

Legal regulation of administrative relations

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1. Introduction and focus

- Introduction
 - General approach
 - What is administrative law?
 - Where does it come from?
 - Conceptual frameworks/themes
- Focus
 - Crime victim compensation
 - Administration/administrative law in action

General approach

- Non-constitutional constitutional law
 - Structure of government; individual vs. state (common law “fairness”; rule of law)
 - Everyday/soft constitutional law
- Public law (vs. private law)
- Modern (administrative/regulatory) state
 - Discretion, discretion, discretion
 - Agencies, commissions, tribunals, boards, departments ... (BC Directory!)
- Statutes/statutory interpretation
 - vs. common law (judiciary)
 - Enabling statutes vs. directive statutes (e.g., criminal law)
- The State! (vs. government)
 - State functions (officials)/branches of government
 - Interrelation, deference, coordination, control, supremacy
- Significance of executive (vs. judiciary, legislature)

General approach (general vs. special part)

- General principles, not doctrinal details
 - vs. environmental law, tax law, immigration law, labor law/workers' compensation, securities law/regulation, public utilities, health (assistance, control), professions/trades/licensing, prison law, human rights (!)
 - General part of administrative law
 - Special part (focus)
 - victim compensation law
 - vs. private law (torts), other public law (criminal)

General approach (scope)

- lotteries
- hawkers and peddlers
- firing of guns
- usury
- Frauds
- buying and selling of offices
- beggars and disorderly persons
- rents and leases
- firing woods
- destruction of deer
- stray cattle and sheep
- mines
- ferries
- apprentices and servants
- bastards
- idiots and lunatics
- counsellors, attorneys and solicitors
- travel, labor, or play on Sunday
- cursing and swearing
- drunkenness
- exportation of flaxseed
- Gaming
- inspection of lumber
- Dogs
- culling of staves and heading
- debtors and creditors
- quarantining of ships
- sales by public auction
- stock jobbing
- Fisheries
- inspection of flour and meal
- practice of physic and surgery
- packing and inspection of beef and pork
- sole leather
- strong liquors, inns, and taverns
- pot and pearl ashes
- poor relief
- Highways

(NY State Police Regulations
1781-1801)

General approach (scope cont'd)

- Of blasphemy and oaths
- Of drunkenness
- Of disorderly and Christian dress
- Of excessive expenses for weddings, baptisms, and funerals
- Of day laborers, workers, and messengers
- Of expensive eating in inns
- Of civil contracts
- Of Jews and their usury
- Of the sale of wool cloth
- Of sale of ginger
- Of measures and weights
- Of servants
- Of carrying weapons on horse and on foot
- Of beggars and idle persons
- Of gypsies
- Of jesters
- Of flute players
- Of vagrants and singers
- Of sons of craftsmen and apprentices

(First Imperial Police Ordinance
1530, Holy Roman Empire of
the German Nation)

What is administrative law?

- The administration of law, the law of administration, administration + law
- Administration
 - Government, executive, regulation
 - What government does/how government does
- Law
 - Positive (green-light)
 - What government does
 - Negative (red-light)
 - What government may
 - Negative (red-light)
- Internal/External
 - Review
 - Government in miniature (Willis)
 - Good/Efficient vs. Right/Just

Where does it come from?

- The Act of Government
 - Family/Household
 - Great Family of the State
- Rationalization: Police Science & Police Power
 - Economy/Political Economy
- Expansion and diversification of police power
- Administrative Law
 - Disappearance/minimalization of police
 - Police as security/institution

Conceptual frameworks/themes

1. Administrative law vs. administration
2. Administrative law vs. regulation
3. Public vs. private law
4. Law vs. police
5. Managerial direction vs. law (Fuller)
6. Rule of law vs. rule of men (experts, bureaucrats, civil servants)
7. Goldilocks (too hot vs. too cold vs. just right)/ Respect-o-meter (too much vs. too little vs. just enough)
8. Three Approaches (Willis)

1. Administrative law vs. administration

- Act vs. Limits
 - What? vs. Whether?
- Effectiveness vs. Legitimacy
- Executive/Legislature vs. Judiciary
- Executive vs. Legislature/Judiciary

2. Administrative law/administration vs. regulation

- Regulation:
 - “improving the efficiency of the economy by correcting specific forms of market failure such as monopoly, imperfect information, and negative externalities”
 - “sustained and focused control exercised by a public agency over activities that are socially valued”
 - “the intentional activity of attempting to control, order or influence the behavior of others”
 - “influencing the flow of events”
- Hard vs. soft; rowing vs. steering; formal vs. informal; rules vs. incentives, “by moral suasion, by shaming, and even by architecture”

