Evolution and Gestalt of the state in the United Kingdom

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Martin Loughlin

Outline

1. INTRODUCTION

1. The British system of government recognizes the fact of public authority but, at least until recently, not the concept of public law. The primary objective of this chapter is to explain how this distinctive situation came about and to identify some of the key features of that legacy. Since a concept of public law has emerged during the last fifty years, it will also seek to assess the contemporary implications of this recent development.

2. That the English succeeded in building up an efficient system of official administration from the earliest days without drawing a distinction between public law and private law is mainly a consequence of the formation of the common law. The existence of a body of ordinary law applied by the ordinary courts and binding on all persons irrespective of status or official responsibilities suggests that the binary division between public law and private law, which became a feature of continental European systems, could never evolve. But the source is deeper than the existence of the common law. The reason is to be found in the general history of the evolution of the English – and later the British – system of government.

3. The British have pursued a distinctive path of legal modernization. In particular, modernization in government has been achieved essentially by way of political adaptation rather than the juristic reconstruction of the foundations of public authority. Consequently, the basic concepts on which the modern European practices of public law rest have in the British context a thoroughly ambiguous meaning. It is therefore not possible to understand contemporary British practices with respect to public authority and public law without having regard to the historical evolution of the British system of government. This chapter will accordingly be organized with by reference to three of those basic concepts, the understanding of which renders the British experience different from that of most continental jurisdictions. These concepts are state, constitution and administration.

4. In a juristic sense, the British have never developed a clear concept of the state. 'We cannot get on without the State, or the Nation, or the Commonwealth, or the Public', noted F.W. Maitland, but that, he added, 'is what we are proposing to do'.[1] Maitland wrote

[1] *F. W. Maitland*, The Crown as Corporation, in: Collected Papers, Vol. III, H.A.L. Fisher (ed). 1911, p. 244 f., esp. 253.

those words at the end of the nineteenth century. Since then, the role of the state in the course of ordinary life has been transformed: government now assumes responsibility for the management of the economy and the social welfare of citizens to an extent which would have been almost inconceivable a century or more ago. Yet the situation has not since been properly remedied. The British still lack a clear legal concept of the state.

5. The reason for the lack of a clear concept of the state is a product of the path of modernization that has been taken. This lack is linked to the fact that, for the same reason, the British have also never established a constitution of the modern type. Although for much of the last 300 years the absence of an entrenched documentary constitution has often been a cause of wonder and admiration, the strains of possessing an extensive system of administrative government without the formal restraints of a modern constitution has recently become a source of concern. It has caused many commentators during the last fifty years, to advocate the need for fundamental constitutional reform, or to promote the cause of 'constitutional modernization'.[2]

6. This peculiar constitutional arrangement and unusual path of political-legal modernization has bequeathed a specific legacy: it has ensured that there has never emerged in the British system a hierarchical and undifferentiated concept of administration. One consequence of this is that the concept of administrative law has never acquired a sure foothold in British thought and practice. The traditional view was summed up by A.V. Dicey, the pre-eminent Victorian constitutional lawyer, in his comment to Joseph Berthélemy of the University of Paris that 'in England we no nothing of administrative law, and wish to know nothing about it'.[3] Although this position has been considerably modified during the twentieth century – it could hardly be otherwise given the formation of an extensive administrative government – contemporary arrangements carry the legacy of this (common law) mode of thinking.

7. The general point to be highlighted by way of introduction is that the contemporary British practices of public authority and public law cannot be grasped without paying careful attention to political history. Britain has, for good reasons, been referred to as a 'stateless

[2] *M. Loughlin*, The British Constitution: A Very Short Introduction, 2013.
[3] *W. A. Robson*, Administrative Law, in: Morris Ginsberg (ed.), Law and Opinion in England in the Twentieth Century, 1959, p. 193.

society', a society which lacks a state tradition.[4] Britain has, for good reasons, been characterized as a state that lacks a constitution.[5] Britain has, for good reasons, been identified as lacking a system of administrative law.[6] If we are to understand the ways in which state, constitution and administration are today recognized and thereby to appreciate the contemporary status of public authority and public law in the British system, it is necessary to explain something of this distinctive history.

2. STATE

2.1. Introduction

8. English law does not recognize a concept of the state. The closest equivalent is the concept of the Crown. But the Crown does not provide an adequate substitute primarily because the monarchical frame of the English system of government has frustrated any attempt to unravel the 'public' from the 'private' aspects of the sovereign's responsibilities. Although the king can conceptually be identified as an entity distinct from the concept of the Crown, in practice it proved impossible to separate king and Crown.

9. At the end of the nineteenth century, Maitland had been highly critical of those lawyers who unreflectively fell back on the idea of the Crown, holding that that concept was merely 'a convenient cover for ignorance' which 'saves us from asking difficult questions'.[7] But at least the Crown at that time maintained a distinctive status, with a special body of law having grown up around it.[8] During the course of the twentieth century, however, the Crown has lost many of its traditional immunities. The modern growth of government and the assumption by Ministers of the vast majority of the prerogative powers of the Crown has accentuated the limitations on the use of the Crown as a synonym for the state.

10. During the last fifty years, the judiciary has sought gradually to modify the nature of the traditional prerogative powers of the Crown and the terms on which this particular form of public power can be exercised, when faced with the apparent need to reconceptualise the idea of the Crown as a symbol of government, the judiciary has prevaricated. This prevarication has complicated the judiciary's continuing project since the 1960s of

[4] *K. H. F. Dyson*, The State Tradition in Western Europe, 1980, viii, p. 36–44.
[5] *A. de Tocqueville,* Democracy in America H. Reeve trans., D. J. Boorstin intro, 1990, Vol. I.
[6] *J. D. B. Mitchell*, The causes and effects of the absence of a system of public law in the United Kingdom, 1965, Public Law 95.
[7] *F. W. Maitland*, The Constitutional History of England, 1908, p. 418.
[8] See, e.g., *W. R. Anson*, The Law and Custom of the Constitution, Vol. II, The Crown, 1935; *A. B. Keith*, The King and the Imperial Crown, 1936.

developing a body of public law and setting in place a more realistic conception of the nature of public power and the conditions under which it may legitimately be exercised. With the gradual emergence of a concept of public law, some have argued that the situation has become more confused.[9]

11. In order to explain these developments and their implications, the processes of state formation in Britain will first be outlined and then the concept of the Crown and the nature of its prerogatives will be considered.

2.2. State formation

12. The most obvious reason for the lack of a concept of the state is the remarkable degree of historical continuity in the form of the principal institutions of rule. The state is a purely modern concept and the fact that there has been no permanent rupture which brought the British the paraphernalia of modern settlements – written constitutions, documents proclaiming the fundamental principles of the political order and such like – has meant that state formation in Britain has been a fairly slow process of incremental adaptation of the governing apparatus to the exigencies of the moment.

13. The most rudimentary objective in the early stages of state formation is invariably that of securing the authority of the ruler. In England, this process was consolidated at a comparatively early stage in European history. This was largely as a consequence of the Norman Conquest of 1066 and the Norman exercise of statecraft.[10] By the time of the accession of Edward I in 1272, the right of monarchical succession had been undisputedly established. This early achievement ensured a relatively high degree of centralization of official power. Of particular importance was the degree of legal integration that was achieved as local courts became supplanted or transformed into the king's courts. The establishment during the thirteenth century of this high degree of legal uniformity throughout the country then brought about the creation of the common law.[11]

14. By centralizing early, England was able to avoid many of the dangers of political feudalism, which threatened neighbouring states of continental Europe. One consequence was that the central authority was able to leave much of the internal government of England to ancient local institutions.[12] The pattern of what has been called 'self–

[9] See *J. M. Jacob*, The Republican Crown: Lawyers and the Making of the State in Twentieth Century Britain, 1996.
[10] *J. Le Patourel,* The Norman Empire, 1976.
[11] *R. C. van Caenegem,* The Birth of the English Common Law, 1988.
[12] See *M. Loughlin*, Legality and Locality: The Role of Law in Central–Local Government Relations,1996, 14–17. On the contrast with continental Europe see: *J. W. F. Allison*, A Continental Distinction in the Common Law. A Historical and Comparative Perspective on English Public Law, 1996, p. 72–73; *R. C. van Caenagem*, Judges, Legislators and Professors: Chapters in European Legal History , 1987, ch. 2, esp. p. 93–94.

government at the King's command'[13] was thus a product of the unrivalled authority of the central power. The practices of local government were able to evolve in England mainly because of the high degree of centralization of authority.

15. The subsequent history of institutional development has been one of slow adaptation of ancient forms to various shifts in power relations. Occasionally the general objective of strengthening monarchical authority had to be tempered by incorporation, that is, by assimilating those power brokers who could not be removed. In England, this was accomplished with the nobles through the Privy Council and the regional power-brokers through Parliament. When during the Reformation, Henry VIII exerted his sovereign authority by eliminating the privileges of the church, he was obliged to make use of the instrumentality of Parliament. 'We at no time stand so highly in our estate royal as in the time of Parliament', Henry declaimed, 'wherein we as head and you as members are conjoined and knit together into one body politic'.[14] This is the critical moment at which the unlimited legal power of the Crown-in-Parliament is asserted.

16. After the constitutional conflicts of the seventeenth century, this monarchical frame of government underwent significant modifications. These modifications were effected mainly by a process of rearrangement of the partners in authority; that is, by altering arrangements for representation in the House of Commons, or appointment to the House of Lords, or for participation in the executive authority of government. Through the establishment of a constitutional monarchy[15] (and thus, arguably, the formation of a 'disguised republic'[16]), the gradual extension of the franchise, the institutionalization of the principle of representative and responsible government,[17] the limitation of the power of the hereditary principle,[18] and the emergence in twentieth century of the practices of party government, a system of government in which the executive powers of the Crown are exercised by the party controlling the Commons – what some have called a regime of 'elective dictatorship'[19] – was consolidated.

17. This process of incorporation of partners in authority must also be understood broadly as one that also encompassed enlargement.[20] By the early seventeenth century, borders had

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[13] *A. B. White*, Self–Government at the King's Command, 1933.
[14] Ferrers' case (1543), excerpted in*: G. R. Elton* (ed.), The Tudor Constitution: Documents and Commentary, 1960, pp. 267, 270.
[15] See *V. Bogdanor*, The Monarchy and the Constitution, 1995, ch. 1.
[16] *W. Bagehot*, The English Constitution [1867], 1963, p. 94: "A Republic has insinuated itself beneath the folds of a Monarchy."
[17] *A. H. Birch*, Representative and Responsible Government, 1964; *D. Judge,* The Parliamentary State, 1993.
[18] Parliament Acts 1911, 1949; Life Peerages Act 1958.
[19] *Lord Hailsham*, The Dilemma of Democracy: Diagnosis and Presciption, 1978, ch. 20.
[20] See *R. R. Davies*, Domination and Conquest. The experience of Ireland, Scotland and Wales 1100–1300, 1990.

been mostly removed throughout the British Isles: since 1535, Wales had been absorbed into English lands; the English conquest of Ireland had been brought to a successful conclusion by the end of the sixteenth century; and in 1603 Scotland and England became united dynastically. In 1707 the union of the Crowns was extended by the construction of a unitary state through the establishment of a common legislative and fiscal – though not judicial – framework. While some have contended that this Treaty of Union should be seen as providing a form of modern constitutional settlement,[21] it seems 'idle to deny that Scotland was swallowed up in an anglo–centric Britain, instead of England being absorbed into a polycentric one' and, more generally, that 'a large part of medieval and modern "British" history can be seen as a process of conquest and forcible anglicisation'.[22] And although Ireland eventually achieved its liberation in the early twentieth century, six of the historic thirty-two counties remain as part of the state of the United Kingdom of Great Britain and Northern Ireland.

18. The United Kingdom now has a common language, though only through practising what Aylmer calls 'a kind of linguistic ethnicide'.[23] But other than in a purely political sense, it is not a nation–state. It maintains a peculiar boundary (especially at its north–western edge[24]), has no common law[25] or religion,[26] and has assumed its present form through a combination of conquest, treaty, Acts of Parliament, and rebellion. These factors take on a particular significance when one considers the structure of public authority within the state. The history explains why there is a certain coherence in talking about the English state, why it may be difficult to formulate an adequate concept of the British state,[27] and why the United Kingdom may not constitute a state.[28] What does seem clear, is that the formation

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21 *T. B. Smith*, The Union of 1707 as Fundamental Law, 1957, Public Law, p. 99; *N. MacCormick*, Does the United Kingdom have a constitution?, 1978 29 *Northern Ireland Legal Quarterly* 1; *M. Upton*, Marriage Vows of the Elephant: the Constitution of 1707, 1989, Law Quarterly Review 79, p. 105; *Colin Kidd,* Union and Unionisms: Political Thought in Scotland, 2008, p. 1500–2000.

22 *G. Aylmer*, The Peculiarities of the English State, 1990 3 *J. of Historical Sociology* 91 at 94. See also *J. G. A. Pocock,* Political thought in the English-speaking Atlantic, 1760–1790: (i) The imperial crisis, in: Pocock (ed.), The Varieties of British Political Thought, 1500–1800, 1993, p. 246, 258 (rejecting the idea that the union was a 'federating' union rather than an 'incorporating' union). See further, *J. Robertson,* A Union for Empire: The Union of 1707 in the History of British Political Thought, 1999.

23 *Aylmer*, ibid., p. 95.

24 The abnormality of which is acknowledged, e.g., in the referendum guarantee given in the Northern Ireland Act 1998.

25 Although the English common law was imposed in Wales and Ireland as well as England's colonial empire overseas, Scotland maintains a separate legal system which is protected by the guarantees in the Articles of Union 1707.

26 The reference here is not so much to the prevalence of other faiths and denominations within the UK but rather to the existence of different established Churches in England and Scotland. Anson noted that: 'The King is Head of the Church, not for the purpose of discharging any spiritual function, but because the Church is the National Church, and as such built into the fabric of the State. The Crown itself is held on condition that the holder should be in communion with the Church of England as by law established.' (*Anson*, above n. 8, p. 250). But the Act of Union 1707 states that a 'fundamental condition of the Union' which must 'continue in all times coming' is the securing of the Protestant religion and Presbyterian Church government, with the establishment in the said Act contained' (s.5). See *Jacob,* The Republican Crown, p. 305 (who highlights the fact that Anson got it wrong: the Head of the Church of England is Christ; the monarch is the supreme governor); *Bogdanor*, The Monarchy and the Constitution, above n. 15, ch. 9; *Francis Lyall*, Of Presbyters and Kings. Church and State in the Law of Scotland, 1980.

