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The Intrusion of Private Law ln Public Administration

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The Intrusion of Private Law in Public Administration

T. G. Ison *

Introduction

The title of this panel is "Private Law — Public Law: Where Lies the Frontier". Thus the ostensible objective is to identify the boundary between private law and public law. Obviously someone is kidding.

To accept that challenge would be like accepting an appointment to an inquiry commission established on a Pacific island to identify where the boundary lies between two tribes, when the evidence is that both tribes are nomadic, each covers the whole island in its wanderings, and neither claims any sector of the island as its own nor recognizes any sector as belonging to the other tribe. Moreover, there has been interbreeding between the tribes for at least a hundred years, and no reason is stated why a boundary is required.

Rather than dwelling on perimeters or definitions, this paper attempts to explain some of the influences of private law in public administration. For this purpose, private law might be described roughly as that which covers transactions and inter-actions between individuals, particularly in regard to property, commerce, and the family. The areas of public law and administration of concern in this paper relate to the structure and operation of government, including the regulatory and service roles of government, such as social insurance, transport and communications, schools, hospitals, environmental control, and occupational health.

The area of criminal law is not covered in this paper.

Legal Education

The influence of private law might be seen as beginning with the significance assigned to it in legal education.

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Twenty years ago, the typical law faculty curriculum was heavily weighted in the traditional private law subjects. Courses in public law were certainly included. For example, constitutional law held a central place, and there were generally courses on administrative law, labour, and tax, although these would sometimes be optional. It was common to find no courses at all in any field of social legislation. The offering in public law was impoverished compared with the range of private law courses that were available, and usually compulsory, particularly in property, commercial and financial subjects.

In recent years, law faculties have developed a range of courses in various areas of public law. But these still tend to be seen in the profession as frills, and the law societies still press the universities to regard private law subjects as the hard core of legal education.

The same emphasis appears in the articling system. The type of articling traditionally accepted by law societies required service with a lawyer in private practice. Here again there have been changes. In British Columbia, for example, students are now allowed to article with lawyers employed in government departments, or by boards or commissions. Unfortunately, however, this appears to have resulted from a shortage of articling positions in private practice; not from a growing recognition in the profession of the importance of public law. Thus a student who articles in the public service is still required to show that his articles include some exposure in major areas of private law. But there is no corresponding requirement that a student articling in private practice must show a comparable exposure in major areas of public law.

It is interesting to consider why this heavy emphasis on private law came about, and why it persists. One influence no doubt was the demand for legal services by those with the money to pay fees. Much of this demand related in the early development of the common law to the administration of property, and later to commerce and finance. But this does not explain why our law faculties were unable or unwilling to train lawyers for salaried positions in the public service, or for the roles that they often undertake as elected representatives.

A possible explanation for the preponderance of private law might be that it reflects the influence of the Establishment on the legal profession, and on legal education. But this hardly seems credible, at least not as a decisive factor. Major corporations may dislike a great deal of regulatory legislation, but they probably have as much interest as anyone else in having an available supply of lawyers trained to understand it.

Another possible explanation might be seen in the goal orientation of contemporary society. The financial dependency of the communications media on advertising may seem to result in the promotion of maximum consumption as the paramount goal of human existence. It would be consistent with this that a support role in production and marketing could seem more virtuous for a lawyer than a role in public administration.

In considering this hypothesis, it is interesting to compare our curricula with the curriculum of law students in another society where the goal orientation may have been different. Roman law at the time of its climax and codification in the Eastern Empire provides an example. The Institutes of Justinian purport to be a basic student text "comprising the first elements of the whole science of law".[1] The prooemium concludes with an Imperial statement of the objective of legal education.

> Receive then these laws with your best powers and with eagerness of study, and show yourselves so learned as to be encouraged to hope that when you have compassed the whole field of law you may have ability to govern such portion of the state as may be entrusted to you.[2]

One might expect that the curriculum for this elite corps of potential governors would contain mostly public law. But it was not so. The Institutes that follow contain a heavy preponderance of private law, and there is very little on public administration.

Thus while contemporary goals or power structures may have some relevance, they do not seem to provide any obvious, convincing or total explanation for the preponderance of private law. Three other factors seem more significant.

First, there may be a natural tendency for the perimeters of any discipline to become defined by the extent of available literature, rather than by philosophical analysis or by any pragmatic assessment of societal needs. In law, it was the process of litigation that generated, directly or indirectly, the most accessible literature in a fairly uniform style and covering a broad spectrum of subjects. This helps to explain not only the choice of subjects included in a law faculty curriculum, but also the choice of topics within each subject, and the choice of materials for study. For example, the materials for a course on the law of contracts typically do not include contracts, nor do they include much about the action for debt, which is the court remedy most commonly used for breach of contract. The typical contracts course

1. *Institutes of Justinian*, English translation by J. B. Moyle, Oxford, 1913, p. 2.
2. *Ibid.*

has consisted, almost exclusively, of a study of appellate decisions in actions for damages. Similarly constitutional law has often consisted almost exclusively of federalism, while courses on administrative law have often contained little except judicial review. This structure was reinforced as the "case method" became the conventional wisdom of legal education so that judgments in litigated cases were revered as having a pedagogical value superior to any other kind of material.

