

COMPARATIVE ADMINISTRATIVE LAW: THE CONTINENTAL ALTERNATIVE

FRITZ MORSTEIN MARX †

As a field of study, comparative administrative law finds itself relegated to an uncertain place on the fringe of American legal learning. On grounds of merit, it deserves a more central position. This is especially true in a period which has witnessed a striking expansion of governmental activities. Arrested in our social vigor by the growing pains of the modern "service state," we can seek relief only in a clarification of the organizational problems which accompany the transition from the postulates of economic liberalism to the demands of a balanced industrial order. In this effort we have good reason to take stock not only of our own national experience but also of those patterns of adjustment which have been evolved abroad.

I

It is no longer a far-fetched assumption that administrative power is destined to serve as the foremost instrument in securing economic stability and social peace. One cannot grant the assumption and in the same breath doubt the utility of careful exploration of the methods by which administrative power has been reconciled with individual rights in other countries. To be sure, the peculiarities of each political system make it impossible for one nation simply to imitate the ways of other nations. But it is no less true that intelligent awareness of solutions attempted and tested elsewhere would contribute to the maturity of our own thinking. This rather than any predisposition toward deliberate eclecticism is the idea which underlies and lends justification to the comparative approach.

In order to embark from a self-evident proposition we may say that basically identical conditions present themselves in all countries which have felt the full impact of industrialization. One need not be reminded of the element of uniformity which the machine age has superimposed upon the diversity of national mores. Once the case for government regulation of vital zones of economic life is established,

† J. D., 1922, University of Hamburg, Germany; Associate Professor of Political Science, Queens College; Visiting Lecturer on Public Administration, Graduate Division for Training in Public Service, New York University; Administrative Consultant, Bureau of the Budget, Executive Office of the President; author of *Comparative Administrative Law: Exercise of Police Power* (1942) 90 U. OF PA. L. REV. 266; *Comparative Administrative Law: Economic Improvisation by Public Authorities* (1940) 88 U. OF PA. L. REV. 425; *Comparative Administrative Law: A Note on Review of Discretion* (1939) 87 U. OF PA. L. REV. 954.

few alternatives are left for the forms which the regulatory process may take. Conversely, the cardinal issue of retaining the spontaneous cooperative impulse of the individual remains the same wherever citizenship is associated with political liberty. In view of the conspicuous acceleration of the American development toward more extensive public control, inquiries formulated in terms of comparative administrative law actually promise greater returns today than they might have a generation ago.

There is something ironical in the fact that comparative administrative law can point to an imposing pedigree in this country. Goodnow's pioneer work¹ stands out as a singular achievement in the perspective of half a century. The same theoretical and practical interest which sustained his labor was in evidence as an active factor even in earlier decades. At that time, Continental and American scholarship were allied through close bonds of intellectual companionship. Circumstances rather than considered choice subsequently caused a parting of ways. American legal thought was progressively absorbed into problems looked upon as indigenous to our own national growth. Ideological tendencies simultaneously undermined the very conception of a common purpose. Freund² seemed to signify the close of an epoch. By and large, his comparative method had little but academic significance to the younger generation of American lawyers. It required deeper insight, social as well as economic, to inaugurate a change of attitude. The emerging reorientation has thus far proceeded at a relatively slow pace, notwithstanding the dynamic pressures behind it.

At this hour, despite the signs of increasing receptiveness toward the opportunity posed by comparative study, the struggle for national survival forced upon us inevitably restores the old misgivings about the value of Continental legal prototypes, whatever their origin and record. A wealth of facile arguments are marshaled to demonstrate that totalitarianism is merely a novel guise of firmly rooted national traditions; that an unbridgeable chasm lies between us and the legal theory and institutions of those nations which, willingly or unwillingly, now provide the core of Hitler's ill-famed New Order; and that this fundamental cleavage existed throughout their entire political past, even though we sometimes failed to recognize it. Today's totalitarianism is being regarded by many as a still more monstrous expression of yesterday's authoritarianism. Continental administrative law in consequence appears incriminated by its alleged authoritarian descent. It therefore warrants attention only as the *exemplum horribile*.

1. COMPARATIVE ADMINISTRATIVE LAW (1893).

2. His most representative work is ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY (1928).

In such reactions one can discern a mixture of ideological axiom and political emotion. Neither, however, is compelling as a statement of fact. Preconceived notions are rarely a dependable guide. Perhaps we should also bear in mind that the Continental system of administrative law has found adoption in widely separate parts of the globe. Mention may be made especially of Latin America. Up to the present, it was a more common occurrence to encounter reviews of works of Latin American authorities on administrative law and justice in the legal journals of Continental Europe than in those of the United States. In the face of this situation, it does not make much sense to fall back on one-sided stereotypes about the never-changing climate of Continental political thought. Far-reaching qualifications must be introduced before we can gain an appropriate vantage point for objective appraisal.

In other papers the present writer has tried to show the practical working of Continental administrative law in individual areas of the administrative process.³ In each of these articles, an effort has been made to focus comparative analysis on selected court decisions, American and foreign, matched in such a way as to typify concrete alternatives in the judicial response to essentially one and the same administrative situation. Needless to say the "situational" case method is particularly well suited to illuminate the operation of the different legal concepts and categories relied upon here and abroad in the adjudication of disputes arising between administrative authorities and private interests. The following observations are intended to place in relief some of the premises on which Continental administrative law rests and to outline in more general fashion some of its most important features. It is hoped that in this way the reader will obtain a glimpse of the institutional philosophy which has been woven into the Continental scheme of judicial review of administrative action. Although a comprehensive treatment would require much more space than is available within the confines of a single essay, even a brief sketch may be expected to serve the purpose of segregating reality from partisan contention.

