it.

<sup>73</sup> See, e.g., *Robinson v. Minister of Town and Country Planning*, [1947] K.B. 702.

<sup>74</sup> See, e.g., *Woollett v. Ministry of Agriculture and Fisheries*, [1955] 1 Q.B. 103.

major cases would reinvigorate the application of principles of natural justice,<sup>75</sup> impose much stricter judicial limits on ministerial discretion,<sup>76</sup> give a much more narrow reading to preclusive clauses,<sup>77</sup> and more generally use the doctrine of *ultra vires* to review a broad range of administrative illegalities.<sup>78</sup>

Although one could fairly say this sort of judicial activism was precisely what Lord Hewart was demanding in *The New Despotism* in 1929, there were several major differences in the political and legal environment in the late 1950s and early 1960s as compared to three decades earlier. After the Second World War, no one in the judiciary any longer seriously questioned the right of the state to intervene actively in social and economic affairs, even if this conflicted with property rights and freedom of contract. Consequently, the greater activism of the British courts at the outset of the 1960s was not seen as a conservative attempt to protect the interests of private property or individual autonomy. Rather, as the Franks Committee put it, the courts were now simply seeking a ‘new balance between private right and public advantage’ that was necessary to achieve both ‘fair play for the individual and efficiency of administration.’<sup>79</sup> In other words, the role of the courts in the modern welfare state in postwar Britain was not to impede administrative power but to legitimize it. The courts were to serve as a mechanism to ensure that the British administrative state observed certain basic norms of a constitutional nature, such as natural justice, while also respecting the boundary of authority as established by the enabling legislation itself. Thus, after a decade of quiescence, the British courts had found their place in the postwar constitutional settlement of administrative governance.

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<sup>75</sup> *Ridge v. Baldwin*, [1964] A.C. 40.

<sup>76</sup> *Commissioners of Customs and Excise v. Cure & Deeley Ltd.*, [1962] 1 Q.B. 340.

<sup>77</sup> *Anismic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147.

<sup>78</sup> For a summary, see Schwartz and Wade (above n.66), 299. For a detailed historical consideration of increasing judicial activism in the early 1960s, see Griffith, *Judicial Politics Since 1920* (above n.50), ch. 4. On the specific point of using the notion of jurisdiction to reach a range of administrative illegalities, there is another useful comparison to be drawn with nineteenth-century developments in French administrative law. The original basis for striking down an administrative act was for *incompétence*, narrowly defined. Over the course of the nineteenth century this evolved into the notion of *excès de pouvoir*, a more general concept. The evolution in the terminology (from *incompétence* to *excès de pouvoir*) reflected a transformation of the underlying substantive notions of administrative legality, involving a shift in the analytical focus from the relative authority of individual actors in the administrative hierarchy to the legality of particular administrative acts in a hierarchy of norms; that is, from actors to acts.

<sup>79</sup> *Report of the Committee on Administrative Tribunals and Enquiries* (above n.67), 2.

## IV.

It is appropriate now to return to the ‘double movement’ thesis set out by Polanyi in *The Great Transformation*. The obvious question is whether the legal-administrative phenomenon explored in this chapter (dejudicialisation/rejudicialisation) and the political-economic dynamic described by Polanyi (disembedding/reembedding) are not simply superficially similar but, in fact, causally linked. The concluding chapter to *The Great Transformation* itself strongly suggests a causal relationship, in which Polanyi celebrates the role of ‘tribunals and courts ... [in] vindicating personal freedom’ and as ‘guarantees against victimization.’<sup>80</sup> Although such judicial interference might inhibit ‘efficiency of production, economy in consumption or rationality in administration’ – hence suggesting an intimate relation among the three – it was well worth the cost because ‘[a]n industrial society can afford to be free.’<sup>81</sup>

Polanyi, unfortunately, does not elaborate on this point, but by looking at several other statements he makes in the book’s conclusion, the linkage between judicial protections and his more general double-movement thesis becomes more evident. For Polanyi, public regulation was the inevitable consequence of the political construction of market capitalism. However, he further states that ‘the strengthening of the rights of the individual in society’ via the courts was an equally essential (and hopefully inevitable) ‘answer to the threat of bureaucracy.’<sup>82</sup> In this effort, ‘[n]o mere declaration of rights can suffice,’ but rather ‘institutions are required to make rights effective.’<sup>83</sup> It is here that Polanyi refers to the special role of courts in ‘vindicating personal freedom,’ suggesting that these institutions had already been essential to protecting society from the excesses of *both* the market economy as well as the dangers of an expanding state bureaucracy – a danger that flowed primarily from the ‘planning’ and other forms of regulatory intervention that he otherwise espoused.

