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Contents

CHAPTER 1

AN ANGLO-AMERICAN TRADITION

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1.1 Tradition

This chapter explores the idea of a 'tradition' of comparative administrative law in the trans-Atlantic Anglosphere. The concept of 'a tradition' is both open-textured and contested (Glenn 2014, ch. 1). However, for present purposes it is enough to adopt Patrick Glenn's definition of a tradition as a narrative 'that allows our predecessors to speak to us, with more—or less—insistence' (Glenn 2014, 2). A tradition projects the past into the present and relates the present to the past. In Glenn's opinion, a tradition 'is inherently normative: it provides present lessons as to how we should act' (Glenn 2014, 17); and so tradition, he says, is not history (Glenn 2014, 5). By contrast, this chapter is primarily about how comparative administrative law has been, and is, done, not how it can and should be done.

The chapter is divided into three main sections. The first deals with a period from the early eighteenth to the late nineteenth century. At this time, Western comparative public law was predominantly an Anglo-European affair. England was the main focus of comparative attention, and the most influential observers were French and German, including the Baron Montesquieu, Jean-Louis De Lolme, and Rudolph Gneist. The work of Montesquieu and De Lolme predates invention of the modern concept of 'constitutional law', which may be traced to the end of the eighteenth century. As a result of early centralization and bureaucratization of power in European polities, a distinct category of 'administrative law' appeared on the Continent earlier than it did in England or America. Gneist's work witnesses the emergence of a distinction between constitutional law and administrative law.

The second section focuses on a period between about 1880 and 1940, a time of heavy intellectual traffic between England and the US, in which we may locate the birth of an identifiably Anglo-American tradition in comparative administrative law. It was at

this time that English and American administrative law scholars began comparative engagement with both European systems and each other's. A leading figure in this development (and arguably founder of the tradition) was Albert Venn Dicey. In the Anglo-European phase, scholars concerned about executive power pinned their hopes for its control mainly on legislatures. In the Anglo-American phase, courts displaced legislatures as the main repositories of such hopes.

The third main section of the chapter is concerned with the impact on the Anglo-American tradition of the US Administrative Procedure Act (APA). The APA marked the maturation of American administrative law as a legal category concerned above all with judicial control of administrative power. One result was that scholars (subliminally) began to think of English and American administrative law not as two interpretations of a common tradition but as two distinct sets of solutions to the shared problem of controlling the executive/administration. Another result was the divorce of administrative law from constitutional law in the scholarly tradition, both domestically and comparatively.

1.2 The Pre-history of the Anglo-American Tradition

1.2.1 Montesquieu

Charles Secondat, the Baron Montesquieu, may justifiably be credited with founding the Anglo-European tradition of comparative administrative law. A French aristocrat, he lived in England for a short period between 1729 and 1731. At this time, the post-Revolutionary English system of government was an object of admiration and envy in Europe, England having been the first country in the region to make decisive moves towards what we would now call 'constitutionalism'. Montesquieu's account of the English system of government—the most famous aspect of *The Spirit of the Laws* (Montesquieu 1989) – instantly became, and remains to this day, one of the tracts most formative of the thought-worlds of government, politics, and law. In different ways, it was highly influential in France and America in the latter half of the eighteenth century, and the ideas it expressed are now part of the bedrock of public law theory.

As already noted, Montesquieu wrote long before the modern concepts of 'constitutional law' and 'administrative law' were invented. As a distinct category of thought, 'constitutional law' was made imaginable by the appearance of the first national, codified constitutions in the late eighteenth century (Gosewinkel 2018). In the Anglosphere, the category of 'administrative law' was invented to address the growth of bureaucracies in the industrialized world from the late nineteenth century onwards.

In Montesquieu's account, the word 'constitution' refers to the 'nature', or 'shape' or 'structure' or 'make-up' of relations between the governors and the governed in a polity.

For him, the 'laws of the constitution' would have been the aspects of those relations that were 'necessary . . . deriving from the nature of things' (Montesquieu 1989, 3). It does not follow, of course, that in Montesquieu's day, England[1] lacked law relating generally to the governance of the polity or, more particularly, to the creation, allocation, and control of administrative power (as we would now call it). Only about forty years before Montesquieu's visit to England, the Glorious Revolution of 1688 had fundamentally re-adjusted various aspects of the formal relationships between the main organs of central government: the monarchy, the Houses of Parliament, and the courts. In particular, royal power and influence over the exercise of legislative and judicial power were very significantly curtailed, and 'sovereignty' shifted from the monarch to the (monarch-in-) Parliament. In the eighteenth century, it has been said, the House of Commons 'had two main functions: holding ministers to account; and redressing the people's grievances . . . In the years which immediately followed the revolution . . . [m]uch energy in parliament was devoted to examining the activities of the executive government' (Harris 2009, 176; see also Jupp 2006, ch. 3). As the century progressed, Parliament engaged increasingly in the essentially administrative business of licensing and regulating large, infrastructural projects by enactment of 'local', 'private' (as opposed to 'general', 'public') legislation.