Thus the preponderance of private law may well have resulted primarily from the abundance of literature that has sprung from *lites inter partes*; and in shaping the curriculum around that literature we may simply have followed a natural propensity to do things the easiest way.

The second factor relates to the legal profession and the choice of forum. Courts of general jurisdiction have advantages for lawyers compared with other tribunals. The courtroom is the lawyer's own arena. It is here that the lawyer can play his Patrician role, exchanging with the judge in a formal manner the awesome jargon of his profession. It is here too that a range of issues and problems are processed through an intricate procedural machine, the mastery of which is the lawyer's demonstration to his client of the need for his services.

Proceedings in specialized boards or commissions are different. Unless the lawyer deals with the particular tribunal regularly, he may be on unfamiliar ground. Not only might the client be more familiar than the lawyer with the subject matter of the dispute, and with the specialized branch of law, but he may also be more familiar with the procedures of the tribunal. Even if the lawyer is clearly able to present the case better than could his client, he might still run the risk of appearing inept compared with a lay advocate acting for another party. Other features of the process, such as the tribunal being self-motivating, or discussing policy more overtly than is usual in the courts, can demand of the lawyer a kind of presentation different from that to which he is accustomed, and sometimes one that can be beyond his ability.

The legal profession has an interest in reducing as many issues and disputes as possible to a common forum and a common procedure, and this interest is threatened by the proliferation of administrative tribunals.

> ... it requires no great effort of the mind or will to enable a lawyer or a judge to persuade himself that a development which removes disputes from the courts, which will provide a mode of adjudication wherein the practising lawyer has so far had but little part, in which a rival technique

> and a new jurisdiction will outstrip the waning popularity of the established courts, is a Machiavellian tendency which the public good requires to be stamped out like an evil pest.[3]

The argument here presented does not deny the value of courts, nor is it intended as a judgment on the merits of other tribunals. The point being made is that regardless of the merits and regardless of the relative value of various tribunals to other sections of the community, lawyers have an interest in elevating courts of general jurisdiction and disparaging other tribunals; and this interest may account for some aversion in the legal profession to many areas of public law.

A third factor may be the limitations on human capacity to recognize and respond to the need for precautionary measures. A tragedy or misfortune that has already occurred has a victim — an identifiable person who may have the money and personal incentive to pay for professional help, or on whose behalf the urgent assistance of government might be sought. But a tragedy or misfortune that has not yet occurred may have no victim yet identified, and hence precautionary measures may be unsupported either by private fees or political pressure. Whether or not this is the explanation, there appears to be something in human nature, or in human organization, that results in greater rewards and incentives for those who respond to alleviate affliction than for those who take precautions to prevent its occurrence. Thus in faculties of medicine the emphasis is on curative rather than preventive medicine. Similarly in faculties of law the emphasis is on dispute resolution rather than the orderly administration of public affairs.

The remainder of this paper is concerned with the subsequent significance of the preponderance of private law in legal education.

Conceptual and Procedural Limitations of Private Law

Concepts and procedures usually regarded as fundamental in the common law evolved out of litigation. In many areas of public law, however, they are often inapplicable or of more limited use. Examples include the distinction between law and fact, the distinction between evidence and argument, the distinction between parties and non-parties, and the single-event trial. The role of the adjudicating tribunal can also be different. In private law, the role of the court, geared to the *lis inter partes*, is generally limited to adjudication by a way of

3. W. A. ROBSON, *Justice and Administrative Law*, 3rd ed., 1951, p. 422.

response to the presentation made by the parties. By contrast, the role of an administrative tribunal commonly includes investigation and other self-initiated measures as a prelude to decision.

Through the concentration in legal education on the concepts and procedures of the *lis inter partes*, lawyers have usually been trained in only one system in depth, though with a mention of others. Consequently the profession has not developed the procedural flexibility to function willingly and effectively in different arenas.

Another consequence is that in many areas of law, the legal profession has avoided the role of adjudication, leaving it to others who may not have the disciplinary background for deciding the issues of law and policy involved. Examples of this can be found in relation to medical services and hospital facilities. Decisions must be made frequently about the termination of life, the survival of seriously deformed babies, blood transfusions, organ transplants, and the allocation of limited resources to patients with competing needs. These decisions involve questions of law and policy relating to vital issues of life and death itself. Yet we leave the decisions to the medical profession as if they involved purely medical questions. Thereby the criteria by which the decisions are made are obscured from public view and insulated from review through the democratic process. Having such decisions, or some of them, made by lawyers would at least distinguish medicine from policy, and it would also get the criteria of decision into the open.