3. Public vs. private law

- Roman Law, still (6th c.)
 - Publicum ius est, quod ad statum rei Romanae spectat, privatum, quod ad singulorum utilitatem. (“the government of the Roman empire” vs. “the welfare of individuals”).
 - Publicum ius in sacris, in sacerdotibus, in magistratibus consistit. (“sacred rites, with priests, with public officers”)
- Martin Loughlin (2005)
 - “a set of practices concerned with the establishment, maintenance and regulation of the activity of governing the state ... the nature of [which] can be grasped only once that activity has been conceptualised as constituting an autonomous sphere; the political realm”

4. Law vs. Police

- Ideal types, modes, approaches, frameworks
 - analysis, critique
- Conduct vs. status
 - conduct vs. character
 - of governor and governed
- Person vs. (human) resource
 - power to “govern men and things”
- Defense vs. exemption
- Rule vs. standard
- Norm vs. measure
 - Norm vs. prerogative
- Formal vs. informal
- Principles/rules vs. guidelines/maxims
- Rigid vs. flexible
- Constraint vs. discretion
- Justice vs. efficiency/welfare
- Right vs. good
- Legitimacy vs. prudence
- Rights vs. interests
- Private vs. public
 - Public vs. private
- Autonomy vs. heteronomy
- Government vs. management
- Equality vs. hierarchy
- Judiciary vs. executive
- Legislature vs. executive
- Fiction vs. fact
 - Ideology vs. reality
 - Ideal vs. actual
 - Theory vs. practice

Police (Rousseau)

- “The word Economy, or Oeconomy, comes from oikos, house, and nomos, law, and originally signified only the wise and legitimate government of the household for the common good of the whole family. The meaning of the term was subsequently extended to the government of the large family which is the State.” Jean-Jacques Rousseau, “Discourse on Political Economy,” (1755).

Police (Blackstone)

- The king, as the “father” of his people, and “pater-familias of the nation,” is charged with “the public police and economy[, i.e.,] the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners: and to be decent, industrious, and inoffensive in their respective stations.” 4 William Blackstone, Commentaries on the Laws of England 162 (1769).

Police

(Cyclopaedia of Political Science, Political Economy, and the Political History of the United States, New York 1899)

“The police power of the state is an authority conferred by the American constitutional system upon the individual states, through which they are enabled to establish a special department of police; adopt such regulations as tend to prevent the commission of fraud, violence, or other offenses against the state; aid in the arrest of criminals, and secure generally the comfort, health and prosperity of the state, by preserving the public order, preventing a conflict of rights in the common intercourse of the citizen, and insuring to each an uninterrupted enjoyment of all the privileges conferred upon him by the laws of his country. The organization of a state police, which shall fulfill its functions effectively, and yet leave to the individual unimpaired freedom under the liberal laws of a republican form of government, is one of the most delicate tasks ever intrusted to the lawgiver.

Blackstone defines the system to be ‘the due regulation and domestic order of the kingdom, whereby the inhabitants of a state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations.’ (4 Bl. Com., 162.)”

Police (POGG)

Constitution Act (British North America Act), 1867

Sec. 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces

– residual, emergency, national interest

[See also New Zealand Constitution Act 1852, Commonwealth of Australia Constitution Act 1900, West Indies Act 1962]

Where does it come from?

- The Act of Government
 - Family/Household (*oikos*)
 - Great Family of the State (micro/macro)
- Rationalization: Police Science & Police Power
 - Economy/Political Economy
- Expansion and diversification of police power
- Administrative Law
 - Disappearance/minimalization of police
 - Police as security/institution

Mannori & Sordi: Administration

- Administration
 - household
 - micro/macro
 - 16th c.: police/polizia/Policey
 - king as shepherd/tutor
 - good order/common weal(th)/welfare
 - (human) resource
 - discipline
 - (“king’s/public”) peace
 - prerogative
 - police science
 - analysis: “complete knowledge of the state”
 - England: denial of the state; Scotland: Adam Smith, Patrick Colquhoun
 - police state vs. law state (*Rechtsstaat*)
 - England: rule of law without a state
 - French Revolution-Napoleon
 - centralization
 - elimination of micro householders

Mannori & Sordi: Administrative Law

- Administrative Law
 - classification, facilitation (France, 1789+)
 - reciprocity of administration and administered
 - oath of fealty (support/loyalty) (allegiance)
 - Rule of law (*Rechtsstaat*)
 - “well-ordered administrative law” (Mayer 1924)
 - administrative courts, “judges” (internal/external)
 - “From sovereignty to service”
 - from police to welfare (public-service state)
 - from Police to police

Law vs. Police

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5. Managerial direction vs. law