Beyond the centre, local administration (in areas such as law and order, regulation, and welfare) was conducted, notionally at least, on behalf, and in the name, of the monarch, most importantly by Justices of the Peace (JPs) who, from the time of the Tudors, had been 'the pillars of local government and the favourite agents of the central government in the localities' (Chrimes 1965, 137). In addition, various appointed commissions and boards played important roles in local administration, dealing with matters such as drainage and sewerage, and the relief of poverty. For about a century, until they were abolished in 1641, conciliar courts (notably Star Chamber) exercised significant judicial control over central and local government. Early in the seventeenth century, the Court of King's/Queen's Bench began adapting the existing administrative writs of *certiorari, mandamus*, and prohibition as new judicial mechanisms for controlling local administration in the name of the monarch (Henderson 1963). In the interstices of the remedially-oriented writs, the grounds of judicial review, recognized today, were taking shape (Craig 2015, 25–95). The basic justification for central court intervention was to ensure that decision-makers acted legally, within jurisdiction; and provided they did, errors 'within jurisdiction' could be effectively challenged only if obvious 'on the face of the record' (Murray 2016). Following the abolition of the conciliar courts, central control of local administration rested chiefly in the hands of the Court of King's Bench until the nineteenth century, when Parliament started creating 'tribunals' and inspectorates to monitor and discipline the implementation of statutory regimes of regulation and welfare (Port 1929, 54).

[1] Although relatively little is yet known about the law of public administration in the American colonies in the eighteenth century, there is no reason to think that it did not substantially resemble English law at the time, adjusted to local conditions. By the beginning of the eighteenth century, English law was established as the formal legal regime in all the colonies.

There are good reasons to think that Montesquieu knew, at most, very little about the English law of administration in his day. For one thing, he identified administrative power with the functions of royal government at the centre (making war and peace, sending and receiving ambassadors, establishing security, and preventing invasions (Montesquieu 1989, 157)). He did not mention local administration. Nor, apparently, did he realize that a significant portion of the business of eighteenth-century parliaments (local, private legislation) was essentially administrative. Moreover, in relation to central administration, he misled readers by describing the monarch's basic function as 'executing' the will of Parliament or 'the general will of the state' (ibid, 158). However, the Glorious Revolution had had very little impact on the monarch's legal ('prerogative') powers of unilateral action, especially in foreign affairs. It is true that the Revolution established the principle that the monarchy was dependent on Parliament not only for its very existence but also for funding of all its public activities; but still, it was neither directly dependent on, nor answerable to, Parliament for the way it exercised its powers of unilateral action.

Secondly, Montesquieu conceived of the function of courts (either in fact or in ideal theory, or both) as merely being mechanical application of the law. In fact, however, the common law courts were the most significant source of general legal rules in the English system of his day. It was not until a century later that Parliament began enacting significant amounts of general, public (as opposed to local, private) legislation. Moreover, since 1688 the central courts had enjoyed a monopoly power of statutory interpretation to the exclusion of both the monarch and Parliament. Also, as we have seen, from the early seventeenth century, and especially after 1641, they played a very significant role in controlling local administration.

In summary, then, Montesquieu overestimated the role of the legislature in the English system and underestimated the significance of the functions of the executive and the courts. Nonetheless, Montesquieu's chief preoccupation was control of the exercise of administrative power. As a member of the French aristocracy, he was looking for ways to prevent monarchical absolutism and to promote 'liberty' (Carrithers 1977, 66–75). Montesquieu thought that the English system was the only system in the world the goal of which was the promotion and preservation of liberty. In his view, two aspects of its design were of particular importance. First, in the English system, governmental power was divided between three separate organs—the legislature, the executive, and the courts. Administrative power was the province of the executive alone: although the legislature should have 'the faculty to examine the manner in which the laws it has made have been executed', it should not 'have the right to check ['veto'] executive power' (Montesquieu 1989, 162). Judicial power was reposed in courts independent of both Parliament and the monarch. Judges, he believed, should be chosen from amongst the people, and their only ('invisible and null': ibid, 158) task was mechanically to apply 'the precise text of the law' (ibid) to the resolution of disputes and the punishment of crimes. There is no liberty, Montesquieu asserts, 'if the power of judging is not separate from legislative power and executive power' (ibid, 157). If judicial power 'were joined to the legislative power, the power over life and liberty of the citizens

would be arbitrary'; and if it 'were joined to executive power, the judge could have the force of an oppressor' (ibid, 157).

Secondly, however, legislative power (which Montesquieu seems to have considered the greatest and most important of the three types of power) was shared between the three 'estates of the realm': the monarch, the aristocracy (in the House of Lords), and the people (in the House of Commons). This sharing of legislative power enabled the Lords to 'check' (put obstacles in the way of) the Commons (and vice versa), Parliament to check the monarch, and the monarch to check Parliament.

For Montesquieu, then, the keys to control of administrative power were, first, to share legislative power amongst three 'estates of the realm' (or, in more modern terms, 'constituencies', understood in a social-political rather than a technically electoral sense), giving each, including the executive monarch, (only) limited power in the legislative process; and secondly, to create an independent judiciary, separate from both the legislature and the executive, the only role of which was mechanical application of law made by others. The first key was seized by the American Founders and the second was given an especially austere interpretation by the French Revolutionaries. Today, the dynamics of the relationship between the executive and the legislature provide the basis for classification of governmental regimes into parliamentary, presidential, and semi-presidential categories. Concerning the judiciary, modern theory distinguishes between judicial independence and separation of judicial power. In England, Montesquieu's chief conceptual legacy was judicial independence. William Blackstone stressed its importance in his 'domestication' of Montesquieu for English consumption (Allison 2007, 79–82); and it provides the conceptual foundation for AV Dicey's account of the rule of law (Dicey 2013, 94–119). Rigid separation of ('ordinary') judicial power from executive and legislative powers remains a feature of the French system and, in a very different context, of the Australian system (Cane 2009, 57–62). Montesquieu's keys provide parameters for contemporary debates in comparative, as much as non-comparative, public law.

