PART ONE

THE PLACE OF ADMINISTRATIVE AGENCIES IN THE JUDICIAL SYSTEM

Chapter 1

Development of Administrative Agencies

FOR many years, both federal and state courts tacitly refused to admit the existence of administrative law as a distinctive part of our legal system. It was considered a Continental concept, alien to our common law, and something to be shunned.[1] While the development of administrative law is now recognized as an outstanding characteristic of twentieth-century jurisprudence, the effects of this long-continued and persistent disregard are still felt. It has affected judicial doctrine, and the attitudes of the administrative agencies themselves. It has increased the difficulties of the lawyer's task. The law digests and encyclopedias, for example, until very recently failed to recognize the subject as one worthy of its own index heading. It has increased the difficulties of any systematic study of this branch of the law. Indeed, there is not even to be found any generally accepted definition of the term "administrative law." Defining the term thus becomes the first element of any discussion of the subject.

[1] *Cf.* A. V. Dicey, LAW OF THE CONSTITUTION (1886) for an English statement of this view. It is interesting to note that thirty years later, viewing with alarm the decisions in Board of Education v. Rice, [1911] A. C. 179, and Local Government Board v. Arlidge, [1915] A. C. 120, Mr. Dicey recognized the existence of this new system of jurisprudence (which he still considered to be in derogation of the Rule of Law) by entitling a review of these decisions, "The Development of Administrative Law in England," 31 L. Q. R. 148 (1915). In this article, he acknowledges with misgivings that "a considerable step" had been taken toward the introduction of "something like the *droit administratif* in France"; and *cf.* Mr. Dicey's introduction to the 8th edition of LAW OF THE CONSTITUTION (1915) xxxviii.

1. Definitions of Administrative Law

In the broadest sense, administrative law may be defined as including all those branches of public law which relate to the organization of governmental administration.[2] In this sense, it covers many of the principles and doctrines comprising the fields usually described as constitutional law, legislation, public corporations, public officers, civil service, and taxation, and includes, in fact, all branches of the law affecting the executive activities of the government.

At the opposite extreme, the subject is sometimes viewed as involving little more than the doctrine of separation of powers and its application to the creation and operation of administrative agencies.

In most discussions of the subject, however, it is deemed to involve somewhat more than the doctrine of separation of powers, but somewhat less than would be included in the definition first suggested. The subject is generally thought to embrace the activities of those administrative agencies which, either by adjudicating judicial questions or by prescribing general rules and standards of conduct, act as little courts or little legislatures in regulating individual activities. It includes those aspects of constitutional law which pertain to limitations on the powers of such agencies, and embraces as well questions of practice and procedure before such agencies, and also questions relating to judicial review of the determinations and orders of such agencies.

It is these three questions—constitutional power, practice and procedure, and judicial review—which are at the nub of all discussions of the subject. It is these three questions, in variant applications, which beset the lawyer in the conduct of every case tried before an administrative agency. To an exam-

[2] *Cf.* M. E. Dimock, "The Development of American Administrative Law," 15 J. COMP. LEG. & INT. LAW (3d series) 35 *et seq.* (1933).

ination of these three topics, therefore, the following pages will be devoted.

2. Administrative Agencies and the Administration of Law

There is a constantly accelerating trend toward the adoption of administrative techniques for disposition of legal matters that have been traditionally handled by the courts. In every field of practice, this tendency may be observed. In the tax field, for example, it is a rare case that justifies an appeal to the courts; and the recent indication by the United States Supreme Court that it will not always concern itself even with asserted errors of law committed by the administrative agencies,[3] only emphasizes the importance of the agencies' role in this field. In corporation law, those issues which are most vital in the conduct of corporate affairs are ordinarily committed to such administrative agencies as the state corporation commissions, the Federal Securities and Exchange Commission, and state and federal utility commissions. The field of labor law, which in recent years has assumed unique social importance, is almost completely a creature of administrative tribunals. Even in the private law realm of contracts, administrative agencies are important. They effectively prescribe, by imposition of conditions and provisos which must be included or excluded, the general form and content of the most significant clauses of many types of private contracts, including agreements of employment, some contracts of sale, and various types of obligation relating to trade and finance. Furthermore, such agencies frequently are concerned with reviewing the performance of such contracts, and imposing sanctions for breach of the re-

