1. About Research

The purpose of Edward Elgar Research Agendas is to reflect on the future of research in a given area, in this case administrative law. What is meant by the term ‘research’ is left unsaid. Within these parameters, leading scholars are given the space to explore their subject ‘in provocative ways’ and map out likely directions of travel. The texts are to be ‘relevant’ but also ‘visionary’. I have taken this to mean that an author or authors should seek to delineate the future directions of their subject area and think imaginatively about how researchers might respond. In short, in the relatively short space of ten to 12 chapters and around 200 pages, authors are asked to present a concise account of what we know and don’t know about administrative law and perhaps also to recast what we thought we knew. They should indicate where the gaps are and what research methods might best be used to fill them.

In respect of administrative law, this is not an easy task. Administrative law is an umbrella subject. It spreads – many would say ‘straggles’ – over a large area with no clear boundaries and without any clearly fixed content. It is difficult to define. Wikipedia misleads its UK readers by saying that administrative law is ‘that part of constitutional law that is designed through judicial review to hold executive power and public bodies accountable under the law’, although many, perhaps a majority of lawyers do see the two as coterminous. One leading English textbook proffers as an ‘approximation’ a definition that administrative law is ‘the law relating to the control of power’, the primary purpose of which is ‘to keep the powers of government within their legal bounds, so as to
protect the citizen against their abuse’.1 Other authors prefer not to define it.2 A leading Australian textbook references two visions of administrative law that will always be in tension – the so-called red light view of law as a mechanism controlling the state, and the so-called green light view that sees a role for law to advance the state’s progressive roles.3 Administrative law has no single objective and no single set of values. From Europe, Sabino Cassese proffers a tripolar analysis of its objectives derived from three historical stages in its development: as an instrument of public power, as a way to ensure that administrative power is not arbitrary (a liberal meaning) and as a way to give effect to the ‘aspiration for equality’ (a socialistic meaning).4

My overall idea for the Agenda was equally tripolar: to open the boundaries of administrative law scholarship to new subject areas; to exemplify and open for consideration a number of different attitudes to research; and to illustrate different ways of writing about the subject. As a long-time believer in pluralism – in its non-technical sense of a multiplicity of beliefs and opinions – as a key academic value, I prized this diversity. No one theory contains the whole truth and academic discourse should not try to be reductionist; it should offer an arena for an exchange of ideas. I therefore thought it best to assemble a group of authors with experience of research in different administrative law fields with a view to presenting a range of visions of administrative law.

Traditionally, administrative law scholarship has tended to centre on courts and provide detailed legal analysis of case law or sometimes statute,5 known

---

familiarly as ‘black-letter law’. The expected readership was lawyers and law students, and the objective was to educate them in the administrative law principles enunciated by the higher (superior) courts. There is no denying that this continues to be the dominant emphasis of legal education and scholarship. Even though empirical research of the type advocated by Maurice Sunkin in Chapter 2 and provided by Robert Thomas in Chapter 3 is more in tune with the current concept of law as one of the social sciences, problems of cost, sponsorship and access are powerful deterrents. Legal analysis in the form of case notes is an attractive, cost-free way for early career researchers to gain a place on the publication ladder. Thus, the ‘general principles of administrative law’ as enunciated in judicial review actions not only constitute the heartland of administrative law but are likely to continue to do so.

In this book, however, the dominance of doctrinal analysis is challenged in several chapters and a decided preference shown for other, more innovative methods of research. In Chapter 1, Elizabeth Fisher takes up the challenge very directly, underlining the importance of matching method to subject matter and to desired output, and asking for greater imagination in research choices. She provides a map of the different methodological choices that can be made. Her aim is to push potential scholars into thinking seriously about research method and to develop novel scholarly agendas that can enrich administrative law. Even in well-trodden areas like judicial review, Fisher exhorts scholars to show imagination. That is indeed the overall purpose of this book. It is not that we do not take judicial review seriously; nearly every chapter touches on this central subject. It is just that our focus is less on doctrinal analysis, already well covered in the literature, than on other methods of research.