But this is not Montesquieu's only claim to fame: he may plausibly be identified as the first, major socio-legal, or 'law and society', scholar. In his view, '[l]aws, taken in the broadest meaning, are the necessary relations deriving from the nature of things' (Montesquieu 1989, 3). The laws of nature, he said, 'derive directly from the constitution of our being' (ibid, 6). He divided positive laws into three categories that we would now refer to as international law, (domestic) public law, and (domestic) private law. Public law is concerned with 'the relation between those who govern and those who are governed' (ibid, 7). The law 'most in conformity with nature is the one whose particular arrangement best relates to the disposition of the people for whom it is established' (ibid, 8). 'Laws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another' (ibid).The disposition of the people is affected by matters such as 'the *physical aspect* of the country [original italics] . . . climate . . . the location and extent [of the terrain] . . . the way of life of the peoples . . . the religion of the inhabitants, their inclinations, their wealth, their number, their commerce, their mores and their manners' (ibid, 9). To the modern ear, Montesquieu's

understanding of the relationship between law, its subjects, and its environments, sounds rather too deterministic and, in some respects at least (such as climate) distinctly odd; but this does not undermine Montesquieu's intellectual achievement in conceiving of politics, government, and law as related to one another, and to their 'contexts' and 'environments'. Montesquieu's contextual approach also had a significant historical strand and—even more importantly for present purposes—a major comparative element. Montesquieu's intellectual imagination encompassed two millennia of time and the farthest corners of the world known to Europeans. Historically and contextually sensitive comparison of laws provides the gold standard for the modern scholar.

1.2.2 Montesquieu's Successors

As we have seen, for Montesquieu, the genius of the English constitution resided in its division of powers between three distinct institutions, each exercising a different characteristic power, combined with the sharing of legislative power in a system of mixed government. His main preoccupation was how to design a constitution so as to forestall monarchical despotism. In the result, he underestimated the relative importance in the English system of both the executive and the judiciary.

By contrast, in *The Constitution of England*, first published in 1771 (De Lolme 2007), Jean-Louis De Lolme put much more emphasis on 'separation of powers' (as opposed to mixed government) (Lieberman 2006, 336–40). This allowed him to champion the advantages of a strong (monarchical) executive which, nevertheless, being unitary, could be more easily controlled than plural counterparts; and, in contrast to Montesquieu, to attribute to the judiciary (and the common law: Lieberman 2006, 340–6) a more realistically active role in maintaining stability in the system. Whereas Montesquieu had chronicled and admired a hybrid system of institutional/functional and socio-political division and sharing of power, De Lolme (who inspired Americans, such as Andrew Hamilton, who favoured a strong executive: McDaniel 2012, 44; Scheuerman 2005) laid the groundwork for a predominantly functional theory of government suited to a changed world in which 'estates of the realm', as political forces, would be wiped out by the incoming tide of democracy. De Lolme's other important innovation was to extend his discussion beyond England by analysing the role of English government in the affairs of Scotland and Ireland and, further afield, those of the colonies (McDaniel 2012). In this context, De Lolme was strongly unionist and imperialist.

We may, then, credit, or blame, De Lolme for marginalization of the 'mixed government', socio-political-power-sharing aspect of the tradition founded by Montesquieu. Of course, power-sharing lies at the bottom of the 'checks and balances' insisted upon by the American Founders. However, they wanted public power generally (not just legislative power) to be shared amongst institutions, each of which would characteristically exercise one or the other of Montesquieu's trio of public powers. They seem not to have imagined those institutions as each representing a different socio-political constituency. Ironically, such an approach offers a plausible account of federalism—an American

invention about which, of course, Montesquieu said nothing. The individualistic focus of democracy, coupled with free-market economics, tends further to suppress group-based claims; and this, we may speculate, might help to explain modern versions of democracy, such as populism and other appeals to 'those left behind by the political process'.

Montesquieu's and De Lolme's analyses of the English constitution were unashamedly tendentious. Both observers used historical and comparative materials to support and justify their respective, ideologically-driven, understandings of English government and law. Through one ideological lens, Montesquieu looked for and found a model of 'moderate', non-despotic, liberty-enhancing government—a sort of monarchical republic. Through another, De Lolme sought and found a model of stability resulting, he thought, from the fact that in England, a unitary executive enjoyed a monopoly of administrative power. Both authors were 'public intellectuals' and men of affairs, well known to a wide audience, highly respected and influential in political circles.

