THE EVOLUTION OF ADMINISTRATIVE LAW IN THE COMMON LAW SYSTEM: A CRITICAL REVIEW

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INTRODUCTION

Administrative Law in the common law system as in other systems of law is a twentieth century phenomenon. Bedevilled by a recurrent state of crisis, however, the common law system of administrative law has remained relatively undeveloped and continues to lag behind the development of administrative law in other legal systems.

Bourgeois jurists readily admit the crisis in the common law system of administrative law.[1] In trying to explain the causes of this crisis, many of them refer to such factors as the anomaly of the existence of administrative action; and the procedures by which administrative agencies reach their decisions. This legal technocratic approach proceeds from the dubious premise that the capitalist system is optical and just and that the real causes of the crisis should be sought in the 'pervasive malaise of the administrative scheme.'[2] This gives rise to the illusion that the remedy to the problems of administrative law can come from legal procedural reforms that standardize administrative practices and enlarge the scope of judicial review.[3]

This paper adopts the position that the crisis that engulfs administrative law is a part of the broader problem of the crisis of capitalism. The causes of crisis in the realm of administrative law should therefore be sought not in the law which is only a superstructural element of society but in the basic contradiction of capitalism which is the main cause of crisis in capitalist society. Crisis causes and exacerbates the economic, social and political contradictions of capitalism which, in turn, generates contradictions and crisis in administrative law. The paper therefore sets out to critically review the historical evolution of administrative law in order to identify the objective controlling forces and the most relevant factors that scientifically explain the crisis in administrative law. Such an analysis, it is hoped, will facilitate a clearer perception of the historical role

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1. See J.O. Freedman, *Crisis and Legitimacy: The Administrative Process and American Constitution*, (Cambridge University Press, 1978); H.W. Wade, *Towards Administrative Justice*, (University of Michigan Press, 1963); K.C. Davis, *Discretionary Justice in Europe and America*, (University of Illinois Press, 1976); R. Parker, 'The Historic Basis of Administrative Law: Separation of Powers and Judicial Supremacy' (1958) 12 *Rutgers Law Review* 449; F.J. Tresolini, 'The Development of Administrative Law,' (1951) 12 *University of Pittsburgh Law Review* 362; and W. Friedmann, *Law in a Changing Society*, (2nd edn., Stevens and Sons, 1972) Part Four.

2. *F.T.C. v Ruberoid Co.*, 343 U.S. 470 (1952) J. Jackson, dissenting).

3. See committee on Ministers' Powers, Cmd. 4060 (1932) and the Committee's report discussed in W. Robson, *Justice and Administrative Law* (Stevens, 1951; *Report of the President's Committee on Administrative Management*, v. *Part D.* (1973); The American Bar Association's Special Committee on Administrative Law, (1934) 59 *American Bar Association Report*, and J. Landis, 'Crucial Areas in Administrative Law', (1940) 53 *Harvard Law Review* 1077.

of administrative law, the modern trend in its development, and enable a projection into the future as to its course of development.

To ensure a comprehensive analysis of the subject, the paper goes beyond the nineteenth century (the period often focused upon by many writers) and traces the genesis of the subject to the origin of the state. The time-span covered by the analysis therefore stretches from the early slave societies to the modern time. In the analysis, appropriate attention will be paid, where necessary, to the legal rules, forms and structures which, no doubt, play an important role in society. The key factor, however, will be the mode of production, the corresponding social relations and their ideological forms. Employing historical and dialectical materialism as tools of analysis, the paper focuses on the dialectical relationship between the state and law; the capitalist relations of production (first in England and later in the USA); the dialectical forces within these relations that were responsible for the development of administrative law; the function and role of administrative law in a capitalist economy; and the factors that impede the logical and objective development of administrative law in the common law world.

I. EARLY FOUNDATION OF PUBLIC LAW

Studies of the evolution of human society show that historical change comes ultimately from social contradictions. The classical expression of this view according to which 'the history of society is the history of its material production and the contradictions between the material productive forces and the relations of production which arise and are resolved in the course of their development,'[4] lays bare the implicit logic and objective laws of historical development. Law then, as a superstructural element of society, has no independent medium of existence. When viewed apart from real history, at best, it remains an abstraction which in itself has no value whatsoever. Law always has a material foundation based on historical reality.

From this perspective, the logical exposition of administrative law is to regard it as an advanced form of public law resulting from the social contradictions of capitalist society. The point must be stressed at the outset that any notion of a dualism or dichotomy between private and public law is an attempt to mystify law and is therefore strongly rejected. Although seemingly different, private and public law are not unrelated. They are both legal expressions of relations of production under modes of production which are based upon class division and exploitation.[5] Furthermore, strange as it might sound, public law protects and reinforces private property in capitalist society. Indeed, the primary objective of both private and public law in a capitalist society is the protection of private property - the pillar of the bourgeois legal order. Above all, they are both applied in the interest of the ruling classes of society (the bourgeoisie). Their function is to legally consolidate the existing order and to perpetuate the continuous reproduction of the capitalist mode of production and the social relations corresponding to it. Based upon these complementary aspects, they form a dialectical unity. Out of this unity, administrative law emerges as a new form of a legal machinery primarily for the protection of the minority ruling class interests. The dynamics of administrative law

4. K. Marx, 'Preface to A Contribution to the Critique of Political Economy,' in Marx, Engels, Lenin: *On Historical Materialism*, (Progress Publishers, Moscow, 1976, 138.

5. The only modes of production that do not entail class division and exploitation are the primitive communal society and future communist society.

therefore consist in the relationship between the capitalist state and law and its interaction with the social and economic forces in society.

1. STATE AND PUBLIC LAW

Marx's concept of historical development outlines five broad modes of production as progressive stages in the socio-economic formations of human society.[6] These are: the the classless primitive community or communal society, the slave-based society of classical times, the feudal society based on serfdom, the modern bourgeois society based on wage labour and the classless communist society of the future. In the early primitive community, the communal mode of production preserved equality as the prerequisite for the continued existence of the society. The emergence of private property, largely as a consequence of the development of productive forces and the division of labour, however, abolished this equality and introduced clearly exploitative relationships. This led to the development of social classes[7] and the state and marked the transition from the classless communal society to the class society based on slavery as the mode of production with private law as its dominating legal form of regulation.

The earliest forms of the state appeared in slave societies like ancient Greece and Rome where the state assumed diverse forms (e.g. monarchy, aristocracy and democracy). Despite this diversity in form, the essence of the state remained the same as a machinery for maintaining the rule of one class over another.[8] To institutionalise this class machinery, Engels notes that a public power, maintained by taxes and public debts and characterised by coercive institutions and material adjuncts, is created which, in contradistinction to the the old classless clan and gentile organisations of communal society, no longer coincides directly with the interest and needs of the whole population. Instead, it represents 'the most powerful, economically dominant class, which through the medium of the state, becomes also the politically dominant class.'[9]

With the creation of public power, the officials of the state, as organs of public power, now stand above society. Private law which hitherto regulated social relations among

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6. The author is aware of the current controversy about out the inadequacy of the traditional unilinear schema of Marx's concept of historical development, and shares the views of the proponents of the alternative multilinear schema. For a discussion of the controversy and the alternative models, see U. Melotti, *Marx and the Third World*, (Macmillan Press, London, 1981). The adoption of the traditional model in this essay is therefore meant to represent specifically the developments in Western Europe.

7. Classes, according to Lenin's well known definition are 'large groups of people differing from each other by the place they occupy in a historically determined system of social production by their relation [in most cases fixed and formulated in law] to the means of production, by their role in the social organisation of labour, and consequently, by the dimensions of the shares of social wealth of which they dispose and their mode of acquiring it. Classes are groups of people, one of which can appropriate the labour of another, owing to the different places they occupy in a definite system of political economy.' V.I. Lenin, *Collected Works*, (Vol.XIX, London, 1960 - 70, 421.

8. For a detailed account of the doctrine of the state and how it justifies social privilege, see V.I. Lenin, 'The State,' in *Marx, Engels, Marxism*, (Progress Publishers, Moscow, 1979), 406 - 424.

