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Federal Administrative Law - A Sketch

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FEDERAL ADMINISTRATIVE LAW*
A SKETCH

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I. INTRODUCTION

MOST of the controversy and much of the intensive development of administrative law which have taken place during the last twenty years have had to do with specific areas within that broad subject. The general approach seems to have been one of treating each area separately; and there has been little effort to view administrative law as a basic system which necessarily has a far-reaching impact on human relations and the daily life of every individual. In any event, it is this author's desire to endeavor to view it in some perspective. It is recognized that this is an endeavor which has many obvious difficulties and pitfalls; and perhaps it is too ambitious to undertake in a few pages, or even at all. But one is compelled to speak from experience and conviction, even where there are great difficulties, where the need to view a subject in overall terms appears to be of immense importance to the conduct of human affairs the world over. If that need is so important, then an attempt to so present it may perhaps be allowed some indulgence, despite the difficulties and pitfalls, and the dangers of using general language.

In this sense, administrative law may be said to be the body of legal principles governing the relations between government officials on the one hand, and the rest of the people on the other. And since so much of history has been a struggle between tyrants and dictators on the one hand, and the rest of the people on the other, administrative law becomes a subject of human relations which is perhaps second to none in practical importance in the establishment and conduct of government. Thus it will be argued that it is the legal subject whose variations necessarily determine

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whether a people are to have tyranny on the one hand, or effective government, political stability, and a chance to engage in that pursuit of happiness which is close to the hearts of all of us, on the other. The purpose of this article is to demonstrate that it is the one legal subject which, perhaps more than any other, dominates the daily life of people all over the world. If that can be demonstrated, then perhaps it must be concluded that administrative law is not a dull, legalistic or abstract subject, but that it is vibrant with human interest, and that the laws of human nature respond to its rules with far-reaching effect. And it should also be concluded that the selection of a system of administrative law should be given prime attention in the formation of new governments and the writing of constitutions.

In order to perceive the importance of the subject in relation to the daily lives of people around the globe, our system of federal administrative law must be viewed in its setting with the other systems of administrative law which are in force over the world.

II. Three Basic Systems of Administrative Law

A. *The Oriental or Russian System*

There are today in a broad sense, three basic systems of administrative law in general use. First, there is the Oriental or Russian system, a system based on the sheer finality of official acts. That means, in other words, that anything that a government official does is law simply because he does it. There is a complete absence, in practical terms, of any machinery for either administrative or judicial review. This system is in force in Russia and other oriental countries today, but there is nothing the least bit new about it. Indeed, it is the ancient system of administrative law which has been in effect in primitive tribes and rudimentary governments from the dawn of history. It was even in effect long ago in medieval England, after the conquest and before the Magna Charta. At that time "all as yet depended on the person of the king,"[1] and the affairs of each county were administered by a sheriff, a magnificent character who was a sort

[1] 2 Holdsworth, A History of English Law 195 (3d ed. 1923).

of provincial viceroy, retaining office at the king's will.[2] What he did was final, in practical effect, with respect to the establishment of relations between government officials and the rest of the people. Today this system can perhaps be readily recognized as the major legal tool of tyranny and dictatorships, where, in practical terms, official acts are absolutely final and there is a complete absence of legal rights which are enforceable by individuals against government officials.

B. *The System of Administrative Review*

Administrative review is review of the act of a government official by other government officials who, from the standpoint of function, are in the executive branch of the government. This necessarily means, in practical terms, that the government officials who conduct administrative review are ordinarily subject to the domination of or interference by the president or other chief executive. And administrative review has had a particularly interesting history in France. In the sixteenth century the feudal regime which had come into being in Europe became displaced in both France and England by a strongly unified power in the hands of the sovereign, by what today would probably be called dictatorship. In both countries this led to political conflict and war, that age-old conflict between government officials and the rest of the people, which has been going on from the beginning of time and which is still with us. The interesting thing about it is that, in England, Parliament and the courts of common law won, while in France, after initial victories of the *Parlements*, in 1661, the king finally triumphed.[3] Here then, began that vast divergence between the two countries which led to early emergence of the doctrine of judicial review in England and the United States, and to an administrative review in France which finally became judicial in character.

What happened in France was this: The old judicial power was represented by the *Parlements*, and through the seventeenth and eighteenth centuries a bitter struggle continued between the

[2] See PORT, ADMINISTRATIVE LAW 25; MAITLAND, CONSTITUTIONAL HISTORY OF ENGLAND 41 (1926).