Rudolph Gneist, a German academic, judge, and politician, began studying English government in the 1850s. By this time, positivism, legal science, and historical jurisprudence had largely displaced the natural law thinking of the seventeenth and eighteenth centuries. Gneist's *magnum opus*, *The History of the English Constitution*, was first published in English in 1886. Gneist professed commitment to the new intellectual trends but, as in the case of his predecessors, his understanding of the English system was coloured by his political purposes (Bornhak 1896). Montesquieu and De Lolme had modelled England as 'the ideal of political liberty for the people of the Continent' (Bornhak 1896, 82–3). However, the transplantation of English ideas had not turned out as well as people had hoped and expected. By mid-century, Germany was wracked by partisan political instability. The problem, it was surmised, 'must lie not in the constitution but in the administration' (Bornhak 1896, 83). 'The adoption of English public law seemed incapable of giving satisfaction . . . because . . . it had been limited to the [sic] constitutional law and had ignored the [sic] administrative law' (Bornhak 1896, 84). In this way of thinking, essential components of the English system were administrative decentralization and administrative law: 'the gratuitous service of the propertied classes in official positions and the non-partisan execution of the public law in the administrative courts' (Bornhak 1896, 87)—in other words, a system of local administration centred on Justices of the Peace (that both Montesquieu and De Lolme had failed to see), coupled with an independent administrative jurisdiction (Gneist 1889, 360–72), which Gneist constructed as an ideal of non-partisan service to the state. In Bornhak's judgement, '[t]o have clearly recognized and demonstrated the nature of [self-administration and administrative jurisprudence] is the imperishable achievement of Gneist as a teacher of public law' (Bornhak 1896, 96). According to GW Prothero (Prothero 1888, 32) it was in Gneist's treatment of 'the humbler stages of our polity' that 'the pre-eminent merit of his work consists'. Montesquieu had understood the executive, its role, and control, primarily in terms of the structural power relationships between it, the legislature, and the courts. Gneist's intellectual advances were to recognize the importance, first, of administrative government beyond the centre; and, secondly, of legal rules and principles regulating the allocation and control of public, administrative power.

Looking at the modern practice of comparative administrative law, Gneist's appreciation of the importance of government beyond the centre has left relatively little mark. Even more than domestic administrative law scholars, comparativists tend to pass very lightly over 'the humbler stages' of the polities being studied. Regarding Gneist's concern with rules and principles of administrative law, the picture is rather more complex. Both Montesquieu and De Lolme were primarily concerned with 'structural' or 'institutional' questions about how power could be distributed in such a way as to minimize the chance that it would be abused. They were concerned more with prevention of the abuse of power than with repair of its consequences. By contrast, Gneist threw a spotlight on controlling administrative power by surrounding it with enforceable rule-based constraints—a 'normative' or 'substantive' approach (see e.g. Gneist 1889, 331–4, 340–9, 373–95, 403–13). His work witnesses the emergence of the modern distinction between constitutional and administrative law.

This is not to say that the distinction between institutional structure and controlling norms marks the boundary between constitutional law and administrative law. For instance, the substance of human rights law is generally understood to be part of constitutional law rather than administrative law. Conversely, in the US system, in more recent times, questions of institutional design have attracted attention from scholars who would think of themselves as (comparative) administrative lawyers rather than (comparative) constitutionalists (e.g. Strauss 2016). The relationship between structural, prophylactic controls and substantive, reparative controls is also being investigated comparatively (e.g. Cane 2016). However, in contemporary public law scholarship there is more than a trace of the idea that while constitutional law deals with large questions of institutional design and structure, and in large concepts such as sovereignty, separation of powers, and rule of law, administrative law is concerned with quotidian, technical minutiae of administrative practice in terms of less-architectural, 'smaller' substantive concepts such as legality, reasonableness, and procedural fairness.

In the West, there is a much longer tradition of substantive comparison of private law than public law. This is partly the result of assumptions that in the case of public law, the legal-structural and extra-legal environments in which the substantive law operates are both harder to investigate and more critical for fruitful comparison than in the case of private law; and that the values underpinning private law are more universal than those supporting public law. In my opinion, these assumptions underestimate the importance of context and value-pluralism in understanding private law; but that is a topic for another day. Even so, it is, perhaps, harder to ignore structural, institutional issues in comparing systems of public law than systems of private law.

1.2.3 Conclusion

How, then, might we summarize the contributions of Montesquieu and his successors to an Anglo-American tradition of comparative administrative law? Two points stand out. First, the pioneers explicitly put description in the service of normative assessment, using

information and analysis of the observed system as a basis for proposing improvements to the observer's. Mixture of the descriptive and the prescriptive remains a significant feature of modern comparative public law, both practical and theoretical. Although there is no such thing as value-free description, such an approach creates a risk not so much of distortion or misrepresentation as of blindness to what the observer would rather not find. Secondly, while some aspects of the pioneering analyses have acquired foundational status—institutional/functional separation of powers, and checks-and-balances, for instance, others—such as a strong appreciation of importance of vertical division of power, and of the distinction between structural and substantive modes of control of administrative power, have left fainter marks.

1.3 Anglo-Americanization of an Anglo-European Tradition

AV Dicey might seem an odd choice as founder of an Anglo-American tradition of comparative administrative law. After all, his influence as a public lawyer rests on a classic, controversial attempt to systematize English *constitutional* law (in *Introduction to the Study of the Law of the Constitution*). Moreover, he famously denied the existence in England of the 'administrative law' that he considered to be a wholly undesirable French phenomenon. Nevertheless, there is good reason to think of Dicey as the first, major English student of comparative administrative law, studying both the French and American systems in detail.

