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ADMINISTRATIVE PROCEDURE AND NATURAL LAW

IN 1910, Joseph Charmont, Professor of Law in the Faculty of Law of the University of Montpellier, France, published a short volume entitled *The Renaissance of Natural Law*.¹ In this work, which was originally delivered in the form of a series of lectures to law students, the author sought to call attention to the renewed influence which natural law concepts have had upon contemporary juristic thought. "I have thought it proper," stated Charmont at the very beginning, "to propose to you as a subject of study the present tendency to return to the principles of natural law."²

To Charmont, the revival of natural law concepts was almost inevitable, because of the inadequacy of pure positivism. In his brief concluding chapter he asserts:³

The confirmation of natural law, or more exactly of juridical idealism, has appeared to us to offer the only solution for the crisis in legal philosophy. This crisis results from the impracticability of rationally and scientifically vindicating the idea of

¹ CHARMONT, *LA RENAISSANCE DU DROIT NATUREL* (1910). Subsequent citations are of the second edition, published in 1927 or the English translation of the last half of the work in volume 7 of the MODERN LEGAL PHILOSOPHY SERIES, entitled *Modern French Legal Philosophy* (1921).

² CHARMONT, *LA RENAISSANCE DU DROIT NATUREL* 7 (2d ed. 1927).

³ Charmont, *Modern French Legal Philosophy* in 7 MODERN LEGAL PHILOSOPHY SERIES 145 (1921).

law, and from the insufficiency of the expedients, the empirical processes, which deplete it of its moral content. If it is possible neither to justify the idea of law nor to do without it, the only escape from the dilemma lies in performing an act of faith. The idea of law is accepted as a belief, as a datum of feeling.

Charmont's little book marks a turning point in modern legal philosophy. For, by the beginning of the present century, juridical idealism, which had held sway in the western world during the seventeenth and eighteenth centuries, had fallen into singular discredit. Law had come to be looked upon merely as command. Legal rules were considered only as imperative norms prescribed by the politically or economically dominant class in society. There was no place in such an approach for moral or ethical elements. "With the goodness or badness of laws," dogmatically declaimed Austin in a famous passage, jurisprudence "has no immediate concern."⁴

A legal philosophy which is wholly divorced from ethics is, however, like a presentation of *Hamlet* without the Prince of Denmark. Wholly to separate law from its moral bases may simplify the task of the jurist, but it hardly enables him to perform the creative role of molder of the law of the future, as well as that of analytical glossator of the law of the present. Indeed, even pure analysis is bound to be distorted, if regard is had only to the strict letter of the law and not to the ethical spirit behind it. Law is normative even more than it is descriptive; it expresses an ideal as much as a juristic fact — an *ought* as much as an *is*. "It is true also of Acts of Congress that 'The letter killeth'."⁵

It must, of course, be recognized that any theory which is based upon the eighteenth century law of nature school is today wholly out of line with the facts of philosophical life. The eighteenth century saw the high-water mark of natural law theories. Fortified by their newly-found reliance upon

⁴ AUSTIN, JURISPRUDENCE 1107 (4th ed. 1873).

⁵ Justice Frankfurter dissenting in United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 548, 70 S. Ct. 309, 94 L. Ed. 317 (1950).

reason, men believed they could work out a series of immutable principles which would be eternally sound. Proceeding from these principles, they hoped to construct an entire system of law which would be everlastingly valid. It was the faith that this was possible that led to the great works of codification at the end of the eighteenth century.

The well-nigh quixotic dream of the law of nature law-makers was doomed to almost inevitable failure. This did not, however, justify the extreme positivist reaction that followed. The rejection of the inordinate conceptions upon which the law of nature school was based does not necessarily involve the repudiation of the ethical aspects of law. To consider law solely in terms of command is to deprive it of its moral value. As command, it is effective only to the extent that it is implemented by the force of politically organized society. It no longer merits personal devotion and sacrifice because of its intrinsic ethical worth.

More and more, men are coming to realize that there are certain basic principles of right and justice to which the law must conform. For men to forego their right to judge the positive law in terms of its conformity to these moral principles is for them to accept State power as the unique criterium. It is true that we can no longer seek to derive the details of our legal rules from a series of eternally valid principles given to us *a priori* by reason or revelation: ⁶

Natural law, as the old school conceived it was universal, immutable; for all questions of positive law, it offered an ideal solution, satisfying in every respect; and the human reason could and should find this solution.

Today, it is recognized that natural law principles, like those of the positive law, are relative: ⁷

Thus it is not only the positive system of law that varies; it is also the so-called ideal system, which is itself contingent and arbitrary, bound to undergo the influence of its time, of its environment, and of individual characters.

⁶ Charmont, *supra* note 3, at 106.

⁷ *Id.* at 107.

Public Law

Natural law theories have had particular influence in the field of public law. The discredit into which the absolutist law of nature school has fallen tends to make us overlook the great things which it accomplished in that field, for ⁸

It established constitutional law, laid down the bases and the principles of public and private international law, contributed to the betterment of the criminal laws. This was an immense effort which we are all too prone to forget.

It is, indeed, not too much to assert that modern public law is founded upon the work of the eighteenth century law of nature jurists.

To an American, familiar with the bases of his own system of public law, this should be especially apparent. That our public law has been dominated by the notion of principles above the State is shown by the fact that it has been governed by the concept of constitutionalism since the eighteenth century. That these principles are not immutable is recognized by the provision in our Constitution for amendment when portions of it no longer meet the needs of a later age. It was the failure to understand this that caused our courts until recently to judge the validity of contemporary legislation by a set of supposedly universal and eternal objective principles, which were in fact drawn from a temporary and subjective individualist ethic. But this is not to deny, in M. Geny's phrase, the unavoidable necessity of a minimum of natural law. The idealist element has never been wholly absent from American law, however much men may have tried to reduce jurisprudence to an analysis of the "pure fact of law," uninfluenced by ethical factors.