Polanyi’s suggestion that ‘tribunals and courts’ were integral to the counter-movement was ironic, however, in at least one significant respect. Polanyi insisted that, in *economic* terms, the effort to create a self-regulating market economy (with its attachment to ‘[f]ree enterprise and private ownership ... [as] essentials of

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<sup>80</sup> Polanyi, *The Great Transformation* (above n.2), 264.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

freedom'<sup>84</sup>) was a thoroughly utopian undertaking. Nevertheless, in *political* terms, Polanyi seemed to acknowledge these liberal concepts served as foundations of precisely the legal culture that was essential to 'creat[ing] spheres of arbitrary freedom protected by unbreakable rules' without which it would be impossible to protect the individual against both market and bureaucratic power.<sup>85</sup> In other words, Polanyi acknowledged that his own largely material conception of liberty in the modern era – 'leisure and security that industrial society offers to all' – needed to *build on*, rather than *displace*, these 'old freedoms and civic rights.'<sup>86</sup>

The critical role of the courts in protecting such freedoms and rights, however defined, was an implicit acknowledgment of the resilience, or as legal historians put it, the 'relative autonomy,' of legal culture in the face of structural-economic change. Polanyi's narrative suggests that the historical evolution of cultural categories like 'freedom' or 'rights' – indeed, one might include 'law' writ large – is not strictly a function of the corresponding evolution in economic structures. Rather, the lack of perfect congruence between the two – that is, the potential 'lag' in legal-cultural development relative to changes in the economy – is a contingency that we must factor into our accounts of political and social history. Polanyi does not focus on this lag in any systematic way (if at all). Rather, in setting out his double-movement thesis, he only thinly describes the cultural-historical underpinnings of the counter-movement, which he depicts primarily as a 'spontaneous reaction ... without any theoretical or intellectual preconceptions.'<sup>87</sup>

For a better sense of how these underpinnings may have motivated the political effort to 'reembed' the market economy, one must look to historians who place the interaction of economic structures and cultural traditions at the centre of their analytical method. The leading example is, of course, E.P. Thompson. Thompson once described the process of historical change this way: '[H]istorical change eventuates ... because changes in productive relationships are experienced in social and cultural life, refracted in men's ideas and their values, and argued through their actions, their choices and their beliefs.'<sup>88</sup> Thompson's approach is not exclusively concerned with changes in economic structures; rather, understanding the direction of history requires an understanding of how

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<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*, 264.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*, 156-57. Polanyi could be forgiven for his emphasis on spontaneity because was responding to conspiracy theories of economic liberals regarding 'collectivism,' trying to demonstrate the fundamentally defensive nature of the counter-movement.

<sup>88</sup> E.P. Thompson, 'History and Anthropology, Lecture Given at the Indian History Congress (Dec. 30, 1976),' in



those changes are ‘*experienced* in social and cultural life.’ This sort of ‘experience,’ for Thompson, involves two inter-related aspects: first, how those material-structural changes are interpreted (‘refracted’) in the prevailing system of ideas and values; and second, how those interpretations motivate, or give meaning to, subsequent social and political action.<sup>89</sup>

Thompson’s approach is one that historians in other domains and of other political persuasions can usefully adopt – particularly those concerned with the evolution of legal institutions in relation to economic change, my focus here. Legal historians, particularly those of public law, should focus on two things: first, how changes in the structures of public governance have been ‘experienced’ in relation to historically-rooted ideas and values of legitimate government inherited from the past; and second, how these experiences motivate choices about institutions for the future. Governance necessarily evolves as societies place new material demands on the prevailing system of norm-production and enforcement. These new structures of governance, however, often outpace prevailing understandings of what constitutes a legitimate legal and political order – that is, in the ‘refraction’ of this reality through ideas or values of legitimacy inherited from the past, the new structures may be found wanting in any number of respects. The gap between socio-institutional reality and historically-embedded conceptions of legal legitimacy thus feeds into a dialectic in which both structures of governance and understandings of a legitimate legal and political order are forced to adjust in the face of the reciprocal influences of the other.<sup>90</sup> In turn, this dialectical process has an impact on subsequent political choices about how the system of governance should operate in the future.

Public law is an ideal point of entry into the study of this dialectical interaction because it is, at least in part, both *constitutive* of structures of governance (albeit imperfectly) while at the same time culturally *expressive* of the form those structures should ideally take, consistent with traditional conceptions of legitimacy. Public law serves, in

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E.P. Thompson, *Making History: Writings on History and Culture* (1994), 222.

<sup>89</sup> This gloss on Thompson is intentionally evocative of the Weberian concept of meaningful social action. See Max Weber, *Economy and Society*, vol. 1 (Roth et al., eds. 1978), 4 (‘Action is ‘social’ insofar as its subjective meaning takes account of the behavior of others and is thereby oriented in its course’’).