At the time Dicey wrote, the ratification of the US constitution had long since laid the foundation for the emergence of constitutional law as a distinct category of scholarly analysis. By contrast, the conditions that would lead to the recognition of a distinct category of 'administrative law' in the US and English systems—expansion and centralization of government activities, major growth in the bureaucracy, and democratization—were in their childhood. Dicey's conservatism inclined him to hope that they would not mature. His thought-world was largely framed in Montesquieuan terms. Two contours of the Montesquieuan terrain stand out: a non-parliamentary executive; and a strong concept of judicial independence. Dicey favoured firm control of the executive, and much of his constitutional theory is driven by that preference. For instance, it explains his antipathy to the French *droit administratif* and administrative courts, and his celebration of 'the ordinary law of the land'. Secondly, it explains his deep concerns about responsible government (ministerial responsibility to Parliament) in the light of democratization and the strengthening of political parties (Dicey 2013a, 122–50), one effect of which was greatly to increase the capacity of the executive to control the 'sovereign' Parliament.

Thirdly, it helps us to interpret the centrality of the 'rule of law' to Dicey's constitutional analysis. Dicey notes that 'foreign observers … such as De Lolme … or Gneist … have

been more struck than have Englishmen themselves with the fact that England is a country governed, as is scarcely any other part of Europe, under the rule of law' (Dicey 2013, 95). The three elements of Dicey's rule of law—no punishment without breach of the law, equality of governors and governed before the (ordinary, private) law, and the common law (non-statutory and non-constitutional) origin of rights—are all directed to limitation and control of executive action. From this perspective, the rule of law is Dicey's version of administrative law.

Fourthly, Dicey's concern for control of the administration explains his interest in and admiration for the US system, which emerges clearly from his only-recently published lectures on comparative constitutional law (Dicey 2013a, esp. 76–88). Dicey found the source of the (much-to-be-desired) stability and conservatism of the US system in the dynamics of the relationship between Congress and the extra-Congressional Presidency. That relationship was regulated by the constitution which was, in turn, enforced by the Supreme Court. Dicey's opinion was that like the English, the US system adhered to and manifested the rule of law (Dicey 2013a, 78); but also that it was set against the radical ideals of those who hoped 'to accomplish things for the mass of the people by means of the intervention of the State' (Tulloch 1977, 839).

When it comes to influence on and within the Anglo-American tradition of comparative administrative law, it is a close-run thing between Montesquieu and Dicey. In 2018, Kevin Stack opined that '[t]he story of [US] administrative law over the past century can be understood as a repeated contest between two strains of thought'. One, he associates with JB Thayer, and the other with Dicey (Stack 2018, 294). In the English context, Lord Hewart (Hewart 1929) and Sir William Wade (Wade 1971) are typically cited as Dicey's most faithful disciples; although Hewart was more concerned about administrative rule-making than administrative adjudication. The likes of William Robson (Robson 1928) and AV Jennings (Jennings 1933) are identified as leading Diceyan antagonists. The essence of the English debate is memorably captured in a distinction, first drawn by Carol Harlow and Richard Rawlings, and which has resonated on both sides of the Atlantic, between 'red-light' (Diceyan) and 'green-light' (anti-Diceyan) approaches to administrative law (Harlow and Rawlings 1984).

In US debates, Dicey's 'rule of law' was taken effectively to mean the rule of courts, implying that they had the last word on what the law is. Thayer, by contrast, championed the position that courts should, in certain types of case, 'defer' to statements of law made by administrators, effectively, giving the executive the final say on what the law is. In 1927 John Dickinson (on the very first page of his administrative law monograph (Dickinson 1927, 3)), transported his readers back to the 'age of Coke'. His target was 'administrative adjudication', by which he meant the application of law to facts prior to and independently of any dispute. The growth of this practice, Dickinson argued, inevitably undermined individual rights by making them 'more flexible, and more responsive to uncertain factors of discretion, than when they are left to be defined by the more rigid processes of a court applying supposedly permanent rules of law' (Dickinson 1927, 29). For this reason, administrative tribunals were to be 'feared' and courts 'favoured' (Dickinson 1927, 76). For Dickinson, Dicey was the champion of the supremacy of law

over government (Dickinson 1927, ch. II). Dickinson considered a written constitution to be 'the most effective possible application of [Coke's] idea of a law sovereign over all laws which emanate merely from government' (Dickinson 1927, 96). The law of a constitution is fixed, inflexible and rigid in a way that law made by administrators (and legislatures) is not. Like Coke's ancient, customary, common law, it stands above and behind all law promulgated by governmental institutions. Just as Coke insisted on the power of the common law courts to enforce that law against governmental institutions, so Dickinson insisted on the power of courts to enforce constitutional (and non-constitutional) law on administrative tribunals and other law-promulgating organs of government. What Dickinson explains at length (Dickinson 1927, ch. V), and Dicey eventually had to concede (Dicey 1915), is that there must be 'practical limits' to the supremacy of law enforced by courts, in order to preserve the effectiveness, efficiency, and vigour of the other branches of government.

During the 1930s, in reaction to the massive expansion of the federal bureaucracy under the New Deal, Diceyan ideas were called in aid by Franklin Delano Roosevelt's opponents (e.g. Beck 1932, esp. ch. XII) and castigated by his supporters (Frankfurter 1938; Landis 1938, 2–4, 96–7, 123–4). In 1941, Roscoe Pound expressed his opinion that American judges of the day were 'much in the position of the common-law judges under the Stuarts', guardians of the common law rights of citizens against executive absolutism (Pound 1941, 138–9). In these trans-Atlantic conversations, the debate was about how to understand a common, English heritage, of which Dicey was a leading interpreter. One reason for Dicey's ubiquity in these exchanges, I suggest, is that almost despite himself, he had crucially re-oriented debates about executive power and its control.