If a public or legislative debate ever occurred on whether all or any of these questions should be decided by doctors, lawyers, or others, it could well be that a consensus would emerge in favour of all such decisions being made by doctors. The point of the argument, however, is not to demonstrate that such decisions ought to be made by lawyers or by others. Rather the point is that the legal profession has failed to offer an alternative. Hence such questions have come to be decided by the medical profession not because of any public or legislative choice, but by default. By concentrating so heavily on the *lis inter partes*, the legal profession has not developed the conceptual or institutional framework that would make the decision of such questions within the legal system a realistic possibility.

Legislators have not been offered the option of using, if they so wish, the legal process for a wide range of decisions; and this has occurred for no better reason than that the decisions do not involve a *lis inter partes*.

The Visibility of Law

It is surely a basic principle of any civilized system of law, particularly in an urban democracy, that the laws by which people are governed must be published for all to read. Only to a limited extent, however, is this principle followed in our public law.

However paradoxical it may seem, most of our private law is available to the public, or at least to the legal profession, while the bulk of our public law is secret.

Although the publication of law has been debated episodically through the centuries, a comprehensive system for publication has never been evolved. In private law, the judgments rendered in litigation have provided a record of principles and rules. The synthesis of these in digests and textbooks has created the working manuals of private law.

In public law, there is nothing comparable. There are the statutes, but generally they provide only the skeletal framework. In some areas, such as labour law, there are also recorded decisions and textbooks. But in many areas, the working law of the system is contained in secret directives or secret manuals. In unemployment insurance, for example, the Commission issues, in addition to the regulations, office directive manuals of practice and principles to be applied in the adjudication of claims. These manuals are so secret that copies will not even be supplied to provincial officials working in related areas. Similarly in most provinces, workers compensation claims are adjudicated by reference to rules contained in secret manuals or secret directives. Another example is in the municipal taxation of property. The criteria for evaluation and the worksheet used by the assessor are commonly treated as secret documents, and a request by the tax-payer for copies is refused.

The same is true with regard to much of the law generated by major corporations. For example, the effective rules relating to repairs under automobile warranties are contained in secret communications from automobile manufacturers to dealers.

The problem of secret law has been considered in recent years, at least at the federal level. The *Special Committee on Statutory Instruments* recommended:

> ... that all departmental directives and guidelines as to the exercise of discretion under a statute or regulation where the public is directly affected by such discretion should be published and also subjected to parliamentary scrutiny.[4]

4. *Special Committee on Statutory Instruments*, Third Report, Canada, 1968–1969, p. 29.

But legislation requiring the publication of statutory instruments is not likely to solve the problem. Such legislation does not extend to law which is not generated under statutory powers. Also in most jurisdictions, the definition of the regulations required to be published is sufficiently narrow that officials have little difficulty in promulgating rules in a documentary form that will lie outside the definition. Most important of all, even when the rules are of a type required to be published there is usually no effective sanction for non-compliance.

The only sanction for non-publication is that the rules may not be enforceable in the courts as regulations. Thus publication is only required as a practical matter if it is necessary to enforce compliance by the public at large, or at least by some people outside the system. As long as the body of law can be implemented entirely by people within the system, the rules can be and commonly are contained in secret manuals or directives.

The objections to secret law are, of course, profound. First, it can be difficult for the people interested in a pending decision to submit evidence or argument if they cannot check what is relevant because the applicable criteria are not published. Secondly, any right of appeal that might be provided can be difficult to use if people cannot check whether established criteria have been followed. Thirdly, reform through the democratic process is impeded if those who might advocate or discuss reform are not allowed to inform themselves of what is and why. Fourthly, if rules of a quasi-legislative nature are not published, any violation of statute law is concealed, and there is no check through publicity on the legality of the rules. Fifthly, the absence of published criteria can facilitate arbitrariness, or the infiltration of improper criteria. Sixthly, the failure to publish manuals and directives is often co-extensive with a failure to give reasons for decisions. Together, these failures negate the value of publicity for quality control in public appointments. The absence of any evidence that those responsible for decisions are able to write can also mark the absence of any assurance that they are able to think.

Published criteria and reasons for decisions written by the tribunal members, or the other public officials responsible for the decisions, are essential to ensure the appointment of people who have the ability to think, to analyze, and to decide in a rational manner.

Remedies

The discussion under this heading relates to the non-fulfilment of legal obligations, or the lack of adequate performance, by public officials or tribunals.

Consider the example of a provincial statute relating to the construction and use of public buildings, the purpose being to prevent danger to the public from fire. A fire precautions officer is appointed in each city to enforce the regulations made under the Act.

In city A, there is an average of one complaint a month to the city or provincial government about X, the fire precautions officer. The complaints are that he is "too demanding", "unreasonable", "against construction", or "trying to drive us out of business". There are never any complaints about Y, who is the fire precautions officer in city B.

Consider:

1. Which of those two officials is most likely to be functioning efficiently in achieving the objectives of the legislation?
2. Which of those two officials is most likely to be supported in his role by the legal structure?

If X is going too far, there are legal and political remedies that might be invoked by an aggrieved property owner to restrain any abuse of power. But if Y is suffering from inertia, or maintaining popularity by adapting his decisions to the wishes of property owners, there are generally no legal or political remedies likely to be invoked by the potential victims of fire (though it *might* be different after a fire has occurred). This example will be referred to in connection with some of the points that follow.