27 On this issue see: *J. G. A. Pocock*, The Limits and Divisions of British History: In Search of the Unknown Subject, 1982, p. 87. American Hist. Rev. 311.

28 This is indicated by the existence of a referendum provision in the Northern Ireland Act 1998, the substance of

of the United Kingdom has been an essentially English project and it has been constructed from the centre.

19. Constitutional scholars from the great Victorian jurists (Austin, Dicey, Anson) onwards, have tended to stress the claim that the sovereignty of Parliament is 'the dominant characteristic of our political institutions'.[29] From this position, it is easy to assert that 'the members of the Commons' house are merely trustees for the body by which they are elected'[30] and therefore to claim that these political institutions express the principle of popular sovereignty or democracy. In this manner, the continental idea of the state as an entity that exists as a power distinct from society is suppressed.[31] But once the historical processes of state formation are examined, the basic principle of sovereignty is cast in a more appropriate light.[32] The doctrine is, in reality, an expression of the sovereignty of the state; that is, of the sovereign authority of the Crown acting through Parliament (Lords as well as Commons). Further, this is a Parliament, which came into existence as an emanation of royal power[33] and as the outcome of a struggle by the people for a voice in the running of the affairs of state,[34] a struggle which persists in a continuing tussle between the partners in authority.

20. This outline of the processes of state formation in the British context highlights some of the difficulties in presenting a succinct statement of the structure of public authority. A legal concept of the state has not been instituted because the slow, laborious history of adjustment has meant that there is a gulf between substance and form in British institutions of government and that these shifts have been effected through understandings and practices which are not formally reflected in law. As Maitland notes, 'the more we study our constitution ... the less do we find it conforms to any plan as a philosopher might invent in his study'.[35] It is important to keep this history in mind because, as Dyson stresses, societies in which a strong conception of the state has been forged tend to be those which exhibit, among other features, a 'concern for formalization', 'a consciousness of institutions which reflects the strength of legalism and codification within the political

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which is to enable the six provinces to rejoin the Republic of Ireland if and when a majority of the population of Northern Ireland votes for this in a border poll.

[29] *A. V. Dicey*, An Introduction to the Study of the Law of the Constitution, 1915, p. 37.

[30] *John Austin*, Lectures on Jurisprudence, Vol. I, 1885, p. 246. Dicey (ibid., 73) criticizes Austin's formulation but only because he fails to maintain the analytical distinction between legal and political conceptions of sovereignty: 'The language ... of Austin is as correct in regard to "political" sovereignty as it is erroneous in regard to what we might term "legal" sovereignty. The electors are a part of and the predominant part of the politically sovereign power. But the legally sovereign power is assuredly, as maintained by all the best writers on the constitution, nothing but Parliament.'

[31] See, e.g., *T. R. S. Allan*, Law, Liberty, and Justice. The Legal Foundations of British Constitutionalism, 1993, esp. ch. 3.

[32] See, e.g., F. W. *Maitland*, A Historical Sketch of Liberty and Equality as Ideals of English Political Philosophy from the time of Hobbes to the time of Coleridge, in: Collected Papers, Vol. I, 1911, p. 19; *Sir Frederick Pollock*, An Introduction to the History of the Science of Politics, esp. ch. 4.

[33] *F. W. Maitland*, above n. 7, 172–177.

[34] Further, it was not always viewed as a struggle; initially,? it was experienced primarily as a burden. See, *F. W. Maitland*, ibid, p. 62, 87–89, 174.

[35] *F. W. Maitland*, ibid., p. 197.

culture and reveals itself in the ubiquity of formal organizations and their detailed constitutions', and 'even when parliamentary and party government is accepted, the idea that the executive power is a public institution that is detached from, and has a basis of authority outside, Parliament'.[36] These are all tendencies which have been rejected in the British experience of state formation. These go some way towards offering an explanation of why the structure of public authority often appears to lack clarity and system.

2.3. The Crown, the Government and the Body Politic

21. Although there is an evident need to fix in law some symbol of official authority, throughout English and British history, there has been an apparently indiscriminate use of such terminology as 'the Queen', 'Her Majesty', 'the Sovereign', and 'the Crown'. Because the former terms are too personal easily to be able to stand as a general expression of official authority, resort has been made to the more abstract idea of 'the Crown'. But the process of substitution has been haphazard and faltering.[37] Might it nevertheless be used as a synonym for the state?

22. Sir Edward Coke CJ maintained that the Crown 'is an hieroglyphic of the laws', explaining that what this signifies is 'to do justice and judgment, to maintain the peace of the land, etc, to separate right from wrong, and the good from the ill'.[38] In Coke's formulation, the Crown is evidently being used as a legal symbol of public authority. This has its attractions. The problem has been that lawyers have been unable to carry out this work. When confronted with this issue, they have been unable to address it in a systematic manner. Institutional continuity has had the consequence that there has been no distinct break between what Maitland termed 'folk-law' and 'jurist–law', meaning that English lawyers have been unable to delve too far into the realms of 'legal metaphysics'.[39] Yet this type of inquiry cannot be avoided if fundamentals are to be examined. The difficulty is that it takes us deep into the categories of medieval legal thought.

23. The critical issue to be examined concerns the way that medieval lawyers undertook the task of converting the king's authority into a more impersonal sense of official authority. This work was initially carried on mainly through changing conceptions of landed property held by the king. The pivotal moment in this process occurred when Henry II established

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[36] *Dyson*, above n. 4, p. 51.
[37] Sir William Anson was more systematic than most. He argued that 'there is a real dualism in our constitution' which has arisen as a result of the bifurcation of the legislative and executive powers; the former of which is located in 'the Crown in Parliament', while the latter vests in 'the Crown in Council': *W. R. Anson*, The Law and Custom of the Constitution, Vol. I, Parliament, 1911, p. 4. But *F. W. Maitland* (Crown as Corp p. 257), above n. 1, commented: 'It seems to me that in fully half the cases in which Sir William Anson writes "Crown", Blackstone would have written "King".'
[38] *Calvin's Case*, 1608, 7 Co. Rep 1a at 11b.
[39] *F. W. Maitland*, Township and Borough, 1898, p. 14.

an inalienable complex of rights and lands which in the thirteenth century became known as the *ancient desmesne*. Since these lands were not part of the King's private property, a distinction had to be drawn 'between lands falling into the monarchy by feudal right, and lands which were more properly the royal desmesne of the king, or of the Crown'.[40] It is here, in the emergence of the idea of an impersonal *fisc*, that we find the beginnings of a sense of the public realm. With respect to such public finances, for example, the barons were able to assert that these matters no longer touched the king alone but affected all within the community of the realm.[41] As the business of the realm extended, taxation became a regular occurrence and this gave rise to the sense of an impersonal, continuous institution charged with undertaking these public responsibilities.

24. In seeking a juristic formulation to express this nascent public–private distinction, medieval jurists drew on the symbol of Christ's two bodies developed in theological doctrine. They devised, by analogy, the notion of the king's two bodies.[42] The significance of the concept was most clearly expressed by Southcote J. in 1559:

> The King has two Capacities, for he has two Bodies, the one whereof is a Body natural, consisting of natural Members as every other Man has, and in this he is subject to Passions and Death as other Men are; the other is a Body politic, and the Members thereof are his Subjects, and he and his Subjects together compose the Corporation ... and he is incorporated with them, and they with him, and he is the Head, and they are the Members, and he has the sole Government of them; and this Body is not subject to the Passions as the other is, nor to Death, for as to this Body the King never dies, and his natural Death is not called in our Law ... the Death of the King, but the Demise of the King... So that it signifies a Removal of the Body politic of the King of this Realm from one Body natural to another.[43]

25. The invention of the idea of 'the body politic' was designed in part to bolster the principle of dynastic continuity. But dynastic continuity was not so contentious: since the thirteenth century it had been accepted that succession to the throne was immediate and dynastical and was in no way dependent on consecration by the Church or election by the people.[44] The main significance of the concept of the body politic concerned its role in

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[40] *R. S. Hoyt*, The Royal Desmesne, in: English Constitutional History: 1066–1272, 1950, p. 124.
[41] *G. Post,* Studies in Medieval Legal Thought, 1964, ch.4.
[42] *E. H. Kantorowicz*, The King's Two Bodies. A Study in Mediaeval Political Theology, 1957, p. 194.
[43] *Willion v. Berkley* (1559) Plowden 233a. See also *Hill v Grange* Plowden 177a; *Sir Thomas Wroth's Case* (1573) Plowden 452; *Case of the Duchy of Lancaster* (1561) Plowden 212. Of Plowden's reports, Maitland (above n. 1 p. 249) commented that 'I do not know where to look in the whole series of our law books for so marvellous a display of metaphysical - or we might say metaphysiological - nonsense.' For opposite opinion see: *Calvin's case* (1608) 7 Co. Rep. 1, esp. 10a–10b; *W. Blackstone*, Commentaries on the Laws of England, 1765, Vol. I, p. 238: 'the law ... ascribes to the king, in his political capacity, absolute perfection'.
[44] As *Coke* reported in Calvin's case, 1608. p. 7, Co. Rep 1, at 11a, it appeared 'by infinite precedents ... that by the laws of England there can be no inter regnum' and that 'by the descent, His Majesty was completely and absolutely King, without any essential ceremony or act to be done ex post facto, and that coronation was but a Royal ornament and outward solemnization of the descent.'

helping to resolve the question of the corporate character of the Crown. In this respect, however, its usage was more complex and ambiguous.

26. By the end of the twelfth century, a legal distinction had been drawn between the Crown and the King,[45] and by the fourteenth century the coronation oath required kings to swear to maintain unimpaired the rights of the Crown.[46] The concept of the Crown might therefore be taken to incorporate the entire body politic: king, lords, commons and the community of the realm. The problem was that different formulations presented themselves on different occasions.[47] The Crown remained an ambiguous and variable entity.[48] But because of a conflation between the Crown (in its corporate capacity) and the royal Dignity (the singularity of the royal office) a fusion was effected between the Crown and the Dignity. It is because of this conflation that the idea emerged that the Crown was a 'corporation sole'.[49] And it was this conflation that prevented the concept of the Crown from evolving into the *persona ficta* which continental jurisprudence recognizes as 'the state': that is, as 'a personification in its own right which was not only above its members, but also divorced from them'.[50]

27. This conflation was reinforced by the existence of a representative Parliament. It has been suggested that the presence of Parliament gave the idea of the body politic a uniquely concrete meaning such that there was no need to render it abstract. [51] The distrust of abstraction, the disinclination to permit the possibility of drawing of a clear distinction between king and Crown and the influential presence of a living Parliament all combined to shape the emergence of the Crown as a corporation sole and thus to prevent the emergence of a more abstract, and more coherent, legal symbol of public authority.

28. This failure has caused difficulties for the recent attempts by the judiciary to develop a distinctive concept of public law. In *Town Investments Ltd* v *Department of the Environment* [1978] AC 359, a case concerning the question of whether an office lease was to a government department or to the Crown, the House of Lords was required to review the question. In his leading opinion, Lord Diplock held that the Court of Appeal had erred in

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[45] For an analysis of the origins of this distinction see, *G. Garnett*, The Origins of the Crown, in: J. Hudson (ed), The History of English Law. Centenary Essays on Pollock and Maitland, 1996, p. 171.
[46] See *Kantorowicz*, above n. 42, p. 354–358.
[47] 'The *universitas* might be represented by Parliament or even by the king as *King*', noted Kantorowicz, but what seemed of particular importance was that the existence of this distinction made possible the attribution of a corporate character to the Crown. Ibid, p. 363. See also p. 381: 'The Crown was the owner of inalienable fiscal property; the Crown defended inalienable rights "which touched all"; and legal disputes arising therefrom as well as criminal cases ... were treated as pleas of the Crown. The Crown, as the embodiment of all sovereign rights ... of the whole body politic, was superior to *all* its individual members, including the king, though not separated from them.'
[48] Ibid, p. 382
[49] *Case of the Duchy of Lancaster* (1561) 1 Plowden 212. *F. W. Maitland*, The Corporation Sole, in: Maitland Selected Essays, Hazeltine (ed.), 1936, ch. 2.
[50] *Kantorowicz*, p. 382.
[51] *Kantorowicz*, p. 447.

assuming that 'the ordinary principles and concepts of private law' applied to the interpretation, since 'it is not private law but public law that governs the relationships between Her Majesty acting in her political capacity, the government departments ..., the ministers of the Crown ... and civil servants of all grades who are employed in those departments'.[52] Nevertheless, acknowledging that 'the vocabulary used by lawyers in the field of public law has not kept pace ... with the continuous evolution of the constitution of this country from that of personal rule by a feudal landowning monarch to the constitutional monarchy today',[53] Diplock accepted that the concept of the Crown was a legal fiction that was causing confusion. He suggested that this could be eliminated if 'instead of speaking of "the Crown" we were to speak of "the government".'[54] Thus understood, the signing of the lease in the case at hand was undertaken by 'the government' or by the Crown in the fictional sense in which that term is used in public law.

29. Lord Diplock's opinion was, in general terms, concurred in by the majority.[55] Diplock had accepted that in law the Crown is technically a corporation sole,[56] but he maintained that this must now be recognized to be a fiction. In public law, it should be treated as a term of art, which stands for the government.[57] We can appreciate Diplock's exegesis as an attempt to unravel some of the effects of the original medieval confusion and, in the context of the emergence of a concept of public law, to establish the idea of the Crown as a legal symbol of public authority. But his attempt to do so has not been without difficulties or commanded universal support. In *M v Home Office* [1993] 3 WLR 433, the House of Lords – faced with the need once again to fix a meaning on the concept of the Crown - fudged the issue. Giving the judgment of the court, Lord Woolf simply noted that 'for some purposes the Crown has a legal personality' and that it 'can be appropriately described as a corporation sole *or* a corporation aggregate'.[58] Having held that Ministers of the Crown were subject to mandatory orders in public law, the court merely concluded that, although 'in the theory which clouds this subject the distinction is of the greatest

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[52] [1978] AC 359 at 380.

