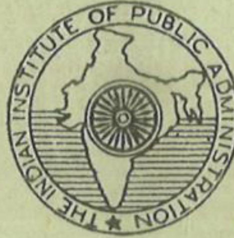
RECORD COPY

Administrative Law In A Changing World

I9
In2



LECTURE DELIVERED
ON
JANUARY 24, 1962

IIPA LIBRARY
5218

BY

DR. W. FRIEDMANN
PROFESSOR OF INTERNATIONAL LAW
&
DIRECTOR OF INTERNATIONAL LEGAL RESEARCH
SCHOOL OF LAW, COLUMBIA UNIVERSITY, U.S.A.

THE INDIAN INSTITUTE OF PUBLIC ADMINISTRATION
INDRAPRASTHA ESTATE, RING ROAD
NEW DELHI-1

Indian Institute of Public Administration

I I
1m2
(37)

ADMINISTRATIVE LAW IN A CHANGING WORLD

[*Text of a public lecture delivered by Dr. W. Friedmann, Professor of International Law, and Director of International Legal Research, School of Law, Columbia University, U.S.A., on January 24, 1962 under the auspices of the Indian Institute of Public Administration.*]

I want to talk to you today about Administrative Law and its significance in the legal evolution of India. Now, it is not so many years ago that in the common law world "Administrative Law" was almost a dirty word. That was very largely due to the influence of a great English jurist Albert Van Dicey, of Oxford, who has made powerful and lasting contributions to jurisprudence and constitutional law and whose book on "Law and Public Opinion in the 19th Century in England" is, I think, one of the great juristic works of all times. But with regard to administrative law he preached and perpetuated conceptions that have, I think, been far from beneficial to the common law world. Deeply steeped in the tradition of the common law Dicey thought that it required one undivided system of law governing rulers and governed alike. He thought that the basic principles of equality and justice as understood in the common law world would be profoundly affected by the introduction of a system of administrative law and justice which had from the French Revolution onwards been pioneered by France, and spread from there throughout the continent. The duality of civil and administrative law is still, with one or two exceptions, a cornerstone of any civilian system of law.

Dicey had studied and thoroughly misunderstood the French system of *droit administratif*, for it gave him the impression that administrative law was nothing but a perpetuation of the inequalities between public authority and the citizen and that it therefore violated the fundamental rules of

62-5218
Indian Institute of Public Administration LIBRARY 62-52 Date 8-11.6

equality between government and citizen as they were implicit in the common law tradition. In interpreting the French *droit administratif* in this manner Dicey completely overlooked that far from having buttressed and fortified the arbitrariness of government towards the citizen, the French administrative tribunals, that is in particular the "Conseil d'Etat"—staffed with highly qualified lawyers, expert in administration and government service—had built up a system of jurisprudence that gave more powerful protection to the citizen against the arbitrary actions of government than the common law system. English law, at least in Dicey's time and for many years after, fell very seriously short of the noble concept of equality of governors and governed, since it gave the government immunity from liability in tort and in contract; a concept which as you know goes back to feudalism: The King can do no wrong, the King cannot be sued in his own courts. This archaic conception is now at last on the way out—though not yet entirely in this country, and certainly only very incompletely in the United States, but such a notion of the relations between government and citizens was long ago thrown out by the administrative jurisprudence developed by the administrative courts of France and of other continental countries. Indeed, in some significant respects administrative courts developed remedies against the government on behalf of the citizen which the civil courts refused. A celebrated example is the doctrine of the so-called "imprevision" which broadly means the occurrence of unforeseen circumstances. The First World War and the inflations following it, had profoundly shaken the value of currencies not only in Germany but also in France, and therefore had greatly undermined the fairness of the conditions, negotiated in long-term contracts between government or other public authorities and suppliers: for example, suppliers of gas, electricity or road constructions. But the civil courts of France, led by the Cour de Cassation had consistently held that a contract is a contract and that no adjustment could be made. It was left to the administrative courts (i.e. the Conseil d'Etat) to develop a different doctrine and to introduce into French administrative law, the equitable adjustment of obligations

in contracts between government and private citizens, where the circumstances had altered so much that the equilibrium of the contract was disturbed. This is roughly the equivalent of the doctrine of frustration in the common law, but the significant fact is, that here the administrative courts developed a remedy for the citizen that the civil courts—to Dicey the only proper courts—had refused. Wrong as they were, Dicey's ideas had a very powerful influence and helped to retard the development of administrative law as a science in the common law world for decades. We may rejoice at the influence that an academic lawyer had on the law but I wish that this particular influence had not occurred, because it distorted and still continues to distort the concept and place of administrative law in the common world.