<sup>90</sup> Cf. Sarah Hanley, *Engendering the State: Family Formation and State-Building in Early Modern France*, *French Historical Studies* 16:1 (Spring 1989), 5 -6 (describing ‘the historical process as a renewable dialogue or cultural conversation, wherein history is culturally ordered by existing concepts, or schemes of meaning, at play in given times and places; and culture is historically ordered when schemes of meaning are revalued and revised as persons act and reenact them over time. One might regard this process of reordering as one that ‘counterfeits culture’; that is, as a process that replicates the perceived original but at the same time (consciously or unconsciously) forges something quite new.’).

this sense, as a kind of bridge between structure and culture. It is the medium through which modes of governance are ‘institutionalised,’ as that term was used by Maurice Hauriou in his ‘Théorie de l’Institution,’ published in 1925.<sup>91</sup> Institutionalisation occurs not simply through the mobilisation of powerful interests in support of a particular governance regime. Rather, it requires, as Hauriou put it, the ‘manifestation of communion in the social group’ expressed in terms of existing cultural ideals. Hauriou’s institutional theory thus suggests a complex process of socio-historical/socio-cultural interaction that necessarily plays itself out over a very *longue durée* – in effect, a legal theory that perfectly complements Thompson’s historiographical method. It is through the long-term historical ‘struggle *about* law, and within the forms of law’<sup>92</sup> (to return to Thompson’s own apt phrase) that a particular mode of governance achieves historical durability and legitimacy – ‘institutionalisation’ in Hauriou’s terminology. Only after culturally-conditioned ‘manifestations of communion’ will a structural situation ‘of fact’ (i.e., one established through political or economic power) become culturally one ‘of law,’ thereby achieving an uncontested social and political existence.

It should not surprise us that Hauriou developed his institutional theory after spending nearly all of his adult life devoted to the study of French administrative law as it evolved over the course of the 19th and into the 20th century. In his recognition that the durability of institutions depended, as he put it, on their coming into ‘harmony with the conscience of jurisprudence’ over time,<sup>93</sup> he almost certainly had in mind, *inter alia*, the French system of administrative justice. Created by force under monarchy of the Old Regime (over the intense opposition of the sovereign courts) and consolidated in the constitution of Year VIII by Napoleon as part of his dictatorial regime, the French system of administrative justice nevertheless became, over the course of the 19th century, an ‘admirable institution’ and a ‘precious corrective to centralisation,’ as Hauriou concluded in 1903.<sup>94</sup> The ‘party of total suppression’ – Montesquieu, Malesherbes, Tocqueville – was defeated not by counter-revolution but by the system’s own recognition that a complete dejudicialisation of administrative justice was untenable – politically, legally, and culturally.

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<sup>91</sup> Maurice Hauriou, “La théorie de l’institution et de la fondation,” *Cahiers de la nouvelle journée*, no. 4 (1925), translated in Albert Broderick, ed., *The French Institutionalists: Maurice Hauriou, Georges Renard, Joseph T. Delos* (Cambridge, Mass.: Harvard University Press, 1970).

<sup>92</sup> E.P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (New York: Pantheon, 1975), 266.

<sup>93</sup> Maurice Hauriou, ‘An Interpretation of the Principles of Public Law,’ *Harvard Law Review*, vol. 31, 816 (1918).

<sup>94</sup> Hauriou, Note on *Terrier* (above n.8).

In 20th-century England, Lord Hewart was the leading member of a similar ‘party of total suppression’ of the emergent dejudicialised system of administrative justice in that country. Hewart’s polemic in *The New Despotism* led directly to the formation of the Committee on Ministers’ Powers, which in turn marked the beginning of the process of rejudicialisation of the system of administrative justice that had developed *sub silencio* over the 19th century. As in the French case, the traditional legal system in England was ultimately forced to make significant adjustments in the face of the new realities of governance – but, importantly, it did not completely surrender to them. Eventually, the system of administrative adjudication, even if intimately bound up with the work of administration, was acknowledged in law as part of the machinery of ‘justice’ traditionally conceived. Parliament thus recognized, in the Tribunals and Inquiries Act of 1958, that administrative tribunals served as a sort of ‘junior partner’ with the judiciary in the enforcement of the Rule of Law in the regulatory state (hence the general right of appeal to the common-law courts), a decisive step in the reconciliation of the new forms of administrative governance with older legal-cultural ideals in England. Once this constitutional settlement was achieved, the English courts could get on with the difficult task before them: the development of a genuine body of ‘administrative law’ – something Dicey claimed was an impossibility in the 19th century – to govern the actions of a state deeply engaged in the regulation of the market economy.

