

The Development of Administrative Law in the United States and England and its Relation to Public Administration

By WILLIAM F. LARSEN*

THE DEVELOPMENT OF LAW

The progress of society upward from a primitive condition of rule by brute force has depended greatly upon the development of rules governing the behavior of individuals and the relations between individuals and the controlling institutions of the group. Beginning with simple folk traditions and customs, human societies have evolved complex, formal rules called *laws* which are enforced by both custom and the power of government. The acceptance of rules of behavior tested by experience, honored by long observance, and written into formal codes indicates an important difference between primitive societies and civilized communities. The idea prevails that it is necessary for men to be controlled by rules which stand above individual desires, and this is of major significance to the study of government. In progressive societies, these rules or codes of law seek not only to maintain a stable social order, but try to combine reasonable certainty about the rules men are expected to follow on one hand, with the flexibility necessary to permit social change on the other hand.

THE RULE OF LAW

Democratic nations accept the principle that what is needed "a government of laws and not a government of men".

This is useful concept of political philosophy, but it can mislead the student

※ Professor

University of Minnesota Group

School of Public Administration

College of Law

Seoul National University

of public administration into thinking that in some way the law itself actually "governs". It is *men* who govern and the principle means that *should* govern administer according to an accepted legal standard rather than according to personal or arbitrary desires. Law is not a self-energizing machine that operates independently and automatically. The so-called "rule of law" in government means adherence to the institutions and procedures which experience and usage have shown to be necessary to protect individual persons from arbitrary or capricious actions by a government or its officials. It means the protection of personal rights by means of laws, legal institutions, processes and traditions which enable men to live with dignity and honor. The *rule of law* connotes both the observance of the law as well as the need for preserving individual liberties and is an essential part of the philosophy of a free society. Administrative justice becomes possible when there is effective operation of the *rule of law* so that men and the official institutions they serve and represent feel bound at all times by legal standards.

These legal standards as applied to the administrative institutions of a country may be derived from many different sources and operate in widely varying ways. The underlying similarity in all civilized nations is the fact that law serves as the framework for all official acts undertaken by administrator, and it is this legal character which marks a principal distinction between public administration and private administration.

ADMINISTRATION AND PUBLIC LAW

As a general concept, public law is concerned with the governing relations among men. Public law in the customary sense includes constitutional, international, administrative and criminal law (and church law in some nations). Modern administrative law is a major part of public law and thus is related to the political process although a distinction is made between political and administrative affair.

Modern jurisprudence has developed many specific divisions of legal functions. The multiple activities of government and the needs of modern society have required the development of highly-specialized systems of administrative law. The matters with which administrative law is concerned range from the keeping of simple government records and the routine collection of fees, to the complex

network of reciprocal relations among the citizens, the public officials and the state. The conduct of public affairs is believed in all respects to be based upon law.

THE LEGAL BASIS OF ADMINISTRATION

As a general rule, the body of law within which the public administration operates may include: (1) the Constitution of a country; (2) the laws enacted by the legislative body or parliament (organic and statutory law); and (3) the administrative codes and regulations which make specific the statutory and organic laws so that the detailed operating functions of modern government can be performed.

CONSTITUTIONAL FOUNDATIONS OF ADMINISTRATION.

The most fundamental law affecting public administration in a nation is usually the constitution. A constitution establishes the basic framework of government, allocates powers and imposes limitations on their exercise, and defines broadly the relationships between the major parts of government and the persons subject to its control.

The essential purposes for which administrative materials may be included in a constitution are: (1) to establish the basis of the administrative structure of government; (2) to affirm the necessary central direction; (3) to define the relationships of the various elements; (4) to assign general administrative power and to insure responsibility from these persons in control. Pressure from many sources often succeeds in placing much administrative detail in constitutions, and some administrative agencies may be created with specific constitutional status which gives them great prestige or power. Because constitutional provisions tend to be rigid and difficult to change, such details may hamper flexible administration. The best theory recommends against constitutional provisions which deal with administrative detail, and both the Korean and United States constitutions, for example, are relatively free of this difficulty.