[3] Dobson v. Commissioner of Internal Revenue, 320 U. S. 489, 64 S. Ct. 239 (1943). Despite apparent Congressional disapproval of the Dobson rule, so-called (I.R.C. 1141(a), 1948), the general trend of the courts is still to reverse only for gross error.

quired conditions. A substantial segment of the law of torts is now a matter of administrative adjudication: workmen's compensation, many forms of unfair competition cases, and the granting of reparations for various statutory offenses are all matters of administrative competence. Suggestions are frequently made that automobile accident cases should be taken from the courts and entrusted to the assertedly more expert handling of a commission or agency. Even in the field of criminal law, much is now being left to the psychiatrist and the parole board, and it is often suggested that there should be still more of this. In the field of domestic relations there has been a similar movement. Issues of alimony and custody in divorce cases are quite likely to be decided by a Friend of the Court or some similar agency. Likewise there should be mentioned the insurance commissions, the banking commissions, the trade commissions, and all the other like agencies that police their designated fields.

Perhaps more significant than the infiltration of administrative elements into the traditional fields of judicial activity is the gravitation of law practice into matters of purely administrative concern. A great part of the practice of law today does not take the lawyer or his client into the courts, but involves matters handled and concluded solely by administrative agencies.

Almost all of the social legislation of recent years has been implemented by the creation of new administrative agencies, some of them passing on many thousands of justiciable cases annually. It is in his dealings with these agencies that the citizen most frequently requires the aid of counsel. Many men can avoid "court trouble" but few indeed can avoid the administrative agencies. Like death and taxes (both of which, incidentally, are now the concern of administrative agencies) the agencies reach everyone.

All this is not to deprecate the position of the courts and legislatures. With them remains the power of superintending control. While tendencies toward self-abnegation by the judicial and legislative organs may sometimes be noted, it is with the courts and the legislatures that there rests the sole power to correct widely noted defects of administrative action.

It must be conceded, nonetheless, that with the developments in administrative law, the center of balance has been shifting. The implications of these developments are portentous both to those professionally concerned and to the general public.

3. Historical Development of Administrative Agencies

(a) *In general.* Administrative law is no modern phenomenon. It is, on the contrary, much older than the common law—older even than judicial systems or democratic legislation. In the earlier periods of history, when the law was little more than custom, it was administered only through despotically controlled administrative processes. The development of the philosophy that government should be by law, and not by men (which originated at least as early as the time of Aristotle),[4] represented a trend away from administrative law.

At various periods of legal history, trends toward and away from administrative law have produced governmental upheavals. Many revolutions have been premised on dissatisfaction with administrative processes. The barons at Runnymede were protesting King John's administrative law.

[4] The classic phrase found in Part I, Section XXX of the Massachusetts Constitution, 1780, was borrowed from Harrington (OCEANA (1656) 2–29), who acknowledged his indebtedness to Aristotle. See Aristotle's POLITICS, III, xvi, 4, 5, "He who bids the law rule, bids God and reason rule, but he who bids man rule adds an element of the beast; for desire is a beast, and passion perverts rulers, even though they be the best of men."

The American Declaration of Independence charged many abuses against the administrative agencies comprising the British Government's colonial establishment. It declared, among other charges, that the King had created a multitude of new offices and had sent hither swarms of officers to harass the American people; that the King had invested his agencies with power to legislate for the colonies in all cases whatsoever, superseding the colonial legislatures; that the King had altered fundamentally American forms of government and deprived Americans, in many cases, of the benefits of trial by jury. The revolution that led to the downfall of the Russian monarchy was in large measure a protest against the czarist system of administrative law.