Empirical research, and socio-legal research more generally, were at first slow to establish themselves inside legal scholarship. From the mid-twentieth century, however, the dominant style of doctrinal analysis was joined by a body of socio-legal research, often pioneered by scholars from other disciplines. Socio-legal scholars were concerned with context and statistical data rather than legal analysis. The aim of empirical research was to uncover what was happening inside the administration, in the era before freedom of information legislation, largely behind closed doors.6


In Chapter 2, Maurice Sunkin underlines the importance of understanding the realities of the world in which administrative law has to operate and explores the utility of socio-legal research in drawing back the curtains. He stresses the importance of pinpointing the essence of the research topic and pairing it with an appropriate methodology. Are we, for example, thinking about the impact of a specific law or contrasting the impact of hard law (statute and regulation) with ‘soft law’ (informal rules)? Are we looking at the effects of judgments or of judicial dicta? And what do we mean by ‘impact’? Impact on the behaviour of policy-makers or decision-takers? On politicians and lawmakers? Or are we interested in a less specific question such as the effect on public attitudes of sensational cases, like the uproar sparked off by the Supreme Court’s decisions in the two so-called Brexit cases?8

Legal research throughout the common law world has been greatly influenced by American realist and functionalist legal theory,9 which forms the theoretical basis for many law-in-context and law-in-action studies of public law.10 In Chapter 3, Robert Thomas provides a prime example of this type of research with a detailed account of the processing of immigration claims of which he has an expert knowledge. He follows the process from the initial decision through administrative review and appeals on to the outcome and often-neglected question of implementation. The chapter argues for the general applicability of his approach. Many of the questions he asks are applicable to other areas of mass administration, such as social security or tax. ‘Given that administrative law and administration are inextricable, researchers need to dig deep into how government works in order to investigate these research questions.’

---

8 R (Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5 (Parliament must be consulted before the Government gives notice to the EU of intention to leave); R (Miller) v The Prime Minister, Cherry and others v Advocate General for Scotland [2019] UKSC 41 (Prime Minister’s advice to Queen on prorogation of Parliament illegal).
INTRODUCTION

2. About Administrative Law

2.1 Executive and Administration

A simple definition of administrative law might be no more than ‘the law relating to the administration’.\(^{11}\) In continental Europe, where there is a close link between public administration and administrative law, it is easy to see why this should be so.\(^{12}\) Administration is, however, barely recognised in Anglo-American constitutional theory\(^{13}\) and has never been properly defined. There is little conceptual space for the burgeoning administrative state that has dominated policy-making since the Second World War, creeping in through cracks and crevices until there had to be ‘conscious, if belated realization by the judges, politicians and members of the practising profession that there is an administrative state in Britain’.\(^{14}\)

No distinctive role is allocated to the administration; it is rolled up with Government and Monarch/head of state under the heading of the ‘executive’. The constitutional fiction that the civil servant has no identity separate from that of the departmental minister – a metaphorical pair of hands that carry out ministerial wishes\(^{15}\) – sits uneasily with the modern idea of the civil service as a neutral force with a degree of independence,\(^{16}\) and still more uneasily with what actually goes on inside government departments.\(^{17}\)

---


\(^{15}\) The principle established in *Carltona v Commissioner of Works* [1943] 2 All ER 560.


In England, where it emerged as a mere subset of constitutional law, administrative law struggled to find a place; indeed, the great legal historian, Frederick Maitland, observed in 1913 that ‘we shall look in vain for any such term as administrative law in our orthodox English textbook’. Maitland was well aware of the looming presence of administrative law and was in no way hostile to it; he was simply referring to the difficulty of disentangling the two closely related sections of public law.

In the standard LLB syllabus, the twin subjects were traditionally coupled and what was actually taught in the short administrative law section of the combined course was often restricted to the remedies available to citizens in defence of their civil liberties by means of judicial review. What is taught today is more variable, but still often limited to a few lectures on the technicalities of the application for judicial review and the Human Rights Act.

Illustrating the need to rethink, Professor Dicey’s famous aphorism that the English ‘know nothing, and wish to know nothing, of administrative law’ (for which he later grudgingly apologised) has recently been re-visited and re-interpreted by modern scholars. Yet constitutional law, which traditionally deals with the institutions of governance, is still seen as the senior partner.