9. F. Engels, *The Origin of the Family, Private Property and the State*, (Pathfinder Press, New York, 1979), 160

individuals of the society becomes obsolete as a legal form of regulating relations between public officials and other members of the society Furthermore, 'being the vehicles of a power that is becoming alien to society, respect for them must be enforced by means of exceptional laws by virtue of which they enjoy special sanctity and inviolability' [10] Public law thus emerged in response to the need to define public authority and regulate the relations between the state's public officials and other members of the society

Public law, since it arose out of class antagonism, has a specifically historical, class-oriented and antagonistic character Its historical mission is to provide legal recognition for the public power of the state and to justify the class interests and social privilege of the ruling classes As society moves from one based on slave ownership to feudalism and then to bourgeois society, the forms of exploitation and the exploiting classes who wield state power undergo qualitative changes Nevertheless, public law and the state retain their exploitative character and are adapted to the changing modes of production in order to serve the interests of the ruling classes

2. *PUBLIC LAW AND PUBLIC ADMINISTRATION*

In Anglo American jurisprudence, the development of public law is attributed to the central organization of the English feudal state under the Norman Kings Following the Norman conquest, England was organized as a conquered territory whose military power was centred in the Crown In order to bring the entire country under the rule and influence of royal power and to consolidate this rule, the Norman Kings introduced the *Curia Regis* or the King's Court under which a system of uniform law (the common law) was initiated and applied throughout the realm Within the framework of the common law, public law was developed Its basic tenets, supported by the theory of "absolute sovereignty ', was used to give legal expression to the power of the Kings and to provide the legal structure for the centralization of royal authority

It is of particular historical interest that the *Curia Regis* was not exclusively or even primarily a court of law Consisting of the highest officers of state and the King's advisers, it was 'the core of the central government - governing, making laws, administering them, and also providing the judges to try suits '[11] Similarly, the various organs of state, such as the Exchequer, the King's Council, the sheriffs, and the justices of the peace, which carried out the centralization of the state's authority also exercised judicial as well as administrative powers This practice of combining administrative as well as judicial powers in the same organ, is significant For even though briefly discontinued, as we shall see below, it is now the accepted standard of administrative practice

The first attempt to separate administrative and judicial powers of government occurred at the end of the medieval period, largely as a result of the further division of labour in society The King's Council, which had started mainly as an administrative body, was compelled by 'pressure of the large amount of judicial work placed on the Council to split into two parts a judicial court and an administrative council' [12]

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10 *Ibid*

11 R W Vick and C F Schoolbred *The Administration of Civil Justice in England and Wales* (Pergamon Press Oxford 1968) 4 5

12 W A Robson *Justice and Administrative Law op cit* fn 3 *supra* 16

The judicial court, later divided into the court of Common Pleas and the King's Bench, undertook the task of developing the common law of England. There is historical evidence that the court of Common Pleas had jurisdiction only in civil cases.[13] This suggests that it applied mainly private law as opposed to public law which, we may surmise, was the province of the King's Bench. Assuming this is true, it would seem then that there was a division between private and public law. However, the historical development of the common law clearly shows that the traditional dualism between private and public law, recognized by Roman Law, and applied in the Civil Law systems of continental Europe was not adopted.[14] Indeed up till today, the common law does not attach particular significance to the distinction between private and public law, although it recognises the broad division.[15]

The executive part of the King's Council, on the other hand, emerged as the most important and most powerful administrative body. It participated in all affairs of the state and controlled all other governmental officials. This development, accentuated by the creation of special administrative courts,[16] and the practice of delegating legislative powers to the executive part of the King's Council, predictably generated tension and conflict between the common law courts and the special courts. To ease the tension, the judiciary was made independent of the administrative officials and given appellate jurisdiction in all matters. In addition, judicial tenure was firmly entrenched. Judges, appointed for life, could not be removed except for malfeasance in office. This boosted the power of the courts tremendously and partly explains the historical basis of the predominant influence of the judiciary in the development of the law in the common law system. As we shall see later, the unique status of the courts in English legal history

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13. R.W. Vick, and C.F. Schoolbred, *op.ict.*, fn.11 *supra*, 9

14. In England, although the Roman Law was known and taught quite early, this distinction never obtained a foothold in the practice of the ordinary courts because of 'the early establishment of the central power of the King which made it possible to replace the local customary law by the common custom of the King's courts i.e. common law, and also because of the existence of he Inns of court, strong professional bodies situated near the King's courts but away from the Universities, and having a common interest with the courts in the exclusion of Roman Law.' B. Nicholas, *An Introduction to Roman Law*, (ed. H.L.A. Hart, Clarendon Press London, 1979), 50.

15. Cf. the civil law systems where the division between private and public law is fundamental and runs through the entire legal system. Private law as the branch of law regulating property and non-property relations between private individuals is clearly distinguished from public law which regulates relations between state officials and private persons. See H.P. De Vries, *Civil Law and the Anglo - American Lawyer*, (Oceana publications, New York, 1976). Cf. also the Roman Distinction: while private law was concerned with relations between individuals, public law dealt with the functioning of the state and included in particular constitutional law and criminal law. See B. Nicholas, *op.cit.*, fn.14 *supra* 2; and R. Pound, 'Public Law and Private Law,'. Private law as the branch of law regulating property.

16. These courts, like the Court of Star Chamber, employed the methods of medieval continental law. Within this system of law, the jury system was not utilized, and suspected persons could be tortured in order to extract evidence. In most cases, the suspect could not cross- examine witnesses nor was he confronted with the charges against him. The Court, in its discretion, could sentence any individual to any kind of penalty short of death. See *Star Chamber Cases*, (Soule and Bugbee, Boston, 1881).

significantly affects the course of the development of administrative law in the common law system. In spite of the progressive trend towards active legislation and administrative regulation, the courts in the common law system remain the focus of attention and the fulcrum of the administrative process.

II. PUBLIC LAW AND CAPITALIST TRANSFORMATIONS

Public Law was qualitatively transformed under capitalism. The bourgeoisie who emerged as the new economically dominant class in capitalist society seized state power, developed it and pioneered the advancement of public law to consolidate their position as the ruling class. The systematic development of public law under capitalist conditions generated its own contradictions and led to an aggravation of the inherent contradictions of capitalism.

Capitalism transformed the social relations and political institutions of English society. The old feudal relations and privileges were abolished and, in their place, capitalism recognises the right of every person in society as 'an independent individual, whose only link with other individuals is private interest.'[17] The capitalist state proclaims liberty 'for all' and declares that it represents the collective interest of the 'whole society'. As the machinery for the expression of this collective will, the state assumes a superior legal position and is regarded as above the individual member of the society. While maintaining the institutional foundations of public law under feudalism, the capitalist state refined and developed public law, particularly in the area of constitutional law, to give legal expression and recognition to its democratic rhetoric and the power of the capitalist state.

Within the framework of constitutional law, the state system was proclaimed a democracy and formal legal equality was bestowed on every citizen irrespective of whether he owned any property or not. The claims to liberty and equality compelled the capitalist state to introduce measures that have a semblance of catering for the interest of the under- privileged class as well. This resulted in the liberation of the serfs who were proclaimed freemen and enfranchised.[18] Hence, the scope of public law which hitherto was limited to state sovereignty, authority and structure was extended as a result of the social change to the rights and duties of the citizen with respect to the state.

This transformation of the social relations and public law under capitalism is often represented by bourgeois jurists as the basis of a free and just capitalist society. The point must therefore be emphasized that capitalism did not in reality do away with class antagonism. It merely altered and transformed the old feudal class relations. With the change and development of the forces of production, class antagonism was adapted to meet the requirements within a different structure of production relations. Indeed, class relationship is rooted in the very nature of the capitalist mode of production whereby the worker by whose labour production is carried out is excluded from the enjoyment of the fruits of his labour. Instead, the surplus value created by his labour power is privately

17. Marx - Engels, *The Holy Family, or Crtitique of Critical Criticism*, (Progress Publishers, Moscow, 1975), 140.

18. Working men in the towns were enfranchised in 1867 while those in the rural areas were enfranchised in 1884. A large section of the society, mostly peasants and women, were however not enfranchised until 1918. For a historical account of the extension of the franchise to the working class, see M. Bruce, *The Coming of the Welfare State* (Batsford, London 1979.

appropriated by the capitalist.[19] The social nature of production and the private appropriation of the social product by the capitalist constitutes the basic contradiction of capitalism.

Thus, even though capitalism abolished feudal class relations, it 'established new classes, (the bourgeoisie and the proletariat) new conditions of oppression, new forms of struggle in place of the old one.'[20] The state and law were also transformed to serve capitalist interests, but they remain essentially class institutions representing class interest. The mere incorporation of formal (not substantial) constitutional principles into public law did not and cannot change the class character of capitalist law. For it leaves the basis of the capitalist economy - private ownership of the means of production - which is the basis of social division and social injustice, fully preserved.[21] This contradiction between the interests of capital and wage labour (a derivative of the basic contradiction of capitalism) generated its own contradictions.

For example, while public law proclaims the right of the worker and peasants to full emancipation, at the same time, the development of capitalist reproduction restricts the realisation of this right. This is because the development of capitalism, as explained by Marx, depends on a high rate of profit and increased capital accumulation. Since wages increase at the expense of profit, capital strives to increase the rate of surplus value and to reduce the price of labour. The collolary of this tendency of capitalist development is that it leads to a decline in and a consequent deterioration of the material conditions of the working class.[22] This contradiction between the interests of capital and wage labour (a derivative of the basic contradiction of capitalism) ensures that '[e] very advance in [capitalist] production is at the same time a retrogression in the condition of the oppressed class, that is, of the great majority.'[23]

Also, the principles of 'freedom and liberty of the individual' recognized by public law tends to encourage the formation and organization of collective labour movements. At the same time, capital as represented by individual entrepreneurs, companies, and the state is opposed to the development of working class organizations as this tends to threaten the free development of capital.[24]

Finally, while the relationship between the worker and his employer continues to be regulated and defined exclusively by private law (i.e. the law of contract), the employer alone is able to enjoy the additional protection of public law through the use of the state's

19. This contradiction forms the subject of Marx's concept of alienation. See K. Marx, 'Economic and Philosophical Manuscripts' in K. Marx and F. Engels, *Selected Works*, (Vol.6 Progress Publishers, Moscow, 1976), 525.