II

While Continental administrative law has obtained its specific content under different national auspices, thus leaving room for doc-

3. Morstein Marx, *Comparative Administrative Law: A Note on Review of Discretion* (1939) 87 U. OF PA. L. REV. 954; *Comparative Administrative Law: Economic Improvisation by Public Authorities* (1940) 88 U. OF PA. L. REV. 425; *Comparative Administrative Law: Public Employer-Employee Relationships* (1941) 4 U. OF DETROIT L. J. 59; *Comparative Administrative Law: Exercise of Police Power* (1942) 90 U. OF PA. L. REV. 266; *Comparative Administrative Law: Political Activity of Civil Servants* (1942) 29 VA. L. REV. 52.

trinal variations from country to country, its fabric is as homogeneous as the Anglo-American common law. The fundamental unity of its structure must be traced to the twofold influence of historic interpenetration and intellectual exchange. As to the latter, Otto Mayer's name suggests itself, who, enriched by his intimate knowledge of French *droit administratif*, did much to guide the evolution of German administrative jurisprudence into similar channels.⁴ His was perhaps the most spectacular success as an intermediary, but there were many others like him eager to look across national boundaries. They set a new style of legal research and attained in their work and that of their disciples a synthesis which was to remain without counterpart in other fields of law.

It is therefore entirely proper to speak of Continental administrative law as one system, irrespective of distinguishable shades which mark the individual national setting. Perhaps it is useful to enumerate its characteristic features. In the first place, despite the sweeping victories which the codification movement has won all over the Continent, the body of legal rules which govern the exercise of administrative power has originated and has been permitted to develop organically as judge-made law. Thus it has never ceased to be in formation. Secondly, instead of being confined to a definitely staked out province, it has continued to expand its orbit, thereby widening step by step its protective function. Thirdly, through the medium of lower courts integrated under a supreme court, it has sought close connection with the frontline of administrative action, opening its portals to the ordinary citizen for immediate and inexpensive redress unincumbered by undue formality. And finally, it has expressed itself through the voice of a specialized judiciary constituted in such a manner as to give assurance of first-hand knowledge of the administrative process, the hierarchy of administrative-courts, informed as well as independent.⁵ Other points might be added for the sake of completeness, but none of them would modify this summary in any significant aspect.

American terminology identifies administrative law primarily with the evolution of quasi-legislative and quasi-judicial powers. The Con-

4. Ample evidence may be found in his general treatise entitled *DEUTSCHES VERWALTUNGSRECHT* (3d ed. 1924).

5. For more recent literature on Continental administrative law, see the writings listed note 3 *supra*. A good bibliography may be found in UHLER, *REVIEW OF ADMINISTRATIVE ACTS: A COMPARATIVE STUDY OF THE DOCTRINE OF THE SEPARATION OF POWERS AND JUDICIAL REVIEW IN FRANCE AND THE UNITED STATES* (1942). This is an incisive analysis of important aspects of French administrative law and justice. See also Lobingier, *Administrative Law and Droit Administratif—A Comparative Study with an Instructive Model* (1942) 91 U. OF PA. L. REV. 36. On the current transformation in National Socialist Germany, see FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (1941); Morstein Marx, *Book Review* (1941) 54 HARV. L. REV. 1264; Kirchheimer, *The Legal Order of National Socialism* (1941) 9 STUD. IN PHILOS. AND SOC. SCI. 456.

tinental definition draws into itself the whole matrix of relationships between public authorities and the individual. This is a distinction of great practical importance. Our courts have largely taken the view that judicial scrutiny of administrative action should center on rule-making and adjudicatory activities rather than the day-by-day conduct of public business itself. Unless determinations of the latter kind plainly transcend the boundaries of "due process," the courts are likely to shove such cases off their dockets.⁶ The differentiation of treatment is neither realistic nor fortunate. It obviously cuts right across the vast ramifications of administrative power, without any reference to the mechanics of its exercise.

To illustrate, most administrative acts spring from generally applicable rules and procedures. It is clearly in the interest of the citizen that administrative demands made on him bear a close relation to such normative standards because these usually embody directives which limit the immediate option of any single government agent. A judicial inclination to challenge rules more readily than manifestations of administrative choice which do not flow from predeterminations of a procedural nature is not conducive to genuine respect for legal principles. It can have only undesirable effects upon the methods by which administrative decisions are framed, since it places a premium on a *modus operandi* which more easily leads to arbitrariness. Equally intertwined with ordinary operations is the exercise of quasi-judicial power. Indeed, each administrative act calling for compliance carries with it certain adjudicatory implications, for it involves an investigation of the relevant facts and a formulation of specific obligations derived from statutory clauses. The law comes to life in the pronouncement of the judge, but the same applies to decisions made by administrative authorities. To administer means in large part to implement a legislative mandate by regulations and to discharge it by adjudging concrete cases.