Why is there any need for administrative law? There is, of course, no need for an administrative law in a primitive society, where the functions of government and public authority are extremely limited, nor does it have any real place in a totalitarian system of justice where all law tends to turn into administration. The thesis that all law becomes administration in a communist society was in fact put forward and for a while extremely popular in the Soviet Union. It was associated with the name of Pashukanis, a jurist who was purged under Stalin. Nevertheless, it was, I think, quite a good expression of the concept of a totalitarian society, that law ultimately merges with administration. In the Nazi system the administrative courts were preserved but they had no real function because all law and all administration was subject to order from the top. There was in fact no proper protection for the citizen when such protection clashed with the interest of the state, as represented by the Nazi government, and whether judicial institutions were called administrative, civil, criminal or special courts, in essence they were more or less the same. It is in a democratic society of the modern type, in a society which does recognize the inevitably vastly expanded functions of modern government, but also seeks to preserve the rights and liberties of the citizen that administrative law is required, and I believe that it is particularly necessary and important in a mixed economy

such as it is developing in India. This is a society in which the state directly or through a vast number of political authorities exercises not only regulatory and administrative, but also entrepreneurial functions, but in which private enterprise and private liberties are also preserved. I cannot think of a more interesting laboratory for the development of administrative law than India. The older common law countries, that is to say, Britain and the other Commonwealth countries such as Australia and Canada, and the United States, on the other hand, have, of course, long developed a system of administrative law. The subject is taught in all major law schools and there is now almost universal recognition that administrative law is a necessary part of the legal system and that any modern state which wishes to preserve a balance between the powers of government and the protection of the citizen's legitimate interests requires a system of administrative justice. In Britain, there have in recent years been significant developments towards a rudimentary system of administrative justice. Now, of course, in Britain as in the United States and as in India, there are multitudes of administrative tribunals that have authority to adjudicate claims in certain fields. There are rent tribunals, pensions tribunals, workmen's compensation courts, public insurance tribunals, and many more.

If one classifies as administrative tribunal any judicial body entrusted with adjudicating claims between a public authority and a citizen any common law country can be shown to have hundreds of them. But now there has grown in England, though not, I believe, sufficiently, the recognition of the need for a more systematic conception of administrative justice. Some of you may have read, and certainly any student of administrative law should read, the report of the so-called Franks Committee of 1957 which was partially implemented in the Tribunals and Enquiries Act of 1958. The gist of it is the creation of an Appellate Division in the High Court for appeals in administrative matteis on a point of law or a case stated. The tradition has still been too strong to accept the proposals submitted, for example, by Prof. Robson of London University, for the creation of a

general Administrative appeal Tribunal. This was regarded as alien to the spirit of common law and to the alleged unity of the common law system, which I venture to think, has long disappeared. Would it not be better for the unification and evolution of administrative law to create, somewhat on the model of the French or the German systems, a tribunal expert in matters of administration and therefore, able to evolve a constant jurisprudence in a field that is on the whole very different from the ordinary civil or criminal litigation. It does not matter so much whether this should be a separate division of a High Court or Supreme Court, or a separate administrative court. What is important is that the need for the systematization of administrative justice should be recognized. That pioblem is also still unsolved in the United States where the preoccupation with administrative law has been predominantly one with grievance procedures and the methods by which the citizen can obtain redress from government. There has been much study of the separation of administrative and adjudicative functions in governmental authorities including the regulatory commissions that play such an important part in the United States. I venture to think that the scope of administrative law is much wider than this, but I have so far failed to convince the experts in administrative law of the need to widen their teaching and case books accordingly.

I believe that administrative law, in order to give a proper systematization and to enable us to properly understand the principles governing the relations between government and citizen, should deal with the totality of these relations in all their aspects. It does, therefore, presuppose the recognition of the different status of government and citizen as legally significant (contrary to Dicey). In fact, I do not see how you can conceive of government, and especially of government in a modern state, without recognizing that there are inevitably inequalities. The public servant administering a Planning Commission, or the regulation of certain industries, or the issue of licences, obviously is not in the same position as a citizen who is the recipient of a licence, whether it is a licence to drive a taxi cab, or to sell liquor or

tobacco, whether it is a building permit or the regulation of traffic conditions—all these are matters in which government and citizen are not only inevitably but most desirably in a position of inequality because this is inherent in the conception of government.