20. K. Marx, and F. Engels, *Collected Works*, (vol.6 Progress Publishers, Moscow, 1976), 525.

21. For a discussion of the sociology of capitalism, See K.Marx *Selected Writings in Sociology and Social Philosophy*, (ed. T.B. Bottomore, and M. Rubel, Penguim Books, Harmondsworth, 1971) Part Three.

22. K. Marx, 'Capital', ChaptXXXII, reproduced in K. Marx, and F. Engels, *Selected Works*, (vol.2. Progress Publishers, Moscow 1977), 142 ff.

23. Engels, *op.cit*, fn.9 *supra*, p.165.

24. See fn. 21, *supra*.

police and judicial powers to enforce the private employment contract. A link is thereby forged between private and public law and is used to legitimize the difference and antithesis between the rights of the ruling classes and the duties of the working class.[25] This exposes the conventional hypocrisy of capitalism as it becomes clear that even though the state, in principle, proclaims 'freedom and liberty for the whole society,' in reality, it is the liberty of those who privately own property and the representatives of the capitalist state that is protected.

These contradictions, *inter alia,* underlie the crisis that led to state intervention.

1. STATE INTERVENTION AND THE ADMINISTRATIVE PROCESS

The end of the first half of the nineteenth century witnessed the first major economic crisis in the history of capitalism. As capitalism advanced in England under the impact of the industrial revolution, the social antagonisms resulting from the contradictions of capitalism became more pronounced. The working class, forced to live and work in extremely unsavoury environment, were kept under the poverty line by low wages, irregularity of employment and actual unemployment. The outbreak of the French Revolution and the subsequent fear of revolution in England too had resulted in the passage of combination Acts in 1899 and 1800 which made illegal associations which aimed at raising wages, reducing hours of work, or sought the improvement of working conditions. In other words, trade unions were made illegal. The already startling antithesis between wealth and poverty under the penal conception of the poor law thus became sharply defined.

Under these conditions, the imperatives of capitalist development were confronted with the struggle of the working class who came out in open protest against the capitalists. Among other things, they demanded for safe working conditions, shorter working day, higher wages and universal suffrage.[26] The persistent rejection of these demands by the bourgeoisie led to the workers' revolt of 1820 and the 1850's. The ensuing crisis compelled the state to intervene in order to stabilise the capitalist system of accumulation and appropriation. To achieve this purpose, certain concessions were made to the working class[27] and social reforms were introduced to remove some of the most blatant forms of inhumanity and social injustice.

State intervention vividly portrays the inherent contradictions of capitalism. Under *Laissez-Faire* capitalism, decisions on the allocation of capital for reinvestment are made in a non-centralised manner by every enterprise or group of enterprises independently of each other. This leads to the anarchy of production in the capitalist economy as a whole. The capitalist economy, however, is not absolutely chaotic. Within enterprises, work is organised according to strict plan. This is an organic necessity for the production of surplus value and a requisite for its maximisation. The keener the competition, the stronger the desire of the capitalist to properly organise the production process within his enterprise, to extract the maximum from the advanced capital and labour: The conditions

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25. Cf. fn.57 - 60 *infra.*

26. These demands were embodied in the 'People's Charter' of 1838 which spelt out the Chartist programme for political tical action. See A.R. Schoyen, *The Chartist Challenge* (1893).

27. e.g. reduction of the length of the working day to 8 - 9 hours, improvements in sanitary and public health, and universal suffrage.

or the production of surplus value in individual enterprises, however, do not coincide with the conditions for the realization of surplus value. The latter conditions are determined by the proportions of social production which are imposed on an individual entrepreneur in the form of the laws of the market. Spontaneous market forces constantly compel entrepreneurs to adjust their initial plans. Thus the development of the tendency towards capitalist planning and capitalist rationalisation in individual enterprises, in its turn, cause an inevitable increase in the anarchy of social production in the absence of a centralized national economic plan.

The conscious intervention of the state posed a serious threat to the free enterprise system because of the 'stifling effect of state control' on individual private enterprise. The *Laissez-Faire* capitalists therefore maintained only the the 'minimum of government which is indispensable for the administration, internally and externally, of the common class interest and business of the Bourgeoisie; and where this minimum of government is as soberly, as economically organised as possible.'[28] In practical terms, this means state regulation of some aspects of the process of production in order to discipline the anarchic competition for private advantage. In addition, it also entails the creation of a state bureaucracy capable of directing public policy to serve national interests and the articulation of a body of legal doctrine which would obligate the private entrepreneur to improve the working conditions of the worker in the context of the overall stability of the capitalist system.

Limited though it is, state intervention at this stage of capitalist development is significant in many respects. For one thing, the very act of state regulation of what is supposed to be a purely free enterprise economy attests to the profound contradictoriness of the entire capitalist system which places the interest of the small capitalist minority above the interest of the whole society. Furthermore, it represents a completely natural result of the development of monopoly capitalism.[29] With the transition to monopoly capitalism, planning extends to complexes of enterprises combined by monopolies. Attempts are then made to regulate capitalist production on a nationwide scale, with the help of the state.

The partial intervention of the state also serves as an effective measure for controlling (though not completely resolving) the contradictions generated by the class antagonism. From the point of view of the ruling classes, it helps to assuage the working class and prevents the class struggle from developing into an explosive situation. To the working class, on the other hand, it marks the first major concession to workers and plays a major role in the introduction of basic reforms which alleviate some of their sufferings. At the same time, the success of the workers' organisation in getting their demands considered underscores the importance of better organisation and unity of the working class movement and points the way to the future struggle.

State intervention, however, posed a serious legal problem. The problem was how the newly acquired power of the state resulting from its enhanced social and economic role should be exercised so as to achieve optimum efficiency and an acceptable mode of operation without undue infringement on the freedom of the individual entrepreneur. This problem acquired a particular urgency dictated by the intransigent attitude of the

28. K. Marx, 'The Chartists' in New York Daily Tribune, 25 August, 1952. Reproduced in K. Marx, *Selected Writings in Sociology and Social Philosophy*, 205.

29. For a detailed account of monopoly capitalism, see Lenin, v.I., 'Imperialism, The Highest Stage of Capitalism,' Lenin, v.I., *Collected Works*, (vol.22, Progress Publishers, Moscow, 1977, 185 - 304.

conservative elements of the capitalist class who view the intervention of the state with great suspicion. Backed by their traditional allies, the courts, these conservative capitalists therefore sought to have the state's power and functions clearly defined in order to institutionalise its power within the legal system and provide a legal framework not only for its exercise but also for its control.

In meeting these demands, the legal system was, however, hampered by the obsolescence of constitutional law (which concerns itself mainly with the protection of personal and property rights of the individual entrepreneur)[30] and the then existing machinery of public administration. This situation prompted the creation of the administrative agencies (the model of modern day administrative machinery) which are entrusted with the organisational and technical aspects of state intervention.

The activities of the administrative agencies utilise a complex of methods which combines all the functions of the three traditional arms of government (i.e. legislative, executive and judicial) and are referred to as the administrative process. The primary task of this process, closely linked with the state objective of regulation of some aspects of the economy, is the stabilisation of the social and political atmosphere through the control of the class antagonisms as well as intra-class contradictions. The former task, performed mainly through centralized state - sponsored social and economic programs (e.g. health services, education, unemployment benefits, pensions, etc), is directed towards the pacification of the working class. While the latter, consisting of mainly legal regulations (e.g. employment regulation, wage control, price control, etc.) is aimed at controlling the anarchic competition among the private monopolies. The administrative process is therefore a system of regulators which the capitalist system utilises in lieu of centralized planning and planning law to control the anarchic competition among the private monopolies through administrative law. From the activities of these administrative agencies, a body of legal rules, mostly procedural and technical, evolve which define the rights, powers, functions and organisation of the agencies and their officials. This body of rules is classified today as administrative law.[31]

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30. The close connection between the common law and constitutional law in their concern for personal and property rights is widely acknowledged. See Friedmann, *op.cit.* fn. I *supra*, pp.93 118. However, Cf. B. Malament, 'The Economic Liberalism of Sir Edward Coke,' Yale Law Journal, (June 1967) 167 for a contrary view.

31. Austin, the first English writer to acknowledge the existence of administrative law, divided public law into two parts: administrative law and constitutional law. He characterized constitutional law as dealing with the law which determined the constitution of the sovereign government, while administrative law comprised the law which related 'to the exercise of the sovereign powers, either by the sovereign or by political subordinates.' J. Austin, *Lectures on Jurisprudence*, (2nd ed., 1875), 367. Austin further stated that 'administrative powers are powers of administering or other commands already established or issued.' *Id.* at 4468 cf. Holland's exhaustive analysis of administrative law. First, he divided public law into six major categories and placed administrative law in the second division. According to him, constitutional law is concerned with the various organs of the sovereign power at rest while administrative law is the 'way in which the different categories of the governing body are set in motion.' T. Holland, *Elements of Jurisprudence* (1917), 144. Holland conceived constitutional law as dealing essentially with structure while administrative law is concerned with the functions of government and the promotion of individual welfare of citizens. Also, Cf. Goodnow, reputed to be the first American scholar to be concerned with administrative law. He defined administrative law as that part of the law which governs the relations of the executive and administrative authorities of government. F Goodnow, *Comparative Administrative Law* (Russell, New York, 1893) CF. fn.39 *infra*.

