

## CHAPTER 2

# Functions and Character of Administrative Agencies

ADMINISTRATIVE agencies serve certain governmental purposes more efficiently than do the traditional judicial and legislative organs. Where the government's purpose is that of policing the minutiae of conduct in some designated field, with a view to forestalling any deviations from the prescribed course of conduct rather than merely enforcing penalties for noncompliance, such an objective can be best achieved by an administrative agency. As legislative programs have tended more and more to adopt such a purpose, resort to the administrative agency as an enforcement device has become correspondingly more common.

### 1. Execution of Preventive Legislation

The traditional technique of legislation, depending largely on court action to compel enforcement of the law, has not been effective to prevent anticipated evils from arising. It has been limited, primarily, to correcting evils after they have occurred. Criminal proceedings, of course, are instituted only after the crime has been committed. Most civil actions similarly operate after the event, embracing a claim for damages for violation of one's rights. Injunctive remedies, it is true, are essentially preventive in nature, and thus operate to some extent to eliminate the occurrence of a threatened wrong, but even here there are certain obvious limitations. It is patent that if the enforcement of the Securities and Exchange Act, for example, were premised upon the bringing of judicial actions to enjoin the issuance of any securities suspected to be fraudulent, the investment banking business would be less

effectively policed than can be done under the various administrative processes which have been developed by the Securities and Exchange Commission.

Many administrative agencies serve primarily the function of accomplishing what ordinary legal remedies cannot normally achieve—avoiding the occurrence of an injury, which, of course, is usually far more satisfactory to the party concerned than to suffer the injury and subsequently obtain a judgment for money damages as at least partial compensation for the injury. Thus, the Interstate Commerce Commission, in determining in advance what freight rates are reasonable, saves the shipper the trouble and expense of shipping his goods and paying an unreasonably excessive tariff, and of suing later for reparations. Similarly, the Securities and Exchange Commission aims to prevent the occurrence of a situation wherein a defrauded purchaser of securities must bring a suit for damages. The state public utilities commissions, and the state and federal trade commissions, and of course the various agencies and boards which license those who engage in various types of activities (from the practice of chiropractic to the operation of radio stations) all serve a similar preventive purpose. In any field where the execution of a preventive program necessitates constant supervision and inspection, administrative devices are much better adapted to the successful operation of the program than are the traditional judicial remedies.

Since most preventive legislation has broad social purposes, reliance on the administrative agency as an enforcement device is prompted not only because administrative devices are more effective to assure compliance than are ordinary legal remedies, but also because more effective enforcement can be attained through this device than where dependence is placed on private initiative in instituting action. Administrative agencies will take action in many cases where the individuals

directly affected, for one reason or another, would be unwilling to appeal to the courts to seek protection of their rights.

Where the legislative purpose is to achieve what are commonly called social ends, it is desirable not only that effective preventive remedies be made available, but also that such remedies be availed of in every case. It is deemed desirable, for example, not only that a method be provided for preventing the commission of unfair trade practices, but also to make sure that appropriate action be taken in every case where any unfair trade practice may be committed. Accordingly, administrative agencies have been created to protect both private parties and the public interest by assuming direct control over business management and social relations, in a wide variety of fields.<sup>1</sup>

## 2. Conducting Social Experiments

As the assertion of social control over private affairs extends into new fields of governmental activity, many situations are encountered where it is uncertain just what type or degree of control is desirable. It is clear that something should be done, but nobody knows exactly what. There ought to be a law, it is agreed; but just what the law should be is uncertain. In situations of this type, the administrative agency is conveniently available as a means of coping with problems of recognized public concern on an experimental basis. This is obviously not a function of the courts, and the legislatures cannot achieve this method of control except through the awkward and impractical expedient of repeated repeals, amendments, and re-enactments. Legislative procedures do not ordinarily permit this to be done, at least not on anything like the scale that is feasible in administrative agencies. When

<sup>1</sup> Chamberlain, Dowling, and Hays, *THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES* (1942) ix.