As Maitland explained,[5] the substantive rules of the common law emerged out of a system of remedies and procedures. Hence in private law there is a system of analytical procedures for achieving remedial judgments. Only to a more limited extent is this true in public law.

In several areas, there are strong remedies available to public officials to enforce the performance of obligations by citizens. But a comprehensive system of public law remedies to enforce the performance of obligations by public officials, whether elected or appointed, has never been developed. Insofar as remedial procedures are available against public officials they have tended to be not public law remedies designed for the achievement of public policies, but the intrusion of private law concepts designed for the protection of private rights. This can be illustrated under the sub-headings that follow.

Judicial Review

Here the performance of a public official or administrative tribunal is challenged and tested not by reference to the achievement

5. F. W. MAITLAND, *The Forms of Action at Common Law*, Cambridge U.P., 1941.

of the objectives for which the office or tribunal was created, but by reference to jurisdictional limitations, and by reference to the extent of compliance with procedural concepts evolved in the context of the *lis inter partes*. Thus through judicial review of administrative action, we have institutionalized the intrusion of private law concepts into public administration. There is no corresponding system of administrative review of judicial action.

Another limitation on the value of judicial review is that the courts lack the executive authority to make their decisions effective. Thus if the area is one in which the representation of parties by lawyers is not normal, the official or tribunal can follow the court order in the particular case in which judicial review has been sought, but still continue in the same old way on every other matter.

Certiorari and Prohibition are essentially negative restraints on official action. They may have some value as safeguards against the infringement of private rights by any abuse of public power. But they do nothing to compel the proper exercise of power by public officials for the achievement of public policies.

Mandamus is a positive remedy designed to bring about the performance of a public function rather than to restrain excess. But it too has much the character of a private law remedy. Before mandamus is issued, there must be an applicant, and he must be someone with an interest in the performance of the official duties which is greater than the interest of the public at large.[6]

There is a similar problem with declaratory relief. The courts have recently broadened the range of circumstances in which a citizen can question the validity of a statute. Thus a citizen with no status except as a federal taxpayer may, at the discretion of the court, have status to impugn the validity of a federal statute.[7] But again, it is a negative check on the functioning of government. It is doubtful whether the court would allow an action against the refusal of a government to legislate on the ground that it has no legislative jurisdiction, and even more doubtful whether anyone would ever attempt such an action.

Returning to the example of the fire precautions officer mentioned above, judicial review might have some use in restraining any excess of authority by X. But it has no potential for inducing performance by Y.

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6. S. A. DE SMITH, *Judicial Review of Administrative Action*, 2nd ed., 1968, pp. 571-574.
7. *Thorson* v. *Attorney-General of Canada*, [1975] 1 S.C.R. 138.

Ombudsman

While the institution of an ombudsman can no doubt be helpful to some individuals, it does not show much potential as a quality control device in the performance of public officials or public bodies. Indeed, it can be more of a palliative than a public law remedy.

First, the jurisdiction of an ombudsman, at least in common law countries, has generally focussed on the performance of public officials who exercise only slight to moderate degrees of power. The most powerful people in governing roles, such as ministers of the crown, the chief executives of major corporations, the proprietors of the communications media, and the judiciary, are not usually made subject to the surveillance of an ombudsman.

Secondly, the role of an ombudsman is designed to be or tends to become that of an official who processes complaints against other public officials or public bodies. That may be politically expedient, and it may also be useful. But it is not what is needed to monitor the performance of public officials in the achievement of public policy objectives. Thus an ombudsman can be seen not as a remedial institution designed in a public law context, but rather as another example of the intrusion into public administration of a private law concept — the need for a grievor.

Consider again the example of the fire precautions officials mentioned above. If anyone is complaining to an ombudsman, it is likely to be a property owner seeking to induce official X to relax his enforcement. The potential victims of fire are unlikely to produce a grievor, and hence an ombudsman is unlikely to discover any laxity of official Y.

Another example might be seen in the administration of welfare benefits. A welfare department in a particular jurisduction may have established a system of appeals to deal with complaints, or there may be a statutory system of appeals. To keep his case-load within manageable limits, an ombudsman may well insist that he is unavailable to welfare applicants until the appeal procedures have been exhausted. But consider where, among the total universe of welfare applicants, the greatest incidence of injustice is most likely to be found. Would it be among those, perhaps the more aggressive personalities, who have been through the appeal system, had their grievances found unjustified, and now wish to appeal beyond? Or would it be among those, perhaps more timorous souls, who have accepted an adverse decision made at first instance, perhaps because they accept without question any decision of anyone in authority? Even people who are normally self-confident or demanding can

become quiescent when afflicted by disability, unemployment, marital desertion, or other problems of welfare applicants. If an ombudsman is needed in this area it is surely for spot checking at his own initiative a sample of cases where no complaint has been made, and thereby reviewing the system, rather than for processing the remaining complaints of those who have already appealed. It is also by proceeding in this way that an ombudsman is most likely to spot any maladministration resulting in over-payment as well as any resulting in under-payment.