It would seem almost trivial to mention this, except for the Diceyan myth—still widely accepted—that governors and governed must be equal. In this form, I humbly submit that the phrase is sheer nonsense. What is, I think, essential is that the inequalities between governors and governed should be inequalities based on principle and not of an arbitrary character. This means that they should be inequalities of function and service and not be based on discriminations between one citizen and another. Such discrimination would, for example, be constituted by a different treatment of two applicants for building licences or the purchase of certain lands who have exactly the same case. In the system of values as it now prevails here, as it does in Britain and in the United States, legal discriminations based on differences of religion, race, caste, or wealth—though recognized in some systems as indeed they were in the past in this country—are improper and should be remediable by administrative justice. This is, I think, the only way in which we can properly define and limit inequalities. In other words, we have to recognize the very opposite of Dicey's premise which was a denial of all discretionary powers to the government. On the contrary discretion is the essence of government, but the principles governing the proper limitations of discretion are the essence of administrative law. In this field I think the common law world really does have to learn a lot from the continental systems and most particularly from the French law, because the French have been at this for over a century and a half. One of the most respected judicial institutions in the world, the Conseil d'Etat has developed, almost entirely without the benefit of codes or statutes, from precedent to precedent, a system of principles that provides as fair a balance between the legitimate powers of government and the legitimate rights of the citizen in a democratic society as can be imagined.

As I said before, the operation of administrative justice depends, of course, on a political system that permits a balance between the interests of government and citizen. In contemporary France, the balance is dangerously tilted in favour of government.

For all the differences of technique and legal tradition, I believe that much of what the Conseil d'Etat has developed is applicable to the contemporary common law world and to contemporary India. The French conceive of administrative law in the wide sense as the totality of legal rules regulating the relations between public authority and the citizen. They, therefore, include quite properly in the sphere of administrative law the growing field of contractual and delictual relations between government and citizens. The field of government contract is an extremely important one. One could write a whole treatise today about government contracts in Britain or in the United States—and no doubt in India—given the multiplicity in contracts made by government authorities. (See in particular Mitchell, The Contracts of Public Authorities, 1954.) You do not find these contracts to any significant extent in the textbooks because they are generally hidden away in standardized conditions, issued by the government from time to time in regulating its relations with its various contractors. Sometimes, as in the famous Bethlehem Steel case, the whole complexity of these relations is revealed. The French have long regarded this as an eminently important aspect of administrative law. They have sought to distinguish contracts where the government faces a citizen as an equal, where it is more or less like an ordinary purchaser or supplier and therefore subject to the civil courts, from other contracts where the government—for instance as a buyer of uniforms—acts as a government. The latter is called administrative contract, a genuine contract subject to legal remedies but distinct from the civil contract, in so far as it gives the government a power of unilateral termination in the interest of the country. For instance where a large purchase of uniforms is made and the reason for it, namely, a war, comes to an end, the government is, in the interest of the community, given the

power to terminate this contract subject to indemnification —as distinct from the full damages that might be awarded in a civil contract. Government contracts and standard conditions in the common law world are pretty much the same. But unfortunately, this whole very important branch of the law is not yet generally recognized as a major part of administrative law. Sometimes the government gets away with unfair conditions. Sometimes it is the other way around. It is, I think, quite proper that, as in France, government should have a unilateral power of determination in the public interest. It is not an ordinary civil contract, since one of the parties is the guardian of the public interest. However, in that case it is proper that the contractor should not suffer any prejudice from having entered the contract. Again, the continental systems of administrative law do not recognize governmental immunity from tort liability. Instead they have long developed the principle that the government must be responsible for wrongs done to the citizen in the execution of public functions, for instance, by a driver of a ministerial vehicle who kills or injures a civilian. Indemnities normally equivalent to civil damages are awarded by administrative tribunals. In fact, in some respects the French courts have gone further. They have imposed upon the state absolute liability regardless of fault, by developing the concept of the "risque cree". The government must, for instance, have the power to establish ammunition dumps, or to construct nuclear reactors. But in undertaking dangerous operations in its governmental function for the benefit of the nation as a whole, the government is liable for the risks created, even if there is no fault because in many of the situations the fault of the particular individual officer cannot be proved. The Conseil d'Etat has seen that a proper adjustment between the necessary functions of government in undertaking such operations and the danger to the public from them demands compensation regardless of fault. I suggest that in all these respects the common law world still can learn something from the older and in this respect maturer systems of the continent not because they are better or wiser themselves but because they have for many more decades recognized the need for

administrative law which the common law world has come to recognize only recently.