To explain: as Montesquieu astutely observed, the Revolution of 1688 had (at least) two fundamental results. One was to re-adjust the relationship between the monarch and Parliament, transferring sovereignty from the one to the other. A second was to free the common law judges from royal control and secure their effective 'independence'. What Montesquieu failed to understand was the major role that the common law courts had played in the English system of government before the Revolution, and which they continued to play afterwards, as law-makers and reviewers of local administrative activity. De Lolme took significant steps towards remedying this defect by giving detailed and perceptive accounts of the civil and criminal justice systems that examined, amongst other things, the dynamics of non-legislative law-making. He celebrated the fact (as he saw it) that

> to such a degree of impartiality has the administration of public Justice been brought in England that…any violation of the laws…though committed by the special direction of the very first Servants of the Crown, will be publicly and completely redressed (De Lolme 2007, 250–1).

On the other hand, he mentions the supervisory jurisdiction of the Court of King's Bench only in passing (De Lolme 2007, 87); and (like Dicey later), the only administrative remedy to which he gives detailed consideration, and that in the context of criminal law, is the writ of *habeas corpus* (De Lolme 2007, 135–8).

It was Gneist who first clearly appreciated the significance of judicial review of administration in the English system. By the time he was writing, Blackstone had 'domesticated' Montesquieu for English consumption by spelling out the special significance of judicial independence in English arrangements (Allison 2007, 78–83). Although Dicey's awareness of the 'administrative justice system' seems to have been no better than De Lolme's, his masterstroke was to build on Blackstone, placing courts front-and-centre by associating them with one of his three pillars of the constitution: the rule of law.[2] It was this aspect of his analysis that travelled quickly and easily across the Atlantic and struck a chord with people who opposed increasing conferral of 'judicial power' on the administration (and growth of 'administrative law' in the sense of law made by the administration).

Dicey casts a long shadow even today. Stack's opinion about the US administrative law tradition, cited earlier, appears in a review of two books on deference, one by Adrian Vermeule (Vermeule 2016), in which, Stack says, the author offers a 'response to resurgent Diceyian [sic] critiques of administrative law' (Stack 2018, 296). Perhaps the most controversial of those critiques is that of Philip Hamburger (Hamburger 2014) whose 'arguments against "administrative power" and administrative law [says Stack] are Diceyian [sic]' (Stack 2018, 296 fn. 8). In fact, Hamburger outdoes Dicey, berating him for (apparently) allowing 'administrative regulations' to qualify as a species of the 'law' that it is the job of the courts (alone) to enforce (Hamburger 2014, 260–1).[3] To Hamburger's eyes, administrative rule-making and administrative adjudication were both outlawed in seventeenth-century England. Moreover, argues Stack, although Vermeule starts out as an anti-Diceyan, his argument that judicial deference amounts to 'law's abnegation' in fact sends him right back into Dicey's camp (Stack 2018, 306). Dicey is dead. Long live Dicey!

This is not to say that Dicey swept all before him. In his pathbreaking comparative administrative law treatise of 1903 (Goodnow, 1903), Frank Goodnow barely mentions Dicey. Goodnow tells us that he was effectively forced to take a comparative approach because of the lack of literature in English concerning 'the activity of government . . . with the exception of . . . both the legislature and the courts' (Goodnow 1903, 1). Thus, in addition to England and the US, he writes about France and Germany. Goodnow proposes to deal only with administrative law except to the extent that reference to 'constitutional law' is 'absolutely required' (Goodnow 1903, v). Unsurprisingly, however, his efforts to distinguish analytically between the two are less than satisfying (Goodnow 1903, 6–9); and only 167 of 629 pages are devoted to control, as opposed to organization, powers, and functions of the administration.

[2] The other pillars were parliamentary sovereignty and conventional constitutional norms—'conventions of the constitution'. In his comparative work (Dicey 2013a), Dicey seems to have added a fourth pillar: ministerial responsibility. In this work he also demonstrates his appreciation for a codified constitution as a check on the legislature.

[3] In so doing, Hamburger conflates rules made under statutory delegation and rules made under the extra-statutory prerogative.

Goodnow identifies three institutional mechanisms of control—administrative (concerned primarily with securing efficiency), judicial (concerned primarily with protecting the individual), and legislative (concerned primarily with public well-being). Goodnow gives no detailed consideration to administrative control. Although he does not mention the rule of law, in good Diceyan fashion the great bulk of the discussion of control is devoted to judicial control, only eight pages being given to legislative power 'to remedy special administrative abuses', twenty to 'legislative control of finances', and six to 'impeachment'. The emphasis in Goodnow's analysis perhaps reflects the fact that in the US at the turn of the twentieth century, attempts to challenge administrative action were commonly based on constitutional (structural/institutional) grounds. He divides his discussion of judicial control by type of institution: 'ordinary courts' (civil and criminal), and the 'special' administrative 'courts' (or 'jurisdiction'). What we would now call 'judicial review of administrative action' is treated as a job mainly for 'the higher courts'. Goodnow devotes only four pages to 'grounds of judicial review'. Goodnow's treatment is overwhelmingly structural and institutional as opposed to substantive.