The institution of an ombudsman is surely a public law remedy only to the extent that he acts upon his own initiative, using cases selected by random or special formula as a vehicle for systems reviews. If an ombudsman acts only in response to complaints, and particularly if he acts only in response to the complaints of those who have already appealed elsewhere, the institution is then analogous to a private law remedy; another example of the old common law maxim — the squeaky wheel gets the grease.

Other Remedies

Other legal remedies are of course sometimes available against public officials or public bodies, particularly tort claims and criminal prosecutions. But again they are unlikely to be invoked except in situations of excess or abuse. They are not broad and useful remedies against inertia or under-achievement. Occasionally a tort claim is brought against a public official for negligence. But the claim is normally to recoup a private loss after the harm has been done. The action for negligence is not a broad remedy for compelling the performance of public duties aimed at public policy objectives.

Other Pressures

The intrusion of private law concepts into the remedies affecting public administration might be seen as achieving a desirable equilibrium if it operated to counterbalance pressures that public officials are otherwise under. But that does not appear to be the case. It may be useful here to itemize some of the other pressures.

One is the financial controls. It is normal in government operations to have a system of expenditure approvals with a hierarchical structure in which the level of the decision depends on the amount. Thus proposals by junior officials to undertake activities that involve unusual expenditure must go up the line for approval. But a lapse into inertia requires no such scrutiny.

The external audit probably operates in much the same way. The inspection by an auditor-general may well involve a scrutiny of whether the accounts are in order, expenditures approved, assets controls operating, and a proper system of tendering for contracts is being followed. But it is unlikely to include any appraisal of how far the department or agency is achieving its policy objectives. Here again, the scrutiny focuses on routines to check for excess or abuse, but not to check for under-achievement.

If there is lobbying pressure, this too may be more likely to coincide with private law remedies than to counterbalance them. To revert to the example of the fire precautions officers mentioned above, lobbying pressure is more likely against official X than against official Y. Social sanctions would tend to operate in the same direction, for it is surely more likely that X would be unpopular among some of the citizens of A than that Y would be unpopular among any of the citizens of B.

The pension plan can be another influence. Government pension plans familiar to me make no provision for vesting, so that an employee who leaves the government under the age of 45 or with less than 10 years service receives no benefit at all from any employer's contribution. For those who remain until retirement age, the pension is calculated by reference to salary during the last five years. These provisions are a heavy penalty against short service; and for long-service employees they can put a premium on being inoffensive, even though that may coincide with being unproductive.

With regard to regulated industries, pressures against achievement can also result from peer-group affiliations between those who are supposed to be regulating and those who are supposed to be regulated.

It may be helpful to illustrate the relationship of private law remedies to other pressures by a specific example. Consider the pressures operating on a worker's compensation board in relation to claims. Employers and employers' organizations may be pressing for a reduction of claims and administrative costs. Workers and unions may be pressing for greater claims payments and better services. Because of the principle of collective liability, the employers' lobbying is most likely to relate to the aggregate, while the attention of workers and unions is more likely to focus on a small minority of individual claims. If any board lacks the integrity, understainding or ministerial support to resist the lobbying, it can accommodate both pressures by adopting different standards for different levels of adjudication. At first instance, decisions can be based on the face of the injury reports and

reached in a peremptory way, following the general principle that if a claim looks at all doubtful, reject it and see if the worker complains. Not only will this minimize the total payment cost of claims but it will also minimize the administrative costs. For those workers who complain, a proper inquiry can be commenced and a proper adjudication can be made in the appeal system. The impropriety of this should be obvious; so too should its adverse affect on medical treatment, on the motivation and confidence of the worker, and on his rehabilitation.

Proposals sometimes emerge from among the legal profession that would aggravate rather than alleviate the problem. One is that after a final decision on appeal within the board, a further review of claims decisions should be possible outside the board, either by appeals to courts or by an ombudsman. Another proposal sometimes heard is for legal aid in the appeal process. But to the extent that any board is succumbing to the pressures described above, these proposals would tend to give an appearance of legitimacy to the system, and to consolidate rather than eliminate the problem. Remedies to counteract pressures of this kind are not going to be found if the private law procedures of the *lis inter partes* are perceived as the source of inspiration. The need for outside surveillance to maintain the quality of decision-making in worker's compensation is not for a further level of appeal, but for automatic inspection to monitor the quality of decisions made at first instance.[8]

Conclusions

The approach of the legal profession to public administration has been burdened by a private law background, particularly a private law procedural background. One result is that the profession has not shown the procedural flexibility to develop remedies to assure the performance of public officials in the achievement of public policy objectives. By focussing on abuse and excess, we have tended to avoid the proper exercise of public power. In so doing we have developed remedies that tend to reinforce rather than counterbalance the pressures that public officials are otherwise under. These remedies and pressures constitute a system of checks and safeguards against almost everything — except under-achievement.