2. *ADMINISTRATIVE LAW AND NON-ANTAGONISTIC CONTRADICTIONS OF CAPITALISM*

Optical state regulation and control was hindered not only by the antagonistic contradictions of capitalism but also by the non-antagonistic contradictions within the ruling class. The capitalist class as a whole was by no means united in its attitude towards state intervention. The establishment of social services advocated under state intervention required a large expenditure of public funds. Although the scheme was devised to protect the ruling classes, they were not prepared to bear the cost of its implementation. The more conservative elements (particularly the monopoly bourgeoisie) were interested above all in the short-term benefits that accrue to them from free unregulated capitalism. For this powerful group, long term measures designed to stabilise the system and prevent it from being consumed by the class struggle were not of paramount interest. This group, supported by the courts who viewed state intervention as an interference with the principle of freedom of contract and contrary to the doctrine of delegation, opposed state intervention and sought to frustrate the social reforms introduced by the state.[32] The less conservative section of the capitalist class, however, perceiving the wisdom in introducing basic reforms and in controlling the anarchic competition among the monopolies and the financial oligarchies, supported state intervention.

This non-antagonistic contradiction between the private individualistic interests of a section of the ruling classes and the general welfare of the whole capitalist class gave rise to an intra class struggle between the courts as the legal protectors of free enterprise and the administrative agencies as the official vehicle for the implementation of state intervention policies. The momentum of this struggle exerts a decisive influence on the course and rate of development of administrative law. It is therefore important to understand the nature of the struggle and its impact on administrative law.

Administrative agencies were composed mostly of bureaucrats and technocrats who were primarily concerned with administrative regulation, efficiency and public order. Administrative regulation was therefore applied on the basis that, while the private monopolies were free in general to organise their business as they saw fit, private organisation would not be allowed to derogate from administrative laws which are a matter of public policy. Since public policy was nowhere defined and there were no special courts for the application of administrative law, the determination of public policy as well as the general development of administrative law devolved on the ordinary courts. In consonance of their opposition to state intervention, the courts seized this opportunity to frustrate the aims and objectives of state intervention and to stunt the growth of administrative law.

It is instructive to note the contrast between the common law practice and that of the continental Civil Law systems. In France, for example, the application of the concept of *order public* is not left to the ordinary courts. It falls within the jurisdiction of separate administrative courts of which the *Conseil d'Etat* is at the apex. The creative role of this

32. The determination of the ruling classes to oppose state intervention is illustrated by the episode of the Tolpuddle Martyrs in 1834. For more examples, see Hedges and Winterbottom, *Legal History of Trade Unionism*, (1930). Judicial opposition is demonstrated by *Hornby v. Close* (1867) L.R. 2 Q.B. 153; *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants* [1901] A.C. 426; *Osborne v. Amalgamated Society of Railway Servants* [1911] I Ch.540; and *Rookes v. Bernard* [1964] A.C.1129, [1964] 1 All E.R.367.

body which is the supreme arbiter in matters of public law[33] has enhanced the development of *droit administratif* in France. On the contrary, the absence of a separate administrative court system which is partly a result of the failure to distinguish clearly between private and public law in the common law system, has left the determination of public policy and other administrative matters in the hands of the ordinary courts. As a result, administrative practices in the common law system take a very different form from the continental ones.

Of course, since their experience was largely in relation to private law, the English courts, through the application of the doctrine of *stare decisis* tended to adopt rules by analogy from private law in their application of administrative law, thus further blurring the distinction between public and private law. For example, the tendency to equate the structure and form of the agencies with those of private companies left the status of the public official in considerable doubt. Furthermore, the absence of a clear theory of state legal personality in public law which distinguishes between the liability of agencies and that of public officials in their individual private capacities resulted in the practice of apply ing private law rules of liability to state agencies and the extension of sovereign immunity to protect public officials.[34] The extension of feudal government immunities to public officials, in itself partly a response to the intra-class struggle between the agencies and the courts, took the officials out of the regime of private law without specifying clearly their submission to public control. The danger of corruption and arbitrary action that was nurtured by this situation was exacerbated by the practice of informal and bureaucratic ways of resolving disputes between public officials and private citizens without the normal judicial safeguards.[35] This practice limited the scope of the courts' influence on the development of relevant legal doctrines to control maladministration and corruption and left the ordinary citizen without any legal protection against the capricious and arbitrary action of public officials. Consequently, the ordinary citizen's chances of having any form of redress against the state was further restricted. This deficiency in the administrative practices of the common law system is highlighted by the contrasting practices in the Civil Law systems of continental Europe.

In France, the insistence on a clear distinction between private and public law resulted in the development of different rules and procedures for the solution of identical legal problems in private and public law. Of great significance is the recognition of

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33. The administrative function of the *Conseil d' Etat* includes giving advice to the Government on proposed legislation or other action. Even though this constitutes the major part of its work, this function has been gradually overshadowed in importance by its judicial function. When *statuant au contentieux* (proceeding judicially), the *Conseil d' Etat* can set aside administrative acts on the petition of any interested private party. From the President of the Republic to mayors of villages, ministers and prefects, the acts of all public officials within the executive branch are subject to review by this body. See Hamson, 'Le Conseil d' Etat statuant au Contentieux' *'Law Quarterly Review* 60.

34. State liability in contract is now widely recognized in the major common law jurisdictions. For the US, see the Tucker Act of 1887; for the UK, see section I of the Crown Proceedings Act, 1947. In Canada, Ch.30, s.3), and the Petition of Rights Act (RSC.1952, Ch.158), have made the state generally liable in contract and tort.

35. Dicey drew attention to this point in his objection to the fact that administrative tribunals were not forced to adopt rules of procedure analogous to the courts' procedure. In his view, this was against the rule of law. See A.V. Dicey, 'The Development of Administrative Law in England,' (1915) 31 Law Quarterly Review 150. See also fn.41 Infra.

administrative law as an autonomous branch of public law with a separate jurisdiction and administrative courts. The development of distinctive principles of administrative law enabled the French system of *droit administratif* to evolve progressive principles of state liability[36] which transcend private law into public law. Hence, for example, while a contract between a state agency and a private individual in the common law system is simply regarded as a purely private law transaction governed by the ordinary rules of contract, in France, the situation is remarkably different. The transaction may be governed by different rules of interpretation or performance, depending upon its nature as a contract of civil, commercial or administrative law. If it is an administrative law contract, then distinctive principles of administrative law, such as *contrat administratif,* which recognise the inherent differences in the position of public officials and private persons, would apply.[37] Otherwise distinctive principles of state liability for acts of their personnel lie with the civil and criminal courts even though a public service and an exercise of state authority are involved. Under these principles the public official is personally liable for a wrong committed by him *hors del'exercise de ses fonctions.* Construed generally, this means that the public official is not personally immune from liability and may be sued even for acts committed in the exercise of public functions.[38] The same is true in Germany, Belgium and Italy.[39] Of course, differences in form between the common law and continental systems of administrative law do not necessarily imply a disparity in aims and objectives. Administrative law in all capitalist countries serves the same class interest. It functions basically as an instrument to stabilise the capitalist system of accumulation and appropriation and thus remains essentially an instrument for class exploitation. However, by their superior administrative practice, the continental systems of administrative law have clearly advanced much further than their common law counterpart in the transition from private to public law.[40]

It is therefore somewhat curious that one of the major arguments advanced by the conservative capitalists for denouncing the growth of administrative law in England in the nineteenth century is the supposed defect in the French system of *droit administratif.* Dicey, one of the foremost consercative elite of this period articulated this view. He contended that the system of administrative law on the European continent is based on

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36. E.g. the principle of legality of the administrative act defines what is an administrative act and also defines the distinction between legal persons of public law and legal persons of private law. See M. Waline, *Droit Administratif,* (9th edn. Editions Sirey, Paris, 1963).

37. In American Law, there is a gradual recognition of the 'government contract' as a distinct category. See, for example L.M. Cherne, *Government Contract Problem,* (Research Institute of America, 1941); S. Williston, *A Treatise on the Law of Contracts,* (3rd edition 1957) Ch.60; and the Symposium on various Aspects of Government Contracts, (1956-8) 24-26 *George Washington Law Review.*

38. Personal liability of public officials applies to such actions as are clearly unworthy of public office. Otherwise, in most cases, the personal liability of the individual is replaced by the liability of the state before the administrative courts. See M. Waline, *op. cit.* fn.36 *supra.*

39. See the comparative studies of Langrod, 'Administrative Contracts,' (1955) 325; 4 *American Journal of Comparative Law* and M. Imboden, *Der Verwalfungsrechliche Vertrag,* (Helbing and Lichenhohn, 1959).