[3] PORT, ADMINISTRATIVE LAW 296; 4 HOLDSWORTH 58, 59 (3d ed. 1923).

nobility and the *Parlements* on the one hand, and the king's administrators, the *Conseil du Roi* and its agents, the *Intendants*, on the other. For as the feudal system had developed, in no country of Europe were the ordinary courts less dependent upon the government, or the executive branch thereof, than in France. The reason was that the judges of the ordinary courts had purchased or inherited their offices and so were not subject to removal. In fact, the king was then almost powerless in relation to them. The result was that, in the last century of the monarchy, as a means of asserting his power and control, the king began, by decree, to withdraw suits involving the legality of acts of government officials from the jurisdiction of the ordinary courts; and he provided for review of their acts by other government officials in an administrative tribunal, the *Conseil du Roi*, only. No less a person than de Tocqueville says that the purpose was "to call into being, as it were beside them, a species of tribunal more dependent on the sovereign, which should present to the subjects of the Crown some semblance of justice without any real cause for the Crown to dread its control."[4] This was termed "administrative justice."[5] This concept, which is the basic concept of administrative review, became so powerfully intrenched in the minds of the governing administrators of France that when the Monarchy ended, the *Conseil du Roi* was continued and its name changed in the year VIII of the French Revolution to the *Conseil d'Etat*, and it continued to have supreme jurisdiction over suits involving the legality of acts of government officials. Then in 1806 with Napoleon's passion for order and system, the *Conseil d'Etat* became organized as a court and thereafter the ordinary courts were deprived of all jurisdiction regarding such suits.[6] But in 1872,

[4] DeTocqueville, France Before the Revolution of 1789, at 96 (H. Reeve's Transl. 1856). Holdsworth says that the basic plan was to secured a tribunal, *i.e.*, the *Conseil du Roi*, "devoted to the interests of the government." 4 Holdsworth, *op. cit. supra* note 1, at 59.

[5] DeTocqueville, France Before the Revolution of 1789, at 96 (H. Reeve's Transl. 1856).

[6] See Port, Administrative Law 299, 300. Today the Council of State is clearly recognized, not as something which came in with the French Revolution or a product of the political ferment of the 18th century, but as a continuation of the tribunal which originated well before 1661 in the *ancien regime*, and thus is "one of the oldest living institutions of our country." See Schwartz, French Administrative Law and the Common Law World 23. Holdsworth, quoting DeTocqueville, L'Ancien Regime et La Revolution 51, 52, says "Its origin is ancient, . . ." referring, apparently, to the 16th

a happening of major important took place in France: a separation of functions was established so that a judicial side of the *Conseil* thereafter took the place of the Minister of Interior as judge.[7]

Since that time, the leading French administrative tribunal, still the *Conseil d'Etat,* has achieved an independence and impartiality which are virtually unknown in many of the countries which profess to follow the French system. Today the *Conseil d'Etat* functions with something closely comparable, at least, to the doctrine of judicial review. [8] Thus the system in France is frequently said to have worked well.[9] But in other countries, based on the French system before 1872, administrative review is still made by a group of government officials who are, in practical terms, under the domination of the president or chief executive, with results which might be expected and which are startlingly different from those of our system.

C. *The System of Judicial Review*

1. *In General:* Finally, we come to the American system of federal administrative law, which is based on the great doctrine of judicial review. Judicial review depends, first, upon the existence of a written constitution. Second, it depends upon the existance of an independent judiciary, that is, ordinary courts established by a constitution which draw their power from the constitution itself so as not to be dependent upon the direction, whim or caprice of the chief executive. Third, it depends upon the judges of these ordinary courts being empowered by the constitution to determine questions of the legality of the acts of government officials and administrative agencies. In this way, the judges of the ordinary courts are empowered to control government officials to the extent of holding them to the law. It is the American counterpart or way of stating what Dicey in his

century. 4 HOLDSWORTH, *op. cit. supra* note 1, at 56. And see PORT, ADMINISTRATIVE LAW 299.

[7] Port, *op. cit. supra* at 303, 304; Schwartz, *op. cit. supra* at 313, 314.

[8] See Schwartz, *op. cit. supra,* at 313. "The Council of State during its early history was more an administrative agency than a court. But since that time there has been a continuous judicialization of the French Tribunal."