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8. In British Columbia, a step in this direction was taken in 1974 by establishing outside boards of review as the first level of appeal, with the Commissioners of the W.C.B. as the final level.

The Preparation of Social Legislation

The preparation or amendment of modern social legislation has requirements very different from the preparation of statutes amending the common law. The need has sometimes been met, for example, by establishing a special group to prepare a particular statute. But no thorough and continuing machinery has been established for the preparation of social legislation. Hence it is still normal to find substantive rules being enacted without implementation machinery or useable sanctions.[9]

It may be helpful to itemize what is needed in the preparation of regulatory or service legislation, and then to compare this with what legislative counsel normally provide. The preparation of such legislation may require that at least the following be considered, though not necessarily mentioned in the statute.

1. Identification of the objectives;
2. The choices of methods — research, information, persuasion, direction;
3. The qualifications, selection, training and terms of appointment of key personnel;
4. The regulatory requirements, or the machinery for establishing the requirements;
5. Administrative structure, procedures, sanctions, and adjudication;
6. Detection — how will non-compliance come to the attention of someone with an interest or duty to invoke the sanctions?;
7. The resources required for implementation, and whether the government is willing to allocate the resources, including a review of monetary and non-monetary costs;
8. Identification of the political costs of implementation, and whether the government is willing to pay the political costs;
9. What are the most powerful interests opposed to the legislation, what form is the pressure from those interests likely to take *after* enactment, and what is required to counteract the pressure?

It is not suggested that legislative counsel should always take the initiative in raising the relevant questions, or in having them resolved. But if he does not consider them himself he ought surely to itemize questions of this kind, and try to ensure than they have been considered elsewhere; and he should certainly have the dexterity to

9. E.G. *Consumer Protection Act*, S.B.C., 1967, Ch. 14, Part II.

accommodate the answers in his drafting. Otherwise he can be producing useless and wasteful legislation.

The role of legislative counsel is, however, usually perceived as much more limited and technical. He will usually design the structure of a statute, perhaps aiming at consistency with other Acts. He will consider the logical sequence of the material, its arrangement into sections, and other points of organization and drafting technique. He may translate his instructions into language that has been well defined, either in other statutes or in litigation.[10]

This limited perception of the role of legislative counsel is reflected in government salary structures. The preparation of legislation ought surely to require the highest standard of legal ability. If it includes considering or checking on questions of the kind listed above, it is certainly more demanding than adjudication. Yet the salaries of legislative counsel are generally below those of the judiciary.

If the expertise to cope with questions of the kind listed above is not provided elsewhere, any failure of legislative counsel to provide it can result in legislation that is useless, misleading to the public, and a waste a resources. If the expertise is available elsewhere, however, this can result in conflict between legislative counsel and the deputy minister, board chairman, or other official responsible for preparing the legislation. The latter will probably want to use the language of the ordinary public and the concepts of the department, service, industry or tribunal concerned. The former may prefer to use the language of the courts, however unlikely it is that the Act will be interpreted in that forum, and however much this may make it unreadable to those who are supposed to comply with it.[11] Here again, the dominance of the *lis inter partes* in legal education can be seen as creating a perception of the lawyer's role that tends to undermine rather than enhance the achievements of public administration.

If such a conflict occurs between legislative counsel and those responsible for the preparation of social legislation, it can be one of the influences in favour of skeleton legislation, leaving as much as possible to be determined by regulation.

The design of the regulation-making power may also reflect a desire to avoid the negative influence of private law on legislative

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10. For a perception of the role of legislative counsel, see E.G.: *E. A. DRIEDGER, The Composition of Legislation*, Queen's Printer, Ottawa, 1967.

11. In one example that came to my attention, legislative counsel objected most persistently to the use of the word "people" on the ground that this word had not been judicially defined. (Everyone else seemed to know what it meant.) Legislative counsel preferred "persons other than a corporation".

drafting. The authority to promulgate regulations under a statute is usually conferred upon either:

A. The Governor or Lieutenant-Governor in Council;

or

B. A minister, board or commission.

Of course the choice between A or B might reflect a judgment on the desirability of having the regulations passed by the cabinet. But in at least some jurisdictions, there is a government rule that regulations must be prepared or approved in the Attorney-General's office if they are to be promulgated by order-in-council. This is not required for other regulations. Hence the choice of B rather than A may reflect a desire to avoid the Attorney-General's office rather than a judgment on the merits of promulgation by the cabinet. It may reflect a concern on the part of the responsible minister or official that regulations in an area of public law should not be nullified or mutilated by translation into the vocabulary and concepts of private law.

It could be interesting to illustrate the influence of private law in the preparation of social legislation. But there is an obvious difficulty in citing examples of weaknesses in legislation that are clearly and only attributable to the influence of private law. Influences are harder to identify than inputs, and the preparation of any social legislation involves the concurrent operation of such a variety of influences, many of them obscure, that it is hardly possible to ascribe consequences to one of them. It is not difficult, however, to find examples of weaknesses in social legislation that are explicable as the result of an intrusion of private law thinking, though other explanations are also credible.