[53] Ibid., p. 381.

[54] Ibid., p. 381. 'The Government should be employed to embrace both collectively and individually all of the ministers of the Crown and parliamentary secretaries under whose direction the administrative work of the government is carried on by the civil servants.'

[55] The only dissent was from Lord Morris who adopted the traditional approach that the phrase 'the Crown', while often used in different connotations, does not incorporate a Minister on the ground that Ministers are Ministers 'of the Crown' and are commonly referred to as servants of the Crown. Lord Morris concluded that, 'even if the grandiloquent description of being an "emanation" of the Crown is applied to him, he remains separate from the Crown and is not and does not become the Crown'. (ibid., p. 393). Note, however, that though Lord Kilbrandon agreed with Diplock's conclusions he stated that 'I do not think it would serve a useful purpose if I were to attempt my own analysis of the status under our constitution of ministers in their relationship with the Crown.' (ibid., p. 402).

[56] Ibid., p. 384.

[57] Ibid., p. 400.Though agreeing with Diplock's analysis, Lord Simon went one stage further and maintained that this fiction of the corporation sole should be eradicated and the Crown should be treated as a 'corporation aggregate headed by the Queen'.

[58] [1993] 3 All ER 537, 566 [emphasis supplied].

importance', there was no need to dwell on it in this case since it 'is of no practical significance'.[59] I

30. Lord Woolf has been more candid in his extra-judicial writing. After identifying the Crown 'as a synonym for [the immense power which was exercised by the Sovereign in the past]', he accepts that these powers 'are the powers of the State which are exercised by the Executive'.[60] Woolf adopts Lord Diplock's usage of the Crown as the Government and explains that, though an abstraction, the concept of the Crown has legal personality.[61] And on the critical question of the nature of this legal personality, Lord Woolf openly acknowledges the ambivalence: 'While the Crown can hardly be both a corporation sole and aggregate as they are quite different entities there are reasons for using both descriptions and it is difficult to say which description is the more appropriate'.[62]

2.4. Crown Prerogatives

31. Once the Crown is utilized as a symbol of public authority it represents the power and majesty of the community of the realm. But because of the confusion generated by the historic conflation of Crown and Royal Dignity, in practice the concept of the Crown has failed to do much work. Consequently, in formal legal terms, it is said that the Queen's fiat makes laws, it is her sentence which condemns, and it is her judgments which determine the rights and liabilities of her subjects. The Queen, as head of the government, appoints her Ministers; these Ministers are the Queen's servants and do not stand in any legal relation to Parliament. Further, this Parliament, which assembles in a royal palace at Westminster,[63] is summoned, prorogued and dissolved by the Queen. Justice is said to emanate from Her Majesty. All jurisdiction is exercised in her name, and all judges derive their authority from her commission. Every breach of the peace is a transgression against the Queen. She alone has the authority to prosecute criminals; when sentence is passed, she alone can remit the punishment. And as the fountain of honour, the Queen maintains the power of dispensing honours and dignities.

32. These royal prerogatives are sometimes said to be attributes of the monarch's ideal character, which might be taken to mean the Queen as Crown. Thus, although the ideal Queen may be the source of justice, at least since the reign of Henry III. the monarch has not been able to disturb the fountain or divert the stream from its proper channel, except

[59] Ibid., p. 551.
[60] *De Smith/Woolf/Jowell*, Judicial Review of Administrative Action, 1995, p. 204.
[61] Ibid., p. 205.
[62] Ibid., p. 206.
[63] See Houses of Parliament Act 1867, which refers to 'Her Majesty's New Palace at Westminster'.

through the agency of her judges.[64] Further, notwithstanding the formal legal position, it is evident that in the exercise of these prerogatives, the Queen is advised, directed and controlled by others.[65] But notwithstanding the modifications and adjustments which have been effected as to the manner in which these powers are actually exercised, the legal form, uniting two capacities in one person, not only remains but must persist.[66] Consequently, although the monarch presently enjoys no legitimate pretensions to the Crown except those, which derive from Act of Parliament,[67] the concept of the Crown cannot be disentangled from the person of the monarch. And since the Queen is the fountain of justice, it becomes trite law that no court can exercise jurisdiction over her. [68]

33. The conviction that the Queen can do no wrong presumably emerged from a conviction that the prerogative was created for the benefit of the people.[69] The question thus arose as to whether the Crown, the monarch in her politic as well as natural capacity, enjoyed a similar immunity from legal action. Once again, because the two capacities could not be disentangled from one another, these privileges inevitably had to be extended to the Crown. With the growth of the Queen's government, however, the immunity of the Crown from suit became a potentially oppressive burden. The adaptations, which ensured that the executive powers of the Crown were exercised by representative and responsible Ministers, alleviated some of the difficulties by establishing channels of political accountability. But, since the legal theory of government was formulated in terms of a set of royal acts, it apparently left the government immune from legal accountability. Here we see the direct consequence of the failure to cultivate a legal theory of the state. Since government departments are agencies of the Crown, they could not be held legally accountable for wrongful action which might injure subjects.

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64 For the most celebrated formulation see *Sir Edward Coke*, Twelfth Reports, Prohibitions del Roy, 1607, 12 Co. Rep. 63.

65 Hence the importance of what Dicey (Law of the Constitution, ch. 14) called 'conventions of the constitution', and which is elaborated upon in Bagehot's distinction between the 'dignified' ('those which excite and preserve the reverence of the population') and 'efficient' ('those by which it, in fact, works and rules') dimensions of the constitution: *Bagehot*, above n. 16, p. 61. 'The Crown is ... "the fountain of honour",' notes Bagehot, 'but the Treasury is the spring of business.' (ibid., p. 66). Note, however, that these conventions are 'vague and slippery' and 'they cannot be understood "with the politics left out".': *G. H. L. Le May*, The Victorian Constitution, 1979, p. 2, 21.

66 Note, e.g., the declaration of the English Parliament in 1642 concerning the Nineteen Propositions, which claimed for Parliament the right to nominate councillors, ministers and judges, to control the militia and to reform the Church. This may be understood as an attempt not only to separate the politic from the natural capacity of the King but also to transfer to Parliament the sovereign authority attributed to the king in his politic capacity. These claims do not easily survive the restoration. As Bagehot (ibid., p. 82) notes: 'The use of the Queen, in a dignified capacity is incalculable. Without her in England, the present English Government would fail and pass away.'

67 Act of Settlement 1700, which settles the succession on the Protestant heirs of the body of Princess Sophia (Electress of Hanover and granddaughter of James I of England).

68 *Blackstone*, Commentaries on the Laws of England, 1765, Vol. I, 239: 'The king, moreover, is not only incapable of doing wrong, but even of thinking wrong: he can never mean to do an improper thing: in him there is no folly or weakness.'

69 Some argue that the idea that the Queen can do no wrong derives from the impossibility of suing the monarch in her own courts. Whilst this may be true, it does not seem to go to the core of the issue. Its roots surely lie in the idea of omnia jurisdictio; that all jurisdiction and coercive power rests with the king. See, e.g. *Kenneth Pennington*, The Prince and the Law 1200–1600. Sovereignty and Rights in the Western Legal Tradition, 1993, p. 14.

34. Attempts have been made to mitigate this position. The Petition of Right, rooted in the attempt to do justice without the concession of legal responsibility, was invoked, though this was only with respect to issues of contract or restitution and did not extend to tortious claims.[70] Further, if the Queen's ministers or other servants appeared as defendants in litigation, it was a personal responsibility which they bore; an essentially official responsibility for governmental acts remained unknown since the law did not recognize 'the government' or 'the state'. This unsatisfactory state of affairs eventually came to be resolved through the Crown Proceedings Act 1947, the effect of which was to place the civil liability of the Crown on a similar footing to that of a private individual.[71]

35. With the extension of the administrative state during the twentieth century, the aberrations became of more pressing concern, fuelling the argument that what was needed was to develop a special system of public law.[72] Though the primary concern of the critics during the inter-war period was that of the culture of the common law, Maitland's reproach concerning the characterization of the Crown at common law lay at the core of their concerns. 'The way out of this mess', Maitland had argued, 'lies in the perception of the fact …that our sovereign lord is not a "corporation sole", but is the head of a complex and highly organized "corporation aggregate of many".'[73] As has already been noted, recent judicial attempts to reformulate the concept of the Crown in the context of developing a concept of public law have sought to follow his lead, though they have not been an unqualified success.

36. In developing this concept of public law the judiciary have nevertheless been obliged to reconsider the relation between the courts and the prerogative powers of the Crown. When the seventeenth century conflict over the locus of sovereignty was finally resolved in favour of the notion of the composite entity of the Crown-in-Parliament as its bearer, it was accepted that the Crown continued to enjoy extensive prerogative powers. Le May noted that these powers consisted 'in all powers regarded as necessary and proper for the defence

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[70] The Petition of Right originally was rooted in the monarch's personal control over his or her servants or property and difficulties thus arose when petitions were extended essentially to claims against the State, that is, to claims which could be satisfied only from funds which had vested in he Crown by way of Parliamentary appropriation. This difficulty was addressed by the (English) Petitions of Right Act 1860 which distinguished between petitions which "relate to any public matter" and those which "relate to any private property of or enjoyed by Her Majesty in her private capacity" (p.14). See *W. Harrison Moore*, The Crown as Corporation, 1904, 20 Law Quarterly Review 351, p. 352–354; *W. Clode*, Petition of Right, 1887. In Scotland, it was possible to sue the Crown in contract although the position in relation to reparation was confused and eventually the English rule was followed: e.g. see *Sir Randall Philip*, The Crown as Litigant in Scotland, 1928, 40 Juridical Rev. 238.

[71] *G. Williams*, Crown Proceedings, 1948; *H. Street*, Governmental Liability: A Comparative Study, 1953; *P. W. Hogg*, Liability of the Crown in Australia, New Zealand and the United Kingdom, 1971; *J. M. Jacob*, The Debates behind an Act: Crown Proceedings Reform, 1992, Public Law 452, p. 1920–1947.

[72] See, e.g., *W. A. Robson*, Justice and Administrative Law, 1928; *W. I. Jennings,* Law and the Constitution, 1933; *J. D. B. Mitchell*, The causes and effects of the absence of a system of public law in the United Kingdom, Public Law 95 (1965). See *M. Loughlin*, Public Law and Political Theory, 1992, p. 165–181,191—97. For an explanation of the reasons for this movement see *Jacob*, above n. 9 , esp. ch. 5 and 7.

[73] *F. W. Maitland*, above n. 1, p. 259.

and good ordering of the realm which were not covered by statute', adding that 'the strength of the prerogative lay in its indefiniteness'.[74] Further, it was generally accepted that, although it was the judiciary's duty to determine the boundaries of prerogative powers, it was no part of their function to review the manner in which these powers were exercised.[75] In largely ignoring the extensive immunities and privileges which the Crown enjoyed at the end of the nineteenth century, Dicey presented a rather skewed account of British constitutional law. Some years later, Laski tried to redress the balance. 'The government has for the most part kept the realm of administration beclouded in the high notions of prerogative', he wrote in 1919, and this is 'inadequate because it exalts authority over justice'.[76] The idea of the state had, in essence, escaped the categories of the law.

37. During the latter half of the twentieth century, the judiciary sought to address the ensuing difficulties by gradually developing a concept of public law, that is, a corpus of rules – both adjectival and substantive – relating to the exercise of public power. The impact on the status of the Crown and its prerogative powers has been profound. The movement has been accomplished in stages: first, by strictly construing the Government's claims to act under the authority of prerogative power;[77] secondly, by asserting the power to override a claim of Crown privilege[78] and subsequently denying that the public interest claim against disclosure of information in legal proceedings is in fact a privilege of the Crown;[79] thirdly, by assuming the power to review the exercise of prerogative power on comparable grounds to the review of statutory powers;[80] and finally, following developments concerning European Union law,[81] holding that the court has jurisdiction to make coercive orders against ministers of the Crown.[82]

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[74] *Le May*, above n. 65, p. 6.

[75] See, e.g., Attorney-General v De Keyser's Royal Hotel Ltd [1920] AC 508. See further, *S. A. de Smith*, Judicial Review of Administrative Action, 1973, p. 253–254: 'If it is claimed that the authority for the exercise of discretion derives from the royal prerogative, the courts appear to be limited to questions of *vires* in the narrowest sense of that term. They can determine whether the prerogative power exists, what is its extent, whether it has been exercised in an appropriate form and how far it has been superseded by statute; they cannot, it seems, examine the appropriateness or adequacy of the grounds for exercising the power, and they will not allow bad faith to be attributed to the Crown.'

[76] *H. J. Laski*, The Responsibility of the State in England, 1919, 32 *Harv. L. Rev* 447, p. 471–472.

[77] See, e.g., British Broadcasting Corporation v Johns [1965] Ch. 32, 79 (It is '350 years and a civil war too late' to claim new prerogative powers: per Diplock LJ); Burmah Oil Co v Lord Advocate [1965] AC 75. Cf R v Secretary of State for the Home Department, ex parte Northumbria Police Authority [1988] 1 All ER 556.

[78] Conway v Rimmer [1968] AC 910, in which the House of Lords, taking advantage of the newly assumed power to overturn their own precedents, overruled the broader propositions of Duncan v Cammell, Laird & Co [1942] AC 624.

[79] R v Lewes Justices, ex parte Gaming Board of Great Britain [1973] AC 388.

[80] R v Criminal Injuries Compensation Board, ex parte Lain [1967] 2 QB 864; Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 p. 407 per Lord Scarman: 'the law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject-matter in respect of which prerogative power is exercised is justiciable ... the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power'.

[81] Factortame Ltd v Secretary of State for Transport (No. 2) [1991] 1 AC 603 (citizen entitled to obtain injunction against the Crown or an officer of the Crown to protect interests under Community law).