In Chapter 4, Janet McLean explores this problem. Underlining the significance of history and applying a model devised by Peter Cane, she argues that, in the UK, where power is relatively concentrated and sovereignty resides technically in the Monarch in Parliament, accountability is routinely achieved by disaggregating that power. She instances judicial review doctrines that treat the executive as separate from Parliament, even when the two appear as fused when viewed politically. McLean suggests a new and potentially rich seam of scholarly inquiry, where the term ‘executive’ is broken down into its separate constitutional components and their functions are considered separately, affording a stronger basis for accountability.

2.2 Lawmaking: Scrutiny and Accountability

This is significant because, in recent years, power seems to have amassed in the hands of the executive. As an executive function, secondary lawmaking has always fallen clearly within the parameters of administrative law. Its volume has increased exponentially over the years,\(^2^3\) an increase currently accentuated by the Covid crisis and, in the UK, by the Brexit need to ‘bring regulation home’. In sharp contrast to the US, where the process of agency rulemaking is regulated by statute,\(^2^4\) the focus in English administrative law has largely been on the constitutional propriety of delegation and parliamentary efforts to stem the use of controversial ‘Henry VIII clauses’, which empower the executive to rewrite statute law. Surprisingly little attention has been paid by scholars to how executive legislation is in practice drafted and who drafts it, though the Hansard Society has recently started to fill this obvious gap by conducting a sizable Delegated Legislation Review with funds from the Legal Education Society.\(^2^5\)

The concern of Alexander Horne and Torrance in Chapter 5 is with scrutiny, an administrative law dimension of the lawmaker’s role, blighted in terms of scholarship by a general unwillingness to look behind classical constitutional doctrine, this time to uncover the participatory nature of the lawmaking process.\(^2^6\) Using the Westminster Parliament as exemplar, they examine techniques used by the executive to sideline Parliament, including the substitution of secondary for primary legislation, fast-track, emergency legislation and ‘Henry VIII clauses’. They consider the adequacy of parliamentary machinery for scrutiny and ask whether more could be done to improve the efficiency and accountability of the legislative process.

Pinpointing a further serious gap in current research and scholarship, the chapter turns to the UK’s arrangements for lawmaking by and with the

---

devolved Parliaments. The overview draws attention to a serious gap that affects devolution matters generally. There is some research into procedures at Westminster (such as ‘English votes for English laws’ bill procedure) and some discussion of lawmaking in the devolved Parliaments, but little comparison of the respective processes or overview and assessment of the arrangements for scrutiny.\(^{27}\) Is scrutiny collaborative? What are the inter-institutional relationships? And those of their staff?\(^ {28}\) What is the role of those relationships in smoothing out complexities before they arrive at the Supreme Court for resolution? These are important questions, which require a network of scholars working on a trans-territorial basis to provide satisfying answers.

2.3 Courts, Tribunals and Administrative Justice

Important as it is to acknowledge the scrutiny role of Parliament and probe its efficacy as machinery for accountability, it would be wrong to downplay the importance of judicial review. In Chapter 6, Joanna Bell and Sarah Nason point to areas of the judicial review process that remain under-researched and chart the different methodological techniques, theoretical, empirical and otherwise, that can provide a deeper understanding of judicial review. They describe the increasing sophistication of empirical research into case law and the new opportunities offered by computer science technology for collecting and analysing data.

In every legal system costs are an issue of great concern to government and likely also to prove a significant barrier to access to justice, a problem that invites sociological investigation.\(^ {29}\) There is, however, a paucity of academic literature other than case notes. The same is true of evidence and fact-finding in public law proceedings. Problems with access to evidence, disclosure of documents and fairness to witnesses in litigation with government and public authorities are very much a matter of public concern and the so-called public law ‘duty of candour’ to produce relevant evidence has been the subject of

---

\(^{27}\) Though see Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Imprint Academic 2005).