Congress adopted the wage stabilization law,<sup>2</sup> for example, it appreciated that there would exist a practical necessity for permitting certain normal, minor wage adjustments to be made freely despite the general prohibition against voluntary wage increases during World War II. But it was impracticable for Congress to define the standards or tests to be employed in determining what types of wage increases were to be permissible as voluntary adjustments that could be put into effect without seeking prior governmental approval. The National War Labor Board, to which was delegated the task of administration, very shortly after its creation issued a "general order" which specified the types of cases in which wage increases could be made without prior approval. But as experience was obtained, the need for revisions in this "general order" became apparent; and during the ensuing two years numerous amendments were issued. Some of the amendments were quite plainly experimental in nature—an idea would be tried to see how well it would work out, and if early results were not encouraging, a change would promptly be made. Similarly, much of the work of the Federal Communications Commission has been experimental in character. Many similar examples could be named.

As an agency gains experience, the need for continued experimentation diminishes, but almost every important agency at the time of its creation faces a necessity of picking out a path on an uncharted sea, and it must, on some of its excursions at least, adopt a trial and error method.

Where the necessity of experimentation thus exists, the obvious need of flexibility and discretion dictates the desirability of reposing powers in an administrative agency. In this type of case the administrative agency can perform val-

<sup>2</sup> Act of October 2, 1942, as amended; 56 Stat. 765; 50 U.S.C. App. § 901 at 198.

uable functions for which the traditional judicial and legislative organizations are unsuited.

### 3. Other Reasons for Utilization of Administrative Agencies

It is sometimes said that the traditional legislative and judicial systems broke down in the face of modern necessities; that they were not effective to cope with important problems of recognized public concern; and that accordingly, resort to some more modern device was necessitated. But this unfairly belittles the importance of the legislatures and the courts. It is fairer to say that administrative tribunals have been availed of as a valuable assistance to hard-pressed and overburdened legislatures and judiciaries. Supervising control has been retained—the effectiveness and extent of which remains subject to the desires of the legislatures and courts themselves—and there have been delegated only subsidiary functions which are adaptable to administrative handling.

The ever-broadening delegation of legislative power has come about not only because the legislature may lack time and technique to prescribe detailed rules, but equally because the delegation of certain rule-making powers to administrative agencies is desirable to relieve the legislature of a burden of detail so that its essential policy-making work may go forward more effectively. It is not only the fact that courts may be inexpert in making factual determinations in certain highly technical and complex fields, which has led to the delegation of judicial powers to administrative agencies, but it is equally a purpose of such delegation to avoid burdening the judiciary with a myriad of small cases, the consideration of which would interfere with the most effective disposition of the courts' more important duties in laying down fundamental principles.

In certain types of cases, however, some definite advantages are inherent in the administrative process. It makes

available a continuity of attention which, particularly in fields where expert knowledge of changing conditions is an aid to effective social control, enables regulation to keep pace with new events. This would appear to be true in the case of the regulation of the television industry. Again, reliance on administrative agencies makes possible the application of uniform national policies in fields where reliance on ordinary judicial procedure would lead to a conflict of decision on many points. If, for example, it were left exclusively to the courts to determine what were unfair trade practices, or unfair labor practices, it seems clear that it would be much less certain what was permitted, and what forbidden. Further, utilization of the administrative process satisfies the need of an organization equipped to dispose of a great volume of business. For example, the courts would obviously be flooded if called upon to decide the hundreds of thousands of cases arising yearly under workmen's compensation and social security and unemployment insurance legislation. Similarly, creation of administrative agencies avoids dangers of unfairness which might be present in some fields if reliance were placed on purely executive action. For example, while the distribution of public improvement funds for the use of municipalities may safely be left to ordinary executive action, yet when it comes to the allowance of benefit claims of the sort handled by the Veterans' Administration, it is plain that some orderly procedure and provision for assuring equal treatment is highly desirable. Finally, administrative procedure achieves a speed which cannot be attained through the ordinary processes of legislation and adjudication.