40. For the greater part, continental administrative law is concerned with such matters of substance as public law contracts, domains and principles of public ownership, principles of state personality and liability and the liability of public officials. See fn.38 *supra.*

ideas which are completely alien to the fundamental concepts of English common law(i.e. the rule of law and separation of powers). According to him, 'In England, and in countries which like the United States, derive their civilization from English sources, the system of administrative law and the very principles on which it rests are in truth unknown.'[41] To buttress this thesis, Dicey argued fervently that there is a major conflict between the doctrine of the rule of law and the French system of *droit administratif* which, in his view, is characterised by arbitrary action and despotic tendencies. Supremacy of law and equality before the law (two tenets of Dicey's concept of the rule of law) according to him, require that both public officials and private citizens be subject to the same law and jurisdiction of the same tribunals (i.e. the common law courts) and are opposed to the exemption of public officials from the process of the ordinary courts.

It is important to understand that by skillfully juggling with the principles of legality and equality, Dicey secured for the courts and their masters (the monopoly bourgeoisie) the supremacy of the judiciary.[42] With the aid of judicial sovereignty, the conservative capitalists attempted to neutralise the administrative process by subjecting the activities of the agencies to the power of judicial review. The ascendancy of the power of the courts diminished the role of legislation, created a contradiction between judicial precedent as the rule of judges and legislation as the rule of the people through elected representatives and increased the scope of judicial arbitrariness.

Dicey, who took the greatest pains to misunderstand the French system, argued also that the doctrine of 'separation of powers, as applied by Frenchmen to the relations of the executive and the courts... means... something different from what we mean in England by the 'independence of the Judges'[43] According to him, the doctrine of separation of powers in France simply means that the government and its officials are to be independent of and free from the jurisdiction of the ordinary courts. In England, however, the separation of powers, as he conceived it, deals with the distribution of governmental powers and, under this doctrine, judicial power could be exercised only by the courts alone.

The point Dicey missed is important. In the first place, it is crucial to an understanding of the French system to know that the French *Administration* embraces more than its Anglo-American counter-part. It is not merely an adjunct of the executive branch, but is a vital institution in its own right, separate from the *Governments* (which is the Anglo-American equivalent of the *Administration)* and responsible for the stability and continuity of French national life.[44] The exclusion of administrative acts from the jurisdiction of the

41. A.V. Dicey, *Introduction to the study of the Constitution*, (Macmillan, 1939), p.330.

42. Cf. the modern conception of the rule of law formulated by the International Commission of Jurists in their Declaration of New Delhi, 1959, which seems to emphasise legislative supremacy and 'a complete code of social legislation' (i.e. administrative regulation) for ensuring adequate social and economic conditions of life of the individual See 2. *Journal of the International Commission of Jurists* (1959) 1; also, Cf. 'Socialist legality' which presumes supremacy of the legislature as the democratically - elected representatives of the interests of the Soviet peoples.'

43. Dicey, *op.cit.*, fn.41 *supra*, at 337.

44. At the heart of the *Administration* is the *founctionair*, the permanent civil servant, with a legal status which prevents his being discharged for other than serious reasons. See Trouve, 'The French Civil Service,' (1951) 11 *Public Administration Review* 180. Although nationalized industries are part of the *Administration* in a broad sense, the new national enterprises differ from the traditional governmental bureaucracy as well as from business forms of the private sector. See

ordinary courts (as well as the development of *droit administratif* as a separate body of law) is the result of special policy considerations which stem from superior community interests.

Secondly, the strong prohibitions placed on judicial review of administrative action stemmed from the hostile public reaction to the abuses of the pre-Revolutionary *Parliaments,* the powerful courts of appeal during the *ancient regime.* 'By their dogged defense of a privileged class.. [the courts] foreclosed all hope of moderate reform, ensured that the wave would engulf them all, and earned for themselves a nations' wrath, a lasting distrust which in France is not yet overcome.'[45] The outcome of this historic event is an awareness of the evil of 'government by judges' which underlines the French determination to restrain the courts of general jurisdiction from interfering with the *Administration,* as it represents superior community interests.

The basis of Dicey's argument (that is, the doctrine of separation of powers), if taken literally, shows then that he grossly misunderstood the French system. For the French system in all respects reinforces the doctrine and application of separation of powers a thing that could not be said about the English system itself.[46] However, there is no need to belabour this point. The primary motive for Dicey's exposition of the doctrine as well as the doctrine of the rule of law was to rationalise the opposition of the conservative bourgeoisie to state intervention and to provide a legal basis for their opposition. In this regard, he was quite successful, for thanks to his influence, the administrative process was disrupted and the recognition of administrative law in England and the United States was delayed until the twentieth century.

The twentieth century marked a decisive turning point in the history of capitalism. At the turn of the nineteenth century, the contradiction between the growing monopolisation of

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industries are part of the *Administration* in a broad sense, the new national enterprises differ from the traditional governmental bureaucracy as well as from business forms of the private sector. See de Vries and Hoeniger, 'Post Liberation Nationalizations in France,' (1950) 50 *Columbia Law Review* 629.

45. Dawson, *The Oracles of the Law,* (1968) p.373.

46. Carr has pointed out many aspects of the French system which Dicey failed to consider or completely overlooked. In his view, Dicey 'wasted pity on the French for being at the mercy of officials whom they could not bring into the ordinary courts, when in truth the special courts for deciding disputes between citizens and officials in France were working most acceptable and giving a practical remedy where English citizens got none. He thought of officials mainly as potential oppressors. He over-estimated the value of an Englishman's right to sue any official personally; he underestimated the procedural difficulties of suing the Crown, the effect of the immunity of the Crown in tort, and the non-application to a government department of the rule that a master is responsible for the actions of his servants.' C.T. Carr, *Concerning English Administrative Law* (Columbia University Press, New York, 1941), 22. The point has also been confirmed that Dicey's position was conditioned by *Laissez-Faire* ideology. See W.I. Jennings, 'Courts and Administrative Law - The Experience of English Housing Legislation' (1936) 439 49 *Havard Law Review.* For other criticisms of Dicey's views, See W.I. Jennings, *The Law and the Constitution,* (5th edition University of London Press, 1959); Robson, *op.cit.,* fn. 3 *supra;* E.C.S. Wade, *Dicey's Law of the Constitution,* (Macmillan, 1957); C.K. Allen, *Law in the making,* (7th edition, Oxford University Press, 1967); C.J. Hamson, *Executive Discretion and Judicial Control,* (Stevens, 1954); and J. Garner, 'Anglo American and Continental European Administrative Law,' (1929-30) 7 N.Y.U.L. *Review* 387.

the economy and the vital interests of the working class found expression in powerful outbursts of social protest, mass actions by the working class and the activisation of democratic trends in socio-political affairs.[47] The resulting tense political situation was exacerbated by the rise of socialism which, repudiating as inadequate its idealistic and mechanistic past, was poised to take a revolutionary course to find scientific remedies to the injustices of capitalist society.

A major outcome of these developments was the ascendancy of liberalism, a political philosophy which replaced *Laissez-Faire* capitalism as the dominant ideology in the early part of the twentieth century. Liberalism conceded the enlargement of civil and political rights and moderate reforms as a means of checking socialist agitation. Under the influence of this new political philosophy, England and the United States initiated many social reform legislations and social services.[48] In order to forestall the opposition of the monopoly bourgeoisie and their allies, the courts, the administrative agencies were fortified with wide discretionary powers which excluded the jurisdiction of the courts and effectively countered the supremacy of the judiciary.

Parenthetically, it should be noted that the delegation of legislative power to non-representative bodies itself derogates from the principle of popular sovereignty and violates the democratic requirement of a co-relationship of popular sovereignty and legislative supremacy. To exclude the actions of the administrative agencies from judicial review under circumstances where no separate administrative courts exist therefore was tantamount to the establishment of a bureaucratic autocracy. Hence, it should be clear that the substitution of delegated legislation for judicial sovereignty was not in recognition of any democratic principles nor the needs of the people but merely served the need for a change in the balance of economic power in the interests of one section of the ruling classes.

The pervasive liberal atmosphere led to a dramatic change in the conservative attitude of the courts. This change was signalled by the decision in *Board of Education v. Rice*[49] in which it was held that the exercise of judicial power should not be regarded as the

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47. After 1900, even though these were years of relative prosperity for the ruling classes in Britain, the real wages of the workers continued to fall. This led to a succession of strikes between 1910 and 1914 by: mine-workers in 1910; shipworkers and dockers in 1911; railwaymen in 1911; and miners and dockers again in 1912. See the rise of 'syndicalism': in Hedges and Winterbottom, *op.cit.*, fn.32 *supra*.

48. In England, the first electoral victory of the liberal party in 1906 led to the establishment of a state system of old age (non-contributory) pensions scheme. In 1909, Labour Exchanges were set up to encourage labour mobility; Trade Boards to suppress 'sweated labour'; and, under a 'People's Budget', a system of graduated taxation was introduced to wage an impeccable warfare against poverty and squalidness.' Under the Parliament Act of 1911 a National Health Insurance Act of the same year was enacted which instituted for all below a certain income level a national system of insurance for sickness and unemployment and set up special administrative tribunals to handle contested claims for unemployment benefits. See R.S. Sayers, *A History of economic Change in England, 1880-1939*, (Oxford University Series). In the US too, the impact of liberalism was visible in increased social service functions of the state and a corresponding expansion in the activities of the administrative agencies. See C. Forcey, *The Crossroads of Liberalism: Croly, Weyl, Lippmann and the Progressive Era, 1900-1925*, (Oxford University Press, New York, 1961).