[82] M v Home Office [1993] 3 WLR 433

38. By this assertion of their constitutional authority to 'interpret the laws, and see that they are obeyed' the judiciary has not only sought to ensure that executive action 'conforms with the standards of fairness' but also has recognized that during the twentieth century parliamentary methods of redress have 'on occasion been perceived as falling short, and sometimes well short' of what was necessary.[83] Consequently, in order to 'avoid a vacuum in which the citizen would be left without protection against a misuse of executive powers the courts have had no option but to occupy the dead ground in a manner, and in areas of public life, which could not have been foreseen' in mid-twentieth century.[84]

39. In developing a public law jurisdiction over the last fifty years, the judiciary has significantly limited the manner in which the exercise of the Crown's prerogative powers might legitimately be exercised. The courts have, for example, held that the 'distribution of bounty' by the Crown could be reviewed on the grounds of unfairness or irrationality,[85] that insofar as civil servants' conditions of employment are regulated by prerogative then judicial review is available,[86] that the Home Secretary's exercise of the prerogative of mercy is reviewable,[87] that the exercise of prerogative powers involving the defence of the realm are justiciable in all but the rarest of cases,[88] and that the Foreign Secretary's decision on whether or not to issue a passport, being an administrative decision which affected an individual's right to travel, is susceptible to judicial review.[89] But as the House of Lords' ruling in *M. v. Home Office* indicates, the judiciary has developed this public law jurisdiction and extended their supervisory jurisdiction to the exercise of prerogative powers while retaining at its core an unreconstructed concept of the Crown.

40. At the same time that the judiciary has been extending its supervisory role over the exercise of prerogative powers, significant work has been undertaken through statutory reforms that place prerogative powers on a statutory foundation.[90] By promoting statutory reform to cut back on many of the immunities conferred by prerogative powers, it now seems to be generally accepted officially that many of the traditional immunities that have been accorded to Crown status are now regarded as anachronistic.[91] These developments,

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[83] R v Secretary of State for the Home Department, ex parte Fire Brigades Union [1995] 2 WLR 464, 487 (per Lord Mustill, dissenting).
[84] Ibid.
[85] R v Criminal Injuries Compensation Board, ex parte P [1995] 1 All ER 870 (CA). Note that Peter Gibson LJ, in the majority, specifically acknowledged (p. 886–887) Wade's argument that the scheme 'was set up and revised under the prerogative, or, perhaps more correctly, by executive action without statutory authority ...'. See Wade, Administrative Law, 1988, p. 241–242).
[86] Council on Civil Service Unions v Minister for the Civil Service [1985] AC 374.
[87] R v Secretary of State for the Home Department, ex parte Bentley [1993] EWHC Admin 2.
[88] R v Ministry of Defence, ex parte Smith [1995] 4 All ER 427.
[89] R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett [1989] 1 QB 811 ('there is no doubt that passports are issued under the Royal Prerogative in the discretion of the Secretary of State' per O'Connor LJ ~~at~~ p. 817).
[90] Constitutional Reform and Governance Act 2010.
[91] See The Citizen's Charter Cm. 1599 (1991), 40.

together with the development of a body of European Union law imposing liabilities on 'the state',[92] are bringing about a shift in the foundations of British public law.

3. CONSTITUTION

3.1. The myth of the ancient constitution

41. The fact that the outlines of the main institutions of English government can be traced to a dim and distant past is one reason why a legal concept of the state has not been established. But this fact has also given rise to a peculiarly English constitutional trope: the apparent need to claim that progress is measured against the yardstick of antiquity. This claim rose to prominence during the constitutional conflicts of the seventeenth century. At this critical moment, the common lawyers devised the myth of the ancient constitution: they asserted that there once existed an ancient Anglo–Saxon constitution based on principles of liberty and democracy and which has continued in existence to provide the source of the 'fundamental laws' of the English.[93] At that time, the argument was deployed primarily to assert the privileges of Parliament and the common law courts against the prerogative claims of the Crown. But these claims lingered on to provide the basis for a grand tradition of constitutional history which flourished in the nineteenth century,[94] and which has become known as the 'Whig interpretation of history'.[95]

42. A key tenet of this body of thought is that local self–government lies at the heart of the historic constitution. Under the ancient constitution, it was claimed, exclusive responsibility for the management of local affairs, including that of taxation, rested with the *gemote* (the moot or meeting) of all the freemen of the township. The *gemote* provided the foundation of the entire governmental structure, since the heads of the *gemotes* (the *reeves*) met collectively in the *witenagemote* (great council), and it is from this great council that the modern parliament emerged. The structure of governmental authority thus rested on the will of the people expressed through their local communities. Neither the king nor his government, it was

[92] See in relation to the direct effect of EC Directives against 'the State': *Marshall* v *Southampton & South-West Hampshire AHA* (152/84) [1986] QB 401; *Johnston* v *Chief Constable of the RUC* (222/84) [1987] QB 129; *Foster* v *British Gas* (C-188/89) [1991] 1 QB 405. And on the issue of State liability see *Francovich* v *Italy* (C-6/90) [1993] 2 CMLR 66; *Marshall v Southampton & South-West Hampshire AHA* (C-271/91) [1994] QB 126 ; *Brasserie du Pêcheur SA* v *Germany*, *R* v *Secretary of State for Transport, ex p. Factortame* (C-46/93, C-48/93).

[93] See *J. G. A. Pocock,* The Ancient Constitution and the Feudal Law, 1957, esp. ch. 2; *J. W. Gough*, Fundamental Law in English Constitutional History, 1955.

[94] The leading figures were Stubbs, Freeman, Macaulay and Hallam: see *J. W. Burrow*, A Liberal Descent: Victorian Historians and the English Past, 1981.

[95] See *H. Butterfield*, The Whig Interpretation of History, 1931; ibid., The Englishman and His History, 1944.

maintained, had the power to make law or levy taxes without first obtaining the consent of the nation in parliament.

43. Within this mode of thought, English constitutional history must be viewed as a history of the struggle to ensure that these ancient local liberties – the fundamental laws – are not usurped by the central authority. The traditional Whig view was that the Norman Conquest was simply a disturbance rather than a breach in constitutional continuity and that the historic outcomes of post-Conquest struggles can be seen reflected in such documents as the Magna Carta (1215), the Petition of Right (1628) and the Bill of Rights (1689). These, the Whigs argued, assert no new political principles; they simply require the better observance of the ancient fundamental laws and they seek the redress of grievances which have arisen as a consequence of their neglect. In this narrative, 'England is pre–eminently the country of local government'.[96] This claim has a particular significance since the argument is made that it is the existence of a regime of local government that prohibits the formation of a singular notion of administration and ensures that no system of administrative law could be created.

3.2. The common law tradition

44. The myth of the ancient constitution lived on in the mentality of the common law and through this medium exerted an influence over the shape of administrative arrangements. These arrangements can most succinctly be highlighted by way of contrast with continental European practices. Thus, by the end of the eighteenth century, it had been widely recognized throughout continental Europe that responsibility for the internal administration of the country was that of the ruler. That is, as the functions of governing increased, a distinction emerged between judgment and the execution of a judgment. From this differentiation, two discrete activities were identified: the rule of judicature and the rule of administration. The 'rule of administration' became known as administrative law. This administrative law was founded on the power of the ruler to issue ordinances. Since administration was acknowledged to be the peculiar domain of the ruler, these orders were regarded as the ruler's law and this body of orders – administrative law – was treated as forming a distinct system of equivalence to the laws of the land. It was through this

[96] *E. Jenks*, An Outline of English Local Government, 1921, p. 9.

administrative law that the central authority regulated and controlled the activities of administrative agencies.

45. This continental practice can be contrasted with the English experience. Although England has, at least since the Norman Conquest, always been *ruled* from the centre, the central authority has not generally sought to *administer* from the centre. While there have been periods, such as the Henrician Reformation or the Stuart dynasty, when attempts were made to introduce administrative law in the continental sense, the idea that administration is the special preserve of the sovereign, and that disputes concerning administrative issues should be resolved by separate courts operating in accordance with special principles, has never been accepted. This achievement is primarily attributable to the efforts to ensure that the common law formed an undivided system of law. Consequently, in the English system no clear distinction has been drawn between public law and private law (or between administrative law and common law). Since the administration remained subordinated to the ordinary law, the principle of the rule of law in the English system came to represent the rule of judicature.[97]

46. Two particular implications of this tradition of the rule of law throw into relief the issues of administration and administrative law. The first is that it is because of the tradition of local government that there has never emerged in England a hierarchical and undifferentiated concept of administration. Local institutions have evolved not as creatures of the central authority, but as representations of historic communities within a structure of national laws to which both the Crown and the localities are equally bound. The central authority thus possesses no inherent superior jurisdiction over local institutions. It is in this sense that the English inheritance is claimed as a tradition of local government rather than a system of local administration.

47. The second, equally important, implication of the rule of law tradition concerns the role of Parliament. The common law, as an undivided system of national laws, could not be altered by the Crown alone, but only with the consent of the people expressed in Parliament. This principle of Parliamentary sovereignty is thus entwined with the idea of the unity of law. There being few significant prerogative powers in the domestic sphere, the Crown-in-Parliament, as a supreme legislature, came to exercise absolute authority over

[97] See *A. V. Dicey*, Introduction to the Study of the Law of the Constitution, 1915, ch. 4; *E. Barker*, The Rule of Law, 1914 Political Quarterly, p. 117.

internal administration. The Act of Parliament became the form through which was framed, not only all new laws, but also all the ordinances which regulate administrative action. As a result, administrative bodies became answerable for the exercise of their legal powers not to the central authority but to the courts and, ultimately, to Parliament. In the English tradition, then, the relationships between the centre and the administration of local areas were not primarily worked out through arrangements between central government and institutions of local administration. They were resolved through a network of relationships between local government, central government, Parliament and the courts.

3. 3. Administration and Parliament

48. Within the English tradition, the Act of Parliament became the formal method by which the will of the central authority was expressed to all administrative institutions. The central government thus needed to secure the approval of a Parliament, which was composed essentially of the representatives of local communities. The House of Commons, as its name implies, was a body consisting of representatives of the ancient local communities who were (and still are) referred to as such in Parliamentary proceedings (and although peers attended Parliament in their own right, they too took – and take – local titles). Parliament provided the localities with a forum within which their interests and grievances could be brought to the attention of central government.

49. Until the end of the eighteenth century, the Crown and Parliament had generally left local institutions free to deal with their administrative responsibilities. When, however, new needs made themselves felt through the demand for new services, the centre inevitably became involved. These demands took the form of petitions from local bodies seeking new powers to act. By retaining control over this process, Parliament was able to assume a jurisdiction which in continental states had become the preserve of the central authority under administrative law. This was achieved primarily through the private Bill procedure, in which Bills were generally presented on the petition of local bodies and were deliberated upon mainly by the representatives of the localities concerned. In the evolution of parliamentary practice it gradually came to be recognized that two different activities were being carried out under the general form of an Act: legislating both for the common interests of the country (public general legislation) and legislating for particular administrative requirements (private or local Acts). Through the development of this latter

instrument,[98] Parliament became the intermediary between the central authority and those local authorities undertaking administrative tasks.

50. This direct Parliamentary control over administrative powers provided a mechanism for central regulation which complied with the spirit of the constitution. Control through a Parliament in which the localities were fully represented could be seen to reflect the tradition of local self–government. Furthermore, since Parliament assumed an essentially judicial mode when adopting the private Bill procedure, this practice of 'the High Court of Parliament' also bolstered the principle of the rule of law.

3.4. Administration and the judiciary

51. The principle of the rule of law in the English system is founded on the rule of judicature. It means, in essence, that every exercise of public power must be have a lawful source of authority and that, having no system of administrative law, the sole judge of legality is the ordinary courts applying the ordinary (*sc.* common) law. There have been occasions, especially under the Tudors and Stuarts, in which attempts were made to fashion a special administrative jurisdiction. Under Henry VIII, for example, proclamations and royal warrants were issued direct to the Justices of the Peace, thus bringing them directly under the authority of the Crown and under the Stuarts the Star Chamber, a committee of the Privy Council, threatened to develop into a supreme administrative authority.[99] But these types of measure led to fundamental constitutional conflicts in the seventeenth century, and after the Restoration of the monarchy in 1660 no further attempt was made to develop a separate administrative jurisdiction.

52. By the eighteenth century, the courts had emerged as the principal agencies for the control of administrative action. This control was executed mainly through the use of the prerogative writs; it is through the procedures of the prerogative writs that the actions of administrative officers could be brought to judicial attention.[100] But the fact that during this period most of the work of local administration was carried out by Justices of the Peace

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[98] See *F. Clifford*, History of Private Bill Legislation, Vol. II, 1885–1887; *O. C. Williams*, The Historical Development of Private Bill Procedure and Standing Orders in the House of Commons, 1948); *S. Lambert*, Bills and Acts: Legislative Procedure in Eighteenth Century England, 1971.

[99] See, e.g., *F. W. Maitland*, The Constitutional History of England, 1908, 261–264.

[100] *E. G. Henderson*, Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century, 1963.

who were also judicial officers reinforced the conviction that administration was based on law and that all administrative responsibilities were being exercised in a judicial spirit.

3.5. Constitutional rights and administrative duties

53. The institutionalization of the doctrine of parliamentary sovereignty during the eighteenth century had the potential of eroding the belief in the idea of law as a body of ancient custom to which all were bound. How then might sovereignty and liberty be reconciled? Since English commentators tended to focus solely on practical questions, the task of discovering the mainspring of the English system was left mainly to foreign observers. Of these, Montesquieu was destined to become the most feted.

54. Fearing that, under the pressures of modernization, European monarchical traditions might come to be replaced by various forms of despotic rule, during the mid-eighteenth century Montesquieu went in search of an alternative model. He claimed to have discovered this in the English system which, being based on the mechanism of the separation of powers, enabled a reconciliation to be achieved between royal integrity, aristocratic wisdom and popular sentiment.[101] This idea of a balancing mechanism within constitutional arrangements, which operated to preserve liberty in the face of change, was happily adopted by the British scholars of the period.[102] But the big gap in Montesquieu's abstract analysis was the question of how, in practice, the country was actually governed. It took another foreigner scholar to supply the answer.