While no close parallel can be drawn between the *droit administratif* of France or the administrative law systems of other Continental countries and our American legal system, yet a most intriguing comparison does exist between the developments in the United States during the fourth and fifth decades of the twentieth century, and the experience of England some four hundred years earlier. In the middle of the sixteenth century, English lawyers were heard complaining that the common law was being set aside and that scarcely any business of importance came to the King's law courts. Legal matters were being handled instead by administrative tribunals—the Star Chamber, the Court of Requests, Chancery, and the Great Councils. Each of these agencies was staffed with a permanent clerical establishment, which (the bar complained) undertook the duties performed by attorneys in the law courts, so that the members of the bar had but little place in these new agencies. There remained only, as Professor Plucknett says, "numerous duties of a quasi-legal character which had to be done, and litigants soon found it convenient to have a sort of law agent who would set the complicated machinery in motion by engaging and conferring

with the various branches of the profession as occasion required, and doing other duties, sometimes of a legal and sometimes of a business character." It was thought for a time that the professional courts, with their judges and trained lawyers, would be discarded and that the Crown would place all judicial powers in laymen as exponents of a new technique of law and government. But in the end a compromise was worked out. The common-law courts survived and ultimately regained their former importance.[5]

While the underlying causes and conditions are of course different now than in sixteenth-century England, yet the striking similarity between that ancient development and the current situation compels attention. A host of new agencies are set up. They take over the conduct of many of the most significant aspects of the legal matters that had formerly been handled in the courts. These matters are handled on a nonlegal basis. The agencies in charge are staffed with large clerical establishments who perform many of the functions which in the judicial courts are assigned to attorneys. The function of lawyers, in some of the agencies at least, is pretty well limited to setting the wheels in motion and to conferring informally with the administrative staff, as the occasion requires.

The final outcome of the English crisis of four hundred years ago was characterized principally by the assimilation of the equity courts as a special branch of the judicial system. Does this bit of history carry any hint as to the future course in the United States? The possibility is worthy of conjecture. In emphasizing the importance of granting respect and deference to the determinations of administrative agencies, the Supreme Court not long ago remarked that the twentieth-century judicial system should not "repeat in

[5] Pound, ADMINISTRATIVE LAW (1942) 36; Simmons, "Law and Administrative Government," 28 J. AM. JUD. SOC. 133 (1945); Plucknett, CONCISE HISTORY OF THE COMMON LAW, 2d ed. (1936).

this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice." [6]

(b) *In the United States.* The development of administrative agencies in the United States reflects the social history of the country, and can be roughly divided into three general periods. As above noted, the birth of this country was prompted by the abuses of the administrative agencies of the Tudors and Stuarts, who (at least so far as the American colonies were concerned) had waged unremitting war against the supremacy of law. The long-standing and bitter conflict between the colonists and the Crown agencies set up to govern the colonies had served to establish a firm conviction in American minds that broad grants of discretionary power to governmental agencies must be avoided; governmental powers must be strictly limited and effectively separated between the different branches of government; the government must be one of law. This philosophy of course left little room for the development of administrative tribunals. In addition to this hatred for the things that English administrative government had stood for in the colonies, other factors also militated against the development of administrative government in early America. These were the economic condition and the social philosophy of the country. The relatively simple course of trade and commerce in a sparsely settled, agricultural country created no need for close governmental supervision, and the highly individualistic spirit of the times rebelled against bureaucratic control.