Thus, there is a plain need for the administrative tribunal. It serves its own particular functions; and it is capable of serving them well. The administrative process is needed as a supplement to the legislative and judicial processes. It is needed as a directing process in an industrialized, urban

society which requires that social controls be administered with a greater degree of adjustment to unique situations and with a greater degree of preventive control than ordinary judicial processes, looking at controversies after the event, can afford.<sup>3</sup>

#### 4. Administrative and Judicial Procedures Contrasted

But despite the plain need for administrative agencies, and their inherent ability to serve certain functions more effectively than can either courts or legislatures acting alone, yet there have developed in many administrative agencies, within both the state and the federal governments, certain characteristics of attitude and procedure which are detrimental to their most effective fulfillment of their particular functions. These characteristics often color every step of administrative procedure, and affect the task of the attorney who conducts cases before such agencies. They underly the mistrust harbored by large segments both of the bar and of the public as to the fairness and justice of many administrative agencies.

(a) *Interest in result.* Perhaps the outstanding trait of administrative tribunals is their interest in the result of the cases pending before them. As later pointed out, this interest may affect all the processes of pleading, hearing, and decision. It is, of course, inevitable that administrative agencies should have such an interest in the result of pending administrative proceedings. Most agencies are created for the purpose of administering certain broad policies of social or economic reform. They are naturally interested in attaining such reforms. So long as this interest in the general course of decision does not affect the fairness and impartiality with which each contested case is decided, there are but scant grounds for objection to its existence. It is inherent in the purpose for which such agencies are created, and the absence of such interest

<sup>3</sup> Cf. Pound, *ADMINISTRATIVE LAW* (1942) 26.

would interfere with their most effective functioning. But overconcern with the desirability of achieving appointed ends leads sometimes to an excess of zeal. For example, it has produced in some agencies an antipathy toward participation by counsel in agency proceedings. The diligent efforts of counsel on behalf of the party respondent are sometimes resented, as tending undesirably to hamper the expeditious execution of the agency's work. There is a feeling on the part of the agency that its expertness as to both the law and the facts renders the assistance of counsel superfluous. Similarly, a pronounced antagonism toward judicial review has sometimes developed. Some agencies put every obstacle in the path of a party who seeks to obtain a court decision as to the validity of an administrative determination. These, of course, are extreme examples, but they indicate the fundamental differences between administrative and judicial procedures which are a necessary concomitant of the fact that administrative agencies are normally parties in interest to the proceedings they conduct.

(b) *Role of discretion.* A second outstanding characteristic of the administrative process is the broad scope and effectiveness of administrative discretion. Authorized in increasingly frequent instances to make decision on the basis of what is "fair" or "reasonable" (and being ordinarily the sole judges of the reasonableness or fairness of the measure involved) administrative agencies tend to substitute a rule of discretion for the rule of law. This is what is sometimes called administrative absolutism. Indeed, it may well be that delegation of power to administrative agencies is often resorted to because the matter in hand cannot be regulated by general rules but only by the exercise of discretion in the decision of particular cases.<sup>4</sup>

<sup>4</sup> Cf. Hayek, *THE ROAD TO SERFDOM* (1944) 65, 66, 78.



There can be no argument but that the vesting of discretionary powers in administrative agencies is necessary to the most effective performance of their appointed tasks. At the same time, there can be little question but that these discretionary powers have had an important effect on all the processes of administrative adjudication. The possession of discretionary power has engendered in many agencies an impatience to proceed along the tiresome, detailed, plodding path of deciding each case on the basis of careful and painstaking consideration of all the evidence produced in the slow-moving process of a contested hearing. Discretion can be more freely exercised when cases are decided without a hearing, or without hearing both parties.<sup>5</sup> This tendency of many agencies to minimize the importance of hearings, as may be noted in the common practice of basing the decision not on the record of the hearing itself but rather on abstracts or reports prepared by staff assistants, has had far-reaching effects on the course of administrative decision.