It will be the purpose of this paper to show the influence of natural law upon a particular branch of public law, namely, administrative law. The law governing the relations of the citizen and the administration is permeated throughout by

⁸ CHARMONT, *op. cit.* *supra* note 2, at 8.

ethical elements. Its very purpose, that of enabling the individual to secure justice even against his government, illustrates this. A sound system of administrative law is one which seeks to subject the action of the State to the same standards of fairness and legality that govern the acts of private citizens. It rejects the conception that law and legality are one and the same thing. It has been stated that: ⁹

It is not enough to say with Dicey that "Englishmen are ruled by the law, and by the law alone," or, in other words, that the powers of the Crown and its servants are derived from the law; for that is true even of the most despotic State. The powers of Louis XIV, of Napoleon I, of Herr Hitler, of Signor Mussolini are derived from the law, even if that law be only "The leader may do and order what he pleases."

Because of space limitations, the discussion that follows will be concerned with one aspect of administrative law, that of administrative procedure. It is in the law governing the procedural requirements which must be followed by the administration, as much as in any other branch of law, that one can note the importance of natural law conceptions. Thus, as we shall see, the law of administrative procedure in this country has been based upon the constitutional requirement of due process of law, which is fundamentally a notion of natural law. This is shown by the fact that the requirement of fair administrative procedure does not depend upon the existence of a specific provision for due process, like that contained in the American Constitution. Such a requirement is demanded by man's inherent sense of justice and fair play, from which the constitutional doctrine of due process is, after all, derived. This will be apparent from the analysis, which will be given, of the situation in Britain, where, as is well known, there is no written constitution, and that in France, where, though there is a written constitution, there is no effective judicial machinery to ensure the enforcement of its provisions. The position in a civil law country like France is of particular

⁹ JENNINGS, *THE LAW AND THE CONSTITUTION* 46 (3d ed. 1946).

pertinence. If, in a country whose legal system is based upon the absolute sovereignty of the written law, it is recognized that there are basic principles of natural justice to which administrative procedure must conform, it goes far toward demonstrating that the relationship between public law and natural law does not depend upon the existence of an enforceable constitution in which specific natural law principles, like that of due process, are declared to be part of the supreme law of the land.

Procedural Due Process

The starting point of the law of administrative procedure in this country has been the due process clause:¹⁰

The dominant factor in the development of the procedural aspect of American administrative law has been the provision of federal and state constitutions that no person may be deprived of life, liberty or property without "due process of law." While the consideration of whether an administrative body must give notice and an opportunity to be heard to interested individuals frequently involves difficulties of statutory interpretation, the ultimate legal problem is whether the procedure utilized satisfies the guarantee of due process of law.

The due process concept, as it has been interpreted by the courts in this country, imposes certain procedural requirements which must be followed by the American administration, whether or not they are made mandatory by any statutory or regulatory provision. In its application to the administrative process, due process is essentially a requirement of notice and hearing. "Notice and opportunity to be heard," as Justice Douglas has recently reminded us, "are fundamental to due process of law."¹¹

It is, however, a mistake to assume that the requirement of notice and hearing can be imposed upon the administration only by judicial enforcement of an express provision in the Constitution like the due process clause. "Fairness of pro-

¹⁰ GELLHORN, *ADMINISTRATIVE LAW: CASES AND COMMENTS* 229 (2d ed. 1947).

¹¹ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 178, 71 S. Ct. 624, 95 L. Ed. 817 (1951).

cedure is 'due process in the primary sense,'” Justice Frankfurter has stated. “It is ingrained in our national traditions and is designed to maintain them.”¹² There are certain fundamentals of just procedure demanded by man’s inherent sense of fair play, which antedate the constitutional provision for due process, and upon which the latter is based. As it was expressed by an American court almost a century ago:¹³

It is a rule founded on the first principles of natural justice older than written constitutions that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard in defense of his rights, and the constitutional provision that no person shall be deprived of these “without due process of law” has its foundation in this rule.

The due process clause, upon which the law of administrative procedure in this country is based, is thus but a constitutional statement of what is required by what our highest Court has termed “the sense of justice.”¹⁴ Due process of law is a summarized constitutional guarantee of respect for those personal immunities which are “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”¹⁵

It is clearly erroneous to look upon the due process clause only as a principle of positive law promulgated by the Constitutional Assembly of 1787. The Founding Fathers sought in the constitutional provision to safeguard the procedural rights required by what they felt to be the law of nature. The “deep-rooted demands of fair play enshrined in the Constitution”¹⁶ have their origin in both religion and reason. An English judge asserted over two centuries ago:¹⁷

The laws of God and man both give the party an opportunity to make his defense, if he has any . . . even God himself

¹² *Id.*, 341 U.S. at 161.

¹³ *Stewart v. Palmer*, 74 N.Y. 183, 190, 30 Am. Rep. 289 (1878).

¹⁴ *Brown v. Mississippi*, 297 U.S. 278, 286, 56 S. Ct. 461, 80 L. Ed. 682 (1936).

¹⁵ *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934).

¹⁶ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 161, 71 S. Ct. 624, 95 L. Ed. 817 (1951).

¹⁷ *The King v. University of Cambridge (Dr. Bentley’s Case)*, 1 Str. 557, 93 Eng. Rep. 698, 704 (K.B. 1723).

did not pass sentence upon Adam, before he was called upon to make his defense. Adam (says God) where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldest not eat?

Nor is the concept of due process one whose contours are necessarily constant and immutable. Like other natural law notions, it is seen to have a variable content, whose details may change with modifications in external conditions. As a member of the Supreme Court has stated: ¹⁸

. . . "due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess.

As the above analysis has shown, what is required under the due process clause is appropriate regard for "the fundamentals of fair play" ¹⁹ demanded by man's sense of justice. The law of administrative procedure in this country is thus grounded essentially upon the feeling for fairness which is rooted in man's nature. Justice Harlan stated in a leading case: ²⁰

. . . this court has never held, nor must we now be understood as holding, that administrative officers . . . may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his . . . [rights] without opportunity, at some time, to be heard. . . .

