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LAW COMMISSION

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EXPLORATORY WORKING PAPER ON ADMINISTRATIVE LAW

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1. In paragraph 5 of the Note prefacing our First Programme published in October 1965 we drew attention to the problems which arise in the reconciliation of the rule of law with the administrative techniques of a highly developed industrial society. We took the view that those problems would require further study before we were ready to propose any specific aspects of administrative law for inclusion in a Law Commission Programme.

2. On December 2nd/3rd 1966 a Seminar on Administrative Law was held at All Souls College, Oxford. Its intention was to bring together a number of lawyers and administrators in a critical examination of the present study of that branch of the law. In the light of the views expressed at that Seminar and of subsequent studies, it has appeared to the Commission that administrative law has strong claims for inclusion in some form in a future programme of the Commission as a subject for examination with a view to reform. The purpose of this working paper is to refer shortly to some of the criticisms of administrative law in this country which have been brought to the attention of the Commission at the All Souls Seminar and otherwise, and to consider what aspects of administrative law might be appropriate for inclusion in a future law reform programme.

3. The Scottish Law Commission were represented at the All Souls Seminar and we have consulted them before publishing this paper. They share our view about the claims of this branch of the law for inclusion in future law reform programmes, and whilst certain technical differences between the two legal systems may require some degree of separate study in the early stages of an inquiry, should the topic find a place in the programmes of the two Commissions a ~~joint~~ study would be our

ultimate objective.

4. It is common ground that whilst the experience of the Parliamentary Commissioner for Administration will be of the highest importance in a topic which in the ultimate analysis is essentially concerned with the redress of grievances, the institution of that important office in no way diminishes the need for a review of the legal redress available in respect of administrative actions.

5. Four main lines of criticism of our administrative law have at this stage been brought to the attention of the Commission.

6. First, there appears to be a widely held feeling that the remedies available in the courts for the review and control of administrative action are in urgent need of rationalization. The procedural complexities and anomalies which face the litigant who seeks an order of certiorari, prohibition or mandamus have long been the subject of criticism, whilst the circumstances in which injunctions and declarations are obtainable would also appear to call for review. The law of judicial control, it has been argued, is at present at the mercy of a formulary system of remedies. The technicalities and uncertainties which mainly for historical reasons are a feature of the judicial control of public authorities under our legal system contrast sharply with the simplicity with which administrative proceedings may be started in other systems, e.g. that of France.

7. Secondly, it has been suggested that in our system of pre-decision safeguards our concern for a judicial quality in inquiries and similar procedures, exemplified by the recommendations of the Franks Committee (1957 Cmnd. 218), may perhaps have created a tendency to concentrate upon "procedural due process", i.e. the propriety of the procedure, whilst giving insufficient attention to "substantive due

process", i.e. the quality of the decision reached. This is not to underrate the contribution to British public administration of the standards of "openness, fairness and impartiality" strengthened by the provisions contained in and made under the Tribunals and Inquiries Acts 1958 and 1966 and overseen by the Council on Tribunals, in particular those aspects of "openness" which require policies to be explained and reasons for decisions to be given. Nor is there any lack of awareness of the need to review and simplify the pre-decision and decision making procedures, as is evidenced by the recent White Paper on Town and Country Planning (1967 Cmnd. 3333). But it has been suggested by some, including distinguished administrators, that pre-decision safeguards which not infrequently impose great delays upon activities of social importance often fail to secure in practice any comparable benefit in the shape of an effective control over the administration. In particular, the control by our courts in relation to the issues of fact involved in administrative decisions has been compared unfavourably with that which applies in certain other systems. In this connection it has been suggested that the remedies available under the American Administrative Procedure Act in cases of administrative actions unsupported by substantial evidence might involve an elaboration of the records of our administrative agencies which might not be desirable on other grounds. Nevertheless this is an aspect of judicial control which may call for examination.

8. Thirdly, the opinion has been expressed that whilst the existence of administrative law as a separate topic has come to be recognised, we still lack a sufficiently developed and coherent body of legal principles in this field. Views on this matter vary considerably. It has been suggested that we need a body of law which, inter alia, makes the remedy for damages more widely available where administrative acts are

found to be unlawful, and which recognises in the fields of contract and tort that the administration as a party is different from a private party and, as in a number of other countries, provides special rules of public law accordingly. It has also been suggested that there is a need to re-define for the purposes of public law many of the concepts of private law, e.g. negligence, including negligent misstatement, malice, fraud etc.

9. Fourthly, the view is held by some that in dealing with administrative matters our judges are sometimes unable to get near enough to the administrative decision and that one reason for this may be their lack of expertise in the administrative field. It is said that in the case of the French Conseil d'Etat, for example, the high degree of administrative expertise possessed by its judges has been one of the important factors which have given to the working of that Court the qualities which have been so widely admired. It is recognised that our system of judicial control has great effectiveness where it operates, and that it would be inappropriate to attempt to reproduce in this country features of the French and other systems produced by historical factors which have no counterpart in this country. But suggestions for reform have been made, ranging from the creation within the Privy Council of a specialized administrative court, the personnel of which would possess both judicial and administrative experience of a high order, to less radical suggestions for a greater degree of specialization within the existing general framework of the High Court.

10. Based upon the above-mentioned criticisms the following would seem to be some of the questions which might be covered by an item in a future programme of the Law Commission:-

(A) How far are changes desirable with regard to the form and procedures of existing judicial remedies for the control of administrative acts and

Could be started

omissions?

(B) How far should any such changes be accompanied by changes in the scope of those remedies (i) to cover administrative acts and omissions which are not at present subject to judicial control and (ii) to render judicial control more effective, e.g. with regard to the factual basis of an administrative decision?

(C) How far should remedies controlling administrative acts or omission include the right to damages?

(D) How far, if at all, should special principles govern (i) contracts made by the administration, (ii) the tortious liability of the administration?

(E) How far should changes be made in the organisation and personnel of the courts in which proceedings may be brought against the administration?

11. It is however for consideration how far a law reform programme should at the outset attempt to cover in one inquiry the whole range of matters in which changes have been suggested. It is for example arguable that as a first step Questions (A) and (E) should alone be dealt with. On the other hand it may be thought that a consideration of the problems of remedies would require an examination of Questions (B) and (C) also. A third possible approach is that the problem of remedies is inseparable from the substantive law governing administrative action and that Question (D) also should be included.

12. The Commission invites the expression of views on the scope of an inquiry into administrative law which might be proposed for inclusion in a future law reform programme.