The difficulty of isolating in concise terms the quasi-legislative and quasi-judicial elements within the wider range of administrative action would be almost insurmountable, were it not for the fact that a shortcut is offered by a structural peculiarity of our scheme of regulatory controls. For practical purposes, it has been possible to resolve the dilemma by associating both elements with the functions of the independent regulatory commissions and boards.⁷ Admittedly, this is

6. For typical examples, see Morstein Marx, *Comparative Administrative Law: A Note on Review of Discretion* (1939) 87 U. OF PA. L. REV. 954, at 956 *et seq.*; *Comparative Administrative Law: Public Employer-Employee Relationships* (1941) 4 U. OF DETROIT L. J. 59, at 61 *et seq.*

7. Cf. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938). For a broader conception, see GELLHORN, *FEDERAL ADMINISTRATIVE PROCEEDINGS* (1941).

an entirely pragmatic classification since "delegated legislation" and administrative adjudication are by no means a monopoly of the independent establishments. Nor should it be taken for granted that government regulation of economic activities requires the creation of special commissions and boards outside the departmental system. Even Great Britain, perhaps the nearest parallel, has generally preferred to entrust the regulatory process to ministerial agencies. And the last word has not been spoken about the future status of our independent establishments, even though the recommendations of the Brownlow Committee⁸ failed to receive the approval of Congress.

If one turns to the "purely administrative" area, another complication enters upon the scene. It stems from the fact that the borderlines of "due process" are extremely fluid. In the judicial forum, far removed from the zone of administrative operation, it is often well-nigh impossible to supply a rational answer to the question whether or not to repudiate the acts of public authorities. At times, the courts have ventured forward with more verve than understanding, and the result occasionally reminds one of the proverbial bull in the china shop.⁹ More frequently, however, they have acted on the hypothesis that it is sounder to leave administrative judgment alone. There is ground for the suspicion that this hesitation is caused by the perfectly natural uneasiness which must befall the courts when they are confronted with matters too elusive for any mind devoid of expert knowledge. Many have seen virtue in such timidity, but their blessings make sense only because it is conceded that our judiciary lacks sufficient familiarity with the stubborn technicalities of administrative business. Nonetheless, such judicial withdrawal marks a partial defeat of the "rule of law," to which we seem to reconcile ourselves because the defeat ordinarily remains hidden.

Measured with the same yardstick, Continental administrative law has a more inclusive scope. It has been accorded a distinctive autonomy side by side with civil law and criminal law. Comprehensive in its sphere, it surrounds power with restraint. Thus it addresses itself to the citizen as well as the administrator, furnishing the former with tangible guarantees of his civil rights and directing the latter to promote the public interest only in accordance with the principle of legality. It reaches into every phase of the administrative process, and offers

8. PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, REPORT WITH SPECIAL STUDIES (1937). Cf. also BROOKINGS INSTITUTION, REPORT ON THE GOVERNMENT ACTIVITIES IN THE REGULATION OF PRIVATE BUSINESS ENTERPRISES, No. 10, SELECT COMMITTEE TO INVESTIGATE THE EXECUTIVE AGENCIES OF THE GOVERNMENT, 75th Cong., 1st Sess. (1937).

9. For an illustration, see Morstein Marx, *Comparative Administrative Law: Economic Imposition by Public Authorities* (1940) 88 U. OF PA. L. REV. 425, at 426 et seq.

concrete guidance even on the proprieties of official motivation. Principle-minded, it shows remarkable simplicity in its legal architecture, making it easy to follow out its prescriptions. One of its chief assets is its systematic unity.

III

In this respect, Continental administrative law has successfully counteracted earlier tendencies. Originally, administrative power kept itself free from judicial supervision. This was in part an aftermath of absolutism, but to no lesser degree the result of practical considerations. In France, for instance, the uncurtailed extravagance of court control in the period of dynastic disintegration brought forth a natural reaction not unlike that caused by the legislative omnipotence fostered by most of the first state constitutions in the United States.

As Uhler¹⁰ succinctly puts it, "The acute lack of synchronization of the executive and judicial machinery under the *ancien régime* in France had caused serious frictions which could not fail to have disastrous consequences. After the revolution had swept over France, the leaders of the new regime were greatly concerned with devising means to prevent the recurrence of similar conditions. To this end they incorporated Montesquieu's theory of free government in the legislation of 1789 and in the subsequent constitutions, hoping to accomplish two things: (1) to secure a new form of . . . government in which popular sovereignty was reflected, and political liberty established, through a legislative body which was independent of the executive; (2) to insure a system under which the administration could fulfill unhampered the tasks which the revolution had entrusted to it. These objectives were to be attained by the separation of the legislative and executive powers, and by a differentiation of the administrative and judicial agencies." The resulting division of major functions gained its principal safeguard in the prohibition of any interference with administrative action on the part of the courts. This working arrangement, although distinguished by consistency, left the citizen without an independent organ for the review of measures of the bureaucracy, however grievous their effects. Relief could only be sought through the channels of complaint procedure. The gap was closed by the gradual emergence of the *Conseil d'État* as a full-fledged administrative court.

At the start, then, administrative justice as an untried innovation operated within relatively narrow confines. To our way of thinking, it might have seemed conclusive to expect little change in the scope of the initial administrative jurisdiction. Yet, the opposite took place.

10. *Op. cit. supra* note 5, at 11-12.