[9] Schwartz, *op. cit. supra,* provides an excellent discussion of this theme.

classic English work[10] defines as the "rule, supremacy, or predominance of law"[11] and as meaning "that no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land."[12]

There are profound differences between the system of administrative review and the system of judicial review—differences which also reflect the contrast between the Roman law system and that of the common law. Under the Roman law government officials were the final judges of their own powers, were above the law as administered by the ordinary courts, and were beyond their control. That is, if a top government administrator said that the word "white" in a statute meant "black," there was no group or tribunal empowered to reverse his decision or to say otherwise. Under the English common law, however, government officials were not above the law, but were subject to it like everyone else. Indeed, Blackstone in his *Commentaries*, published beginning in 1765, treated the subject of administrative law, the relationship of government officials to the rest of the people, under the law of rights of persons, on the theory that officials are persons and the law applicable to them is the law applicable to everyone else.[13]

2. *Origin of the Doctrine in the Writ of Habeas Corpus:* Fundamental though it is, even in our own country, one actually hears very little about the doctrine of judicial review. Indeed, it is now more or less taken for granted. What is perhaps even less realized is that the doctrine of judicial review quite probably originated with the writ of *habeas corpus*, "the most celebrated writ in the English law,"[14] used to test the legality of detention by a government official. There is a very practical reason for this. Just as most of the great litigated cases today in the field of administrative law revolve around controversies with government officials over property rights, in older times when society was basically

[10] DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, still the leading book on English Constitutional Law, which has gone through some nine editions since 1885.

[11] *Id.* (9th ed. 1941) Pt. II, C. IV, at 187.

[12] *Id.* at 188.

[13] 1 BLACKSTONE, COMMENTARIES, Chaps. 3-9. See Pound, *Public Law and Private Law*, 24 CORNELL L. Q. 469.

[14] 3 BLACKSTONE, COMMENTARIES 129. See also Book I, Chapter I, the subdivisions dealing with personal security, and personal liberty. And see Chapter V at 129-38, 231.

agricultural and rural, many of the controversies that raged through English history involved interference by government officials with the right of personal liberty. Thus, English history is studied with instances of people being imprisoned, kidnapped, beheaded, etc., often for political reasons and without any legal justification. Out of this long history of arbitrary interference with the right of personal liberty, and the desire for some kind of protection, evolved the doctrine of judicial review by writ of *habeas corpus.*

This doctrine of judicial review is a creature of the common law, and also of Article III of the American Constitution; but there is no such thing as judicial review over most of the world today. Over vast areas of geographical territory containing millions and millions of people, the acts of government officials are final. In practical terms, it must be said that many of these millions live under the domination and control of government officials, to the extent that the latter wish to assert it. And instead of the safety valve of the doctrine of judicial review, the only safety valve left is that of bloodshed and violence—revolution. In this author's own time he has been a fairly close witness, at least, of six revolutions, and has heard it said in private converation in some countries that a young man cannot get ahead, when the top government officials are against him, except through the safety valve of revolution. The government officials can apply the law to him as they please, arbitrarily or vindictively. Thus where there is no safety valve of judicial review over the legality of acts of government officials, there is only the safety valve of revolution.

3. *The Guardian of the Written Law and of Individual Rights:* As has been observed from the foregoing, the doctrine of judicial review stands out basically as the guardian of the written law and the integrity of the dictionary. Thus, in practical terms, it is the only true guardian of the individual rights which are written into a constitution. When an individual in this country asserts in court that his legal rights, constitutional, statutory or otherwise, have been unlawfully interferred with by a government official or administrative agency, the independent judiciary will impartially enforce his rights, even against government officials, and thus the

written law is enforced so that it becomes law in a practical sense also.

4. *The Foundation of Business and Commerce:* In acting as this guardian of the written law, the doctrine of judicial review has several major effects. First, it protects the individual personally from arbitrary interference by government officials and administrative agencies in his personal affairs, as discussed above. Second, it has a far-reaching impact upon business generally. A certain practical confidence in the future is absolutely necessary to enable businessmen to plan ahead and to feel sure that they can execute their plans. In turn, the execution of the steps of every business plan depends upon being able to enforce either the written law, or a contract, or both. If the businessman knows that either the written law or his contract may be arbitrarily interfered with or extinguished, in practical effect, by a government official—and this goes on in a number of countries today—then, what confidence can he have in the future? He can have little, if any confidence; the only real basis upon which he can proceed is necessarily that of intrigue or favoritism with the government officials involved. There is no other machinery to which he can resort. And with the winds of favoritism and intrigue constantly changing, he does not even dare to try to make plans; his ability to plan is circumscribed. Hence, in those countries where there is no doctrine of judicial review, where the ordinary courts are powerless to hold government officials to the law, business does not dare to make anything resembling a maximum effort. Potential foreign investors know only too well that once the money has been poured into such a country, it is subject to the whim of the chief executive, and that the enterprise can be wrecked by a simple decree, even by a telephone call; and that, short of favoritism and intrigue, there is nothing to be done about it. The result is that a long range business plan is impossible; capital, domestic or foreign, stays out; and the businesses that have been started have their troubles. The end result is that enterprise is restricted, employment is retarded, and energy stagnates. One drives through towns and villages where people are idle for lack of business progress and expansion, wasting talents, energies and lives. Un-