55. The revolutionary crises of 1848 had shaken all the constitutions of Western Europe, leaving only the British constitution unaffected. How had this been achieved? Surely it was, as Montesquieu had predicted, because of the liberalism of our institutions, which had ensured harmony between the monarchical, aristocratic and democratic elements? The Berlin professor, Rudolf Gneist, was not convinced. If the constitution was actually based on the separation of powers, then Britain, he suggested, might have been especially prone to conflict. Gneist investigated beyond the façade of the central governmental structure and discovered that the real basis of British government was to be found not in separation but in unity. Britain, Gneist contended, was governed from top to bottom by a class of wealthy

[101] *Montesquieu*, The Spirit of the Laws, 1748, Bk 11, ch. 6.
[102] See, *M. J. C. Vile*, Constitutionalism and the Separation of Powers, 1967, ch. 3; *J. N. Shklar*, Montesquieu, 1987, p. 112: 'Montesquieu in effect wrote out the English constitution, and Blackstone in copying it gave that version a semi–official standing'.

landowners, who performed unpaid personal service not only as members of the Lords and Commons but also as Justices of the Peace who administered the counties. Beneath the apparent divisions there existed a deep unity, which Gneist referred to as 'self–government'.[103]

56. The 'real practical basis' of the English constitution was to be found not in a system of rights but in a network of duties: 'It is not the rights of Parliament and the forms of parliamentary government that have founded England's greatness, but ... the personal co-operation of all, from the lower classes in the social scale upwards in the daily duties of the State'.[104] Within this network, the Justices of the Peace, who were appointed by the King on the recommendation of the Lord Lieutenant of the county, performed a critical role. Being entrusted with the combined tasks of administration and justice free from active control by the central authority, the Justices constituted the principal organs of self–government. These 'simple, sober and earnest' institutions, though they are 'far removed from the fantastic pictures once disseminated ... by the author of the *Esprit des Lois*', are 'firm and durable, and in the hour of danger and trial ... they display the energy and greatness of character of a proud free nation'.[105] Gneist believed that 'it is only the transformation and moderation which class contrasts receive from this local self–government that produces those moderate political parties, which are capable of conducting a parliamentary government after the English fashion'.[106]

57. Gneist's portrayal of the system of self–government was rather complex. It was based not only on personal service and an aristocratic principle, but also on a sense of cohesion between sovereign rights and local government. But he did not root his scheme in some romantic–historical idea of Teutonic folk-freedom with governmental authority being constructed from the locality upwards. Rather, he argued that the English state was highly centralized and that 'England has to thank the Norman kings for an absolute government which enabled her to develop a consciousness of unity and strength at a time when all the great nations of the Continent were disintegrated by feudalism'.[107] It was precisely because England had centralized early and that no serious challengers existed to the sovereign authority of the centre that the centre had been able to concede so much liberty to the

[103] Gneist's writings on this subject are primarily contained in Self–Government: Kommunalverfassung und Verwaltungsgerichte in England (Berlin, 1871) und Englische Verfassungsgeschichte (Berlin, 1882).
[104] *R. Gneist*, The History of the English Constitution, 1886, Vol. II, p. 428, 438.
[105] Ibid., p. 438.
[106] Ibid., p. 387.
[107] *J. Redlich/F. W. Hirst*, Local Government in England, 1903, Vol. II, p. 395.

organs of local government. But the autonomy of the Justices of the Peace was purely administrative and it was strictly limited by the legislative power of Parliament and policed by the common law courts.

58. Though Gneist had identified a major weakness in Montesquieu's constitutionalist edifice, his own interpretation of the tradition of self–government was not immune from criticism. In particular, the structure of eighteenth century government which Gneist had designated as self–government 'was in truth a form of government in which all authority was monopolised by certain social and economic interests, and employed by them to their own advantage'.[108] And 'one of the principal features of aristocratic "self–government" was its subordination of efficiency to the maintenance of class rule'.[109] The conclusion this drives towards is that the lack of a formal state tradition was the product of a high degree of cohesion within the governing class. The Justices of the Peace as the agents of local administration, the parliamentarians that checked the policies of the central authority, and the judges who managed 'the rule of judicature' had all been educated in a common tradition of rule. This shared culture of the governing class contributed greatly to the management of a regime in which there was no need for a formal concept of the state or for anything resembling a system of administrative law.

4. ADMINISTRATION

4.1. The origins of the administrative state

59. During the eighteenth century both the Crown and Parliament left matters of internal administration in the hands of the local authorities. There were few subjects of an administrative character which were beyond the remit of local authorities, and few restraints on the manner in which they exercised their tasks.[110] But these administrative arrangements were haphazard, forming a complex mosaic of parochial, manorial, borough and county institutions, originating in a jumble of local customs, common law, royal charters and Acts of Parliament and they were inextricably entangled with one another according to local needs and circumstances.[111] There was certainly nothing that was recognizably a system. It

[108] *J. Redlich/F. W. Hirst*, ibid., Vol. II, p. 402.
[109] Ibid., p. 409.
[110] See *W. S. Holdsworth*, History of English Law, 1938, Vol. X, 160–162 for an inventory of powers and duties of the Justices of the Peace.
[111] See *B. Keith-Lucas*, The Unreformed Local Government System, 1980.

was therefore not surprising to discover that these eighteenth-century arrangements were singularly ill–equipped to respond to the challenges presented by the economic and social changes of the Industrial Revolution. Industrialization was the crucible in which the modern administrative practices were forged.

60. The coming of the industrial revolution had a particularly powerful impact in urban areas. As a result of increased trade, growth in population and the rapid conversion of rural communities into urban centres, the social structures that underpinned the traditional administrative arrangements disintegrated. The impact of urbanization often meant that the governmental challenge was greatest in the areas in which local administrative arrangements were the most inadequate. Describing the situation in Manchester in 1835, Alexis de Tocqueville commented that 'everything in the exterior appearance of the city attests the individual powers of man; nothing the directing powers of society'.[112]

61. The transformation of the physical environment in these rapidly growing urban centres created major problems of housing, sanitation, crime and environmental pollution for which the traditional arrangements were hopelessly deficient. New administrative arrangements were required to deal with these new challenges. The initial response was the establishment, under local Acts, of special bodies, such as sewer commissions, improvement commissions and turnpike trusts to take on the governmental challenge in the industrial era. At this stage it seemed likely that the ancient local institutions would continue to represent the locality in a ceremonial sense, but that special administrative bodies would be established to undertake the utilitarian functions of domestic government. And since the latter would be created by, and remain dependent on, the central authority, a regime of administrative law would be formed.

62. As it materialized, the configuration became more complicated. Eventually the industrialists and merchants of the towns and cities who had found themselves excluded from the institutions of local government started to demand the reform of these local institutions under the banner of 'equal privileges for all of equal station'. Once these reforms had been instituted local government was restored to a central role in the provision of public services. Thereafter, the practices of administrative government expressed a tension between respect for the ancient institutions and the establishment of single-purpose special

[112] *A. de Tocqueville*, Journeys to England and Ireland, 1958, p. 108.

bodies, that is, between respect for local autonomy and the promotion of (centrally–controlled) uniformity and efficiency.

4.2. The philosophy of administrative reform

63. If the driving force of administrative reform was industrialization, then its philosophical underpinning was that of Bentham's utilitarianism.[113] Bentham had sought to devise a science of politics from immutable laws of human nature: in his formulation, the principle of utility was translated from individual self-interest to public action through the principle of the greatest happiness of the greatest number.[114] Utility was the benchmark against which all laws and institutions were to be assessed; any appeal to preserve local custom and common law on the ground that it embodied traditional wisdom handed down by our ancestors was rejected as simple superstition.

64. Armed with this philosophy Bentham devised a plethora of schemes for social reform, most of which required major administrative reform. These reform proposals, which related to such fields as schools, prisons, local administration and reform of the poor law and social assistance, followed a common organizational pattern. In general, Bentham's philosophy amounted to a sustained assault on the influence of the aristocratic principle in government.

65. Bentham founded his administrative reforms on the principles of hierarchy, centralization and the establishment of a set of rewards and punishments which would ensure effective and responsible public service.[115] He planned, in effect, to subject public administration to the discipline of commercial principles by, for example, putting out to competitive tender tasks such as the execution of public works or the management of prisons and then ensuring that the work was properly undertaken by subjecting contractors to surveillance through inspection. Benthamism in general was a highly centralist philosophy. As Halevy recognized: 'The State, as conceived by Bentham, is a machine so well constructed that every individual, taken individually, cannot for one instant escape from the control of all the individuals taken collectively'.[116] Since the necessity was to secure the greatest happiness of the greatest number, no local authority could be given autonomous

[113] The precise influence of Benthamism on administrative reform movement has, however, become one of the major controversies of nineteenth century history. For a concise introduction to the debate see: *A. J. Taylor*, Laissez–faire and State Intervention in Nineteenth–Century Britain, 1972.
[114] See *D. Roberts*, Jeremy Bentham and the Victorian Administrative State, 1959, 11 Victorian Studies, p. 193.
[115] See *N. L. Rosenblum*, Bentham's Theory of the Modern State, 1978, ch. 6.
[116] *E. Halevy*, The Growth of Philosophical Radicalism, 1928, p. 432.

powers with respect to its locality. There could be no sphere of public administration, which could be immune from intervention by the central authority.

66. Benthamite reform proposals were invariably centralizing and rationalizing. They sought to establish clear lines of authority for administrative action, with a supervisory power being vested in central government departments. They also sought to put all public service provision on a firm statutory foundation. Such structures, it would appear, would lead not only to the formation of a singular framework of administrative government but also, with central departments displacing courts as the primary agencies of supervision, to the formation of a system of administrative law.

4.3. Local government modernization

67. The Reform Act of 1832 marked the great turning point in the modernization of the system of government. In extending the franchise to just over five per cent of the population, the Act was scarcely a great democratizing measure. It marked a transition precisely because, being a compromise measure which was devoid of principle, it was able to pave the way for the gradual democratization of Parliament.

68. The reformed Parliament immediately turned its attention to the archaic arrangements of local government, which by 1832 had, under the general pressure of social and economic change, largely fallen into decay. After appointing a Royal Commission in 1833 to inquire into the existing state of the municipal corporations, reform soon followed. The Municipal Corporations Act 1835 restored municipal corporations as governmental institutions by separating the functions of justice from those of administration and by establishing the corporations as representative councils elected by the local ratepayers. The Municipal Corporations Act of 1835 ushered in the modern era of local government.[117]

69. The importance of the 1835 Act is to be found in two of its main features. First, the Act was a measure of sweeping simplicity which, by imposing uniform constitutions on the boroughs, established the juristic concept of the municipal corporation.[118] Secondly, by

[117] See, e.g., *H. J. Laski/W. I. Jennings/W. A. Robson*, A Century of Municipal Progress, 1935, ch. 3.
[118] Cf *Redlich/Hirst*, above n. 107, Vol. I, p. 112: 'the constitutions of towns differed one from another in accordance with their charters of incorporation, which had been acquired at times and under conditions so various. ... No statute had ever defined a municipal corporation. In 1833 you could hardly have found two municipal corporations of the same species; and there was no genus, or none known to the Jurist.'

imposing on the town council the general duty of 'the good rule and government of the Borough', it reversed the tendency to split off function after function to special authorities. The Act thus restored the principle that a general authority should assume responsibility for the administrative needs of its local area.

70. During the nineteenth century, this process of municipalisation was gradually extended to the other institutions of local government.[119] The Local Government Act of 1888 created elected county councils to undertake the governmental functions previously assigned to the Justices in Quarter Sessions and it established the councils as corporate bodies with a constitution and franchise almost identical to that of the municipal corporation. By the Local Government Act of 1894, the ancient system of parish government by vestries was swept away and a pattern of urban and rural district councils established. It was as a result of this process that, during the twentieth century, it became possible to generalise the rules relating to the constitutions of all local authorities.[120] While the Webbs had detected 'the pure milk of Benthamism' in the 1835 Act principles,[121] the fact is that the nineteenth century arrangements were still rather patchwork and complicated. The nineteenth century structure remained more or less intact until the reforms to local government of the 1970s.[122]

71. The influence of Benthamism over local government reform is more powerful, however, once the focus shifts from structure to functions. From a functional perspective, the critical moment which opened the new era was not the 1835 Act, but the Poor Law Amendment Act enacted in 1834. By the 1830s, the financial burden of poor relief, which was administered by 15,000 parishes and which 'affected everybody, pleased few, and was understood by nobody',[123] was becoming unbearable. A Royal Commission, on which Bentham's disciples were heavily represented, was established and produced a report which led to the formulation of the 1834 Act. This Act marked a clear break with the historic traditions of local self-government.

72. The administrative arrangements established by the poor law reforms were radical. Rather than working within the historic boundaries of local government, the administrative map was redrawn and new units were created. Rather than permitting local discretion, a

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[119] See *B. Keith–Lucas*, The English Local Government Franchise: A Short History, 1952.
[120] See, Local Government Act, 1933.
[121] *S. & B. Webb*, English Local Government, 1922, Vol. IV, p. 755.
[122] Local Government Act 1972.
[123] *S. E. Finer*, The Life and Times of Sir Edwin Chadwick, 1952, p. 42.

relatively uniform system of local administration was instituted. Furthermore, in order to realise the objectives of this national system, a Central Board was established and vested with extensive powers to promulgate rules and orders to be followed by local agents. By establishing central administrative supervision of local administration of poor relief, the first steps towards establishing a hierarchical structure of administrative law had been taken.

73. The stresses which shaped the process of nineteenth-century administrative reform are revealed by considering the tensions between the principles of the 1834 and 1835 Acts. The municipalisation movement was based mainly on the principle of self-government, particularly no effective method of directing a council to exercise its powers had been provided and even the enforcement of duties required judicial proceedings to be instigated. But the councils possessed few powers and these could be extended only by Act of Parliament. Initially this was left mainly to local initiative through the promotion of private Bills,[124] and then to the framing permissive legislation, that is, public general legislation which left local authorities free to adopt the powers conferred.[125] But eventually the model of public general legislation which generally empowered, or occasionally required, authorities to undertake particular tasks was utilized.[126] With this development, the principles relating to poor law administration, especially that of central department supervision, came to play a more prominent role in shaping the nature of the system.[127]

74. The reforms of the 1830s thus incorporate a basic tension between self-government and centralization which reverberated throughout the nineteenth-century reformation of local government. Though the reconstitution of local government seemed designed to restore the principle of self–government, the necessity of addressing the problems impressed on public consciousness as a consequence of demographic, social and economic change provided a critical impetus for central action. The poor law reforms were the harbinger of centralization and provided a model which was to be emulated in the field of public health from the 1840s and education after the 1870s. The general point is that, once we understand the nineteenth-

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124 See, e.g., *D. Fraser*, Power and Authority in the Victorian City, which shows the manner in which the corporations of Liverpool, Leeds and Birmingham built up their powers through local Acts.