One such example is the development of consumer protection bureaux in the U.S. and Canada during the last 20 years, following the New York model. These are the bureaux that recover money for aggrieved consumers and issue or obtain prohibitions against predatory practices in marketing. But they do not operate or concentrate on any program of detection and penal sanctions that might have deterrant value to prevent fraudulent or predatory practices from arising in the first place. It is at least arguable that the legislation establishing these bureaux is more likely to promote than to prevent predatory practices in marketing.

Another example is in the licensing provisions of the *Consumer Protection Act*[12] of Ontario. The procedural framework is modelled

12. R.S.O. 1970, Ch. 82.

on the litigation process rather than being designed to meet the policy objectives of the Act.

The *Environmental Contaminants Act*[13] of Canada contains another example. The schedule to the Act is intended to identify harmful contaminants the emission of which is prohibited or restricted. There are eleborate procedures and safeguards in the Act to protect private interests against the unwarranted inclusion of a contaminant in the schedule. But there are no corresponding procedures or safeguards to protect the public interest against the unwarranted omission or deletion of a contaminant.

Administration and Adjudication

Even after its enactment, social legislation can still be retarded by the intrusion of private law concepts. In workers' compensation, for example, the essence of the plan was to abandon liability for negligence in favour of a system of compensation for employment injuries regardless of fault. Yet time and again lawyers, steeped in the law of tort, have decided or advised that a claim be denied for reasons which, when analyzed, amount to nothing more than that the worker was at fault.[14]

The same influence can be seen in the promulgation of regulations. For example, the *Accident Prevention Regulations* of the Worker's Compensation Board (B.C.) provided for an appeal to the Commissioners against any compliance order, or the imposition of a penalty.[15] But there was no provision for any appeal against a failure or refusal to issue an order or to impose a penalty.[16]

In the administrative procedures of the same Board, the influence of private law, or of other pressures on administrators to prefer private interests over public policies, could be seen again. Where an accident prevention officer discovered serious violations of the regulations, he was required to explain and justify any recommendation that a sanction be invoked. But he was not (prior to 1974) required to explain or justify the absence of such a recommendation. Here in the administration of a statute, enacted for the safety of workers, a procedural safeguard was created for the protection of private

13. S.C. 1974–1975, Ch. 72.

14. For a discussion of this, see *Decision No. 108*, (1975) 2 Workers' Compensation Reporter 44 (B.C.).

15. Reg. 4.10 as revised in 1972.

16. Proposals drawn up in 1975 for revision of the regulations provided for this to be changed.

interests, while no comparable procedural safeguard was created for achieving the public policy objectives of the Act, even though they involved the protection of human life.

Similar examples of the unwarranted intrusion of private law concepts and values can be found in the court system. When the Government of British Columbia took over the B.C. Electric Co., the legislation determined the rate of compensation to be paid to the B.C. Power Corporation (the shareholder), and it also provided that this should not be open to question in any court.[17] The constitutional validity of the legislation was challenged as an encroachment on federal legislative jurisdiction. The court might have decided that the takeover legislation was or was not a valid exercise of provincial power. But on no view of the constitutional position could the value of the shares be relevant. The trial judge conceded that the value of the shares was not relevant.[18] Nevertheless he devoted many days of evidence and many pages of reasons to arrive at a conclusion on value. It is hard to find any credible explanation except to create a political pressure on the government to pay more than the statute provided. Here again, dedication to the protection of private property interests appears to have prevailed over fidelity to statute law.

Institutional Limitations

Some regulatory legislation, for example wage and price controls, has a history almost as old as the common law. Courts of summary jurisdiction had administrative and regulatory roles relating to those controls as well as, for example, the licensing of taverns and the repair of highways. Some functions of an administrative nature were also performed in the superior courts, including the superior courts of specialized jurisdiction, such as admiralty and probate. But just as modern social legislation was being introduced on a broad scale in the late 19th century, so during the same period, the superior courts of specialized jurisdiction were being merged into a court of general jurisdiction. In this new style of high court, the institutional, conceptual and procedural framework was one that had evolved primarily out of criminal prosecutions and private litigation; and it was the handling of these matters that appears to have shaped the public perception of what a court is or should be. The court lacked the

17. *Power Development Act*, 1961, 2nd sess., Ch. 4; *Power Development Act 1961 Amendment Act*, 1962, Ch. 50.

18. *B.C. Power Corp.* v. *A.G. of British Columbia et al*, (1963) 44 W.W.R. 65, 191.

institutional framework, the staff, and the procedural flexibility to cope with regulatory and service legislation. In one statute after another, the court was excluded from any adjudicative role and a new administrative tribunal was created.

In recent years there appears to have been some revival of interest in the potential value, at least in in some areas, of superior courts of specialized jurisdiction. In Canada, the old exchequer court has been reorganized into the new Federal Court, and in England the Restrictive Trade Practices Court was created.