THE STATUTORY BASIS OF ADMINISTRATION

In most nations, statutory law creates the principal administrative organs of the state and is the source of their authority. Within the limits of the constitution, the legislature is the primary creative source of the administrative machinery of the government. Statutory law creates departments and agencies, determines

the form of their organization, grants authority, defines the programs to be carried out, provides financial support, prescribes personnel methods and operating procedures to be used, and sets forth the means of ensuring accountability for what is done.

Statutory law is easier to create and change than constitutional law. Hence, it is a more flexible basis for the creation of public agencies. Even so, frequently it is difficult to enact the statutory legal changes necessary to adapt administration to changing conditions. It is often easier to make use of the existing body of law than to secure new statutory legislation.

DIFFERING CONCEPTS OF ADMINISTRATION

Law has been defined as the rules regulating human conduct within a particular society which represent the authoritative values of the society enforced by means of the political and legal system. The boundaries of a system of law tend to be determined by national frontiers and its functions by the prevailing ethical values and positive law-creating abilities of the state.

As we have seen, the political values and beliefs, what might be called the political culture of a group, determine the formal pattern of government expressed through a constitution and laws, and this, in turn, provides the legal setting for public administration. It is the differences in the basic legal structure of various government — the different basic constitutional and legal frameworks— which create the differences in administrative law among nations or groups of nations. It is important, for example, for student to know whether the conception of “public administration” in a country is a broad one with implications for all the political institutions of the country, or whether, in a nation, “public administration” is regarded as merely the technical aspect of what the executive organs of government must do to accomplish public policy. Nations may have similar budget systems or the same kinds of social welfare programs, and maintain at the same time very different systems of administrative law. These mild paradoxes, although perplexing, need not keep us from an understanding the nature and role of administrative law and administrative regulation in the continental European and the Anglo-American systems.

THE EUROPEAN APPROACH.

In French and general European legal science, the functions of government are separate from the administration of civil and criminal justice. Crimes are punished and civil disputes between persons are judged by a separate system of courts and legal officials who do not, *in principle*, control the executive or administrative functions of government. The body of law which regulates official powers, which regulates the discretion of government officials, and which protects citizens against official actions where the civil codes are silent (or where changing conditions create controversies), was evolved outside the customary civil and criminal law and is termed "administrative law". Special administrative courts of major importance have grown up in these systems and the limits of official powers have been marked off in legal science separate from ordinary law.

THE COMMON LAW APPROACH

By contrast, the common law countries such as England and the United States long ago evolved an independent system of judicial courts with the power not only to punish crimes and settle legal disputes between individuals, but to adjudicate controversies involving the exercise of official powers, and to grant individuals relief from improper administrative actions. Through the centuries in common law countries, the ordinary judicial courts have retained their basic power of control over these controversies. However, administrative orders and the administrative regulation of persons and property were not an important part of the machinery of government in common law countries until the twentieth century, and the ordinary courts therefore, were seldom called upon to rule on disputes arising from administrative decisions.

An understanding of the systems in England and the United States depends on a further distinction. In European countries the ordinary civil courts occupy an inferior position in relation to the state and are unable to question the constitutionality of an act of the legislature. In England, although the courts do not have the power to question the constitutionality of legislative enactments, they may question the proceedings of administrative agencies where a complaint is made that an administrative order or action has violated the basic "law of the land"

which includes common law tradition and precedent, and statutory enactments of parliament including administrative procedures prescribed by parliament. The American system expands the power of the courts further and, as a general principle, there is no legislative or administrative act which cannot be reviewed by the ordinary courts. In other words, a question regarding the basic constitutionality of any action by any branch or agency or officer of the government can be raised for consideration in any legal controversy which is being tried by a regular judicial court. Thus, there are substantial difference in the powers of the judicial or civil courts between the "common law" and the European legal systems.