The same is true of two other, now-neglected, products of the inter-war period: Ghose 1919 and Port 1929. Nagendranath Ghose (a 'vakil' – lawyer—of the Calcutta High Court) divides his almost-700-page discourse on 'comparative administrative law' into an 'analytical and historical' section, a section (by far the longest) on 'substantive' law (concerned with the organization and powers of the administration), and a section (the shortest) on 'adjective' law (concerned with control of administrative power). Ghose's sophisticated treatment is deeply and eruditely historical and comparative, and invaluable for its analysis of colonial administrative law in India. In apparently-the-first English textbook on administrative law, Frederick Port devoted a whole chapter to 'defining the subject', distinguishing it from constitutional law. He explained inclusion of chapters on the US and French systems, and an historical chapter on England, on the ground that they demonstrated 'the efficacy of a system which in general imposes one governmental function as a safeguard on another, thus minimising the chance of tyranny' (Port 1929, 20). In England, he argued, the legislative and judicial powers had, 'in a sense' developed out of the administrative power (Port 1929, 18) because, in his view, 'in ancient as well as in modern times, the administrative is, in the last resort, the most essential of State functions' (Port 1929, 327). Port detected a long historical arc in which judicial and legislative power had first, as a function of changing political and governmental practice and social demands, moved away from the executive; but in which, by 'statutory re-grant . . . during the last half century or so . . . a good deal of the territory surrendered long since' by the executive had been regained (Port 1929, 328).

1.3.1 Conclusion

Until the mid-nineteenth century, comparative administrative law was predominantly an Anglo-European affair. Largely thanks to Dicey, the period between (say) 1880 and 1940 witnessed the birth of a vibrant Anglo-American intellectual conversation which

reached its zenith in the 1930s. As in the earlier Anglo-European tradition, debates concerned how best to control administrative power. However, the terms of the debate had changed, focusing no longer on the structural relationships between the various branches of government but on the role and powers of the judicial branch in scrutinizing and controlling the executive branch.

1.4 The US Administrative Procedure Act

Debate amongst pro- and anti-Diceyans around the New Deal was not the only long-running comparative skirmish in America in the early part of the twentieth century. Another took place between Ernst Freund and Felix Frankfurter. Their dialogue revolved around a choice between 'common-law' and 'civil-law' models of bureaucracy.

> The civil law model relied on centralised, agency-based, state administration aimed at the implementation of regulatory standards through expert legislators and bureaucrats. The common law model fundamentally distrusted bureaucratic administration, and as a consequence, identified courts as the proper locus for administrative governance (Morag-Levine 2007, 604).

Both Frankfurter (as we have seen) and Freund 'rejected the widely held dogma, most authoritatively pronounced by A.V. Dicey, that equated the Rule of Law with the freedom to challenge any administrators' [sic] deprivation of a private right in a proceeding conducted in "the ordinary legal manner before the ordinary Courts of the land"… [However], [f]or all that, the two disagreed fundamentally about administrative law' (Ernst 2009, 172; see also Chase 1982; Ernst 2014). Whereas Freund (a German emigré) was suspicious of administrative discretion which he, like Gneist, thought should be tightly cabined by statutory law enforced by administrative courts along the lines of the German *rechtsstaat*, Frankfurter favoured freeing administrators as much as possible from judicial review and detailed management by the legislature. Frankfurter got his way over legislative control when, in the 1930s, the Supreme Court more or less abandoned the non-delegation doctrine. In return, however, he and his fellow New Dealers were forced to accept procedural regulation of administrative rule-making and adjudication, enforced by the ordinary courts under standards of review of various degrees of intensity. This compromise was enacted in the Administrative Procedure Act 1946 (APA).

The scheme of the APA has three main planks: restatement of the law of judicial review, including the grounds; separation of agency officials who exercise judicial power from policy and prosecutorial staff so as to provide adjudicators a significant measure of independence; and proceduralization of agency 'adjudication' and rule-making. The APA represented a sea-change in American administrative law, shifting the main thrust

of regulation of the 'administrative state' from limiting its growth by the use of structural, separation of powers ideas (non-delegation doctrines) to regulating the bureaucratic process and subjecting it to judicial control on substantive and procedural grounds. The APA also re-oriented the Anglo-American tradition of comparative administrative law. From a comparative perspective, the APA might be understood as a triumph of Diceyan, rule of law ideas over German, *rechtstaat* principles—of retrospective over prospective control. In the words of Bernard Schwartz, published in 1949 in his study of British administrative law, '[t]he central and most characteristic feature of our Anglo-American polity, one that has evoked countless praise from foreign observers, is embodied in the almost axiomatic concept of the *rule* or *supremacy of law*' (Schwartz 1949, 2; original italics). The entry for 'separation of powers' in the Index of Schwartz's book refers the reader to the entry for 'rule of law'. Most of the book is devoted to the law of judicial review of administrative action, and the discussion of Parliament is concerned only with its role in scrutinizing delegated legislation. Of the handful of references to US statutes, more than half are to the APA.

The apotheosis of this new, court-and-retrospective-control-focused, substantive/procedural approach to the executive is, perhaps, Schwartz's 1972 comparative study, with his English co-author, William Wade, of English and US administrative law (Schwartz and Wade 1972). An important feature of this style of comparative work is its focus on finding similarities between national systems rather than understanding differences (Schwartz 1949, vii). The main interest was in 'solutions or lack of solutions, for the problems of keeping the powers of government under proper control' (Schwartz and Wade 1972, 3). The question was no longer how to understand a common heritage but, in the words of Judge Henry Friendly, how best to fulfil a common task: to 'protect the citizen from arbitrary exertions of the awesome power of government' (Schwartz and Wade 1972, xxi). Largely gone is discussion of the organization and powers of the administration, and its location in the institutional landscape of government. In its place we find analysis of the two main targets of judicial control, namely administrative rule-making and adjudication. (Comparative) administrative law had been detached from its constitutional moorings.