¹⁸ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162-3, 71 S. Ct. 624, 95 L. Ed. 817 (1951).

¹⁹ *The term used in Federal Communications Comm'n v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143, 60 S. Ct. 437, 84 L. Ed. 656 (1940).

²⁰ *Yamataya v. Fisher (Japanese Immigrant Case)*, 189 U.S. 86, 23 S. Ct. 611, 614, 47 L. Ed. 721 (1903).

It is by judging in each case whether the procedures observed by the administration were consistent with the requirements of fairness that our courts have worked out the details of the procedural demands imposed upon administrative agencies. They have started with the basic proposition that the essence of fairness is to be found in the maxim *audi alteram partem* — that “no man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence.”²¹ Very quickly, however, they came to see that the right to be heard was devoid of practical content unless those affected were made cognizant of the charges against them and given ample opportunity to prepare their defense. Hence, came the requirement of adequate notice which is basic in our administrative law:²²

The very basis of a judicial or quasi judicial hearing at which property rights are determined presupposes some sort of process by which the interested party is put upon his notice as to the time, place, and nature of the hearing.

In the first important case holding that administrative adjudications must be preceded by notice and hearing, the Supreme Court refused to go behind the formal hearing which had been afforded by the administration.²³ Yet it should be plain that the mere fact that a hearing is given may not be enough. The conduct of the hearing must be inquired into to ensure that its details are not inconsistent with fairness. And it is this type of inquiry that our courts have constantly been called upon to make. In doing so, they have formulated a great many procedural principles which must be observed. The tribunal before whom the hearing is held must be free from bias. Both parties have the right and the duty to present relevant evidence. The hearing need not be conducted according to the common law rules of evidence; but the

²¹ Wood v. Woad, L.R. 9 Ex. 190, 196 (1874).

²² Abrams v. Daugherty, 60 Cal. App. 297, 212 Pac. 942, 944 (1922).

²³ Yamataya v. Fisher (Japanese Immigrant Case), 189 U.S. 86, 23 S. Ct. 611, 47 L. Ed. 721 (1903).

“ . . . assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force.”²⁴

In addition, our courts have felt compelled to look into the process of administrative decision itself. They have recognized that the right to be heard would hardly be worthwhile if the tribunal relies upon materials not presented in evidence at the hearing in deciding the case. The principle of exclusiveness of the record, under which the administrative decision must be based solely upon the record of the hearing, has consequently been developed. Similarly, the process of institutional decision, which is common in the administration, is prone to abuses which must be safeguarded against. In its decisions in the first two *Morgan* cases,²⁵ the Supreme Court sought to accomplish this goal. And, finally certain principles have had to be laid down with regard to administrative decisions themselves. Foremost among them has been the rule that such decisions must be accompanied by the findings upon which they are based. This is essentially a requirement of reasoned decisions, a requirement which is clearly demanded by man's sense of justice. As it has been expressed by Harold J. Laski, “the giving of decisions without giving the reasons upon which they are based is as near autocracy as you can get.”²⁶

The above has presented in brief form the basic principles of our law of administrative procedure. Our courts have been able to invalidate administrative action where these procedural principles have not been complied with because of the existence in our Constitution of the due process clause. The discussion which follows, of the experience in France and Britain, shows, however, that judicial control of administra-

²⁴ Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 230, 59 S. Ct. 206, 83 L. Ed. 126 (1938).

²⁵ *Morgan v. United States*, 298 U.S. 468, 56 S. Ct. 906, 80 L. Ed. 1288 (1936); *Morgan v. United States*, 304 U.S. 1, 58 S. Ct. 773, 82 L. Ed. 1129 (1938).

²⁶ As quoted in ALLEN, LAW AND ORDERS 167 (1945).

tive procedure is not dependent upon an enforceable constitutional provision for due process. Even without such a provision, the courts can intervene to ensure administrative conformity to the fundamentals of fair procedure. It is these fundamentals, after all, which the due process clause enacts into our positive law. It is the natural law concept of natural justice that is the foundation of the jurisprudential edifice that has been constructed by American courts in the field of administrative procedure. Its base is essentially that which lay behind the well-known Biblical query, "Doth our law judge any man before it hear him, and know what he doeth?"²⁷

Procedural Requirements in France

According to section 10(e) of the Federal Administrative Procedure Act,²⁸ which merely restates a principle which had uniformly been applied by American courts, a reviewing court shall hold unlawful and set aside administrative action found to be "without observance of procedure required by law."²⁹ The same principle has been followed by the Council of State,³⁰ the supreme court in the French system of administrative law, almost from the beginning of its exercise of the authority to review the legality of administrative acts. It should not, however, be thought that the approach of the French system to the question of administrative procedure has necessarily been the same as that followed in American law. In fact, there has until recently been a basic difference in approach, which has prevented the Council of State from being as effective a controller of administrative procedural regularity, as the courts in this country have been.

²⁷ St. John 7:51; quoted in GELLHORN, *op. cit. supra* note 10, at 231.

²⁸ 60 STAT. 237 (1946), as amended, 5 U.S.C. §§ 1001 *et seq.* (Supp. 1952).

²⁹ 60 STAT. 244, § 10(e) (B) (4), 5 U.S.C. § 1009(e) (B) (4) (1946).

³⁰ For a discussion of this tribunal written for a common law audience, see Schwartz, *A Common Lawyer Looks at the Droit Administratif*, 29 CAN. B. REV. 121 (1951); Schwartz, *The Administrative Courts in France*, *Id.* at 381.

The procedural ground of review, stated an important French article in 1941,³¹

... should ensure the respect of that outer legality which is the legality of procedure and which results from the forms and procedures which are imposed by legal provisions with regard to the performance of administrative acts.