THE DEVELOPMENT OF ADMINISTRATIVE LAW IN FRANCE

Because the French legal system is an important source of present-day administrative law in many parts of the world including Asian countries it is useful to note the significant elements represented by it. A tradition of centralized administrative authority in France became strong in the sixteenth century and the responsibility of the monarch for administration was complete in the eighteenth century at the time of Louis XIV. Virtually no discretion was allowed regional or provincial officials and no opportunity was afforded for independent administrative authority to develop at the center of the Kingdom. Napoleon Bonaparte completed the centralized system formalized as the "Code Napoleon", and the Council of State (Conseil d'Etat) gradually evolved into a tribunal and became the main forum for administrative disputes of all kinds.

The nineteenth century brought a vast expansion of the functions of the state during a period of industrialization, urbanism and population growth. These conditions placed increased administrative responsibilities on the state at a time when political liberalism increased the number of conflicts between the state and the individual. It became necessary to secure the legal rights of individuals during a period when governmental powers were expanding and the extent of governmental activity was being greatly enlarged. The functions of the state in France had long been regarded in a positive sense, and the Council of State assumed the new functions of principal administrative court of the nation without political or administrative difficulty.

The creation of the Third French Republic in 1870—71 completed the development of this major tendency and brought a clear separation of executive and judicial functions in that country. It was at this period that the civil courts developed fully their doctrine of refusing to judge administrative cases, and the Council of State in the celebrated case *L'Arret Peletier* firmly established the principle that administrative acts of government must be judged by administrative courts.

(It should be noted further that administrative acts have taken on a special character in the "Droit Administratif" countries. These acts are considered to belong to the body of administrative law, whereas ordinary administrative rules and regulations (*régles et réglemens*) are not properly a part of the main body of law.)

The implications of this development for public administration and administrative law were considerable. The Council of State, a direct arm of the executive, became the court and the principal exponent of a system of law dealing with the claims of the individual against the government. This derived from the view, held logical in France, that because of the great power of the state, the disproportion of power between it and the individual was so large that only a special court with independence from the government, as well as expertness in governmental matters, could satisfactorily protect individual interests and also determine the proper legal limits of administrative authority. It is significant that the Council of State, as the court for determining the legality of official acts developed as an arm of the executive and not as a part the judiciary branch of government.

French administrative law developed out of the direct administrative controls with which its society was familiar and had as its object the regulation of the structure and functioning of the administrative organs of the state as well as governing the powers of public officials (except judges and members of the legislature) in their relations with each other and with private citizens. In recent years it has been recognized that administrative law relating to government activities may extend to more than official controls and regulation of administrative conduct, and may be expanded to include the active promotion or sponsorship of a public cause or enterprised by government agencies and other public

bodies. The basic purpose of administrative law in European remains, however, determination of the legality of official actions.

ADMINISTRATIVE LAW IN ENGLAND AND THE UNITED STATES

While brief mention has been made of the nature of the court system in common law countries and of the general nature of French administrative law, a more extensive account will be developed here of the fundamentals of Anglo-American administrative law. This is done for two principal reasons. First, the student in Korea has available a considerable amount of writing about the French and Japanese legal systems from which much of the Korean system is derived. Second, little has appeared in Korean on the common law systems and the development of administrative law and administrative regulation in England and the United States. Inasmuch as Korea now has much contact in the form of military, diplomatic, commercial and cultural exchanges with these countries and is experiencing some of the social change already undergone by them, it may be appropriate to illustrate the principal factors which have influenced administrative law in the common law nations.

BACKGROUND OF THE COMMON LAW SYSTEMS

Whereas the French and continental systems grew out of traditions of centralized governmental authority, the English and American conceptions developed out of a heritage of dispersed, limited or decentralized authority in which freedom from extensive central government control had long been emphasized. The rise of democracy in the eighteenth centuries and the growth of large industrial civilizations required new methods of government and new techniques of administration.

The traditional beliefs of Anglo-Saxon countries had developed the concepts that whenever the law forced a citizen to act against his will or when legislation or legal enactments affected the rights of a citizen, the controversies which arose could be left to the ordinary courts and to the centuries-old legal customs and precedents of the so-called common law. The common law derived from traditional group social customs and had binding force on individuals. It was an individualistic legal philosophy that was matched by a political philosophy which:

(a) sought to minimize government ; (b) distrusted strong executive power ; (c) believed in the legal separation of governmental power ; (d) had great respect for the supremacy of the traditional common law ; and (e) maintained elaborate legal procedures in order to protect persons and property to assure what was termed "due process of law". However, the needs of the modern age were not well served by these philosophies and both the legal and political systems had to make adaptations to modern conditions.