Instead of conceiving judicial review of administrative action as an exceptional concession, the administrative judiciary widened its concerns through a series of noteworthy precedents. To return to the French example, the *Conseil d'État* did not need public pressure to seize upon the concept of *service public* to enlarge its power of review. Recognition of this criterion opened up additional opportunities for redress not only with reference to acts of authority, but also to all other acts of government management, provided these were linked to the performance of a public service. In a similar manner, the *Thérond* case¹¹ subjected all contracts related to the discharge of governmental functions to administrative jurisdiction. Patently, the dominant idea beneath these progressive moves was "to make the special technical fitness of the administrative courts available for the adjudication of all disputes where it might be desirable."¹² Such technical fitness could not be hoped for in the "ordinary" judiciary. It was possessed by the administrative courts because their members were drawn in their majority from the government career service.

To be selected for such judicial tasks carried high prestige. Only men of marked ability, thoroughly versed in administrative law, were chosen for so delicate an assignment. While serving in a judicial capacity, they were naturally placed outside the administrative hierarchy. Their only superior was the law itself. No higher authority was entitled to issue instructions to them, and no administrative court has furnished ground for the charge of docility toward the powers to be. On the other hand, the administrative judiciary was eminently qualified to bring its practical insight into the working of public authorities to bear upon its decisions. Hence it could play a corrective rather than a negative role. In censoring administrative agencies, it did not shun the responsibility for devising and suggesting reasonable solutions for the attainment of legitimate administrative objectives within the framework of the laws.

Of particular interest is the way in which the administrative courts accomplished the introduction of legal restraints into the exercise of discretionary power. While the aims of administrative action can usually be indicated without much difficulty in statutory provisions, it is a considerably harder task for legislative bodies to outline the approach to be followed in reaching these aims. In fitting the law into a wide diversity of conditions, the administrator must be enabled to move with a degree of freedom. He must be granted discretion in

11. *Thérond v. Ville de Montpellier*, *Conseil d'État*, S. 1911, 3, 17. For further comment on this case, see UHLER, *op. cit. supra* note 5, at 50 *et seq.* The decision elicited opinions from several French authorities, which are cited *ibid.* Cf. especially III HAURIOU, *LA JURISPRUDENCE ADMINISTRATIVE DE 1892 À 1929* (1929) 685 *et seq.*

12. UHLER, *op. cit. supra* note 5, at 51.

order to proceed, not blindly and with the pointless force of a rolling stone, but with an eye to the numerous variables of locality and circumstance. In this sense, all enforcement appears as graduations of adaptation, and adaptation does not take place automatically. On the other hand, since every act of discretion rests on authorization, administrative freedom is never a personal privilege. It must function with reference to stated administrative objectives, being the servant of these objectives. Hence discretion is never completely "free."

Faced with the practical problem of the lawmaker's incapacity for supplying explicit standards to govern the exercise of discretion, the administrative courts evolved implicit standards of their own.¹³ They reasoned that discretion, having its basis in statutory authorization, was necessarily limited by its intended dedication to achieving the concrete ends encompassed by the statute. To bend it in the direction of other ends would be an unlawful departure from the authorization. Once this restriction was recognized, it was only another step to make it the touchstone for separating proper and improper administrative motivation. Independent of good faith or good intention, no government officer was permitted to let motives extraneous to the statutory objective encroach upon his discretionary decision. Action could therefore be brought based on the contention of improper administrative motivation. Yet this did not mean that the court would replace the administrator in his appropriate domain. A sharp line of demarcation was drawn between the extraneous motive whose presence would invalidate the act and mere differences of point of view or of judgment.¹⁴ The court's notions might not always harmonize with the attitude of the government agency, but such disagreements of opinion did not mislead the court to substitute its own conclusions for those of the government agency.

Equally revealing of the spirit of Continental administrative justice is the doctrinal development which culminated in the adoption of the Rule of the Mildest Means. Public authorities are often directed by law to eliminate conditions which adversely affect the general welfare. In most cases, several means commend themselves for such a purpose, but the question which of them is most appropriate is seldom quickly answered. Leaving aside the somewhat simpler problem of defining a means which is plainly inappropriate, the final choice is a matter of great concern to the individual called upon to abide by it. The Rule of the Mildest Means makes him a participant in this choice, provided he comes forth with a proposal which promises to bring about

13. Cf. Morstein Marx, *Comparative Administrative Law: A Note on Review of Discretion* (1939) 87 U. OF PA. L. REV. 954, at 962 *et seq.*

14. Cf. Morstein Marx, *loc. cit. supra* note 9, at 436 *et seq.*

an effective remedy. In its steady elaboration, this principle gave him the right to demand sanction of the means which he regarded as least onerous to him and which at the same time justified the expectation of meeting the requirements of the public order. Even if he had been tardy in suggesting such a means, he was deemed entitled to a change in the administrative determination of the means by making up his mind afterwards.¹⁵ In the application of these conceptions, the administrative courts encouraged careful weighing of the citizen's interest on the part of government agencies and also reduced the volume of avoidable litigation.