less the doctrine of judicial review can be installed, it is futile to talk about any major development of "underdeveloped" countries, or the substantial increasing of foreign investment. Those things appear to be impossible, on any real scale, except on the basis of the doctrine of judicial review.

Thus in this country, businessmen know that if any government official, from the president on down, interferes with their affairs by exceeding his powers under the written law, the businessmen can go into the nearest appropriate court and obtain relief.[15] It is thus in large part because of the doctrine of judicial review that businessmen have confidence in the future, that they dare to make plans, that business enterprises are started, that jobs are provided, that the people develop, that the standard of living rises, and that there is a dynamic economy and a maximum effort by the people.

5. *Judicial Review and World Peace:* We come to the third and final, broad impact which the doctrine of judicial review has had on our daily lives and on world history. Among the individual rights set forth in our Constitution are the rights of free speech and freedom of the press. The general desirability of these rights is something which is above question. Indeed, even the constitution of the U.S.S.R. contains written guarantees of the rights of freedom of speech and of the press. Not so long ago this author wrote the Russian Embassy asking for a copy of the Russian Constitution, and it sent back about the fanciest constitution in print. It has a beautiful cover; it is printed on elegant paper; the type is distinguished; and it has a red silk ribbon for a bookmark. It contains a lot of enticing language, and by that is meant that, among other things, it contains these provisions for freedom of speech and freedom of the press. But there is no provision for enforcement of those rights by an independent judiciary through judicial review, and hence these rigts, in practical effect, do not exist. As a document it is thus all form, and as a constitution it has no substance whatever.

In this country, however, these individual rights of freedom of speech and freedom of the press are strictly enforced by our independent judiciary, even against government officials them-

[15] See Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579 (1952).

selves. The result is that there is in this country a free and active market place of ideas. The poor ideas are constantly being torn to pieces and dissipated through argumentation; good ideas are constantly mushrooming up from the bottom and becoming accepted by the public; and there is a public opinion which is freely arrived at by public and open discussion. It is no secret that, in the last analysis, it is public opinion which controls the country and the acts of our government officials. For this public opinion, freely arrived at, is immediately and directly reflected in the election or discharge of public officials, and in their acts from day to day and month to month.

From the standpoint of world affairs, there is something noteworthy about public opinion freely arrived at by open and public discussion; and that is, that there is a wonderful trait of human nature, over the world, which is that a majority of the people everywhere, by temperament, seem to be against aggressive warfare. They can express this position through freedom of speech and the press; and so history seems to have shown that the so-called democracies of the world which have a judicially-enforced freedom of speech and of the press, have not been the aggressors. On the other hand, there is a perfectly clear course of history which seems to show that wars have been started by dictatorships founded on the very absence of judicial review. Certainly our own time has shown that. World War II was started by three such dictatorships, Germany, Italy and Japan; and today, the one great trouble-maker or *enfant terrible* in the world, Soviet Russia, is the most iron-bound dictatorship of all with a complete absence of the doctrine of judicial review. Thus the cold war with Russia appears to be, at bottom, a war between systems.

This is a time of change and upheaval in the world. Revolutions are taking place; old governments are changing; new governments are being formed. It is a period which depends specially upon the calibre of the draftsmanship of new constitutions by people who understand government, the lessons of history, and the doctrine of judicial review. For the process of formation of a government, of writing a constitution, is not a simple matter that can be treated casually. It takes more than a strong national desire to throw off the yoke of tyranny, plus good generalship on

the field of battle, to set up a government which will bring out the best in its people, stabilize their affairs, and make possible the pursuit of happiness. If our experience is any criterion, it requires the use of competent lawyers to write the doctrine of judicial review into a constitution, in workable form. Indeed, the hopes of humanity depend upon a lawyer-like utilization of the doctrine of judicial review by the various governments of the world, to the extent that these hopes depend upon governments of law and stability in international affairs.

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