POITICAL AND SOCIAL CHANGE

By the end of the nineteenth century, government became the concern of the individual "common man" and the idea spread widely that politics was a means through which ordinary citizens might achieve a better life and society. To this was attached the view that the conditions of life and of society are a necessary and proper concern of government. The quickening of industrial and social change brought new relationships between the individual, the social and economic classes, the property owning and laboring classes, and the state. The government moved slowly but steadily to regulate private interests through broad grants of power of to administration agencies and officials who were permitted to issue rules, regulations and orders of legal effect. In the formerly individualistic, "laissez-faire" nations, control of a wide range of formerly unregulated private activities by governmental administrative agencies charged with protecting the "public interest" by means of administrative measures of their own devising, became an accepted fact.

THE GROWTH OF ADMINISTRATIVE POWER

Legislatures elected by the people with the duty of making laws for the nation began to discover that the speed of social change made slow, deliberative decisions quickly obsolete or inadequate, and they were forced to be content to establish general standards for public policy, leaving the details of operation to a host of new administrative agencies. Particularly in America there was a reluctance to leave the new areas of social action to the established departments of government and there were created many specialized administrative agencies.

These were agencies which regulated or developed some new area of social life which had become a matter for the attention of the government. Examples are found in such fields as civil aviation, radio and television communication, labor unions, social insurance and protection of consumers in an industrial civilization. The new agencies had power to undertake investigations, to make rules, to hold hearings and force the attendance of witnesses, to act like courts, to render decisions, and to enforce their rulings and judgments. A special study committee set up by the chief legal officer of the United States government, the Attorney-General, stated in 1941 the general purposes of the "regulatory agencies":

It is well recognized that the purpose of Congress in creating or utilizing an administrative agency is to further some public interest or policy which it has embodied in law, whether it be a unified transportation or communications system, or old-age security, or the prevention of unfair practices in competition or in labor relations. But everyone also recognizes that these public purposes are intended to be advanced with impartial justice to all private interests involved and with full recognition of the rights secured by law. Powers must be effectively exercised in the public interest, but they must not be arbitrarily exercised or exercised with partiality for some individuals and discrimination against others.

THE DEVELOPMENT OF EXPERT ADMINISTRATION

The growth of administrative regulation has led to the development in turn of select, compact groups of persons; experts in government and in particular fields of public administration. It is true to say that the political developments of the past century have relied heavily on the development of expert administration as an answer to the limitations of the judicial and the legislative processes. James M. Landis has written that the exercise of administrative power moves in an atmosphere which embraces what is usually accomplished only by government as a whole. That is, the administrative process is not simply an extension of the executive branch of government, but as professor; John D. Millet has noted, "there is an element of separate identity to be observed in

practice between the legislative, executive and judiciary on the one hand... the organs of political decision-making... and the various administrative agencies of government which in their aggregate comprise the bureaucracy on the other..." Admittedly, there are inadequacies in a simple three-part division of government powers and much of need for the administrative process in the United States springs from this source.

DEVELOPMENT OF ADMINISTRATIVE TRIBUNALS

The number of legal disputes about the growth of administrative powers became so large that the traditional civil courts were overburdened. Gradually, the administrative agencies which made investigation and issued regulations were granted limited judicial authority. Thus, it has developed that the majority of administrative disputes are now processed and resolved at the administrative level by courts consisting of the administrative department themselves with a method of appeal to the regular judicial courts provided if either party believes that a legal issue still remains unsettled.

Professor Bernard Schwartz writes that there exists in the United States a sort of administrative jurisdiction in a large sense; and it is under these assumptions that one speaks ultimately of "administrative tribunals". These are the jurisdictional organs such as the National Labor Relations Board, The Federal Trade Commission and others. They are administrative organs, independent or not, having the power to affect private obligations and rights. Instead of one major administrative court, therefore; the American system of administrative justice of many boards, commissions and tribunals, each one of which exercises a unique jurisdiction and, except for certain uniform procedural requirements, follows its own separate procedures.