49. [1911 A.C. 179.

exclusive preserve of the courts alone. Four years later, in a more remarkable and perhaps more important decision, administrative agencies were freed from the judicial stranglehold. In *Local Government Board, v. Arlidge,*[50] it was held that administrative agencies may not only exercise judicial power but may adopt their own procedure and principles and are no longer bound to follow the common law procedure of the courts. These two cases together marked the recognition of administrative law as a branch of public law in England.

In spite of the formal recognition of administrative law in England, it should be pointed out that what emerged as administrative law is by no means distinctive nor autonomous. The excessive dependence on private law rules and principles plus the fact that these rules and principles were developed mainly in response to the need of the intra-class struggle greatly distorted the growth and development of administrative law. English administrative law therefore turned out to be merely an 'amalgam of centrifugal forces' consisting of various administrative procedures and regulations unified only by the organizing principle of state intervention. Also, the absence of originality and independence made it inevitable that the modicum of legal protection afforded to the ordinary citizens under administrative law, now balanced against the needs of the ruling classes, be relegated to the background. As a result, the legal principles and rules developed to attain administrative justice became merely formal, technical and procedural, devoid of any substance whatsoever. Finally, since it is this same depraved system of administrative law that has been exported to the English colonies, the opportunity for a systematic development of autonomous administrative law rules and principles was thus lost to the entire common law system.

III. ADMINISTRATIVE LAW AND THE NEEDS OF THE RULING CLASSES

The events that led to the further development of administrative law in the common law world started with the first world war. This war engaged the capitalist states in a crisis of national survival. Under the emergency war conditions, owing to the inherent contradictions of the capitalist system, the private monopolies could not be relied upon to help save the system. The state was therefore compelled to assume full and direct control over the production and distribution of arms, ammunition and other essential commodities. After the war, the great wave of pre-war labour organizations were reactivated by the problems of unemployment. The success of the October Revolution of Russia gave further impetus to the workers' agitation. These events influenced a reorganization of the capitalist economies on the basis of a 'mixed economy'.

The theory of a mixed economy urges an economy built on a combination of private and state enterprises and private monopolies with state regulation of the market. In practice, a mixed economy is characterised by a high degree of sociolization of the private economy through joint ventures of public and private corporations. Any remaining private corporation is strictly subject to varying state controls through administrative regulation of rates and tariffs, prescriptions of modes of employment and many other anti-trust regulations.[51] The result is increased state control of the economy.

50. [1915] A.C. 120.

51. For a legal analysis of the various administrative controls, See E. Freund, *Administrative Powers over Persons and Property: A Comparative Survey,* (Chicago University Press, Chicago, 1928).

England and the United States which among others adopted this form of economy did so in the belief that it would help to (i) adapt capitalist institutions to the changing international condition aggravated and accentuated by the war; (ii) reconcile social antagonisms and eliminate built-in contradictions of capitalism; and (iii) lead to a balanced economic growth.

Increased state participation in the economy was accompanied by a corresponding growth in the administrative process. In England, joint industrial councils were established which recognized for the first time the rights of organised labour to joint consultation with employers. In addition, the administrative machinery available for the conduct of various services were reorganised to achieve greater efficiency. Thus, a single Ministry of Health established in 1919 absorbed the Local Government Board and the Insurance Commissions and brought together National Health Insurance, the public health function of local authorities, including housing and the whole of the poor-law administration.[52] The United States experienced an even more significant development. Congressional acknowledgement that a national regulatory policy was needed to cope with such problems as 'unfair' methods of competition and 'unfair' labour practices led to the proliferation of administrative agencies to regulate banking, bridges, canals, ferries, railroad freight rates and warehouses.[53] The various practices and procedures of these agencies led to the development of a body of law which clearly had the impress of administrative law. In spite of this, the American courts continued to ignore the existence of administrative law. As Goodnow rightly pointed out, 'the general failure... to recognise administrative law is really due, not to the non-existence... of this branch of law, but rather to the well-known failure of [the] law writers to classify the law.'[54]

The question arises then as to why the opposition to administrative law is directed only to the classification of the law and not to the administrative practices themselves. This same contradiction had characterised the evolution of administrative law in England in the second half of the nineteenth century. In the United States, however with the creation of the Inerstate Commerce Commission in 1916,[55] the contradiction became more pronounced. The question must therefore be answered.

The resistance to the classification of administrative law has its roots in the common law tradition of not clearly distinguishing between private and public law.[56] This tradition

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52. See Sayers, *op.cit.* fn 48 *supra*, p.220.

53. See Freund, *op.cit.*, fn.51 *supra*, p.119.

54. Goodnow *op.cit.*, fn.31 *supra* pp.6-7.

55. Referring to the enactment that created the Interstate Commerce Commission, Hughes stated that 'this legislation has such distinctive features that it is hardly too much to say that we have entered upon a new era in the development of the law [i.e. administrative regulation].' C. Hughes, Some Aspects of the Development of American Law,' (1916) 39 *Rep. N.Y. State Bar Assoc.* 269. Taft J. also acknowledged that administrative law actually existed in the proceedings of the I.C.C. See 257 U.S. XXV-XXVI (1922).

56. The historical reasons for the failure to distinguish clearly between private and public law has been given, see fn.14 *supra*. In addition, we may note that English law has never been academic in origin in the way that the continental civil law is. The reason for this, according to Nicholas, is because England missed the academic revival of Roman Law in the 11th-14th centuries and did not create a chair of English Law until in 1758 at Oxford, almost a century after the creation of the first chair of French law in Paris. See Nicholas, *op.cit.*, fn.14 *supra* fn.2 p.50. Hence, academic

as however been transformed into an ideological tool with which the ruling classes ppress the workers. Public law, as indicated above, is a higher form of legal regulation han private law in the sense that its development coincides with a higher socio-economic ormation in society. As the state developed, private law which became inadequate as a orm of legal regulation gave way to public law as a more advanced legal form of social egulation. Public law has thus become the main legal framework within which the ompeting rights of the antagonistic classes find expression. Historically, the political ains of the oppressed classes in society have often led to a progressive development of ublic law.[57] The refusal to classify administrative law is therefore a political strategy esigned to impede the progressive development of public law and, consequently, to eny the rights of the working class. This explains the objective interest of the bourgeois urists in maintaining a vague distinction between private and public law and exposes the notives behind the various concepts of a dualism or dichotomy between private and ublic law.

The validity of this conclusion finds support in the opposition of even some bourgeois egal scholars to the dichotomy between private and public law. For example, Duguit, a rench legal philosopher and constitutional lawyer, opposed the dualism in the name of social solidarity' which, according to him, demands that all, governors and governed like, should be subject to the same principle of service to the community.[58] Based upon is 'pure science' theory of law, Kelsen has also argued that all legal norms of a legal ystem form a hierarchy which have at the apex the *Grundnorm* which validates all the egal norms. He therefore regarded the dualism of private and public law as contrary to he 'step by step' unfolding of legal norms from the ultimate *Grundnorm* since the ndividual administrative decisions of administrative agencies and the private activities of rivate individuals all have to derive their validity from one source.[59] Even though Duguit and Kelsen wrote with reference to civil law systems, their comments and rguments are apposite to the common law system as well. With direct reference to the ommon law system, it may be recalled that Dicey's exposition of the doctrine of the rule f law also echoed similar sentiments: by demanding equal subjection of all classes of eople to the same law, Dicey's concept of the rule of law could thus be said to be pposed to the dichotomy between private and public law.[60] However, we must hasten o add that the opposition of all these jurists to the dualism was based upon their pposition at the same time to the development of administrative law in their various

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developments in law, e.g. classifications of legal rules, in England has never quite matched developments on the continent.

7. E.g. The following English Acts which progressively amplified the scope of public law were the direct results of the struggle of the working class: *Repeal of the Combination Acts* (1824); *The Reform Act* 1867; *Education Act* (1875); *The Trade Disputes Act* (1906); *and the Trade Union Act* (1913).

8. See L. Duguit, 'Law and the State', (1917) *Havard Law Review* 31.

9. See H. Kelsen, 'The Pure Theory of Law' (1934-35). *Law Quarterly Review*, p.50, 51.

0. See Dicey, *op.cit.*, fn.41 *supra.*

countries.[61] The real motive behind their opposition of the dualism was therefore the preservation of *Laissez-Faire* capitalism under the guise of protecting officials.[62]

The acceptance of the practice of administrative regulation on the other hand, is compelled by the objective laws of historical development. History has shown that the centre of gravity of state powers had gradually shifted from the legislature in the first half of the nineteenth century to the judiciary in the second half of the century. In the twentieth century, state power has again shifted to the executive and the administration. This process is the result of the class struggle and the changing role of the state in response to the struggle. As the struggle progresses, it determines the particular type and form of legal regulation that marks the various points in history. Administrative regulation which, broadly speaking, covers the whole field of legal regulation represents the most advanced type of legal regulation. Its development is the result of the existing advanced social relations and the corresponding development of public law to give legal form to these relations. The acceptance of the practice of administrative regulation is therefore inevitable, compelled by the demands of social reality.