There is another field which is, I believe, wrongly neglected by administrative lawyers in the United States, although far less so in England and the Commonwealth. I refer to the field of public enterprise. It seems to me that an analysis of the status and function, the powers, privileges, duties, and liabilities of the corporation, is a very important part of administrative law. But the subject is left to the political scientists. Perhaps, if administrative lawyers had not disinterested themselves so much, the subject would be in less dismal a state than it is. There is little left today in the United States of President Roosevelt's concept (with reference to the Tennessee Valley Authority) of a government corporation as combining the powers of government with the flexibility and relative autonomy of private enterprise. In Britain, or Australia, perhaps because of the importance of the public corporations since the post-war nationalizations, this field is not left to the political scientists or the expert on public administration, and you will find that modern textbooks on administrative law, such as that of Griffith and Street, deal with this subject fully. Needless to say, it is considered as a proper and important part of administrative law in the continental systems, and I think that it should be treated as such in this country, where the public corporation, owing to the importance of governmental enterprise in the mixed economy, plays a very important part. Its legal status, however, appears to be far from clear or secure. Indeed one of the leading civil servants concerned with the administration of an important public corporation told me a few days ago that he thought it was time that a comprehensive statute would regularize the legal status of the public corporation. Whether the time is ripe for this may be a matter of debate. But the whole question of how far the public corporation should be legally identified with or treated as separate from the government, is one of great importance in the whole complex of claims and liabilities and powers as between government and citizen. Among the important questions are those of immunities, tax liability,

legal privileges, such as those prevailing with regard to the prescription of statutes or the exemption of government from statutory duties.

I have, of course, no time to go into these questions. I suggest that it is an eminently important field for study particularly in this country and that it should be dealt with as an important part of administrative law.

Finally, there is the question of administrative justice, and the form it should take. As you know traditionally administrative justice in the common law system has taken the somewhat rudimentary form of the prerogative writs developing out of the supervisory jurisdiction of the King's courts over the lower courts, and such administrative justice as there is, has been largely through the issue of prerogative writs supplemented nowadays by the declaratory judgment.

It is time, I think, that administrative justice, i.e., the whole question of administrative remedies, their scope, their standing, the conditions required and the degree of reviewability of administrative decisions should be treated more systematically and comprehensively.

I have said before that the gravamen of the subject of administrative law is to define the proper limits of administrative discretion (not to deny administrative discretion). We have a great deal of precedent both in the civil law and in the common law jurisdiction. On such questions as legal remedies in the case of abuse of powers, excess of powers, the treatment of equals and of equal situations in an unequal manner, the importation of prejudice (for instance, the mixing of personal motives with official functions in a particular decision) of conflicts of interest that may invalidate a decision and many others more. All these have been developed in the jurisprudence not only of the continental courts, but also, though much less systematically, of the common law courts. It would, I believe, be a challenging task to bring all this into a coherent presentation, which must, of course, base itself on the basic values that permeate the Indian

Constitution, the Indian legal system and on that basis seek to define the proper limits of administrative power and the legitimate sphere of protection of the rights of the citizen. This presupposes an understanding of the proper function of government in a contemporary democratic welfare state today. In such a state you do have to acknowledge as legitimate functions of government that our parents and grandparents would never have recognized as such, but which today we have to accept as realities of contemporary society. If we do that we must also recognize that with the expansion of governmental activity it becomes increasingly improper to exempt large segments of social and economic activities from the ordinary principles of law only because they happen to be undertaken by a governmental or quasi-governmental body. In other words, the entire field of relationship between government and citizen—government meaning all kinds of public authorities, not only government departments—has to be reviewed. It can only be done by viewing the subject as a problem as a whole, and ultimately I think this will mean that it will have to be administered by courts that whether separated from the High Courts and the Supreme Court or whether they are constituted as special Divisions, will concern themselves specifically with the interpretation and the evolution of administrative law as a legitimate and vital branch of the entire science of law.