ADMINISTRATIVE ADJUDICATION

In America, administrative regulation and administrative adjudication developed, in large part, to protect what is called "the public interest", and in this field law was generally lacking and precedents were not found. The common law offered little help in dealing with new administrative question. The new administrative agencies often found themselves in opposition to the civil courts and had,

practically, to measure the extent of their powers by themselves from the start. They have done this with much ingenuity and flexibility in ways which represent a marked difference from the European pattern.

In the United States writes Professor Roland Pennock, there are four classes of administrative agencies whose work concerns the legal rights or obligations of individuals or legal person. These are :

1. *The regular bureaus and departments of government*, as when the administrator of the Veterans Administration reviews decisions of the Insurance Claims Council of that agency, or the Secretary of the Interior reviews Land Office decisions.

2. *Fact-finding bodies with some adjudicate power*, examples being the General Accounting Office when it hands down legal opinions, or the United States Tariff commission, which is primarily a fact-finding body but which also discharges some adjudicative functions.

3. *The independent regulatory commissions*, the best known of which are the state workmen's compensation commission, state public-utility commission, the Interstate Commerce Commission, The Federal Trade Commission and others.

4. *Special types of so-called administrative courts*, such as the United States Court of Claims or the Board of Tax Appeals. These agencies are hard to classify, but the trend in the United States is toward more of them.

Their work has been characterized generally by more speed, greater flexibility and an absence of many of the cumbersome methods of traditional law. The way in which many of these new agencies held hearings, gathered evidence, listened to complainants and witnesses, weighed and judged facts, and arrived at decisions aroused opposition from the conservative elements of the legal profession and the regulated interests. Together they have made efforts in recent years to "judicialize" the administrative process, particularly as it relates to work of administrative or regulatory agencies. A balance has been struck with respect to encouraging the administrative courts and agencies to follow many of the

traditional legal procedures particularly in such areas of Anglo-American legal specialty as "evidence", "official notice", "separation of functions", and the right to be represented by counsel.

The ordinary courts have assisted the development of administrative courts by their own self-imposed doctrine of "administrative finality". Generally speaking, this means that the judicial courts will not interfere with administrative actions or decisions unless it can be shown that the actions were clearly a violation of the law or that the administrator exceeded the powers granted him by the law. In American administrative law the control of administrative agencies by the judicial courts is broader than merely hearing and deciding appeals for it must be noted that the courts can order or restrain the performance of an official action, and, if necessary, take physical custody of the administrator.

When an administrative agency or court has made a decision, the person affected or the government may appeal on legal grounds to the regular courts, but by far the greatest number of administrative disputes are settled by internal procedures at the administrative level. Moreover, in the United States as a result of informal and decentralized administration and the great size of the government, much specialization has developed in the handling of administrative problems and disputes. Each agency from the traditional Post Office Department to the newer Atomic Energy Commission has special staff whose primary duties are in the field of administrative law and procedure.

THE PROBLEM OF DEFINITION

Legal theorists in Britain and the United States have had difficulty in developing satisfactory definitions of administrative law. As recently as 1915 Dickey, the English scholar, was denying the existence of administrative law in British jurisprudence. The problem comes in large measure from the fact that in the common law countries, administrative responsibility had traditionally been conceived of in a negative sense and the work of government was viewed as that of arbiter or referee between freely-competing social and economic forces. The newer regulatory functions of administration have served as the principal stimulus for the development of systems of administrative law.

Administrative law, as the words imply is concerned with the administration of government affairs, but several questions arise. Is it simply the law which establishes the structure or pattern of government organization? Shall it also include the law which establishes the powers and duties of government officials and regulates the functions of the various department? Should it include what the English call "delegated legislation" and does it include the law is made by administrative agencies? Is it, in effect, the whole body of law relating to public administration, and if so, what are its relations to constitutional and statutory law? Where should control lie? Many of these questions are unsettled and in process of further development.