125 See, e.g., Local Government Act 1858; *J. Prest*, Liberty and Locality. Parliament, Permissive Legislation, and Ratepayers' Democracies in the Nineteenth Century, 1990.

126 This impetus came about mainly through the public health movement and then later through educational reform: see *W .C. Lubenow*, The Politics of Government Growth. Early Victorian Attitudes Toward State Intervention 1833–1848, 1971, ch. 3; *Redlich/Hirst*, above n. 107, Vol. I, 134–173 (development of a sanitary code); Vol. II, 224–236 (organization of education).

127 See *S. E. Finer*, The Life and Times of Sir Edwin Chadwick, above n. 123, 188: 'the administrative proposals of the (Poor Law) Report are worthy of the highest praise. They have proved the source of nearly all the important developments in English local government, viz. central supervision, central inspection, central audit, a professional local government service controlled by local elective bodies, and the adjustment of areas to administrative exigencies.'

century reformation of local government as being motivated by the pursuit of efficiency, the key issues the system faces are those, which derive from the tension between efficiency and autonomy. These reforms ensured that local government thereafter would remain bound up with the affairs of central government.

75. This tendency was exacerbated in the twentieth century. Local government law was consolidated first by the Local Government Act of 1933, which for the first time established a common set of organizational rules governing all local authorities. The Act also marked the culmination of the 1835 Act principle that a local council should assume responsibility for all locally–provided public services. After the structural reforms of the late–nineteenth century, further progress in the realization of this principle was made, most notably with the absorption of the school boards by local councils in 1902 and in 1929 bringing the administration of the Poor Law into the local government system. This principle ensured that local authorities would perform a major role in public service provision, as is reflected in the fact local government expenditure increased from 4.5 per cent of GNP in 1890 to 18.4 per cent in 1975.[128] But this expenditure was fuelled almost entirely by the provision of central government grants to local authorities. And this has meant that during the twentieth century central departments have performed an active role in the supervision of local service provision.

4.4. The emergence of administrative law

76. During the eighteenth century, local institutions operated independently of central government. The Justices of the Peace 'enjoyed, in their regulations, an almost complete and unshackled autonomy' and the municipal corporations 'regarded their corporate property ... as well as their exemptions and privileges as outside any jurisdiction other than their own'.[129] These administrative institutions derived their authority from the law and could be confined and checked only by the superior courts of law. There was no active supervision by central government: in 1815 the Home Secretary was assisted by two under-secretaries and eighteen clerks,[130] and with an establishment of only twenty the Home Office simply did not possess the administrative capacity to undertake active supervision of local administration. But one

[128] *R. Jackman,* Local Government Finance, in: M. Loughlin/D. Gelfand /K. Young (eds.), Half A Century of Municipal Decline, 1985, p. 144, 147.
[129] *S. & B. Webb*, English Local Government, above n. 121, Vol. IV, p. 352.
[130] See *Redlich/Hirst*, above n. 107, Vol. II, p. 238 (n.1).

major consequence of the nineteenth–century reforms was that central government began to replace the courts as the primary agency for regulating local administration.

77. The Poor Law Commission established under the 1834 Act was the first central department of state created for the purpose of regulating and controlling local administration. In 1871, this Commission merged with the Public Health Department of the Privy Council and the Local Act Branch of the Home Office to form the Local Government Board. The Local Government Board continued in that form until, in response to functional reorganization, it was in 1919 reconstituted as the Ministry of Health. This department, together with the Home Office, which retained responsibility for the police, and the Board of Education which was established in 1899 from two committees of the Privy Council, were the main central departments which acquired general powers of supervision over domestic administrative matters.

78. Although various statutes established an administrative relationship between the central department and local authorities, this relationship was not a simple one of superior and inferior. Local authorities became bound to the central department by many administrative ties but the Board possessed no general right to issue administrative commands which compelled obedience. Rather than being indicative of strong directive leadership from the centre, the Board became known for its pragmatism and conservatism.[131] The mosaic of controls, particularly as exercised, tended to respect the independent authority of local authorities.

79. Nevertheless, during this period central departments took over certain important powers from both Parliament and the courts. The Board, for example, acquired certain powers over private Bill legislation, which traditionally had been exercised by Parliament alone.[132] While this had the objective mainly of streamlining the conduct of business at the centre, it also

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[131] *C. Bellamy*, Administering Central-Local Relations 1871–1919: The Local Government Board in its Fiscal and Cultural Context, 1988, p. 237.

[132] As a result of the growing burden on Parliament in dealing with private Bills, the process was streamlined through the use of the technique of the provisional order. This technique required the local authority to petition the Minister rather than Parliament and this resulted in the Minister holding an inquiry rather than a Parliamentary committee being established. If ministerial approval were obtained the order was made, though it did not become valid until confirmed by Parliament. Provisional orders could be made under many Acts, including the Tramways Act 1870, the Gas and Water Works Facilities Act 1873, the Public Health Act 1875 and the Local Government Act 1888. These statutes conferred powers to make orders in relation to such matters as the compulsory acquisition of land, the supply of gas, the alteration of local authority boundaries and the amendment of local Acts.

marked a shift in power from the legislature to the executive.[133] An illustration of the executive assumption of judicial powers was the acquisition by the Board of the powers of a tribunal of appeal for parties aggrieved by the auditor's decisions on surcharge or disallowance of expenditure. These powers included the power to remit surcharge or disallowance, even if the decision were unlawfully made, in cases in which it was considered 'fair and equitable' so to do.[134] What the pattern of controls thus seemed to indicate was not so much the establishment of a directive control by the centre, but the construction of a system of administrative law.

80. With the acquisition of these supervisory powers, petitions for extensions to local powers came to be channelled through central departments and local authorities began to lose their channel of direct access to Parliament. In one sense, Parliament became, for the first time, a true legislative body having responsibility mainly for laying down general rules of social conduct and leaving to departments of State the task of addressing questions of administration. But the range of powers conferred on Ministers became extensive. They included powers to issue rules, regulations and orders; to approve the bye–laws, plans and schemes of local authorities; to determine various appeals against local authority decisions; to intervene in default of action by local authorities; to exercise certain controls over local officers; and to inspect, inquire and obtain reports. In addition to these administrative controls, there existed a range of financial powers relating to the payment of grants and controls over local authority borrowing.

81. The characteristic technique of this structure of central supervision was that of inspection. The Home Secretary's supervision of police was, for example, based on the principle of inspection. Each police authority was required to produce an annual report to the inspectors who were obliged 'to visit and inquire into the state and the efficiency of the police for every county and borough' and to 'report generally on such matters' to the Secretary of State.[135] Inspection, the technique invented and promoted by Bentham, was the foundation of central supervision not only in relation to the police, but was also applied to

[133] A further example of this shift is to be found in the use of Royal Commissions of Inquiry, which since the beginning of the nineteenth century were used by investigate pressing problems of social and economic life and which were the source of almost all of the century's administrative reforms. Redlich and Hirst, Vol. II, p. 320, estimated that over 150 Royal Commissions were established between 1832 and 1844 and that they provided a key vehicle through which 'Bentham's demand for the application of scientific principles to legislation and government' could be realised.

[134] Poor Law Audit Act 1848, p. 4. Under the Local Authorities Expenses Act 1887 these powers were extended to permit the Board to sanctioning expenditure, which would otherwise be unlawful. In the year 1888-89 the Poor Law authorities made 1, 130 applications to the Board to sanction expenditure and approval was granted in all but 29 cases: Redlich and Hirst, Vol. II, p. 274 (n. 2).

[135] County and Borough Police Act 1856, s.15.

the poor law, public health, education and, through audit, to the system of local finance and expenditure. Inspection, concluded Redlich and Hirst is a characteristically English invention, since 'it is designed to obtain the advantages of efficiency without the incubus of bureaucracy'.[136]

82. In practice, the centre's supervisory powers were used in a strategic sense only to enforce a basic minimum standard of provision or to protect the centre's interests relating to the management of the economy. Their powers seemed to have been designed mainly for the quasi–judicial purpose of ensuring the fair treatment of the various local interests affected by the exercise of local authority powers. Disputes were to be resolved through administrative processes according to standards which emerged through practice and, to the extent that the jurisdiction of the courts was more or less ousted, a relatively closed system of administrative law was constructed. The system of central controls which emerged was thus much more in the nature of an emerging system of administrative law than one which sought to guide the strategic development of public service provision.

4.5. Judicial review of administrative action

83. A further consequence of nineteenth-century administrative reforms was to enhance the degree of formalization in the mechanisms of judicial control. This came about mainly because of the emergence during the nineteenth century of the *ultra vires* doctrine and of its application to public authorities. This doctrine was developed by the courts in relation to disputes in the mid-nineteenth century concerning the trading powers of railway companies established under statutory powers, where it was held that 'a statutory corporation, created by Act of Parliament for a particular purpose, is limited, as to all its powers, by the purposes of its incorporation as defined in that Act'.[137] As a result of the 'statutorification' of local government, this doctrine also came to be applied to local authorities.[138]

84. The application of the *ultra vires* doctrine to elected local authorities was the subject of criticism. Given the growth of municipal trading during the latter half of the nineteenth century,[139] however, its application to local government activities was only to be expected. But recognizing that an overly-strict application of the doctrine could frustrate the ability of

[136] *Redlich/Hirst*, above n.107, Vol. II, p. 251.
[137] *Ashbury Railway Carriage & Iron Co.Ltd* v *Riche* (1875) L.R. 7 H.L. 653, 693 (per Lord Selborne).
[138] See, e.g., *Attorney-General* v *Newcastle-upon-Tyne* (1889) 23 Q.B.D. 492.
[139] See *H. Finer*, Municipal Trading. A Study in Public Administration, 1941.

public authorities to undertake the tasks entrusted by Parliament, the judiciary tried to adopt a flexible approach, holding that 'whatever may fairly be regarded as incidental to or consequential upon those things which the Legislature has authorised, ought not (unless expressly prohibited) to be held to be *ultra vires*.'[140]

85. To the extent that the courts developed a general supervisory jurisdiction over public authorities during the latter half of the nineteenth century, this was achieved mainly through the development of the prerogative writs.[141] They did so by extending the use of prerogative remedies, which had been designed to control the actions of courts of inferior jurisdiction, to the quasi–judicial functions of administrative authorities. It is generally acknowledged that the courts were set on this course by Brett L. J. who, in 1882, stated that 'whenever the Legislature entrusts to any body of persons other than the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons, if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament'.[142] Since the 1880s, the courts have adapted the writs to keep public authorities within the boundaries of their powers.

86. When the exercise of these powers was subject to official review in the early 1930s, it was accepted that the maintenance of the jurisdiction was essential, though it was also felt that the existing procedures were 'too expensive and in certain respects archaic, cumbrous and too inelastic'.[143] This refrain continued to be expressed throughout the mid–twentieth century, though it was not until 1977 that the procedures were streamlined through the introduction of a single 'application for judicial review'. But judicial review through the prerogative writs was often of marginal importance because of a general tendency, developed in the early decades of the twentieth century, of inserting in statutes conferring powers on public authorities the power to appeal decisions on questions of law to the High Court.

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[140] Attorney-General v Great Eastern Railway Co. Ltd (1880) 5 App.Cas. 473, 478.

[141] Jennings notes that Brice on Ultra Vires, the standard work which was written in 1877 did not even mention the jurisdiction of the prerogative writs, whereas its successor in 1930 (Street on Ultra Vires) discusses the question at considerable length: *Jennings*, Central Control, in: Laski/Jennings/Robson (eds.), A Century of Municipal Progress, above n. 117, p. 417 and 422.

[142] *R. v Local Government Board* (1882) 10 Q.B.D. 309, 321.

[143] Report of the Committee on Ministers' Powers Cmd.4060 (London, 1932), 99.

87. Some scholars have offered highly critical conclusions about the general impact of judicial supervision of decisions of public authorities, especially decisions concerning matters of policy.[144] As a result of his studies of judicial decisions concerning local authorities, for example, WI Jennings drew as its general point 'the frequency with which the Courts manage to interpret – no doubt correctly in law – in such a way as to obstruct efficient administration'.[145] 'It is a remarkable fact', he continued, 'that so often a decision of a court acts as a spanner in the middle of delicate machinery'.[146] But this type of criticism should not deflect from the fact that since the late–nineteenth century the courts had readily acquiesced in the emergence of this informal and relatively closed system of administrative law.

88. Consider, for example, the case of *Pasmore* v *Oswaldtwistle UDC*[147] in which the plaintiff mill–owner, having unsuccessfully petitioned the authority to bring the sewers up to standard, sought an order of mandamus requiring the authority to discharge its statutory duty under the Public Health Act 1875. In finding for the authority, the House of Lords held that the plaintiff should have used the statutory default procedure provided for in the Act. It held that where statute created the obligation and provided a remedy, the general rule is that it could not be enforced in any other manner: 'the particular jurisdiction to call upon the whole district to reform their mode of dealing with sewage and drainage should not be in the hands, and should not be open to litigation, of any particular individual, but should be committed to a Government department'.[148]

89. Decisions of this character seemed implicitly to have acknowledged the fact that the ordinary courts simply did not possess the capacity to provide an adequate resolution of these essentially administrative issues.[149] The matter, the courts were saying, was better left to administrative channels of appeal. It is through the establishment of these central mechanisms of supervision, then, that a non–juridified system of administrative law

[144] For representative accounts see: *H. J. Laski*, Judicial Review of Social Policy in England, 1926, 39 Harvard Law Review, p. 839; *W. I. Jennings*, The Courts and Administrative Law - the experience of English housing legislation, 1936, 49 Harvard Law Review, p. 426; *J. A. G. Griffith*, Judges in Politics, 1968, 3 Government & Opposition, p. 485; *P. Mc Auslan*, Administrative law, collective consumption and judicial policy, 1983, Modern Law Review 1, p. 46.
[145] *W. I. Jennings*, Local Government in the Modern Constitution, 1931, p. 3.
[146] Ibid, p.3.
[147] (1898) A.C. 387.
[148] Ibid., p. 395 (per Lord Halsbury).
[149] For examples of such acquiescence see Board of Education v Rice [1911] AC 179 and Local Government Board v Arlidge (915) AC 120. See *W. J. L. Ambrose*, The new judiciary, 1910, 26 Law Quarterly Review, p. 203; *A. V. Dicey*, The development of administrative law in England, 1915, Law Quarterly Review 148, p. 31.

evolved. Judicial supervision of public authorities, a basic characteristic of old regime, had been replaced by the administrative supervision of central departments.