\(^{29}\) Eg, Michaela Keet, Heather Heavin and Shawna Sparrow, ‘Anticipating and Managing the Psychological Cost of Civil Litigation’ (2007) 34 Windsor Yearbook of Access to Justice 73. In the UK, there have been several official inquiries, most recently, the Jackson Review: (The Stationery Office, 2009).
complaint in both judicial review proceedings and public inquiries.\textsuperscript{30} Yet as Bell once observed: ‘Public law evidence is barely discussed in key textbooks and not taught in law schools [which] leaves us without a sophisticated and empirically accurate account of evidence in contemporary judicial review.’\textsuperscript{31}

Justice, however, has never been confined to courts or even to courts and tribunals, characterised for many years as court-substitutes but, in the UK now part of the court system. My main theme in Chapter 7 is the fanning out from a court-centred model of administrative justice to a wider and more inclusive complaints-handling model. What is the place of ombudsmen, relative newcomers with a characteristic investigatory style in this expanding administrative justice system? Is complaining a dimension of the administrative process or a form of administrative justice? The relationship of this investigatory technique with the classic adversarial common law model of justice raises a number of questions for researchers. Can the two styles be satisfactorily blended? Is the investigatory method perhaps better suited to an era of digital technology? Is formality a prerequisite of justice, necessary to mark out its legitimacy and give it authority?

The movement in research from formal adjudication to in-house complaints-handling and internal review denotes the blurring of one boundary but the chapter suggests another. There are lessons to be learned by public service ombudsmen from the practice of the ‘organisational ombudsmen’ employed to resolve disputes in the private sector. Technical lessons are being learned, but there is less discussion of informality and standards. Is there a need for a measure of procedural formality in public law adjudication? What values and standards apply to ombudsman schemes in private settings? How should private rights to confidentiality and privacy be weighed against a public right to know? These questions need to be addressed.


3. Breaking the Mould

One effect of the focus on judicial review has been to confine administrative law research within public law boundaries without addressing the question of where the boundaries lie. It is often suggested that, in common law systems, there is no distinction between public and private law. In many ways this is a court-centred conception: it means only that cases against government and public authorities are determined in a single set of courts by a single judicial hierarchy and that the principles applicable, whether public in origin and character or private law rules of contract and tort, derive from and form part of the common law. This is not the whole story. In most jurisdictions, for example, judicial review is available via a special procedure applicable only to public law bodies and, although private law principles apply theoretically to public bodies, courts often seem unwilling to apply them. Nor should we take this to be the last chapter of the public/private debate. The issue remains contestable and vigorous justifications for a public/private legal border have from time to time been mounted.32

In Chapter 8, Jason Varuhas embarks on a deconstruction of the public–private law boundary, arguing the case vigorously that the taxonomy is dysfunctional and should be disregarded both as a tool for legal analysis and as a normative concept. Although popular with judges, Varuhas argues that it has little historical pedigree in the common law and has been discredited by leading scholars. More relevant here, it is out of step with the organisation of contemporary society, economy and governance systems both inside and outside the boundaries of the nation-state. Varuhas urges researchers to focus on specific legal problems, such as outsourcing public services, and draw on insights from different spheres of legal thinking with a view to finding workable and lasting solutions for problems. He charts a path forward, highlighting several potential research agendas and suggesting how one might work towards legal solutions in areas where ‘public’ and ‘private’ entities receive differential treatment or in overlapping legal fields.

Fleshing this out in Chapter 9, Richard Rawlings provides an extended case study of public contracting as it has evolved in the UK against a political background of economic liberalism. Emerging from the shadows in the

1980s, public contracting has moved rapidly from a largely concealed area of government activity to an issue of political salience. Feared at first by public lawyers as a diminution of their influence, contract has now to be accepted on the public law scene as a standard method of public administration. Rawlings traces its evolution from an initial period in the 1990s, through a regulatory process, a period of EU pressure for a codified public procurement law to new vistas of legal and administrative control in the post-Brexit area, when public dissatisfaction over failed financial initiatives and doubts over quality of service and value for money spiralled into public revulsion during the Covid crisis at profiteering. Currently, widespread and controversial practices of outsourcing public services to the private sector and costly and often inefficient public/private partnerships are also causing mounting concern.

Rawlings calls for collaborative and creative approaches from scholars with diverse legal experience and for attention paid to different mixes of public and private law. There are plentiful opportunities for research at every stage of the extended contractual cycle and there is a need to extend research beyond formalities and turn attention to the multiple soft law interventions in contractual situations. The framework is one of rapid technological change.

In Chapter 10, Tony Prosser reflects on some of the problems facing regulators and regulatory theory in rapidly moving systems of governance. Self-regulation raises particular concerns about the degree of transparency and the process values that can be expected from private actors. Can private corporations really be trusted to regulate their own, or sometimes our behaviour? For that matter, can public authorities?