The same tendency to rely on discretion is largely responsible for the willingness evidenced by many agencies to set up policies going beyond or even at variance with the standards of the statutes which the agencies administer. The tendency is to decide cases, not on the basis of interpreting the governing statutes—as courts would—to discover the apparent legislative intent, but rather to decide on the basis of broader policies which it is thought may be, within the broad discretionary powers of the agency, superimposed on the stated legislative purpose.

Again, reliance on the role of discretion has disinclined many agencies to make available for the use of interested parties any clear statements either of the exact practice and procedure of the agency or the criteria relied on by the

<sup>5</sup> Cf. Reports of American Bar Association's Special Committee on Administrative Law, 63 A.B.A. REP. 331, 346 (1938); 64 A.B.A. REP. 575 (1939); Pound, ADMINISTRATIVE LAW (1942) 68-73.

agency in deciding cases.<sup>6</sup> Discretion can be more freely exercised if procedural matters can be settled in accordance with the agency's convenience in each case. Similarly, discretion has a broader range if the agency has not committed itself to any stated bases or principles of decision comparable to common-law rules of decision, but has reserved the privilege of deciding each case on its "merits," permitting such departures from prior criteria of decision as may seem expedient in any particular case. Hence, the party appearing before the agency may be in the position of not having the assurance, commonly available in court proceedings, that established procedures and rules of decision will govern the disposition of his particular case.

### 5. The Lawyer and Administrative Agencies

The task of the lawyer in conducting cases before administrative agencies is a difficult one.<sup>7</sup>

Even the preliminary step of discovering the court-made case law on the particular issues with which he may be concerned is no easy one. The historic reluctance of the courts to recognize administrative law as a distinct topic is reflected by the absence of any such heading, until very recently, in most law digests and encyclopedias. The search for the law applicable to questions of administrative procedure, or governing the validity of administrative action in certain types of cases, leads the researcher through almost every topic in the digests. Decisions involving a single point of law, uniformly applicable to any agency, may be scattered through such diverse headings as Aliens, Agriculture, Carriers, Commerce, Constitutional Law, Gas, Electricity, Mandamus,

<sup>6</sup> Sec. 3 of the Federal Administrative Procedure Act of 1946, Ch. 324, 60 Stat. 237; 5 U.S.C. § 1001, imposes certain requirements for the publication of such information. See Davis, "Separation of Functions in Administrative Agencies," 61 HARV. L. REV. 389 (1948).

<sup>7</sup> See Dulles, "Administrative Law: A Practical Attitude for Lawyers," 25 A.B.A. J. 275 (1939).

Internal Revenue, Licenses, Master and Servant, Mines and Minerals, Post Office, Public Lands, Public Service Commissions, Radio, Railroads, Rate Regulation, War, and Workmen's Compensation. In the following pages, an attempt is made to correlate the decisions, handed down in various substantive fields and involving various federal and state agencies, which lay down principles generally applicable to the functioning of all administrative agencies.

But the problems of administrative law cannot be properly understood without going beyond the decisions of the courts to the decisions of the agencies themselves and to the processes of administration.<sup>8</sup> Accordingly, the following discussion will attempt to capture the spirit of administrative law in action. An appreciation of the philosophy of administrative adjudication is essential to the most effective participation of the bar in the administrative processes. The lawyer appearing at an administrative agency must accommodate himself to the difference between administrative and judicial proceedings. In many respects, greater skill in advocacy is required in the administrative than in the judicial hearing. In court proceedings, the attorney need not be concerned with convincing his opponent of the merits of his case; but in an administrative proceeding, it is the opponent's reaction which is paramount, for the agency which decides the case often appears as the opponent of the respondent. Effective presentation of the respondent's case requires not only knowledge of the applicable rules of law, but an adaptation to principles of procedure and decision which are based on somewhat different considerations than those which control judicial proceedings.

<sup>8</sup> Chamberlain, Dowling, and Hays, *THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES* (1942) xi.