In the French system, it has been only the procedural requirements imposed by specific legal provisions that the administration has been obliged to follow. The Council of State, in its jurisprudence upon this subject, has started from the proposition that its control of the procedural aspect of administrative law is limited to ensuring compliance by the administration with the procedure made mandatory by the legislature or by the agency concerned itself. "The procedural defect in the *droit administratif* is a defect which arises from the failure to follow the procedures prescribed by statutes and regulations."³²

That this has been the starting point of the law of administrative procedure in a civil law country like France is not surprising. The basic principle in the legal system of most continental countries is that of the complete supremacy of the written law. "Franco-German doctrine rests upon the absolute sovereignty of the written law."³³ Legal principles are deduced entirely from the law laid down by the legislator. The role of the judge is limited to interpretation and to filling in the *lacunae* in the Code. In such a system, the inductive method, which is second nature to the Anglo-American lawyer, leads only to misconceptions.

It is not to be wondered at that the French judge has left himself a lesser role than that assumed by his confrere in the common law world. In a system which has been grounded upon the unqualified sovereignty of the positive law promul-

³¹ Berlià, *Le Vice de Forme et le Contrôle de la Legalité des Actes Administratifs*, REVUE DU DROIT PUBLIC 370, 371, (1941).

³² ALBERT, LE CONTRÔLE JURIDICTIONNEL DE L'ADMINISTRATION 221 (1926).

³³ *Id.* at 15.

gated by the legislator, he has hesitated to test administrative action by its conformity to principles of right and justice, unless those principles have been enunciated in a legislative text. Hence, his starting point in the law of administrative procedure has been that action of the administration would not be invalidated for failure to comply with procedural requirements, unless those requirements were expressly imposed by statute or regulation.

As we have already seen, insofar as the procedural aspect is concerned, American administrative law has been based upon a wholly different starting point, that of the constitutional doctrine of due process of law. The concept of due process and its employment in the field of administrative law have ensured to the procedural aspect of that subject in this country a development unlike that of its counterpart in France. The French Council of State has, in the past, tended to set aside administrative action for procedural defects only where the procedural requirements which were not observed were imposed by statute or regulation. The American courts, on the contrary, have gone much further and have held the administration to the observance of the fundamentals of fair play, regardless of whether the applicable statutes or regulations have exacted any procedural demands.

Natural Justice in Britain

It will be objected that it is not entirely fair to compare the procedural aspect of French administrative law with that of the system which prevails in this country. The American courts have been able to hold the administration to the observance of basic procedural requirements, even in the absence of legislative provision therefor, because of the due process clause which is contained in the Constitution and the fact that our courts have successfully asserted their authority to declare invalid any governmental action which conflicts with the provisions of the organic instrument. In France, on

the other hand, the fundamental principle has been the supremacy of the statute law, even in the face of contrary constitutional provisions. The French courts have never sought to assume for themselves the power to invalidate governmental acts on the ground of unconstitutionality. It is, therefore, not surprising that they have refused to enjoin procedural prerequisites upon the administration beyond those demanded by the legislature.

It is, however, a mistake to assume that nonstatutory procedural requirements can be imposed only by judicial enforcement of an express provision in a Constitution like the due process clause. That clause, itself, as we have seen, has its basis in man's sense of justice. It is the articulation in our positive law of the principles demanded by our feeling for fairness. But the validity of those principles does not depend solely upon their being enacted into positive law.

It is the realization of this that has led the courts in Britain, like those in the United States, to hold that the administration must comply with certain basic procedural requirements, regardless of whether they are demanded by the relevant enabling legislation. The British experience in this respect is particularly significant. For, in Britain, as in France, there are no constitutional procedural requirements which the courts can enforce. But the British courts have endeavored to ensure administrative fair play through the concept of "natural justice." The well-known Report of the Committee on Ministers' Powers states on this point: ³⁴

It has been truly said that, however much a Minister in exercising such [i.e., judicial] functions may depart from the usual forms of legal procedure or from the common law rules of evidence, he ought not to depart from or offend against "natural justice."

The principles of "natural justice" can be said to be as much a part of British administrative law as the procedural

³⁴ REPORT OF THE COMMITTEE ON MINISTERS' POWERS, CMD. No. 4060 at 75 (1932).

demands which the United States Supreme Court has held are required of the American administration under the due process clause. These principles are implied as a condition precedent to the lawful exercise of adjudicatory authority by the administration. This is well shown by the language of Lord Justice Bowen in an important opinion on the employment of such authority by bodies other than the ordinary courts. The relevant enabling statute merely prescribed that the particular decision should be made after due inquiry. The opinion states: ³⁵

The statute says nothing more, but in saying so much it certainly imports that the substantial elements of natural justice must be found to have been present at the inquiry. There must be due inquiry. The accused person must have notice of what he is accused. He must have an opportunity of being heard, and the decision must be honestly arrived at after he has had a full opportunity of being heard.

The law of administrative procedure in Britain has been constructed by the courts upon the basis of the concept of "natural justice," just as the American law on the subject has been worked out from the constitutional concept of due process. The requirements of natural justice in Britain, like those imposed by due process in this country, are essentially requirements of notice and hearing. As it was expressed by Lord Selborne in a well-known case, "He [the administrator] is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice. . . ." ³⁶ ". . . it would be contrary to fundamental justice," ³⁷ Lord Esher, M.R., has stated, to allow the administration to proceed without giving notice and an opportunity to be heard.

Just as has been the case in this country, the courts in Britain have not limited their inquiry into the mere question

³⁵ *Leeson v. General Council of Medical Education*, 43 Ch. D. 366, 383 (C.A. 1889).

³⁶ *Spackman v. Plumstead District Board of Works*, 10 A.C. 229, 240 (1885).