## V.

It would perhaps be wise to end there. However, I would like to add one final thought – a kind of epilogue, if you will – and an extremely brief one at that. My purpose is to suggest a relationship between the material covered here (and more particularly the historiographical theory that I have outlined) and debates over the current state of governance in the European Union which may be of greater interest to contemporary readers.<sup>95</sup> The historical evolution of administrative justice that I explored in this chapter is tied directly to the diffusion and fragmentation of normative power in the modern regulatory state, and, in turn, to the evolution of the expanding market economy. Over the course of the 20th century, in order to make the state a more effective regulator of that economy, significant amounts of power were shifted into a complex and variegated administrative sphere, away from the constitutional *trias politica* (legislative, executive, and judicial) established originally in the 18th and 19th

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<sup>95</sup> See the contribution of Christian Joerges and Michelle Everson in this volume for an overview.

centuries. As we proceed into the 21st century, and as market capitalism continues to evolve ('globalise'), this diffusion of normative power will no doubt continue, not simply to 'independent' agencies operating within the state but also, more importantly, to institutions operating outside the confines of the state – even to those operating at the supranational level, a phenomenon especially pronounced in Europe.

I would like to conclude, then, with some thoughts specifically about the European case. To many observers, this shift in the locus of governance to the supranational level in Europe appears historically unprecedented, *sui generis*, and thus in need of entirely novel forms of legal legitimation. There is some truth in this claim, but one might query whether the current situation in Europe might also be understood as merely a 'new dimension to an old problem.'<sup>96</sup> Throughout history, political-economic demands have pushed governance in new directions. The difference today is that, in Europe at least, those demands are increasingly pushing governance outside the confines of the nation-state, into a complex system operating at multiple levels. As in the past, however, the durability of those new structures of governance will depend heavily on society's capacity to reconcile them with historical notions of a legitimate legal and political order. A useful analogy can be drawn to my thesis here: Just as the pursuit of administrative efficiency through complete dejudicialisation ultimately gave way, at least in part, to a rejudicialisation over time, so too will supranational efficiency give way – despite the ardent hopes of many European federalists – to a significant degree of 'renationalisation' of the legitimation of European norm-production.

In fact, as most observers of integration recognize, this has long been the case despite the seemingly supranational form of Community (and now Union) institutions. The driving force behind this persistence of national supervision and control (even if indirect) is the widespread cultural attachment to national constitutional structures as the foundation of a legitimate legal and political order in Europe, something that the progress of European integration has only marginally altered. Even as significant normative power has shifted to the supranational domain in certain areas, there is a discernible legal-cultural resistance toward the creation of a general system of norm-production that is constitutionally 'disembedded' from the nation-state (i.e., fully autonomous). The result, in institutional terms, is that norms produced at the European level still need to be mediated in meaningful ways through national institutions, a position I have explored elsewhere and will not revisit in detail here.<sup>97</sup>

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<sup>96</sup> Peter L. Lindseth, 'Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community,' *Columbia Law Review*, vol. 99, no. 3 (1999), 628, 629.

<sup>97</sup> *Ibid.*; see also Peter L. Lindseth, 'Delegation is Dead – Long Live Delegation: Managing the Democratic

Europe is living, in other words, through a period of increasing historical disconnect between the socio-institutional realities of governance, which are moving in a supranational direction, and legal and political culture, which remain wedded to national constitutional structures as expressions of legitimate government. Unless European public law can bridge this disconnect, the citizens of Europe will not ‘experience’ the institutions of integration as legitimate in a historically recognizable sense (except perhaps as supranational ‘administrative agencies’). It thus seems likely that, for the foreseeable future, the struggle to reconcile supranational governance with specifically *national* constitutional structures (perhaps under the rubric of ‘transnationalism’) will be the focus of European public law, rather than the creation of a supranational ‘constitutional’ order that is ‘disembedded’ from its national foundations.<sup>98</sup>

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Disconnect in the European Market Polity,’ in Christian Joerges and Renaud Dehousse, eds, *Good Governance in an ‘Integrated’ Market* (London: Oxford University Press, 2002), 139-163; Peter L. Lindseth, “‘Weak’ Constitutionalism? Reflections on Comitology and Transnational Governance in the European Union,’ *Oxford Journal of Legal Studies*, vol. 21, no.1 (2001), 145-163.

<sup>98</sup> For further elaboration of this thesis, see Peter L. Lindseth, ‘The Contradictions of Supranationalism: Administrative Governance and Constitutionalization in European Integration Since the 1950s,’ *Loyola-Los Angeles Law Review*, vol. 37 (2003), 363-406 [Symposium Issue on ‘The Emerging Transnational Constitution’].