Other important factors in the scholarly divorce between what we might call 'constitutionalist' and 'administrativist' approaches to the executive were the post-Second World War human rights movement, and the proliferation of codified constitutions and bills of rights, first during European decolonization in the 1940s–1970s and, later, during Soviet decolonization following the fall of the Berlin Wall in 1989. Under the dominant, late eighteenth-century US constitutional paradigm, constitutional rights protect, first and foremost, against abuse of legislative, not administrative, power. Despite the radical aggrandisement of the power of executives vis-à-vis legislatures since the nineteenth century, in most places (with some notable exceptions such as South Africa and Kenya) legal protection against the administration is still largely a matter for sub-constitutional law. The substantive stuff of constitutional law is made of 'fundamental, human rights'. The divorce has also been greatly assisted by globalization. There is no global polity; and this, for many, makes the language of constitutionalism inapplicable at the supra- and

trans-national levels (Cane 2017). If global regulatory power is to be controlled—so the argument goes—this must be done sub-constitutionally by 'global administrative law'. Similarly, some have argued that the European Union 'polity' is best understood as a development of the administrative state and not in terms of classic principles of constitutional design (Lindseth 2010; Lindseth 2017). Late twentieth-century horizontal fragmentation of the administrative state by outsourcing and privatization also escapes the language of eighteenth-century constitutionalism, leaving administrative law to make the running. These factors have affected comparative public law as much as its domestic counterparts.

Stephen Gardbaum identifies a 'post-war constitutional paradigm' consisting of a codified, written constitution that establishes 'the ground rules of government' and protects certain rights, and which 'sits at the apex of its legal system . . . [as] the supreme law of the land . . . authoritatively interpreted and applied by a high court with power to set aside conflicting non-constitutional law and legal acts' (Gardbaum 2012, 169). The solidification of this paradigm, coupled with Britain's re-orientation to Europe (in the guise of both the European Union and the Council of Europe's European Convention on Human Rights) have affected the way the Anglo-American tradition of comparative administrative law has been practised since the 1970s. Some 'Anglo' scholars still find Anglo-American comparison interesting and valuable (e.g. Cane 2016; Craig 2017; Fisher 2007), although more as 'two systems divided by the common law' (Cane 2019) than as parts of an ongoing, common tradition. But many more analysts, both Anglo and American, have turned their comparative gaze to Europe and the European Union, and to other parts of the world. Some Americans see in the European Union a diffused system of power somewhat like their own. Because EU governance raises issues of regulation and administrative rule-making in contexts similar to those that prevail in the US, US scholars feel they have valuable experience to impart. Susan Rose-Ackerman has been a pioneer of such re-orientation of American interest from England to Europe (Rose-Ackerman 1995; Rose Ackerman 2005; Rose-Ackerman, Egidy, and Fowkes 2015).

Rose-Ackerman was also instrumental in organizing a conference at Yale Law School in 2008 to kick-start 'comparative administrative law' as a universal focus of scholarly activity alongside the already-established 'comparative constitutional law' and 'global administrative law' (Rose-Ackerman, Lindseth, and Emerson, 2017 is the product of the second of such conferences). Such movements have been greatly assisted by the apparently unstoppable march of English as the universal language of comparative legal scholarship—although it must be said that given the intimate connections amongst law, language, and culture, linguistic imperialism (like other imperialisms) is bound to be a mixed blessing. A valuable consequence of such developments has been the adoption of non-nationalistic principles of individuation, such as regime-type, or concepts and understandings of law: Romanist (civil), Islamic, and Confucian, for instance (Glenn 2014).

From the start, writers in the Anglo-European/American tradition of comparative administrative law have had mixed motives—on the one hand, to describe, analyse, and explain another system; and on the other to find in that system pitfalls to be avoided, or solutions suitable to be adopted, in the observer's own system. Our early predecessors

were more or less unashamedly tendentious and ideological. Amidst the political and social chaos that afflicted much of Europe in the eighteenth and nineteenth centuries, England seemed like an oasis of stability and good government. Political instability in the modern, post-colonial world has catalysed both scholarly interest in comparative public law, and ideologically-driven exportation and transplantation of Anglo-American public law around the world. In this way, the Anglo/European-American tradition, the seeds of which were planted in the eighteenth century, has persisted and flourished.

1.5 Conclusion

At the risk of oversimplification, we may conclude by saying that in the course of the 300 years we have surveyed in this chapter there have been at least three major changes in the scholarly tradition around limitation and control of executive, administrative, and bureaucratic power. First, legislatures have given way to courts as the centre of attention. Secondly, structural approaches have been eclipsed by substantive solutions. Thirdly, and relatedly, as a result of (1) the invention of the written constitutional code at the end of the eighteenth century; (2) the development of the international law of nation-states in the nineteenth century; and (3) enormous increases in the size of bureaucracies beginning around the turn of the twentieth, the holistic approach to public law that we find in Montesquieu, for instance, has been superseded by a fragmentation of the field of study into at least three distinct categories: constitutional law, administrative law, and international law. Nevertheless, it is hoped that this chapter has revealed advantages in understanding the current practice of comparative administrative law in the English-speaking world as having its roots in a long tradition of scholarly inquiry and reflection about public power, its location and control.

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