³⁷ *Hopkins v. Smethwick Local Board of Health*, 24 Q.B.D. 712, 716 (C.A. 1890).

of whether a formal hearing has been afforded by the administration. The requirement of a hearing is of little value unless it proceeds with the "substance of a judicial proceeding."³⁸ If, as Harold J. Laski has insisted, "executive discretion is an impossible rule unless it is conceived of in terms of judicial standards,"³⁹ the courts must clearly have the authority to ensure compliance with such standards. "The judiciary should have such power of scrutiny as will enable it to see that the rules adopted by the executive are such as are likely to result in justice."⁴⁰

The English courts, like those on this side of the Atlantic, have insisted that the administrative tribunal be free from bias. The tribunal "must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything."⁴¹ The administrative decision must not be based upon *ex parte* evidence. The *audi alteram partem* rule is not observed where evidence is given by one party without an opportunity being given to the other party to contradict it.⁴² An administrative officer, in exercising powers of decision, must, in the words of the leading English case, "do it in accordance with the rules of natural justice, that is to say, he must hear both sides and must not hear one side in the absence of the other."⁴³

It should not, however, be thought that the details of the law of administrative procedure are necessarily the same in Britain as they are in this country. In both systems, the law on this subject requires the administration to observe what are considered to be the "ordinary principles of fair play."⁴⁴ But though these basic principles may be constant on both sides of the Atlantic, the detailed rules derived from them

³⁸ *Parsons v. Lakenheath School Board*, 58 L.J.Q.B. 371, 372 (1889).

³⁹ LASKI, *A GRAMMAR OF POLITICS* 301 (4th ed. 1938).

⁴⁰ *Ibid.*

⁴¹ *Board of Education v. Rice*, [1911] A.C. 179, 182.

⁴² WADE and PHILLIPS, *CONSTITUTIONAL LAW* 294 (4th ed. 1950).

⁴³ *Errington v. Minister of Health* [1935] 1 K.B. 249, 268 (C.A. 1934).

⁴⁴ *Id.* at 272.

may differ in each country. Thus, the House of Lords, in the famous *Arlidge* case,⁴⁵ refused to adopt the principle enunciated by our Supreme Court in the first *Morgan* case.⁴⁶ The type of vicarious decision disapproved of by our Court in that case, as contrary to our conceptions of fairness, was held not to violate the principles of natural justice by the English court.⁴⁷

Yet, important though such differences in detail may be, they cannot obscure the fact that the law of administrative procedure, in both Britain and this country, rest upon the same natural law foundation. Both systems are based upon the existence of fundamental principles of justice, which must be complied with by the administration. This is, indeed, even clearer in Britain than it is on this side of the Atlantic. The "substantial requirements of justice,"⁴⁸ to which the British administration must conform, are not imposed by any text of the positive law, of the type of the due process clause in this country. Their observance is demanded because it is felt that they are the basis upon which the English law, itself, is grounded.

Natural Justice in France

The starting point of the procedural aspect of French administrative law has, as we have seen, been the principle that the administration was held to the observance of those procedural requirements only which were imposed by some legal text. The Council of State would annul administrative action for procedural defects only if the agency concerned failed to follow a procedure demanded expressly by statute or regulation. The British experience shows, however, that the courts can impose the fundamentals of fair procedure upon the administration, even in the absence of a judicially enforceable

⁴⁵ *Local Government Board v. Arlidge*, [1915] A.C. 120 (1914).

⁴⁶ *Morgan v. United States*, 298 U.S. 468, 56 S. Ct. 906, 80 L. Ed. 1288 (1936).

⁴⁷ Another important difference arises from the refusal of the courts in Britain to impose a requirement of reasoned decisions upon the administration.

⁴⁸ *Spackman v. Plumstead District Board of Works*, 10 A.C. 229, 240 (1885).

constitutional provision like the due process clause. And, since the Liberation, the Council of State has, indeed, in one of the most significant changes in its jurisprudence that has ever occurred, imported something very much like the British concept of "natural justice" into the French system.

The change in the attitude of the French tribunal was clearly shown for the first time in a case decided by it in 1944,⁴⁹ just before Allied troops were to land on French soil. In the case referred to, the administration had summarily revoked the petitioner's permit to operate a stand from which she sold newspapers on one of the large Parisian boulevards. Under the pre-existing case law, there was clearly no procedural question which could be raised upon judicial review, since there was no requirement imposed by statute or regulation for notice and hearing in a case like this. But M. Chenot, the *commissaire du gouvernement*,⁵⁰ in his conclusions to the Council, urged a wholly new approach, which was followed by the tribunal in its decision.

After admitting that the general French rule did not require an opportunity to be heard, unless a legal text demanded it, M. Chenot went on to say,⁵¹

In certain cases, however, this practical rule gives way to a higher principle. By their nature and their object, certain decisions must be preceded by a hearing, or, at the very least, they must not be rendered before those affected have had some opportunity to present their point of view. This is true of all judicial decisions and disciplinary matters, involving civil servants. Only a legal text could exempt the administration from following an adversary procedure in these two fields.

In actual fact, the principle of a required hearing, in the absence of a legal text demanding it, had been applied by the

⁴⁹ Tromprier-Gravier, May 5, 1944. The decisions of the Council of State are customarily cited by the name of the plaintiff and the date. They are reported in chronological order in the *Recueil des Arrêts du Conseil d'Etat Statuant au Contentieux*, often called the *Recueil Lebon*, after its founder.

⁵⁰ On the role of this member of the French tribunal, see Hamson, *Le Conseil d'Etat Statuant au Contentieux*, 68 L.Q. REV. 60, 81 (1952).

⁵¹ See note 49 *supra*.

Council of State only to the decisions of lower administrative courts at the time M. Chenot rendered his conclusions in 1944. He was thus, in effect, proposing a very great extension of the Council's jurisprudence, which he stated in the following terms: ⁵²

When an administrative decision assumes the character of a penalty, and it has a serious enough adverse effect upon the situation of an individual, your jurisprudence requires that the individual be given an opportunity to present his point of view on the measure which affects him The victim of a penalty must be given notice and be able to present his defense.