One who has had the privilege of representing his department before administrative courts in Republican Germany, and who has observed the operation of administrative justice in other parts of the Continent, is apt to be impressed with the high calibre of the judicial personnel and the efficacy of their approach. They knew their business. They had no desire to force the administrator into a strait-jacket, but they were alert to their duties toward the public. With the official file of the government agency before them, they would unravel with competent hands the threads of the administrative decision at issue, asking incisive questions which left no obscure aspect untouched. And where the plaintiff, appearing perhaps without counsel, would prove helpless and bewildered, they would outline the intricacies of his case in his stead. All too frequently do we fall into the error of envisaging justice as concerned with large economic stakes. But administrative impositions, just or unjust, may be as painful to the common variety of people as to the mighty combine. To a large extent, the administrative courts of the Continent served as popular tribunals, hearing the grievances of the ordinary citizen.¹⁶ He was truly the central figure. And he secured his standing because administrative law, above all else, was every man's law.

IV

If the ordinary citizen was one beneficiary, the government officer in charge of public functions was another. When administrative law is expected to operate as the very charter of public authority, it is essential that the standards of legality pervade the entire administrative process. This can never fully be accomplished by utilizing the government lawyer as a technician whose task it is to make the exercise of power legally foolproof. In rendering a specialized service of such char-

15. Cf. Morstein Marx, *Comparative Administrative Law: Exercise of Police Power* (1942) 90 U. OF PA. L. REV. 266, at 276 *et seq.*

16. For representative examples, cf. Morstein Marx, *loc. cit. supra* note 13, at 962 *et seq.*; *loc. cit. supra* note 15, at 283 *et seq.*

acter, the government lawyer functions merely at the periphery of the administrative motivation. The formulation of steps to be taken in terms of movements toward policy ends falls to the public manager, while the government lawyer is asked to design the legal form in which the end can be attained with the greatest chance of meeting a judicial test. As to legal form, the government lawyer has the last say. Yet, he knows little about the operational problems which impinge upon the planning of the public manager. On the other hand, the latter, as a layman imbued with the fear of court interference, is prone to shrink before the magic practiced by the former. In this none too happy relationship lies the explanation of the disproportionate influence which the General Counsel and his staff wield in fixing the course of agency policy and in setting the tenor of American administration.

On the Continent, the ensuing dualism is forestalled by the stress on legal studies, especially of administrative law, in the preparation for administrative responsibility. The permanent personnel entrusted with the direction of government departments below the level of political leadership generally are by training lawyers as well as administrators. As a result, legal issues can be resolved by them directly at the point where they arise in the conduct of public business. In laying out the steps for the execution of administrative programs, the question of legal form is not treated as a separate or separable matter. Although few government agencies are without specialized legal divisions, the connection between the staff of these divisions and those carrying operational responsibility is much stronger than in the United States or England. The operating men are adequately equipped to frame their legal problems in the technical language of administrative law when they deem it advisable to request an opinion of the legal division. They are able to state the terms of reference in such a way that the legal staff can recognize the practical implications of the question put before it.

It is, therefore, no exaggeration to say that administration is devoted to the pursuit of legality as much as it is to the execution of public policy.¹⁷ In supervising his force, the administrative officer is under obligation to map out government activities within the bounds of legal standards. Orders and regulations, as they are issued in the every-day activity of the department, must bear the stamp of government of laws. Alternatives of action have to be analyzed on the oper-

17. The historic origins of the emphasis on legal studies in the preparation for the higher civil service career is traced by Friedrich, *The Continental Tradition of Training Administrators in Law and Jurisprudence* (1939) 11 J. MOD. HIST. 129. An appraisal of the training scheme is offered by Brecht, *The Relevance of Foreign Experience*, in MORSTEIN MARX (ED.), *PUBLIC MANAGEMENT IN THE NEW DEMOCRACY* (1940) 107.

ating level in recognition of legal requirements. Thus administrative law comes closest to following administrative authority like its shadow. Little room is left for a juxtaposition of policy end and legal form, or of the operator's mode of thought and the lawyer's mode of thought. While initiating government action, the operator is capable of distinguishing between practicability supported by law and practicability denied by law. In brief, administrative law is made to serve as the mold of administrative activity. No such intimate interrelation is possible of achievement where knowledge of the law is largely confined to a group of specialists who carry on their work in a compartment by themselves.

Lengthy discussions have been going on for quite some time about the ideal formula for preparing aspirants for the higher government career. It is reasonably clear that they should not be trained simply for the work of the legal profession. But a good case can be made to support the view that in their academic background they ought to acquire a good deal of competence for appreciating the role of public law in government activity. This has a significant bearing not only upon the entire tone of administration but also upon the interplay between government management and judicial review. There is truth in the assertion that "no legislative proposals nor new designs for the judicial or administrative apparatus are of themselves sufficient to insure the best possible relationship between the two departments of government. The problem is not merely one of mechanics; it is also one of attitudes. In this country administrative autonomy, because of constitutional conceptions, is to a large extent dependent upon judicial self-restraint. It is important, therefore, that this restraint should be carried to the point where the interplay of adjudication and administration becomes cooperative rather than competitive. To this end [in the phrase of Ralph Fuchs] 'we must learn, as quickly as we may, how to make popular government at once responsible, capable, and just.' Manifestly, traditional prejudice against administrative activity, born of a habit of thinking, is most apt to recede in the proportion that the tasks assigned to the administrative are customarily well done. Consequently the constant supply of adequately trained personnel to take over those tasks is essential, and a critical glance at the law schools, in which a large number of our public servants receive their preparation, is pertinent. Philosophically there may be no fundamental distinction between private law and public law. However, in our law schools, which are primarily geared to preparation for immediate practical tasks, the differentiation of private and public law courses in the curriculum is in need of greater emphasis. A better integration of the public law

courses would be of benefit to our future public servants.”¹⁸ In the light of the measurable advantages which on the Continent have accrued from such an integration, it does not seem far-fetched to suggest that legal studies of this kind should be accorded sufficient recognition in a sound training program for the higher administrative service.