- The welfare state brought an expansion of government and a proliferation of regulation. Much of the new regulation does not resemble legislation so much as what Fuller terms “managerial direction,” imperatives directed by government agencies to its employees or to those dependent on its services. Managerial direction is the art of efficient command structures, and of coordinated activity directed toward a general interest. Fuller himself notes that managerial direction can mask as legislation, that the commands may look very much like general rules.
 - Witteveen, “Laws of Lawmaking,” in *Rediscovering Fuller* (1999) (discussing Lon Fuller, *The Morality of Law*)

6. Rule of law vs. rule of men (experts, bureaucrats, civil servants)

- Rule of Law:
 - We [i.e., the English] mean, in the first place, that no man is punishable or can be lawfully 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. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint. (Dicey, An Introduction to the Study of the Law of the Constitution 1885)

7. Goldilocks/Respect-o-meter

- too hot
- too cold
- just right

- deference as submission = too much
- deference as disrespect = too little
- deference as respect = just right

8. Three Approaches (Willis)

- Judicial
- Conceptual
- Functional

Three Approaches (Willis)

- The Situation
- The Challenge
- The Solution
 - Judicial
 - Conceptual
 - Functional



The Situation

- Discretionary administration or “rule of law”?
 - Discretion = POGG (Relief Act of Canada, 1931: governor-in-council [the Crown’s representative] to “make all such orders and regulations as may be deemed necessary for maintaining peace, order, and good government”)
 - Rule of law = “a prejudice against clothing public authorities with large powers” (Dicey)
- Discretionary administration!!
 - Delegation of legislation = “practical necessity”
 - Privative clauses (excluding judicial review) = “haphazard interference by a court armed with a defective technique of statutory interpretation is not likely to further the social purpose of the statute”
 - More on statutory interpretation later...
 - Delegation of legislation *and* adjudication (and execution) (“government in miniature”) (administrative/regulatory tribunal) (utilities)
 - Delegation of adjudication (workers’ compensation)

Challenge & Solution



- Fait accompli: “The practical problem is how to fit into our constitutional structure these new institutions whose growth seems inevitable.”

- The solution:

- The Function

- The Concept

- The Judiciary



Judicial



The Ugly

- Judicial prejudices
 1. Cases over statutes (judges over legislators); strict construction; common law over statutory law (**formal**)
 - Amateurs and professionals
 2. Private rights over public welfare; common law over statutory law (**substantive**)
 - From localized agriculture to centralized modern society
 - Horwitz re: private/public distinction
 3. Judges and legislature over executive (**personal**)
 - “judges are also men”
- “growing hostility to administrative tribunals” manifests itself in various ways (less deference, stricter review, from “easy-going air of tolerance” to “suspicious distrust”)
 - Compared to what? What has changed?
- The truth is that ... where the legal concepts to be applied are vague and indeterminate, and strong feelings are aroused, the replacement of one attitude by another produces a different result in a similar situation.
 - Legal Realism

The Ugly (cont'd)

- Horwitz:
 - 19th c.: “One of the goals of nineteenth century legal thought was to create a clear separation between constitutional, criminal, and regulatory law—public law—and the law of private transactions—torts, contracts, property, and commercial law.”
 - Why? separate law from redistributive politics; “state regulation of private relations was a dangerous and unnatural public intrusion into a system based on private rights”
 - early 20th c.: progressivism and legal realism: “All law [is] a delegation of coercive public power to individuals, and could only be justified by public policies.”
 - After 1945: “[R]evival of natural-rights individualism ... is a symptom of the collapse of a belief in a distinctively public realm standing above private self-interest. It is not only a dangerous symptom of the unravelling of all sense of community, but also a relapse into a predatory and vicious conception of politics.”

Conceptual



- Doctrinal distinction, labels
 - E.g., judicial vs. administrative function
- Constitutional beliefs:
 - Separation of powers
 - Rule of law
 - “internal limit”
- “Modern necessities” / “public expediency”
 - Use labels (e.g., “administrative” acts) to achieve desired result
- (Administrative) experts vs. (judicial) amateurs
- Indeterminate and outdated
 - Separation of powers: so “eighteenth-century”
 - Rule of law: so “nineteenth-century”

Functional



The Good

- Institutional competen
 - “The problem is neither one of law nor of formal logic, but of expediency.”
 - Fact: “work is assigned to the person best fitted to do it”
 - Legal rights are normally decided by a court for the reason, and no other, that they are best fitted for the work of finding facts and absorbing new interests into the existing social structure.
 - Norm: and that’s the way it should be
- “All three existing arms of government being found inadequate to achieve the social purpose aimed at, a new type of body, called a commission, a government in miniature, is set up.”
 - Deference as recruitment tool: “attract[ing] men of first-class calibre”
- Move beyond “pure law” to deal with the [...] (messiness, complexity, dangers, interconnectedness, exigencies, etc.) of modern life