Though careful to leave the impression that he was merely restating the existing case law, M. Chenot was, in reality, pointing the way to an audacious step forward, which would completely change the approach of the French tribunal to its review of the procedural aspect of administrative action. And that step was taken by the Council, for its decision in the instant case agreed with the conclusions of its *commissaire du gouvernement*. The decision reads: ⁵³

Bearing in mind the character which the revocation of the permit presented in these circumstances and the gravity of that penalty, such a measure could not be taken legally without the Widow Trompier-Gravier having been given an opportunity to be heard.

A great many cases since the Liberation have applied the principle of this case. Most of them have involved attempts by the administration to purge itself of those civil servants who had collaborated too closely with the Government of Vichy. The statute which authorizes the dismissal of such collaborationists does not expressly provide any procedural guarantees. The Council of State has, however, applied the principle of its 1944 decision and annulled dismissals in cases where the individual concerned was not given an opportunity to present his views to the commission charged with carrying out the law. As the Council stated, in one of these cases, in

⁵² *Ibid.*

⁵³ *Ibid.*

language analogous to that used in M. Chenot's conclusions cited above,⁵⁴

. . . it results . . . from the general principles of law which are applicable even in the absence of a legal text that a penalty cannot be pronounced legally unless the individual concerned has been given an opportunity adequately to present his defense.

This language of the French tribunal is of primary significance, for it shows us the basis of its holding that an opportunity to be heard must be afforded even though no statute or regulation requires it. Such opportunity, asserts the Council of State, is demanded by *the general principles of law*. As a distinguished Councillor of State has recently asserted:⁵⁵

We consider that certain unwritten rules of law exist which have legislative status and which, consequently, must be followed by those exercising administrative authority, so long as they have not been contradicted by a positive provision of the statute law.

Among these general principles of law is that of the right to be heard:⁵⁶

It requires the administration to institute an adversary procedure and to call forth the views of the individuals affected, before serious measures, which modify their legal position, are taken, where the agency concerned bases such measures upon certain grounds of complaint against such individuals.

It should not be thought that the jurisprudence of the Council of State on the right to be heard, even in the absence of statutory provisions therefor, has as yet developed with any of the details that have characterized the case law of the Anglo-American courts upon the subject. The assertion by the French tribunal of the basic principle is still too recent for that. But it cannot be denied that the Council's decisions have begun to evolve in a manner which permits one to hope that a development analogous to the Anglo-American law of administrative procedure is not far off.

⁵⁴ Avanne, October 26, 1945.

⁵⁵ Address of M. Bouffandeau, June 10, 1950, on the occasion of the one hundred and fiftieth anniversary of the Council of State.

⁵⁶ *Ibid.*

Thus, soon after laying down the principle of the right to be heard, the French tribunal held that implicit in that right was the requirement of due notice as a condition precedent to the proper exercise of the administrative authority.⁵⁷ And the Council has held that the mere giving of notice was not necessarily enough. The question of the adequacy of the notice under the circumstances of the case was open to the court upon review. In one case, where the petitioner was given notice of hearing by a letter mailed the previous day, the Council decided that she was not given sufficient time to prepare her case.⁵⁸

The French tribunal has also dealt with the conduct of the hearing and the process of decision. In a decision recalling that of the United States Supreme Court in the second *Morgan* case,⁵⁹ the Council annulled an administrative decision where the petitioner was not given any information of the concrete claims of the administration during the hearing.⁶⁰ And the French tribunal, like the American Court in the first *Morgan* case,⁶¹ has insisted that the administrative officers in whom are vested the authority to decide cases which affect the rights and obligations of private citizens have a personal duty to decide such cases which cannot be delegated to others.⁶²

Of even more significance perhaps is a recent Council of State decision dealing with the requirement of reasoned decisions. Like the courts in Britain, the French tribunal has consistently refused to require that the administration give the reasons for its decisions in the absence of a statutory provision imposing such requirement. In 1950, however, the Council rendered a decision⁶³ which may, in the words of one

⁵⁷ Clary, November 4, 1946.

⁵⁸ Descieux, May 3, 1946.

⁵⁹ *Morgan v. United States*, 304 U.S. 1, 58 S. Ct. 773, 82 L. Ed. 1129 (1938).

⁶⁰ Brois, July 16, 1947.

⁶¹ *Morgan v. United States*, 298 U.S. 468, 56 S. Ct. 906, 80 L. Ed. 1288 (1936).

⁶² Cattin, March 30, 1949.

⁶³ Billard, January 27, 1950.

commentator, "open a first breach in the established jurisprudence under which, in the absence of a legal text requiring it, the decisions of administrative authorities need not be reasoned ones."⁶⁴ In the case referred to, the Council of State annulled an administrative decision, where reasons were not given. In his conclusions, M. Letourneur, the *commissaire du gouvernement*, advocating a bold departure from the prior case law, stated that the Council should require reasoned decisions in every case where the administration was exercising quasi-judicial functions, even though the legislature did not expressly impose such requirements. Otherwise, said he, how can the Council really determine the validity of a challenged decision?⁶⁵

As it was expressed in the Council's decision, the obligation to give reasons is imposed "in order to enable the reviewing court to be able to determine if the directions and prohibitions contained in the law have been followed."⁶⁶ This, it should be noted, is basically the reason why the American courts have required administrative decisions to contain findings which show their basis. It is to be hoped, in the words of the commentator already referred to, that the Council's decision "is only the beginning of a jurisprudential edifice which will give citizens a new safeguard by ensuring a more effective control of reviewing courts."⁶⁷

Natural Law Aspects

The Anglo-American lawyer who examines the recent jurisprudence of the Council of State, under which the right to be heard must be afforded by the administration, even though it has not been provided for by the legislature, will immediately perceive that what the French tribunal has done is to import into the *droit administratif* something very much like

⁶⁴ Sirey (1950) pt. 3, p. 41.