The world of regulation is a globalised world, a situation considered likely to endure. Whether regulation is a subset of administrative law on the global stage, a mechanism for introducing rule by administrative law outside the state, or a separate discipline with its own procedures and values, remain open questions. Prosser warns of a mismatch between the increasingly globalised multi-national enterprises (MNEs) and other economic actors that form the


34 See the essays in Michael Taggart (ed), *The Province of Administrative Law* (Hart Publishing 1997).

objects of regulation, and opposition at national level to any abandonment of the legal and cultural dimensions of governance. Typically, MNEs are private corporations subject to the private law of their national jurisdiction, while the public law regulation to which they might be subject does not operate extra-territorially. Can the process values associated with administrative law, and its regard for human rights, be embedded in a context so radically different from that in which it has traditionally operated? Cross-border problems multiply the public/private disjunction.

For Prosser, however, the final, and probably most important, of the challenges to be faced, is that of the degree to which values that Prosser associates with administrative law, such as transparency, accountability, due process and responsive government, can form part of the rebuilding of trust currently needed to make effective and fair regulation possible. Are there perhaps unseen side effects? Does accountability, a key value for modern governance systems, perhaps lead to defensive administration or transparency diminish trust in government? The relationship between regulation and administrative law is a complex one and perhaps public law scholarship, with its roots in doctrinal analysis is too reactive. There is a need to think more experimentally about these disturbing problems.

4. Challenges and Opportunities

Those who live in western democracies have in recent decades experienced several different models of governance: a centralised administrative state with a planned economy, economic liberalism ushering in privatisation and a managerial state that ‘steered but did not row’, a fragmented state, defined by agencies and regulation, a loosely internationalist model exemplified in the European Union with a movement back to a nationalist state shaped by populist ideology. There was one sharp paradigm shift at the start of the 1980s with the move to privatisation and we may be on the cusp of another brought on by economic downturn, global pandemic, the rise of populism and rapid

technological change, all of which challenge and perhaps entail change for administrative law.

4.1 Digitalisation: friend and foe

Administrative law scholarship was slow to catch up with the rapid rise of new technology in public administration. At first largely overlooked, then welcomed as an aid to efficiency and effectiveness, the impact of new technology began to be noted and a critical note crept into the legal literature; it was felt that the many ways in which digital technology challenges administrative law were not being sufficiently considered. Paul Daly, Jennifer Raso and Joe Tomlinson take up these issues in Chapter 11 with a detailed look at three areas of administrative law that have recently been the subject of rapid digitalisation: algorithmic decision-making and online justice are on the rise, while routine administration is rapidly being digitalised.

Daly, Raso and Tomlinson warn that administrative law is falling behind; it is failing to take note of and deal with ensuing problems. As applications for visas, vehicle licences, pensions and welfare benefits move online, for example, they are often accessible only online or via a mobile telephone app. This raises questions: Are some vulnerable people locked out of the system? Is a backup advice system needed and a reliable helpline provided? Easy reassurances from government and private providers need confirmation from independent empirical data.

Again, algorithmic decision-making is now fairly common, though the public may not be aware of the full extent of its use, and its legal problems are beginning to surface, generally and in courts. Who is responsible when an algorithm breaches important administrative law principles or violates human rights? What is the impact on access to justice? And are existing judicial review principles relevant and sufficient? If, as many administrative lawyers believe, all public administration, however delivered, should conform with fundamental administrative law values, what are these fundamental values, where do they

come from and who is responsible for applying them? There is a plethora of questions here for the eager researcher.

In the case of online justice, it was easy to accept new technology as promoting access to justice in fringe areas such as legal advice or digital form-filling. These fringe areas should not be neglected. Crowdfunding, for example, is widely viewed as a beneficent populist response to problems of declining legal aid. It could hardly have taken off without social media but how exactly does it function and what are its implications? Who directs the course of the proceedings, who can authorise settlement and what happens to leftover funds if a case is settled? Does the practice require regulation and, if so, how should we go about it?