Most common law scholars define administrative law as *the law which controls the powers and procedures of administrative agencies, or the law of official power and its control by judicial means*. The main problems of administrative law in America, says professor Ernest Freund, relate to the nature and operation of official power, the procedures by which these powers are carried out, the extent of official liability for improper action, the jurisdictional limitations on the exercise of official power, the question of the finality or conclusiveness of administrative decisions, and various judicial remedies which may be available for controlling administrative action. Textbooks of law in the United States, for example, seldom refer to Administrative Law under a single heading. Instead, they discuss "Administration and the Law", "Administrative Legislation", "Administrative Adjudication", "The Administrative Process" and similar topics.

SUMMARY

The growth of administrative law in the Anglo-American world came as the result of changing society and the necessity to regulate individual interests in ways not provided by traditional legal procedures. The development of law in common law countries is not the end result of logical and systematic attempts to create fixed "codes of law", but is continuous and moves slowly forward on an empirical and inductive basis. Anglo-American law is designed primarily to settle disputes and not to support or advance government policies, and thus the development of administrative law and public administration has been quite different

from that in European countries.

There is not a great distinction in America between public law and private law, or between administrative jurisprudence and general jurisprudence. American administrative law has come from the gradual adaptation of traditional law to the problems of society and this takes place more easily than in "code law" countries. The law is always in the process of development and judges apply new solutions to concrete cases in the never-ending search for the principles of the common law.

Most American and English administrative law concerns control of administrative agencies by the courts, for, as the new agencies of administration were created to carry out broad grants of power from the legislature, they largely made their own law subject to certain basic controls by ordinary courts. The American student learns about administrative law by reading "cases" decided by the courts, and even the laws which govern the administrative procedures of government are subject to differing interpretations by the courts.

Rule making in administration (administrative legislation) is now an accepted practice. The general statutes creating a new agency or establishing a new policy to be followed by an existing agency often express only the broad intent of the legislature and the administrator must establish the detailed standards to be followed in applying the statute. Thus, a considerable amount of administrative discretion is allowed in this system, and the courts demand only that the administrator be legally empowered to act and that his decision be clear and reasoned. The courts endeavor primarily to prevent arbitrary, capricious, or illegal actions and not to guarantee the wisdom or social necessity of administrative actions.

It is one of the axioms of French legal theorists to declare that "administrative intervention to assure respect for law corresponds to a real social necessity". This asserts that there exists a general power of government administration which may be used according to circumstances arising from attempts to interfere with the administration of public business. No such power exists in American administrative law (except for a limited number of what are called "summary powers") to enable administrative authorities to enforce their acts without the approval of a

judicial court. There is no recourse to a *general power of administration*. In effect, therefore, the administrator executes what are essentially judicial decisions relative to the administrative competence and legality of his actions. It is the ordinary civil courts which give the stamp of legal approval to administrative decisions.

In Anglo-American administrative law, the essential quality is flexibility and a majority of administrative disputes are resolved at the administrative level. In continental European administrative law, there is much more rigidity and formalism, and administrative disputes are resolved only at a high level by a judicialized arm of the executive. It was natural in those countries with a tradition of a powerful, centralized government, that the administrative changes necessary to meet new conditions should come through direct legislation fixing the powers and duties of new administrative agencies to control or protect private and public interests. This has developed as a tradition in France where the powers of administration are rather strictly defined by legislation and a Council of State.

There is a certain vagueness and lack of precision in the common law system, while in the French formal system, administrative power below the level of the Council of Ministers is well defined. It is fair to say that in France at the present time, the Council of State can be as effective a control of administration as the ordinary courts of the common law countries, and despite differences in matters of both substantive law and procedure, the object of the two systems is the same ... to protect the citizen by appropriate means from arbitrary or illegal acts of his government.

If a glance in the direction of the future may be offered in conclusion, it is useful to speculate the informality and flexibility of the American and English systems at a time when Korea approaches an age of industrialization and modern social problems. Slow, cumbersome, formalistic administration is not a strong incentive to economic development and progressive social change, and the need exists to settle quickly and effectively the host of questions which urbanization, mechanization and high social mobility will bring. To the extent that the common law systems encourage such adaptability, they are worth close study as the Korean legal system continues to develop.