For these reasons, very few administrative agencies were created during the first century of this nation's existence, except those which were clearly necessary to carry on the

[6] United States v. Morgan, 307 U. S. 183, 191, 59 S. Ct. 795 (1939).

public business, such as the collection of customs and taxes,[7] the disposition of public lands,[8] the distribution of veterans' pensions,[9] and the conduct of Indian affairs.[10]

A reaction occurred, however, in the years following the Civil War. As Dean Pound expresses it,[11] the country had become "law ridden," and a counterswing was inevitable because the lines had been drawn so rigidly. The long-standing opposition to administrative control was replaced by a willingness to experiment with what was looked on as a new device. This new spirit inaugurated a second period—the beginning of modern administrative agencies. The demands of an expanding law of public utilities, and the birth of so-called social legislation, imposing stricter and more thoroughgoing public supervision over the conduct of certain types of business, united to produce a need for a greater measure of administrative control. The rapid increase in population, the expansion of industrial organization, and the growing complexity of national affairs, all contributed to this new desire for a more detailed and adaptable method of governmental regulation than could be afforded by legislatures and the courts alone.

The creation of the Interstate Commerce Commission in 1887 signaled the change. This was the first federal agency

[7] Among the laws enacted at the first session of Congress were two granting administrative powers in connection with customs collections: Act of July 31, 1789, 1 Stat. 29; Act of Sept. 1, 1789, 1 Stat. 55. Similarly, local assessors operated under state statutes since an early date; but it is interesting that while federal tax laws had been more or less continuous from 1789, the office of Commissioner of Internal Revenue was not created until 1862.

[8] The General Land Office was established in 1812.

[9] But the Act of Sept. 29, 1789, 1 Stat. 95, granting certain administrative powers in connection with the payment of pensions to soldiers of the Revolutionary War, bore little resemblance to the statutes of more recent years vesting broad powers in the Veteran's Administration.

[10] The Act of April 18, 1796, 1 Stat. 452, authorized the President to prescribe rules in connection with the establishment of trading houses dealing with the Indians.

[11] Pound, ADMINISTRATIVE LAW (1942) 27.

with broad regulatory powers over private affairs.[12] Some ten other agencies with significant regulatory powers were created between the turn of the century and the New Deal of 1932. These included the Food and Drug Administration (1906), Federal Reserve System (1913), Federal Trade Commission (1914), National Advisory Commission for Aeronautics (1915), United States Tariff Commission (1916), the Shipping Board (1916), Federal Power Commission (1920), Board of Tax Appeals (1924), Railroad Adjustment Board (1926), and Federal Radio Commission (1926).

The flood-tide, of course, came in the decade following 1932, with the adoption of the policy of revamping the social and economic structure of the country through administrative action. During this third period, not only did the number of federal agencies exercising important regulatory functions increase tremendously, but there was a growing tendency to vest in such agencies an even greater measure of uncontrolled discretionary power. This decade, further, saw a vast expansion of administrative agencies among the state governments. It was during this period that administrative law in America became of age. Characteristic of the development were such agencies as the Securities and Exchange Commission, the National Labor Relations Board, the Wage and Hour Division of the Department of Labor, the Social Security Board, the Bituminous Coal Division, as well as numerous state price-fixing agencies, labor boards, unemployment commissions, and the like.

While not precisely paralleling these three periods in the development of the administrative agency as a new governmental technique in this country, a roughly similar evolution

[12] A somewhat detailed history of the origin of the various agencies, compiled by the Attorney General's Committee on Administrative Procedure, discloses that some comparatively minor regulatory powers were granted to administrative agencies somewhat earlier. "Administrative Procedure in Government Agencies," Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 8, 9.

has been exhibited in the attitude of the bench and bar of the country toward these agencies. The earliest attitude viewed with alarm the introduction of this alien concept. The principal questions examined and discussed were those concerning the validity of the statutes creating the agencies, and the extent of the powers that could be delegated to them.

Then (starting shortly after World War I and continuing for some twenty years—indeed, the problem is still far from solved) attention was turned to the availability and utility of judicial review as a method of checking or controlling the activities of the agencies.

But as experience has demonstrated the limited effectiveness of judicial review in cases where broad discretion is conferred on the agency and its findings of fact are ordinarily unassailable, legal thought has turned to matters of procedure within the agencies themselves. Recognizing administrative tribunals as co-ordinate agencies in the disposition of significant segments of judicial and legislative business, the more recent point of view is concerned chiefly with improving the level of performance attained by the agencies.