5. THE GROWTH OF PUBLIC LAW IN THE TWENTIETH CENTURY

5.1. The controversy over administrative law

90. 'Where shall we now find the ardent believers in the constitution of England?', Dicey asked rhetorically in 1905. 'If they exist at all', he continued, 'they belong in spirit to the past'.[150] His argument was that the nineteenth century spirit of liberalism had been superseded by a set of political beliefs favouring collectivism. These were the ideas of 'new liberalism'.[151] New liberalism (otherwise labelled progressivism or social democracy) stood in opposition to the social atomism of classical liberalism. The movement asserted that humans were intrinsically social creatures and that 'real' freedom could not be realised without collective action on a significant scale.[152] In 1915, in the last edition to his classic work on the *Law of the Constitution*, Dicey complained that 'the law of England is being "officialised" ... by statutes passed under the influence of socialistic ideas'.[153] This was leading the growth of administrative law, or what Dicey called 'the invasion of the rule of law by imposing judicial functions upon officials'. This was due 'to the whole current of legislative opinion in favour of extending the sphere of the State's authority'.[154]

91. Dicey had feared that if the use of administrative tribunals was extended and regularized, particularly if judicial review were excluded, Britain would rapidly develop an independent and formalized system of administrative law. This is precisely what some 'modern' scholars were advocating. In 1928, William Robson argued that 'no modern student of law or political science has today the slightest doubt that there exists in England a vast body of administrative law'. The problem, he suggested, 'is not to discover it but rather to master its widespread ramifications and reduce it to some kind of order and coherence'.[155] The solution of the modernizers was to rationalize the existing haphazard arrangements for

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[150] *A. V. Dicey*, Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century, 1905, p. 440.
[151] See *J. A. Hobson*, The Crisis of Liberalism: New Issues of Democracy, 1909.
[152] See *J. T. Kloppenberg*, Uncertain Victory: Social Democracy and Progressivism in European and American Thought 1870–1920, 1986. On its influence in public law thought in the UK see: M. Loughlin, The Functionalist Style in Public Law, 2005, University of Toronto Law J. 361, p. 55.
[153] *Dicey*, Law of the Constitution, above n. 29, p.xliv.
[154] Ibid. p.xxxix.
[155] *W. A. Robson*, Justice and Administrative Law, 1951, p. 32.

tribunals and to establish an Administrative Appeal Tribunal, which would supervise the network of tribunals and would remain separate from the High Court.[156] This proposal was officially considered by the Donoughmore[157] and the Franks[158] Committees (the two main official investigations into administrative law in the twentieth century), on each occasion at Robson's instigation. On each occasion it was decisively rejected.

92. Administrative law – its existence, its coherence, its desirability – became a highly contentious political issue in the decade or so following World War I. This was a period which saw not only the retention in peacetime of extensive administrative powers acquired by Government during the war; it also the election of the first Labour government, eager to use these administrative powers to promote social change. The controversy came to head in 1929 when Lord Hewart, the Lord Chief Justice and head of the common law courts, launched an attack on the growth of administrative law in a book called *The New Despotism*.[159] The 'new' despotism Hewart had in mind – in contrast with the old despotism of the Stuart claims of the seventeenth century – was the positing of the central authority (the government departments and their officials) 'above the Sovereignty of Parliament and beyond the jurisdiction of the Courts'.[160] Publication of the book caused the government to appoint the (Donoughmore) Committee on Ministers' Powers, though its membership virtually guaranteed that the Dicey–Hewart line would not be followed.

93. The Donoughmore Report led to reforms that streamlined some of the practices concerning the delegation of legislative powers to the executive, but it otherwise changed little. The controversy that led to the establishment of the Committee was, at base, ideological and once the fact of the welfare state had been accepted, delegated legislation became accepted as an essential instrument for the realization of these social goals. It might therefore be noted that when the Conservative governments of 1979–1997 sought to bring about a fundamental restructuring of the welfare state, the rate of production of executive legislation not only did not significantly diminish: it actually increased.[161]

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[156] *Robson,* ibid., ch. 6; *W. I. Jennings*, The Report on Ministers' Powers, 1932, 10 Public Administration 333, p. 348–351; *J. Willis*, The Parliamentary Powers of English Government Departments, 1933, p. 171–172.
[157] Report of the Committee on Ministers' Powers, Cmd 4040.
[158] Report of the Committee on Tribunals and Enquiries (London: HMSO, 1957).
[159] *Lord Hewart of Bury*, The New Despotism, 1929.
[160] Ibid. p.14.
[161] See *E. C. Page*, Governing by Numbers: delegated legislation and everyday policy-making, 2001, p. 25.

94. With respect to administrative adjudication, a similar story can be told. As the century progressed, the numbers of tribunals significantly increased, although without any obvious ordering principle. In this form, tribunals were viewed by many as ad hoc, dispute–resolving mechanisms. Without a set of intelligible principles to guide them, or a rational institutional structure to supervise them, they could not develop into a true system of administrative adjudication. Tribunals were treated as grievance-handling mechanisms performing mediative rather than judicial functions. Although disposing of six times the volume of contested civil litigation each year, they could not develop their own general principles of law. They were therefore unable to challenge the ordinary court's monopoly power to shape general legal values. Related institutional mechanisms which were established served only to reinforce this impression; from the weak and part-time Council on Tribunals to the 'administrative palliative' of the Ombudsman technique.[162]

95. Some sense of the scale of administrative redress mechanisms existing at the close of the twentieth century can be gleaned by considering the volume of appeals that end up in formal hearings before tribunals: the tax tribunal, which hears appeals that cannot be settled between the Inland Revenue and the taxpayer, was dealing with 30,000 cases per year; 230,000 social security benefit decisions end up in an appeal tribunal each year; and Immigration Adjudicators were hearing around 90,000 cases per year, with the Immigration Appeal Tribunal determining a further 40,000 appeals. In total, about a million people each year were having their cases dealt with by one or other of the seventy tribunals that exist within the British system. Add to those cases the workload of ombudsmen,[163] and it is evident that the arrangements for administrative redress had become a major part of public administration.

96. It was also clear by the end of the twentieth century that this network of tribunals was not performing its public functions as economically, efficiently or effectively as might be expected. In a White Paper of 2004, the Government accepted that 'it was not created as a system and that no coherent design or design principle has ever been applied

[162] *J. D. B. Mitchell*, The causes and effects of the absence of a system of public law in the United Kingdom, 1965, Public Law 95, p. 109.
[163] The local ombudsmen's caseload was around 19,000 pa, the Parliamentary ombudsman's at around 2,000 and the Scottish Public Services Ombudsman at 1, 300: Department of Constitutional Affairs, Transforming Public Services: Complaints, Redress and Tribunals Cmnd. 6243 (2004).

systematically to it'.[164] It therefore brought about a comprehensive overhaul of the entire tribunal system, which was implemented in the Tribunals, Courts and Enforcement Act 2007. This establishes a unified system of tribunals, with a two tier structure in which the Upper Tribunal mainly reviews and determines appeals from decisions of first-tier tribunals which are divided into chambers. Appeals from decisions of the Upper Tribunal are permitted on questions of law to the Court of Appeal. Eighty years after Robson's proposals the essence of his argument has been accepted. Today, however, these reforms are now measured not such much by the degree of a citizen's access to justice and sympathetic dispute resolution; the key criterion is economy, efficiency and effectiveness in the dispatch of administrative disputes.

5.2. The growth of the welfare state

97. During the politically contentious debate over administrative law which raged during the first half of the twentieth century, the concept was regarded as the 'law' that emanated from the executive. Administrative law was conceived as the set of rule–making and adjudicatory powers that had been acquired by the executive. Understood in this light, the existence of these powers was felt to raise constitutional questions affecting the principles of parliamentary sovereignty and the rule of law. But once that political debate receded, administrative law emerged as a distinct subject in a broader frame. Administrative law came to be treated simply as the body of law establishing, organizing and regulating public administration. Thus viewed, it is a vast subject encompassing the establishment and jurisdiction of public authorities, the law relating to the civil service and other public officials, relations between central department and local authorities, between Ministers and public corporations and boards, the duties and liabilities of public authorities, judicial review of administrative action, as well as the organization of administrative tribunals and the rule–making powers of the government.

98. In this broad sense, administrative law grew extensively during the twentieth century and largely as a consequence of the formation of the welfare state. Having been reformed in the nineteenth century, local government was transformed into a major vehicle of public service provision, with almost a quarter of public expenditure being filtered through local authorities. Since this growth was financed by central grants, however, central government

[164] Department of Constitutional Affairs, Transforming Public Services: ibid. para. 4.21. This followed the Leggatt Report: Tribunals for Uses: One System, One Service (London, 2001).

continued to be an active player in local matters: the network of central–local government relations thus became a major sphere of administrative law in both the broad and narrow sense of that term.

99. From the 1930s, the general practice of using local authorities as the sole agencies of local administration was supplemented by a policy of nationalization. Certain public services were removed from the purview of local government. This was undertaken for three main reasons: that local administration of certain services was inefficient and anachronistic; that, although local control was possible in principle, the existing areas rendered the exercise administratively impractical; and because of a general policy of nationalization of the public utility sector. Examples falling into the first category include the transfer of unemployment assistance to a board in 1934,[165] and the assumption of responsibility for the trunk road network by the Ministry of Transport in 1936.[166] A good example relating to inappropriateness of local authority areas was the removal of the local authority hospital services (evolved from the Poor Law institutions) to the national health service which was established in 1946.[167] And the policy of nationalization affected local government mainly through the loss of their electricity and gas trading services with the establishment of national structures operated through regional boards.[168]

100. The loss of these responsibilities did not inevitably lead to a diminished status for local government. But it did result in a significant restructuring. Local authorities mainly lost production-orientated services. Furthermore, since the reforms of the early decades had brought to local councils such responsibilities as education and the poor law, this realignment gave local government a distinct social service orientation. With the establishment of the welfare state, many local government services, such as education, housing and personal social services, became of primary importance to government. Consequently, despite losing certain functions, local government continued to increase the share of total public expenditure it consumed, though this restructuring reinforced the trend of local dependency on central government grants.

[165] Unemployment Act 1934, which established the Unemployment Assistance Board to administer the new service.
[166] Trunk Roads Act 1936, which made the Ministry of Transport the highway authority for 4,500 miles of trunk roads. A further 3,685 miles were added to this network by the Trunk Roads Act 1946.
[167] National Health Service Act 1946.
[168] Electricity Act 1947; Gas Act 1948.

101. The most influential period of the welfare state programme was that of the post-war Labour government (1945–1951). Following the Beveridge Report of 1942, the Government not only established a national health service but also a comprehensive scheme of national insurance and social security, introduced an extensive programme of social service provision, and expanded its education and social housing schemes.[169] The Government also engaged in a policy of nationalization of key industries: in addition to the public utilities, the Government nationalized the Bank of England, civil aviation, road transport, and the steel industry. It also established extensive regulatory schemes ranging from agriculture to town and country planning. Administrative law became a vast and unwieldy subject, ranging from the legal status of public corporations, to complex and specialised bodies of law relating to housing, planning, social security and so on.

5.3. The modern system of judicial review

102. During the post-war period the courts embarked on the major project of modernizing the 'procedure for preventing the abuse of power'.[170] This 'project', which can be identified as such only with the benefit of hindsight, began fitfully and it began to take shape only from the mid–1960s. But it can now be characterized as one of the most remarkable movements in twentieth century judicial policy. After a fitful start in the 1950s, progress towards the realization of that objective has been cumulative.

103. While mainly based on procedural reforms, these procedural changes have been accompanied by important developments in substantive law such as the Crown Proceedings Act 1947 (discussed in para. 34 above), permitting the subject to bring civil actions against the Crown. In the specifically administrative law context, the initial procedural developments were achieved by fashioning the declaration as a remedy against public authorities. This had the effect of ameliorating certain technical limitations in the prerogative orders (such as the general absence of discovery and cross-examination), circumventing delays in the Divisional Court,[171] and also enabling courts to fashion more precise and appropriate relief than was available under the prerogative orders.[172] More

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[169] See *Robson*, above n. 155.
[170] *A. Denning*, Freedom under the Law, 1949, p. 126.
[171] 'By the 1960s the Divisional Court was grossly overwhelmed with work. The court only sat in one Division and it was almost invariably presided over by the Lord Chief Justice of the day so that he could ensure consistency. ... [D]espite all efforts and expertise ... a substantial backlog developed so that even urgent matters were having to wait for an unacceptable period to come before the court.' *H. Woolf*, Protection of the Public – A New Challenge, London, 1990, p. 38–39.
[172] *Woolf*, ibid p. 45–56.

comprehensive change came about as a result of reforms in 1977, which had the effect of replacing the separate prerogative procedures with a general application for judicial review.[173]

104. These procedural innovations were accompanied by significant incremental developments in substantive law: the resurrection of the power to review for error of law on the face of the record which permitted courts to supervise the errors made by tribunals within their jurisdiction;[174] the dramatic extension in the scope of natural justice since *Ridge v Baldwin* in 1963[175] and the emergence of a flexible notion of procedural fairness; the potential since *Anisminic* in 1968 to treat any error of law as jurisdictional, thereby possibly nullifying the distinction between errors within and errors going to jurisdiction;[176] the rejection of the idea that subjectively formulated discretionary powers vested in ministers conferred an unfettered discretion;[177] and the recognition that, in principle, prerogative powers are reviewable in accordance with the same principles which apply to statutory powers.[178]

105. In *O'Reilly v Mackman*[179] the House of Lords achieved the bonding together of substance and procedure. The application for judicial review was adopted as the exclusive remedy for addressing issues of public law and, in order to realise this principle, a conceptual distinction had to be drawn between matters of public law and private law. It was at this stage that Lord Diplock felt able to signal the success of the project, declaring that 'the progress towards a comprehensive system of administrative law ... I regard as having been the greatest achievement of the English courts in my judicial lifetime'.[180] The achievement identified by Lord Diplock is essentially one of bringing administrative law into the fold of the common law. If the growth of administrative powers could not be prohibited, then they should be integrated into the ordinary law of the land, thereby ensuring development in harmony with the common law.