Owing to the prominence of administrative law in the entire scheme of public management, it is not surprising that one finds legal treatises by leading authorities side by side with office manuals on the desk of the Continental administrator.¹⁹ At the same time, law faculties have been instrumental in prompting administrative courts both through the contributions of scholarship to the growth of judicial doctrine and through immediate participation of academic teachers as members of the administrative judiciary. This has produced a wholesome blending of theory and practice, which may in part account for the greater vitality of administrative law as compared with other fields.

V

Let us now turn to the question which has held considerable attraction to those who are persuaded that Continental administrative justice is an offensive distortion of the “rule of law”. The misconception has long lingered in our minds that a specialized judiciary recruited in the main from the government service must naturally gravitate toward an authoritarian outlook. But authority is something ambiguous and a tempting object of wishful thinking.

At the outset, it is necessary to distinguish between the different connotations which can be read into the term “authority”. Authority may be viewed as a mantle of power by which one individual is placed above other individuals. To be in authority carries with it the demand for deference and subordination. In this sense, authority seems to upset the equilibrium of human forces implied by the principle of political equality. Thus authority presents itself as an intruder, to be limited to a minimum and to be fenced in by legal guarantees. As an intruder, it must not be permitted to extend beyond essential social necessities. It must show cause for its very existence, and must be held to a concrete demonstration of such cause. A corollary may be seen in the notion that authority as an intruding factor is apt to be inspired by evil motivations, or at least gives rise to the temptation of ruthless excesses. Hence, wherever authority is in evidence, suspicion becomes a civic duty, and judicial control is in order.

18. UHLER, *op. cit. supra* note 5, at 73-74.

19. One might think of such works as HAURIU, *PRÉCIS ÉLÉMENTAIRE DE DROIT ADMINISTRATIF* (4th ed., 1938) or FLEINER, *INSTITUTIONEN DES DEUTSCHEN VERWALTUNGSRECHTS* (8th ed., 1928).

Needless to say, this view falls short of doing justice to the ideological status of authority within the framework of representative government. Representative government aims at widespread popular participation in the political process, but in the execution of policy it has to rely on authority as a device for insuring the prevalence of the public interest. Here we encounter authority in a different meaning—as an agent of the popular will.²⁰ In its function as an agent of the popular will, authority allies itself with the common welfare. It turns into a custodian of the public interest and an arm of temporal justice. One may therefore say that the presence of authority alone supports the presumption that public concerns are at stake. In this perspective, the emphasis rests no longer on restraint of authority, but on the need for securing adequate recognition of the common interest in the interest of all. Instead of allowing the individual to block the path of authority for the sake of his private preference, he is urged to submit to the requirements of law and order as defined by public policy. We are led logically to the conclusion that authority is entitled to priority in order to uphold the stipulations of common necessity.

To regard authority as an agent of the popular will is more apposite to the conditions of modern industrial society than to decry authority as an intruder. That does not mean that the two connotations are mutually exclusive. When authority collides with private interests, it is likely to cause resentment on the part of the individual affected, regardless of the justification for government action. On the other hand, authority must not be allowed to insist upon being accepted at face value. It does not exist for its own sake. Law cannot automatically police itself, however firmly it may be welded to the legal order. For these reasons we must try to strike a balance between the two connotations of authority.

As citizens of a democratic polity we reject the notion that authority is always right. Yet, our common interest requires submission to authority when authority is right. To test the qualification falls neither to the citizen nor to the exponent of authority, but must be left to a judicial body free from bias and able to penetrate to the heart of the issue. Moreover, all authority is derived from authorization and may legitimately be challenged in terms of the scope of authorization. The Continental development has encouraged such challenge through the judicial invention of legal categories which could be applied successfully by the administrative courts. In the words of a careful student, the "tendency to enlarge their competence usually expresses the desire of making, or rather keeping, the expertness and special training of a

20. This point of view is in evidence especially in DUGUIT, *LE DROIT SOCIAL, LE DROIT INDIVIDUEL ET LA TRANSFORMATION DE L'ÉTAT* (3d ed., 1922).

carefully selected personnel available in all matters which are essentially and intrinsically administrative. The French system offers few obstacles in this respect, and it has been relatively simple to formulate concepts which have satisfied this general trend."²¹

When there is reasonable assurance of lawful procedure on the administrative level itself, judicial review is not in danger of arrogating to itself the right of constant interference.²² At the same time, the record of Continental administrative justice shows that informed judicial guidance has a powerful effect upon the legal orientation of government agencies. Once such traditions crystallize, neither the public nor the courts are apt to display undue eagerness for hampering authority on first sight.

VI

A few words are probably desirable concerning the attitude of the career administrator toward judicial review. The merit bureaucracy of our day inevitably plays an important role in the execution of public policy. Its status and its ethics are not the least conspicuous factors in the evolution of Continental administrative law.