1. ADMINISTRATIVE LAW AND CRISIS MANAGEMENT

By the close of the 1920's, a new scientific and technological revolution started, first in the United States and then in the other major capitalist countries, which represented a new stage in the development of the productive forces. This development marked the beginning of the transition of capitalism from monopoly capitalism to state - monopoly capitalism, a new stage of capitalist development characterised by the 'ever greater coalescence of the monopolies and the state into a single economic and political force.'[63] Owing to the contradictions of capitalism, however, this advancement in the development of capitalism led to the deepest and most destructive economic crisis of capitalism. This crisis which occurred between 1929 and 1933 resulted in large - scale unemployment, degenerated living conditions for the working class, and increased alienation of the individual in society.

Capitalism's reaction to crisis reflects its inherent contradictions. From the view-point of the capitalists, crisis performs a 'useful' function because it makes it possible to exert greater pressure on the working class. In other words, crisis is regarded as the spontaneous means for reducing the remuneration of the workers to a level at which a rise in the profit rate again stimulates the continuation of extended capitalist reproduction. Hence, if a crisis does not seriously threaten the positions of the capitalist class, the bourgeois state is content to do nothing about it. Otherwise, on occasions that it considers to be beneficial to the capitalist class the state itself adopts measures that directly tend to promote crisis.[64]

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61. This view is confirmed by Friedmann and Jennings. See Friedmann, *op.cit.*, fn.I. *supra*, p.378, and Jennings, *op.cit.*, fn.46 *supra*.

62. See Friedmann, *op.cit.*, fn.1, *supra* p.377 ff.

63. M. Daskalov, 'The Scientific and Technological Revolution and the Crisis of State - Monopoly Regulation,' *The Scientific Technological Revolution and the Contradictions of Capitalism*, (Progress Publishers, Moscow, 1982) 160.

64. E.g. to curtail 'excessive' increases of personal consumption, a crisis drop in production may be deliberately provoked by the state. For an analysis and examples of how the capitalist state

This function of crisis is however possible only if there is no organised resistance by the working class to the importance of capital. As noted earlier, since the mid-19th century, the working class movement has become an increasingly important factor which has a fundamental influence on capitalist reproduction. The pressure of the working class therefore compels the state to adopt counter-crisis measures.

Thus, confronted with the devastating consequences of the depression of the 1930's and the resistance of the working class, the capitalist state took steps to control the crisis. These steps, consisting largely of an increased dose of state intervention, further intensified the contradiction between state regulation and the capitalist system of reproduction. In the United States, for example, this represented the era of the 'New Deal' when numerous administrative agencies[65] were created to 'attack the nation's economic and social problems'. The creation of these agencies to serve principally as a state crisis management institution deeply influenced the structure, functions and role of the administrative agencies. The agencies began to evolve into 'independent regulatory agencies' with the role of implementing state anti-crisis measures designed to control the intrinsic cyclical capitalist economies.[66] Highly bureaucratised, the independent regulatory agencies perform such functions as certifying private monopolies, their markets and approved rates, administering unemployment relief, antitrust regulations etc.

The conversion of the administrative agency which until now performed functions that were primarily social into a machinery for state economic management ushered in the new era of technocratic administration. In response to this change, the major thrust of administrative law shifted to regulatory or economic activity, economic management, and a high degree of bureaucratic procedures.[67]

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promotes the rise of crises, See S. Menshikov, *The Economic Cycle: Postwar Developments* (Progress Publishers, Moscow, 1975) pp.27-32, 265-69.

65. e.g. The Federal Deposit Insurance Corporation (1933); the Tennessee Valley Authority (1933); the Federal Communications Commission (1934); the Securities and Exchange Commission (1934); the National Labour Relations Board (1935); and the Civil Aeronautics Board (1938). See E.W. Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* (Princeton University Press, Princeton, N.J., 1966); and R.F. de Bedts, *The New Deal's SEC: The Formative Years*, (Columbia University Press, New York, 1964).

66. The Marxist theory of the economic cycle distinguishes four main phases of the cycle: crisis, depression, recovery and advance. In the 19th and early 20th centuturies, the economies of European countries and the US became cyclical in the following sequence: first Britain, then Germany, the US, France and, lastly, Russia and Japan. See L.A. Mendelson, *The Theory and History of Cycles and Crises*, (vols.I-II Moscow, 1959-64).

67. For a detailed account of these procedures and public reaction to the activities of the independent regulator agencies, See M.H. Bennstein, *Regulating Business by Independent Commission*, (Princeton University Press, Princeton, N.J., 1955); C. Allen, *Bureaucracy Triumphant*, (Oxford University Press, London, 1931); R.E. Cushman, *The Independent Regulatory Commissions*, (Oxford University Press, New York, 1941); J.M. beck, *Our Wonderland of Bureaucracy: A Study of the Growth of Bureaucracy in the Federal Government and its Destructive Effect Upon the Constitution*, (Macmillan, New York, 1932); G. Hewart, *The New Despotism*, (Ernest Benn, London, 1929); and L.M. Kohlmeier Jr., *The Regulators: Watchdog Agencies and the Public Interest*, Harper and Row, New York, 1969).

The demonstrated utility of the independent regulatory agencies in crisis management developed into a tradition. Thus, after the second World War, additional agencies were automatically created to deal with the the post-war economic and social problems. In addition, attempts were made to stimulate economic growth through state regulation. This gave impetus for the concentration and centralisation of capital and the acceleration of state-monopoly tendencies. The result was the emergence of giant multinational enterprises. These enterprises, motivated solely by profit, predictably oppose all forms of state control and seek to re-establish the free enterprise system in its pristine purity. The private capitalist mode of operation of these enterprises and the consequent increase in the deterioration of the general conditions of the working class fuelled the political activities of the working-class movements, especially communist parties, and led to the growth and consolidation of the socialist community.

The impact of the class struggle and the apprehension of the ruling classes that a crisis on the scale of the 1930's depression may recur, has led to the adoption of special legislation in the United States, Britain, and other capitalist countries which officially proclaim full employment as an aim of government policy. This, however, is mere rhetoric. Full employment, it may be noted, is antithetical to capitalism. It may be recalled that, by its nature, capitalist accumulation leads to the formation of an industrial reserve army. The cyclical nature of capitalist reproduction is felt most acutely by the working class as it means recurring cuts in employment, including an increase in stagnant and chronic unemployment and a growth of pauperism. This is why Lenin describes crises as periods when the economic situation of the working class deteriorates not only relatively, but also absolutely.[68] The existence of unemployment is therefore an indispensable condition for 'normal' capitalist reproduction. For it ensures additional reserves of unemployed manpower for the subsequent upswing in production.

The predictable failure of the bogus full-employment policy has precipitated a general increase in the organisation and unity of the working-class movement. In the principal capitalist countries, trade union activities are on the increase. The efficacy of the economic and political action of these working-class organizations has changed the correlation between class forces in the world in favour of democracy and socialism. Under the influence of these developments, the ruling classes of the principal capitalist states have adopted various concepts of a 'welfare state' which aim at diffusing the tempo of the class struggle through the concession of some welfare services to the masses. These concepts advocate a regulated form of private enterprise, that is, an essentially private capitalist economy in which the role of the state is extended to 'protector, provider, entrepreneur, economic controller and arbitrator.'[69]

This expansion in the functions of the state led to an unprecedented growth in the functions and influence of the regulatory agencies. In the United States, the impact of this development compelled the eventual recognition of administrative law. This recognition was signified by the adoption of the Administrative Procedure Act, (A.P.A., 1946)[70] which codifies and standardises all administrative practices and procedures. The codification of administrative law in the United States, it may be noted, represents a major landmark in legal development in the common law world. Today, there is a

68. V.I. Lenin, *Collected Works*, (vol.6, Progress publishers, Moscow, 1963) p.164.

69. Friedmann, *op.cit.*, fn. 1 *supra*. p.506.

70. 60 stats. (1946) 237.

progressive move in other countries, such as Britain, towards the codification of administrative law and away from the excessive dependence on judicial precedent.

2. *ADMINISTRATIVE LAW AND ECONOMIC PLANNING*

Since the 1960's many capitalist countries have been compelled by the struggle of the workers to adopt more positive measures to stabilise their anarchic economies and to regulate the economies' intrinsic cyclical movement. This has led to various attempts at state planning, capitalist style. The contradiction between the cyclical nature of capitalist reproduction and the system of measures involved in state planning of the economy has, however, rendered planning virtually impossible.[71] In the absence of a centrally - directed economic plan and, consequently, planning law, administrative law has been consciously substituted for planning law. This new role of administrative law has led to the expansion of the scope of administrative regulation to such socio-economic activities as taxation, government subsidy for agricultural produce, unemployment compensation payments, wage control, capital investment, bank interest rates, mortgages, securities, consumer protection, credit and various forms of fiscal control of private enterprises.