⁶⁵ M. Letourneur's important conclusions are printed *Ibid.*

⁶⁶ See note 63 *supra*.

⁶⁷ See note 64 *supra*.

the concept of "natural justice." Just as the courts in Britain have held that administrative adjudicatory procedure must conform to the principles of "natural justice," so has the Council of State held that it must not violate the "general principles of law," which include that of the right to be heard. And, in both countries, it should be noted, the courts have acted without the aid of an express constitutional provision, such as the due process clause in American constitutions.

The recent view of the French tribunal has been summarized as follows, by a leading administrative lawyer:

- 1) There exists a body of general principles of French public law;
- 2) These principles have positive legal value. They have the effect of law, and the judge is bound to ensure the respect of them, just as he does for the written law;
- 3) The bases of the authority which these principles are thus recognized to have is not to be found in the statute law; they are applicable even in the absence of statute;
- 4) The judge does not create these principles. He speaks of them as objective rules whose existence he notes, and which do not at all depend upon his pleasure.⁶⁸

The review power which the Council of State has asserted over administrative procedure since the Liberation is thus seen to depend upon certain unwritten legal principles, which are required by man's sense of fair play, to which the administration must conform. The use by the French tribunal of such a concept, which rests upon an inherent unwritten law which is applied by the judge, may, however, lead to difficulties, for it has moral as well as legal connotations. This is also true, of course, of the concept of due process in this country and that of "natural justice," which the British

⁶⁸ Rivero, *Le Juge Administratif Francais: Un Juge Qui Gouverne?*, DALLOZ CHRONIQUE 21, 22 (1951).

courts use. That concept, the Report of the Committee on Ministers' Powers affirms,⁶⁹

. . . must be regarded as belonging to the field of moral and social principles and not as having passed into the category of substantive law, so as necessarily to make every act obnoxious to its canons a transgression of a legal rule recognized and enforced as such by our Courts.

The weakness of legal analysis based upon wholly ethical precepts has been apparent ever since Austin. "With the goodness or badness of laws," said he, in the famous statement which has already been cited, General Jurisprudence "has no immediate concern."⁷⁰ It is not enough merely to choose some moral principle and then to formulate it in legal form. We must, with Dean Pound,⁷¹

. . . ask how far it has to do with things that may be governed by legal rules. We must ask how far legal machinery of rule and remedy is adapted to the claims which it recognizes and would secure. We must ask how far, if we formulate a precept in terms of our moral principle, it may be made effective in action. Even more we must consider how far it is possible to give the moral principle legal recognition and legal efficacy by judicial action or juristic reasoning, on the bases of the received legal materials and with the received legal technique, without impairing the general security by unsettling the legal system as a whole.

The difficulties involved in deriving legal results from ethical principles led a British judge to go far toward rejecting the whole concept of "natural justice" in a famous passage in *Local Government Board v. Arlidge*,⁷² the leading British case on the exercise of adjudicatory authority by the administration. He declared:⁷³

The words "natural justice" occur in arguments and sometimes in judicial pronouncements in such cases. My Lords, when a central administrative board deals with an appeal from a local authority it must do its best to act justly, and to reach

⁶⁹ See note 33 *supra*.

⁷⁰ AUSTIN, *op cit. supra* note 4.

⁷¹ POUND, *LAW AND MORALS* 63 (2d ed. 1926).

⁷² [1915] A.C. 120 (1914).

⁷³ *Id.* at 138.

just ends by just means. If a statute prescribes the means it must employ them. If it is left without express guidance it must still act honestly and by honest means. In regard to these certain ways and methods of judicial procedure may very likely be imitated; and lawyer-like methods may find especial favour from lawyers. But that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are *ex necessitate* those of Courts of justice is wholly unfounded. This is expressly applicable to steps of procedure or forms of pleading. In so far as the term "natural justice" means that a result or process should be just, it is a harmless though it may be a high-sounding expression; in so far as it attempts to reflect the old *jus naturale* it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions; and, insofar as it is resorted to for other purposes, it is vacuous.

A similar criticism of the recent jurisprudence of the Council of State in France is contained in an article which has attracted a great deal of notice from French jurists. Significantly enough, its title is "The French Administrative Judge: a Judge who Governs?"⁷⁴ This is intended as a paraphrase of a famous French study of judicial review of the constitutionality of laws by the United States Supreme Court, which is entitled "Government by Judiciary."⁷⁵

The Council of State, asserts the author of this article, in invalidating administrative action which violates the "general principles of law" is, in effect, assuming for itself a power analogous to that of the American Court, to judge governmental action in the light of certain broad principles, which are almost wholly of judicial creation. The author further says:⁷⁶

Believing itself the servant of these principles, the Council of State is, in fact, their creator. More exactly, it is its action which chooses which, among the complex mass of elements that make up the national conscience, shall be given the legal effect which it alone can give them, and makes them, in that way, a part of the positive law.

⁷⁴ Rivero, *supra* note 68.

⁷⁵ LAMBERT, *LE GOUVERNEMENT DES JUGES* (1921).

⁷⁶ Rivero, *supra* note 68.

Here, it must be admitted, lies one of the great weaknesses in a natural law concept like "natural justice," or its French counterpart. It is the judge who must himself determine the content of the general principles which he holds that the administration must follow, however much he may assert that he is only finding, not making, the law. Thus, it has been stated: ⁷⁷

Is there not, in these general principles, an element of serious uncertainty, a temptation for judicial arbitrariness? Is there not more security, more stability for the individual, in the reign of statute-law, even though poorly made, than in the action of the judge, however benevolent?