One of the first to sense with great acuteness the potentialities of the merit bureaucracy was Gaetano Mosca.²³ His greatest accomplishment must be found in his amazingly accurate forecast of the emerging pattern of modern government in its adjustment to the needs of the industrial order. Western civilization in the machine age presented itself to his eyes as essentially one and the same phenomenon, irrespective of differences in the individual national locale. Writing at the close of the nineteenth century, he assumed that in the economic realm private initiative would supply the impetus of a dynamic force setting the pace of social progress. But he saw far enough ahead to reject the illusion that an enterprise economy could remain free from public control. The basic standards of control would have to be determined in the channels of representative government. Although filled with deep misgivings about the effects of universal suffrage, he realized that public policy, in order to reflect the best judgment, would require the unrestricted interaction of many minds, provided these minds were competent to judge.

21. UHLER, *op. cit. supra* note 5, at 62.

22. This is the fundamental insight which underlies the recommendations of the Acheson Committee. See ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, REPORT, SEN. DOC. NO. 8, 77TH CONG., 1ST SESS. (1941). But it would be unwarranted to infer that consequently judicial review would lose most of its *raison d'être*.

23. His chief work has been translated as *THE RULING CLASS* (Kahn's trans. 1939). The title is unfortunate since the original speaks consistently of the "political class". Cf. MOSCA, *ELEMENTI DI SCIENZA POLITICA* (1896; 2d ed., 1923). For a comment on the American edition, cf. MORSTEIN MARX, *The Bureaucratic State* (1939) 1 REV. OF POLITICS 457.

On the other hand, he was quick to grasp the pivotal distinction between the policy-making process, which could not be expected to benefit from enlightened public opinion without a secure electoral foundation, and the administrative process, which through the continuity of departmental operations would give effect to policy decisions. To him, this latter task appeared institutionally as crucial as the proper working of legislative bodies. It would call of necessity for a carefully recruited corps of trained functionaries—the merit bureaucracy. Instead of bemoaning the rise of the bureaucratic element, he regarded it as the natural counterpoise to the parliamentary structure. Nor did he want the career officialdom spineless and meek. It was to gain sufficient strength to make its *expertise* a telling factor. However, while separate in their major functions, the representative hierarchy and the administrative hierarchy would have to complement each other and work as component parts of one single machine.

Even in retrospect, this outline does not lose its boldness, but we can better appreciate its realism. With the continual decline of the patronage bureaucracy of yesterday, American administration is changing hands. Men and women inspired by a professional philosophy of public service are coming to the fore; they do not fit into the antiquated clichés of the Jacksonian tradition. The Continental career service is much older, but it has produced the same administrative frame of mind, the same pride of workmanship and the same identification with the public interest. Coming from the universities, the young entrants into the higher bureaucracy brought with them the most recent intellectual tendencies. And as they grew older, their academic training and their professional interest kept them close to the stream of current thought. They were able to see the danger of self-isolation behind the massive walls of administrative power. As members of a profession, they were also alive to the need for lawful procedure. Moreover, in the judgments of administrative courts they were confronted with *judicium parium*. Hence it is no longer startling that the beginnings of administrative justice and its gradually widening scope did not arise so much from public pressure as rather from the initiative of the career element.²⁴ Without the full support of the merit bureaucracy, judicial

24. It is interesting that in the delimitation of the administrative jurisdiction against the jurisdiction of the "ordinary" courts, technical considerations have remained in the foreground. Thus, French administrative law has given rise to a special conceptual construction under which certain acts emanating from the administrative sphere, but so completely dissociated from all lawful authority as to assume an erratic character, are assigned to the exceptional jurisdiction of the "ordinary" courts. Such an act would be "administrative trespass". To quote ULLER, *op. cit. supra* note 5, at 148-149: "The utility of the concept of administrative trespass and the necessity when applying it of appraising separately the impeached act, as distinguished from its consequences, derive logically from the peculiar situation brought about in France by the interpretation of the separation of powers. It is true that the adjudication of private

review could not have been refined into an efficient tool of legal control. That such support was freely given in itself testifies to the satisfactory record of the Continental alternative.

VII

The existence of a specialized judiciary presupposes an organizational division within the judicial system. On grounds of unity of the court structure, this may seem undesirable. No doubt it necessitates certain technical adjustments. But if unity demands a price as high as that of inept handling of disputes involving administrative acts, a dual scheme is bound to lose its reprehensible aspects. No other device is available for turning judicial review into a constructive force.²⁵ As a negative and disruptive influence, judicial review is not prevented from deteriorating into an unqualified liability in the context of the "service state."

In the more recent past, we have become increasingly mindful of the price we are paying for the structural unity of the judicial power.

rights and the dispensation of relief in the event of the violation are generally deemed to be within the exclusive province of the judicial courts. But whenever acts of administrative agencies are involved, the question of their propriety and legality can, according to prevailing doctrine, be passed upon only by the administrative courts and must always be referred to them. Under the constitutional and statutory protection guaranteeing administrative autonomy, the administrative courts are the sole judges of the formal validity, the administrative legality of such acts. The administrative department therefore will ordinarily not tolerate its own acts to be condemned, except by its own judicial machinery. It is always directly concerned with the act and its administrative purpose, although the judicial courts may deal with its collateral or secondary effects. However, now and then these effects are so drastic as to be wholly out of proportion to the original administrative object. May it not be assumed then that at such a juncture the administrative department is no longer interested in being identified with the act, and therefore does not insist upon submission of the question of legality for its determination? Is it not more convenient, and less injurious to the administrative prestige, to abandon the *enfant terrible* to be branded a *voie de fait* and to be disciplined at the hands of a judicial court?"