Under the weight of Covid, videoed evidence statements and online hearings are beginning to be rolled out rapidly. They go to the quality of the judicial process, which is an important constitutional right and ought to be the subject of careful evaluation. We need to know more about the experience of real-life users and the impact on them of online hearings before it is too late to row back.

4.2 The outside world

Globalisation poses major problems for administrative law, which this short book can only tackle tangentially. In global space the familiar hierarchies and institutions of the nation state in which administrative law developed have given way to non-hierarchical systems of multi-level ‘governance’ in which the public and private are merged and states compete for power with powerful transnational corporations. The public–private law barrier has collapsed and many public functions institutionalised at national level, notably lawmaking, are carried on in global space by heterogenous networks of commercial, public, autonomous and semi-autonomous entities and agencies. Administrative law scholarship has travelled a long way since Alfred Aman warned that its core values of accountability, due process, transparency and the rule of law, pasted with some difficulty into the administrative law of liberal societies, were


threatened by globalisation. To take ‘control’ of global actors and hold them ‘accountable’ in the absence of established and recognised political and judicial institutions is a mammoth task for administrative law to undertake, requiring much imagination. It requires a research agenda, and perhaps an administrative law, separate and different from the national administrative laws to which we have grown accustomed.

In Chapter 12, Joana Mendes tackles this problem at the level of deep theory, calling for a new theoretical basis for EU administrative law. At supranational level, only the European Union can boast a developed system of administrative law, operational on a transnational basis across EU administrative space. Structurally, the EU is not a state but a system of multi-level governance or perhaps a system of network governance built up on networks as the building bricks of its public administration. Its legal system is, however, normative in character, essentially state-centric and integrationist and built on general principles derived from the common constitutional principles of its Member States, shaped and where necessary re-shaped, by the powerful European Court of Justice (CJEU). Mendes credits normativism with the creation of an administrative law responsible for bringing about an administrative rule of law in the European Union, but questions the heavy reliance on the concepts, practices and institutions of national administrative laws. In a multi-level administrative system, the core objectives of the public administration are likely to be cooperation, coordination and communication, and a key component in its administrative law is likely to be ‘soft law’ or ‘rules’ ‘laid down in instruments which have no legally binding force as such, but are nonetheless not devoid of all legal effect’. Global space and multi-level governance systems are home territory for soft law, the status of which has never been definitively decided – perhaps it is incapable of definition.

Arguing that a new approach is necessary as the EU has moved into policy areas that were until roughly a decade ago ‘core state powers’, Mendes provides an answer in the institutionalist theory of Italian jurist Santi Romano, better suited in her view to the EU constitutional structure. Institutionalist theory is

pluralistic; it leaves space for a plurality of legal systems in which the state is only one. It would therefore provide a valuable counterweight to the prevailing integrationist mindset of the EU institutions – and perhaps indeed a basis for an administrative law in global space.

In conclusion, no one model of administrative law can be valid across the world and across the centuries and this volume, with its pluralist ethos, cannot provide a roadmap for future administrative law research any more than it can foresee the future of administrative law. At one end of the scale, the doctrinal analysis that dominates conventional legal scholarship in the common law world is both necessary and valuable but there is also a need for innovation and imagination. Legal scholarship is often inward-looking; lawyers talk only to lawyers while technologists talk only to fellow technologists. Lawyers may fail to understand technology; technologists, who often hold the key to legal problems, may fail to fathom the niceties of legal language and discount the importance of legal values. In this age of new technology, a very real barrier is created by failures to communicate and there is a great deal of important work to be done in translation.

Albert Meijer, author of a recent article drawing attention to the increasing use of ICT in public administration, suggests that most public administration scholars ‘still do not give ICTs a prominent position in their research into modern developments in public administration’.45 Much the same could be said until recently of lawyers. We should welcome and foster the inter-disciplinary teams and research communities that are beginning to come into being, through which lawyers can contribute to and borrow from other disciplines. Meijer also expresses his regret at the limited success of public administration researchers in influencing contemporary debates on democracy, institutional arrangements, and new policies. He advocates strategies to make other scholars realise that ICTs do indeed transform government in crucial – and often unexpected – ways. I would take this much further. Scholars should not only seek to engage in discourse with other scholars but to communicate with policy-makers. We draw from the public sector to carry out our research, Good research is a contribution to good public policy.