106. One of the most controversial aspects of this modernization programme has been the distinction forged between public law and private law. Sir William Wade has been the most

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[173] Ord 53 RSC, SI 1977 No 1955; Supreme Court Act 1981, s.31.
[174] R v Northumberland Compensation Appeal Tribunal, ex parte Shaw (1951) 1 KB 711 (Div.Ct).
[175] (1964) AC 40.
[176] Anisminic v Foreign Compensation Commission (1969) 2 AC 147.
[177] Padfield v Minister of Agriculture (1968) AC 997.
[178] Council of Civil Service Unions v Minister for the Civil Service (1985) AC 374. See above para.39.
[179] (1983) 2 AC 237.
[180] R. v I.R.C., ex parte National Federation of Self Employed (1982) A.C.617, 641.

vehement of the critics, arguing that the distinction, resulting in procedural technicality once again shaping the subject, was 'a serious setback'. He argued that, by 'declaiming a rigid dichotomy ... without explaining how the line was to be drawn the House of Lords created a host of new problems for litigants'.[181] This line of argument has not gone unchallenged. Lord Woolf, for example, contended that Wade's claim that the exclusive procedure will result in many meritorious cases failing on procedural grounds is exaggerated.[182] And so it has proved, largely because of pragmatic accommodation by the judiciary alongside the adoption of a more explicit managerial approach to their task, especially in the period that followed the civil justice reforms in the 1990s.[183] Almost all the developments in substantive law have served to vest discretion in the judiciary: few clear principles have emerged as a result in the movement from natural justice to procedural fairness,[184] or with the extension of jurisdictional review,[185] or through the manner in which courts have come to review for unreasonableness or irrationality.[186] Sterile jurisdictional disputes have been avoided by pragmatic judgment.

107. The procedural reforms of the late 1970s provided a framework within which this growth in judicial review could be accommodated. As a consequence of these reforms, the Divisional Court of the Queen's Bench Division has been transformed into the Administrative Court, with specially nominated High Court judges forming a special court to hear all public law claims and generally to assert supervisory jurisdiction over all aspects of administration. These various changes have resulted in a significant increase in the workload of this court over the last twenty-five years. But, overall, the outcome of the project has been to ensure that administrative law (in both the narrow and broader senses) has been subjected to the supervisory jurisdiction of the common law courts.

5.4. The formation of the regulatory state

108. A fundamental re-organization of the public sector took place in Britain during the last quarter of the twentieth century. The basic problem, which was experienced in virtually all advanced economies, was that, over a long period, taxation and public expenditure had been growing more rapidly than income. In the face of perceived inefficiencies in public sector

[181] *H. W. R. Wade*, Procedure and prerogative in public law, 1985, 101 *LQR* 180.
[182] *Woolf*, Protection of the Public , above n. 171171, 226–228.
[183] The civil justice reforms were introduced in April 1999 following Lord Woolf's report, Access to Justice, 1996.
[184] *M. Loughlin*, Procedural fairness: a study of the crisis in administrative law theory, 1987, 28 Univ. of Toronto LJ 215.
[185] *P. P. Craig*, Administrative Law, 2003, p. 496: 'The fabric of jurisdiction is infinitely flexible'.
[186] *J. Jowell/ A. Lester*, Beyond Wednesbury: substantive principles of administrative law, 1987, Public Law, p. 368.

performance together with citizen resistance to further tax increases, radical changes were felt to be needed.[187] The British solution involved a shift towards a regulatory mode of governance, the essential characteristic of which was the increasing use of regulation as a formal instrument of government. This entailed the attempt to modify the socially–valued behaviour of a variety of actors – both public and private – who operate at some remove from the central authority by means of formal rules, generally promulgated by an institutionally distinct regulator.[188] It has resulted in fundamental changes in the role, structure, and mode of operation of government.

109. These changes were promoted by four successive terms of Conservative administration (1979–1997). Although their policies were in many respects highly politically contentious, the structural changes introduced were not significantly reversed through three following terms of Labour government (1997–2010). And although the reform programme evolved incrementally and was never designed as an overarching strategy, its general trajectory has been evident. The objective of this strategy has been to reduce the size of the public sector and to subject those public services that remain to the disciplines of competition, market testing and value-for-money auditing. The strategy has also had a major impact on the modes of organization and operation of the public sector. Three features of this re-organization might be highlighted: the separation of policy and operational matters, the establishment of independent regulators, and the institutionalization of a greater degree of formality in governance arrangements. Cumulatively these reforms have had a profound impact on the exercise of public authority and a consequential impact on the organizational form of public law. The emergence of this regulatory state might even be seen as a continuation of a project to realize of the Benthamist administrative agenda.

110. The impact of these reforms on local government was highly politically contentious, especially during the 1980s, as the centre acted in a directive fashion through an unprecedented programme of local government reform and by using its various supervisory powers in active ways to ensure that local authorities complied with this central government programme. It led to a politicization of central–local government relations, not least because the major urban local authorities remained under Labour control. But it also resulted in the juridification of central-local relations, as both central departments and local authorities each

[187] *C. D. Foster/F. J. Plowden*, The State Under Stress, 1996, chs. 1–2.
[188] *D. Osborne/T. Gaebler*, Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector, 1992.

turned to law as a means of protecting their interests.[189] One effect of the restructuring of local government that took place between 1979 and 1997 was to bring to an end the constitutional significance of local government in the British system. Local authorities, being so heavily dependent financially on central government support and being bound by many legal obligations and conditions, are now evidently part of a general administrative system that operates in accordance with the principle of central hierarchy.[190] Although attempts have been made since 1997 to bolster the status of local government, whether through Labour's 'new localism' agenda[191] or the Coalition Government's Localism Act 2011, the structural and financial framework have been so rigid as to render these initiatives of limited significance.

111. Similarly contentious has been the rolling programme for the privatization of public bodies.[192] With respect to public law, the privatisation of the public utility companies – British Telecom (1984), British Gas (1986), the electricity industry (1989), the water industry (1989) and British Rail (1996) – has been of the greatest significance. Although the reform rhetoric suggested that the objective was the promotion of efficiency, these public monopolies were not generally broken down into much smaller private companies with the objective of promoting efficiency through competition. Consequently, the transfer from public to private monopoly has required the establishment of new regulatory agencies to protect the public against the possible abuse of a dominant market position. These regulatory offices have a range of duties, including the regulation of prices, the enforcement of licensing terms, the promotion of competition, and the provision of a mechanism for addressing consumer complaints. In their functions of policing the abuse of monopoly power, the powers of these regulatory offices are linked to those of the Office of Fair Trading and the Competition Commission.[193] Privatisation has thus resulted in the emergence of a new sub-field of administrative law, that of regulatory law.[194] The growing

189 *M. Loughlin*, Legality and Locality: The Role of Law in Central–Local Government Relations, 1996.
190 *M. Loughlin*, The Demise of Local Government, in: V. Bogdanor (ed.) The British Constitution in the Twentieth Century, 2003, ch. 13.
191 *G. Stoker,* Transforming Local Government From Thatcherism to New Labour, 2004.
192 *C. Veljanovski*, Selling the State: Privatisation in Britain, 1987; *Foster/Plowden*, The State Under Stress 1996, ch. 5.
193 *T. Prosser*, Regulation, Markets and Legitimacy. In: J. Jowell/D. Oliver (eds), The Changing Constitution, 2007, p. 339; *T. Prosser*, The Regulatory Enterprise: Government, Regulation and Legitimacy, 2010. In 2014, the Competition and Markets Authority was established, combining many of the functions of the Office of Fair Trading and the Competition Commission: Enterprise and Regulatory Reform Act 2013, Pt. III.
194 *P. Vincent*, The New Public Contracting: Regulation, Responsiveness, Relationality, 2006; *T. Prosser*, The Limits of Competition Law: Markets and Public Services, 2005.

importance of this type of administrative regulation at the domestic level has been enhanced as a result of increasing influence of the European Community regulatory measures.[195]

112. The impact of this general reform programme (sometimes called 'new public management') has been similarly important with respect to those public services that remain in the public sector.[196] The general objective has been to break down public bodies into discrete units, to fix precise performance targets for these units and, wherever possible, to subject their performance to the discipline of market competition. This movement is driven by the conviction that public administration should be concerned only to secure the provision of services which are in the public interest but which, left to its own devices, the market will not provide.

113. The shift towards the regulatory mode can thus be viewed as a displacement of the welfare state model of government. Under the welfare state model, government functioned through relatively homogeneous units of public servants who constituted a permanent corps of officials employed on standard terms and conditions. The welfare state was a service–delivery state, in which government assumed responsibility not only for the provision of a wide range of services but also for their production. Relations within and between the various public sector bodies were relatively informal and opaque to the outsider. Relations between the welfare state and its citizens were characterised by high levels of discretion.

114. The breakdown of monolithic welfare state institutions through the separation of operations from policy–making is nevertheless only one feature of the new regulatory mode of governance, which is emerging. Another characteristic is the trend towards the creation of free–standing regulators.[197] Although the regulatory offices in the utilities sectors are obvious examples, the growing importance of regulators within government to oversee the public sector should not be overlooked. Examples include the National Audit Office and the Audit Commission, the new or reformed inspectorates such as those for prisons (1981) and schools (the Office for Standards in Education 1992), and various new independent grievance handlers such as the Revenue Adjudicator (1992) and the Prisons Ombudsman (1994). A third aspect of the regulatory mode is much greater formality in relations, as compared with the old bureaucratic arrangements which the regulatory mode partly

[195] *G. Majone*, The Rise of the Regulatory State, 1994, 17 West European Politics 77, p. 85–97.
[196] *M. Barzelay*, The New Public Management: Improving Research and Policy Dialogue, 2001.
[197] See *C. Hood/C. Scott/O. James/G. Jones/T. Travers*, Regulation inside Government: Waste–Watchers, Quality Police, and Sleaze–Busters, 1999.

replaces. This is evident in the increasing use of formal rules as instruments of guidance, whether in the licences of utility companies or in the contracts for provision of local services. One general consequence, arguably, has been to render government arrangements more transparent.

115. The impact of the policy-operational distinction in administrative reform is best seen from reforms to the civil service itself. Following a report in 1988 which suggested that managerial tasks had been accorded too low a priority in administration,[198] the Government implemented a series of administrative reforms designed to separate the executive functions of the administration from its policy responsibilities by hiving-off executive tasks to newly formed agencies. Though operating within a Government–formulated policy and resources framework, these agencies, headed by a chief executive, would be responsible for the management of the service and would operate at arms–length from the central department of state.

116. These reforms, widely regarded as 'the most far–reaching since the Northcote–Trevelyan reforms in the nineteenth century',[199] have been actively pursued; between 1989 and 1998 112 executive agencies were created in the UK, employing over 350,000 people and comprising more than 75 per cent of the civil service.[200] They include major public organisations such as the Prison Service, the Environment Agency, the Highways Agency, Driver and Vehicle Licensing Agency, and the Courts and Tribunals Service. The model has been extended across the public sector more generally: a similarly inspired series of reforms have been introduced into the National Health Service,[201] and at the local level there has been a proliferation of agencies – urban development corporations, training and enterprise councils (now Learning and Skills Council), housing action trusts, further education colleges, grant–maintained schools (see now academies under the Academies Act 2010) – which have either been carved out from, or which deliberately by-pass, traditional local government structures.[202] Whatever the efficiency merits of these reforms, they have resulted in considerable fragmentation in government, leading to a recent concern over 'joined–up' government.[203]

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[198] Efficiency Unit, Improving Management in Government: the Next Steps, 1988.
[199] Eighth Report from the Treasury & Civil Service Committee, Session 1987–1988, Civil Service Management: The Next Steps HC 494, Vol. I, para.1
[200] *A. C. L. Davis*, Accountability: A Public Law Analysis of Government by Contract, 2001.
[201] *R. Klein*, The Politics of the National Health Service, 1989.
[202] *I. Leigh*, Law, Politics and Local Democracy, 2000, chs. 9, 10.
[203] *V. Bogdanor*, (ed.), Joined Up Government, 2005.

6. CONCLUSION

117. This chapter provides an overview of the significance of public authority in the British system of government. It seeks, in particular, to explain why the structure of public authority that evolved in Britain did not recognize a formal distinction between public law and private law. Critical to that account, it is suggested, is an appreciation of the ambivalent standing of the concepts of state, constitution and administration in the British system. The status of these concepts has been placed in question as a consequence of the growth of government, especially over the last century. The dramatic extension in administrative government has unsettled many of the assumptions on which Britain's historic evolutionary constitution has rested and presented certain novel legal challenges. It has (arguably) resulted in the formation of a centrally–directed administrative system, the emergence of a distinctive system of administrative law and an explicit acknowledgment of a public law/private law division.

118. These developments have reached maturation only in the last thirty or so years. In one sense, they bring Britain once again into the mainstream of the European public law formation. But the significance of the remaining uncertainties should not be under–estimated. These developments have produced a greater degree of formalization, rationalization and legalization of British governmental arrangements, but they have done so only at the cost of eroding the understandings, habits and practices of Britain's historic constitution. Many of the most foundational elements of the British system have been shaken and today they remain in a state of irresolution. These uncertainties are likely to persist into the foreseeable future, not least because contemporary developments, such as the continuing process of devolution of powers throughout the regions of the UK or the presently rather ambivalent relationship between Britain and the European Union, will continue to unsettle the system for some time to come.

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