25. This point is stressed by Dickinson, *The Acheson Report: A Novel Approach to Administrative Law* (1942) 90 U. OF PA. L. REV. 757. His penetrating comment deserves full quotation: "As a practical matter, it would seem to be almost inevitable that the initial stage in the administrative process, the original or first determination, should be primarily administrative, giving full effect, in the first instance, to the policy, or perhaps what may even be called the bias, of the agency in applying its interpretation of the law. Of course, this is not to say that the hearing officer who presides at this original stage of the proceedings should not act fairly, permitting the introduction of all relevant evidence, and listening with attention to the arguments addressed to him so that a record can be made upon which subsequent stages of the proceedings can be based. He can and should be expected to show this degree of independence. Nonetheless in making his findings, it is almost inevitable that the inferences drawn from the evidence, and the evidence accorded determinative weight, will be the inferences and the evidence which support what the agency is trying to do. If there is to be correction it must come later. If the inferences and the evidence are to be filtered through a dispassionate glass, if conclusions are to be drawn which are not dictated by the desire to further the agency's policy without regard to individual rights, then it would seem that the process of filtration and of drawing conclusions must necessarily take place somewhere else than within the agency. If this is true, the adoption of the Committee's recommendations would have slight, if any, effect in achieving the objective which judicial review exists to accomplish, and there would at the same time be introduced into the administrative machinery a novel, cumbersome and expensive element resulting in no correspondingly important advantage." *Id.* at 776-777.

Proposals for a Court of Appeals for Administration²⁶ or for a High Administrative Court²⁷ have been advanced in various quarters. The expectations which lend support to these proposals are well summed up by Frederick Blachly when he says: "In addition to simplifying control over administrative action, thus making it understandable, the establishment of such a court would greatly decrease the cost of litigation to individuals and to the government, would help to clarify the distinction between public law and private law, and would tend to develop a systematic and easily understood administrative law."²⁸ The lesson of Continental administrative justice makes it abundantly clear that it is not an empty vision to hope for this overdue adjustment through creation of a specialized judiciary.

It is worth mentioning, however, that a specialized judiciary involves more than setting up one single court. In order to carry administrative justice toward the ordinary citizen, it must fan out over the entire administrative system so as to gain proximity to the work performed by the field service. Judicial review functions best when its lines of communication are not overtaxed. Field operations account for a large share of contemporary government business. Legal issues arising in the field should find judicial attention close to the point of their origin. This also accords with the conveniences of the individual. If a thorough examination of the administrative situation involved in each dispute is to take place, it must at least have its beginnings on the spot. Circuit duty imposed upon the members of a High Administrative Court would soon prove too heavy a burden and thus invite undesirable shortcuts. Moreover, the large mass of administrative litigation does not require the time and energy of a High Court. The public interest would be adequately served if facilities were provided for adjudication on a lower level. Once a competent judge has spoken, the interest in an independent forum is in most cases satisfied. We must not imagine that there will be a flood of appeals. On the other hand, if regularly established lower courts are lacking, all disputes would inevitably go to the High Court, thus swamping it with business which could easily be taken care of elsewhere.²⁹

We have arrived at the threshold of the "service state," not because of advance commitments of a theoretical character written into the Constitution, but because of conditions inherent in industrial society. As a

26. As provided in the original Logan Bill, S. 3676, 75th Cong., 3d Sess. (1938). The proposal was later abandoned by its sponsors.

27. Cf. Blachly and Oatman, *A United States Court of Appeals for Administration* (1942) 221 ANNALS 170, at 181-182.

28. *Id.* at 182.

29. On this question, much of the argument has tended to run along political lines. Cf. Special Committee on Adm. Law, A. B. A. REP. (1936) 209.

going concern, government is compelled to rely to an ever growing degree on the effectiveness of the administrative process and the momentum behind it. Resourceful administration can be insured only by safeguarding the creative freedom of public management. This freedom may turn into a peril unless it is tempered with accountability. Internal accountability is readily secured through the hierarchical organization of the executive branch, heading up to the Chief Executive. External accountability to the elected representatives of the people is more problematical since it funnels through the Chief Executive, involving only his own power of direction. Most of the concrete manifestations of administrative power occur far below the sphere of control within his reach. It is a practical impossibility simply to refer the aggrieved citizen to the good offices of his political representative. He must be able to meet administrative power by invoking administrative law. But redress would be a dubious victory if it entailed the destruction of authority when rightfully operating as the agent of the popular will.

Up to now the orthodox viewpoint has been that the supremacy of law is virtually annulled by any deviation from the principle of unity of the judicial power.³⁰ Leaving aside terminological quibbling, it is difficult to see how such a notion can survive straightforward analysis of the Continental alternative. It would be more appropriate to say that a well-constructed system of administrative justice, given a reasonable chance, is likely to reinforce legality in the exercise of administrative power and thus to contribute to full recognition of the "rule of law" in an area of vast importance in which it might otherwise lead only a shadowy existence.

30. Cf. (1938) 63 A. B. A. REP. 331, at 341. See also comment by UHLER, *op. cit. supra* note 5, at 177-178.