To assume, however, that control of administrative procedure under a concept like that of "natural justice" must rest wholly upon the unfettered discretion of the judge is to go too far. As the Committee on Ministers' Powers expressed it: ⁷⁸

Although "natural justice" does not fall within those definite and well-recognized rules of law which English Courts of Law enforce, we think it is beyond doubt that there are certain canons of judicial conduct to which all tribunals and persons which have to give judicial or quasi-judicial decisions should conform. The principles on which they rest are we think implicit in the rule of law. Their observance is demanded by our national sense of justice.

The vague contours of "natural justice" and its French equivalent do not leave judges at large. They may not draw upon their merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of "natural justice" is not final and fixed, these limits are derived from considerations that are fused in the whole nature of the judicial process.⁷⁹ The Supreme Court has declared: ⁸⁰

To practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-

⁷⁷ *Id.* at 24.

⁷⁸ *Supra* note 34, at 76.

⁷⁹ Paraphrasing Justice Frankfurter, in *Rochin v. California*, 342 U.S. 165, 170, 72 S. Ct. 205, 96 L. Ed. 183 (1952).

⁸⁰ *Id.*, 342 U.S. at 171-2.

discipline and self-criticism, incertitude that one's own views are incontestable and alert tolerance toward views not shared. But these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power.

In executing his responsibility to ensure that administrative procedure conforms to the fundamentals of fair play,⁸¹

. . . there is little reason to fear that a judge, relying on his own deliberate reflections and the call of his own conscience, will apply erratic, capricious, or idiosyncratic moral standards. Our judges are products of our society, and . . . they will generally think along with the beliefs of some substantial segment of the citizenry. A man who uses a moral standard that no one shares in a population of 150 million probably does not belong at large, much less on the bench.

Judicial control of administrative procedure, such as is exercised both by Anglo-American courts and the French Council of State under its post-Liberation jurisprudence, is not to be derided merely as resort to a revival of "natural law."⁸² Those who assert that a concept such as "natural justice" is a matter of judicial caprice, like the critics who have already been cited, fail to distinguish between the forms of justice and its underlying inherent principles:⁸³

It is one thing to depart from the procedure adopted at common law, and another, and a very different thing, to adopt a procedure which is inconsistent with the principles of natural justice on which the English common law is based.

As Dean Pound has aptly pointed out, "there are certain fundamentals of just procedure which are the same for every type of tribunal and every type of proceeding."⁸⁴ It is for the courts to ensure conformance by the administration to these fundamentals — whether it be through the constitutional concept of "due process" or the ethico-legal device of

⁸¹ Cahn, *Authority and Responsibility*, 51 COL. L. REV. 838, 850 (1951).

⁸² Paraphrasing *Rochin v. California*, 342 U.S. 165, 171, 72 S. Ct. 205, 96 L. Ed. 183 (1952).

⁸³ *The King v. Local Government Board (Ex parte Arlidge)*, [1914] 1 K.B. 160, 176 (C.A. 1913).

⁸⁴ POUND, *ADMINISTRATIVE LAW* 75 (1942).

“natural justice,” or its French equivalent. As Justice Frankfurter has recently reminded us: ⁸⁵

The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.

Conclusion

The above analysis has shown that the law of administrative procedure rests essentially upon natural law foundations. Nor is this true only in the American system, where the natural law concept of due process has been expressly included in a judicially enforceable Constitution. In Britain, too, where there is no written organic instrument, the courts have held the administration to the procedural requirements of natural justice. And the same has been true of the recent French law, in which the fundamentals of administrative fair play have been held to be demanded by the “general principles of law.” The experience in France is, as has been pointed out, particularly significant, because of the sovereignty of the written law which prevails in civil law jurisprudence. Despite the basically positivist approach of French law, the courts there have felt compelled to hold administrative procedure to the standard of natural justice, even though no procedural demands have been imposed by the legislature.

The reasons which have induced the recent development in this direction in French law have recently been stated by M. Cassin, the Vice-President of the Council of State, who is what we would term the Chief Justice of the French tribunal.⁸⁶ Before 1940, said he, in the general atmosphere of respect of individual liberties and democracy which prevailed under the Third Republic, there was no real reason for the

⁸⁵ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170, 71 S. Ct. 624, 95 L. Ed. 817 (1951).

⁸⁶ The President of the Council is the French Minister of Justice, but his title is essentially a formal one.

French judge to develop the notion of fundamental principles of law to which administrative action must conform. He continued:⁸⁷

It is, on the contrary, because in 1940, an authoritarian regime, reversing the republican basis of the preceding regime, gave rise to a drastic backward movement in the field of public liberties, that the Council of State, changing its approach, felt compelled to bring the bases of French law to the light of day and began to construct a theory of "general principles of law" as a sort of rampart to limit the dangers.

In this statement of M. Cassin, there is expressed in a striking fashion the true purpose of founding a system of administrative law upon natural law principles. Such principles serve as a barrier against undue exercises of administrative authority. It was their personal experience with the authoritarian regime of Vichy that led French jurists to comprehend the need for articulating principles of right and justice to which administrative action must conform. It is only insofar as the positive law itself is consistent with such principles that administrative power can be properly canalized.

In an age of ever-expanding State authority, it is essential that law have its basis in more than mere governmental fiat. Government was, after all, but one of many competing power structures in the State of half a century ago. The individual was affected less by it than by the private institutions with which he normally dealt. In the State toward which we appear to be evolving, on the other hand, government tends either to take over or strictly to regulate the functions performed by these inferior institutions. George Orwell may have been unduly pessimistic in his description of the State of the future in his novel *1984*. The State of tomorrow need not necessarily be the Orwellian super State, with all authority vested in its all-powerful administration. But the Orwellian nightmare can be avoided only if, in the present transitional period, the bases of a sound system of administrative

⁸⁷ 5 COUNSEIL D'ETAT, ETUDES ET DOCUMENTS 11 (1951).

law can be laid. And such a system cannot be sound if it ignores the principles of right and justice upon which our public law has heretofore rested. The present is surely the time for ensuring that these principles remain firmly established in our positive law. It will be too late to do so in 1984.

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