The expanded scope of administrative law has been advanced by some bourgeois jurists as support for the argument that administrative law primarily serves the interest of the working class. In furtherance of this view, all kinds of concepts of a 'welfare state' and an 'affluent society' are fabricated to misrepresent the forced concessions to the working class and democratic movements as concern for the material welfare of the workers and harmony of the interests of all classes.[72] Such an argument, however, only mystifies the reality. Up till today, the working classed have to bear the brunt of the periodic crisis of capitalism. Crisis dooms the workers to mass unemployment and to a direct deterioration of their material conditions. Crisis often coincides with massive lockouts, pressure by the bourgeoisie on working-class organisations, and also with the deliberate organisation of mass unemployment by the capitalist state. Periodically-recurring crisis, engendered by the economy of the major capitalist states, also exerts a disastrous impact on the neo-colonial economy of the Third World countries which form an appendage of the major capitalist economies and operate the same system of administrative law.

It is important to understand that under the capitalist system, it is impossible to eliminate crisis and unemployment. Administrative law in this crises - ridden system is utilised as one of the measures to mitigate the most destructive effects of crisis and unemployment on the working class. In practice, this takes the form of concessions to the working class which tends to extend the ambit of administrative law without a genuine democratisation of the law. The fact that such extensions are limited to only periods of crisis when the state perceives that a crisis can lead to social explosion endangering the existence of the capitalist system is significant. For it shows clearly that administrative law primarily serves the interest of the capitalist class, and any beneficial impact on the working class is merely incidental, necessitated by the dictates of the interests of the ruling classes.

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1. This contradiction results from the fact that 'On the other hand, cyclical upheavals foil the implementation of long-term plans, on the other, the spontaneous consequences of these programmes necessitate periodic deflationary measures by the state and lead to monetary crises.' Menshikov, *op.cit.*, fn.64 *supra*, p.183.

2. See Friedmann, *op.cit.*, fn.1. *supra*, pp.495-512; Freedman, *op.cit* fn.1 *supra*, p.6 B. Schwartz, *Introduction to American Administrative Law*, (2nd edn. 1962), 134; and J.K. Galbraith, *The Affluent Society*, (Penguim Books, 1970).

This conclusion is further buttressed by recent politico-military developments in the capitalist world. In reaction to the deepening contradictions of capitalism, and in a desperate bid to prevent the collapse of the capitalist system, the major capitalist states have resorted to massive nuclear arms and military build-up. The escalation of the nuclear arms race resulting from this reaction has compelled increased military spending by all the North Atlantic Treaty Organization (NATO) members and other major capitalist states like France. The astronomical military expenditure in these countries has led to a sharp change in the attitude of the ruling classes in the major capitalist countries towards the concept of the welfare state. Since 1980, the 'Cointern' (i.e. the unofficial conservative International alliance led by the USA., Britain and West Germany), backed by the powerful international financial organizations (e.g. World Bank and the IMF) have embarked on a systematic worldwide campaign against state intervention in both domestic and international affairs. According to this conservative movement, such matters should be left to market competition and private enterprise (i.e. multinationals), while private charity takes care of poverty.

This reversion to *Laissez-Faire* ideology coupled with the overbearing military budget has resulted in severe cuts in social expenditure, increased taxation, inflation and recurrent budget deficits. The effect of this development on the working class is visible in the decrease in real income and the general rise in the cost of living and the worsening conditions of the workers. At the same time, the renewed deregulation, liberalisation and privatisation of the economy exerts an adverse influence on the development of administrative law as it tends to stagnate and distort the progressive move towards the abolition of private law relationships and the establishment of public law relationships.

The present stage of development of administrative law in the common law system reflects and symbolises the present anarchic system of capitalist reproduction. As this system increasingly comes into conflict with the interests of the majority of the people, the democratic demands for a new and just legal system points the way towards planning law which is representative of the people as a whole. Indeed, despite the failure of economic planning in the majority of the capitalist states,[73] the recognition of the need for planning and the attempt to regulate the anarchy of capitalist reproduction through the framework of administrative law is highly significant. For it reflects the objectively mature social need for centralised guidance of the economy and confirms the relationship between planning as 'that aspect of the social process which is concerned with the maximum utilisation of institutions and resources from the point of view of economic development'[74] and law as 'that aspect of the social process which is concerned with the restructuring and enforcing of social policy (plan) in terms of the rights and duties arising therefrom.'[75] The future development of administrative law thus points to a development from a general economic law to planning law. This development will come about as a result of the transformation of society.

The progressive development of the productive forces under capitalism without a corresponding development of the production relations is a social contradiction which

73. It is only in France, the Netherlands and Japan that planning has turned into a regular activity of the government. Britain and the US offer the best examples of unsuccessful attempts to introduce long-term economic programmes. See Menshikov, *op.cit.* fn.64 *supra*, pp.179-83.

74. H.J. Berman, 'Commercial Contracts in Soviet Law', (1947) 35 *California Law Review*, 206.

75. *Ibid.*

can be resolved only through a social revolution. When this occurs, common ownership of the means of production will replace private ownership as the basis of production relations. The present capitalist system of administrative law will then be replaced by a new law based on plan 'which aims at fostering even development of all constituent parts of society, distributing the common material wealth on an equal basis and eliminating exploitation of many by man.'[76] In socialist society, planned development, based on the dominance of social ownership of the means of production inherent in the very nature of social productions, corresponds to the planned organisation of production both in individual enterprises and production complexes and at the level of the entire economy. Under Socialism, the driving force of production is not the growth of capital, but the maximum satisfaction of the needs of society and its members, the all round harmonious development of man. Centralised guidance of the economy rests on planning orders and planning law. Optical development of the economy and administrative law have thus become possible in many socialist states which have already attained this level of development and started the final transition to the next stage of development, the communist stage. At this stage, all law, as predicted by Engels, will ultimately dissolve into (administration) decentralised, and directed to the service of the interests of the whole society.[77]

CONCLUSION

Administrative law, in its logical and most comprehensive sense, embodies all the legal rules and regulations by which the whole society is governed. The ordinary dictionary meaning of the word 'administration' as 'the function of a political state in exercising its governmental duties'[78] attests to this conception. Significantly enough, this ordinary meaning of 'administration' also forms the basis of the conceptual definitions of administrative law in the common law system.[79] Yet, in practice, the scope of administrative law in the common law system remains severely limited to merely procedural laws and technical regulations. This contradiction between the conceptual definitions and the administrative practices, as we have shown, is a reflection of the basic contradiction of capitalism.

The capitalist state, through its faithful disciples, attempts to distort and obstruct the development of administrative law in order to make it serve the narrow class interests of

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76. F. Theodoropoulos, and K. Akuffo, *Africa: Law and State in Historical and Philosophical Perspective*, (Adena Publishers, Benin City, 1985), 23.

77. F. Engels, *Anti-Duhring*, (3rd ed. Foreign Languages Publishing House, Moscow, 1968), 385. See also V.I. Lenin, 'The State and Revolution' in *Marx, Engles, Lening: On Historical Materialism*, (Progress Publishers Moscow, 1976), 577.

78. *Encyclopedic World Dictionary*, E. Hanks, (The Hamlyn Publishing Group, 1976), 52.

79. See, for example, Vick and Shcoolbred's definition" 'By administrative Law we mean broadly speaking, the whole field of social legislation.' R.W. Vick, and Shcoolbred, *op.cit.*, fn.11 *supra*, p.202. Cf. Jenning's definition: 'Administrative Law is the law relating to the *administration...*' W.I. Jennings, *op.cit.*, fn.46 *supra*, p.217. (Emphasis added). Cf. also the definition of Wade and Phillips:' Administrative law is a branch of public law which is concerned with the composition, powers, duties, rights and liabilities of the various organs of government which are engaged in *administration.*' E.C.S. Wade and G. Phillips, *Constitutional Law*, (6th ed. 1960), 554 (Emphasis added).

the ruling classes. As the various ideological constraints placed on the development of administrative law conflict with its logical and objective course of development, the consequent arrest in the development of the law leads to a crisis. The crisis is exacerbated by the continuous development of productive forces which progresses with the scientific and technological revolution of this century. The contradictions of this development manifest themselves in the form of unemployment, strikes, lockouts and general depression which are themselves creatures of the capitalist system itself. Under these circumstances, the capitalist state depends upon administrative law as the legal machinery for the stabilisation of the social and political atmosphere for the dominance of capital and the preservation of the overall interests of the capitalist class.

It is thus clear that as long as the capitalist class remains in power, the optical development of administrative law cannot be realised. The solution to the crisis in the common law system of administrative law therefore lies in the radical transformation of the socio-economic structure upon which this system of administrative law is superimposed at the level of the superstructure. This transformation of society will abolish the private ownership of the means of production together with the present unjust and distorted system of administrative law and usher in the establishment of a socialist system. Under this new system, administrative law will take its proper place not as a class instrument for protecting the property interests of a minority class but as a law regulating the relationship between state enterprises, work collectives and individual members of society: 'The government of persons will then be replaced by the administration of things, and by the conduct of processes of production'[80] which will be founded on the social ownership of the means of production in which the unity of interests of all members of society finds social and legal expression.

80. Engels, *op.cit.*, fn.77 *supra*, p.385.