Unless there is a constitutional change, however, the potential for further development in this area may be limited to matters within federal legislative jurisdiction; for it is doubtful whether the provinces have authority to appoint a judiciary in a superior court of specialized jurisdiction.[19] Thus when a provincial government enacts a regulatory or service statute that will generate issues requiring adjudication, it usually elects between adjudication in the ordinary courts or creating an administrative tribunal. Establishing an inferior court of specialized jurisdiction would be a constitutional possibility, but it is not usually a viable alternative for other reasons.

What is being suggested here is that this limitation is unfortunate, unnecessary, and a possible handicap in the development of public law. It is not the purpose here to analyze exactly how and when a superior court of specialized jurisdiction would be preferable to an administrative tribunal, or to the ordinary courts. What is being suggested is that the appointment of a judiciary to a superior court of specialized jurisdiction ought to be one of the permissible options from which a province can make its institutional choices.

The Constitutional Danger

In recent years, the curricula of law faculties have shown a stronger offering in constitutional law. This is surely a healthy trend, but one that needs to go further if we are to avert the constitutional danger that can result from a preponderance of private law in legal education.

Lawyers occupy a substantial proportion of the political and administrative positions in national and provincial leadership, and it is to them that many others look for example or turn for advice on matters of constitutional law and propriety. Legal education ought

19. *B.N.A. Act*, Section 96.

surely to include, as priority matters, the structure and workings of government, legislative supremacy, the conduct of elections, legislative and executive processes, conduct in public office, proper and improper forms of lobbying, and other matters of constitutional propriety.

Apart from the accessibility of material, there are of course other reasons why constitutional law in this country came to focus on federalism. During the period in which Canadian legal traditions were developing, it may well have been perceived as of paramount importance to unite under a common government communities of diverse origins, separated by great distances, and with established forms of local and regional government. It is understandable that federalism became the central and almost exclusive topic in constitutional law: but it would be indefensible if it remained so. That law graduates should have a solid foundation in the principles of its constitution is surely essential to the future well-being of any society.

Earlier this year, allegations of a constitutional impropriety were made in relation to what the press described as "the judges affair". But the misconduct alleged was surely pale in comparison with the constitutional improprieties that are more frequent in government. The independence of the judiciary from executive direction or other pressures is vital; but it is also well protected. The independence of administrative tribunals is infinitely more vulnerable.

There is no universal principle governing the relationship between an administrative tribunal and the executive branch of government. The obvious distinction, however, between a government department and an administrative tribunal is that a minister has an overall responsibility for the former, but not for the latter. The extent to which a particular tribunal should reach its conclusions independently and the extent to which it should take ministerial direction are determined by the terms of the Act under which each tribunal is created. There is, however, a general constitutional principle that the terms of the Act must be observed by all concerned. This is simply an aspect of legislative supremacy. It is this principle that is unprotected. With regard to matters that the governing statute requires a tribunal to decide for itself, it is not uncommon for ministerial direction to be demanded, sought or given without any apparent consciousness among the people concerned, including members of the legal profession, of any impropriety.[20]

20. During my term as chairman of an administrative tribunal, I was frequently asked by lawyers what the relationship was between the Board and the Government, and in particular to what extent the Board took ministerial direction. I replied that we simply

The disregard of statute law is, moreover, a problem much broader than the role of ministers in relation to administrative tribunals. It extends also to cabinet and departmental decisions.

During the 17th century struggle between king and parliament, a key issue was the royal assertion of a right to suspend and dispense with laws. Following the Civil War and the subsequent abdication of James II, the matter was settled, or thought to have been settled, by Sections 1 and 2 of the Bill of Rights:[21]

> 1. That the pretended Power of suspending Laws, or the Execution of Laws, by regal Authority, without Consent of Parliament, is illegal.
> 2. That the pretended Power of dispensing with Laws, or the Execution of Laws, by regal Authority, as it hath been assumed and exercised of late, is illegal.

In recent years, however, the executive claim of a right to suspend or dispense with statute law has been resurrected. Moreover it would be a wise precaution, and not unreasonable, to assume that the examples that have come to public attention may be only the tip of the iceberg. There appears to be no systematic screening of departmental or ministerial instructions to assure their compliance with statute law;[22] nor does it appear to be a normal part of the induction or training of public servants to explain that statute law takes precedence over departmental or ministerial instructions. Indeed, this does not even appear to be part of the induction process for ministers of the crown.

Further examples of the problem appeared recently with regard to inflation. When the federal government announced an "anti-inflation policy" and sought provincial co-operation, there appeared to emerge an assumption that the statute law of a province could be dispensed with by executive action in pursuit of the new "policy". Examples appeared of ministers of the crown making decisions,

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followed the terms of the Act. Where the Act provided for a matter to be determined by the Board it was decided by the Board without guidance being sought from or given by the minister. Where the Act provided for a matter to be determined by order-in-council, that was regarded as a proper matter for discussion with the minister. The reply always met with surprise, and often with a comment that it differed from the experience of the enquirer in regard to another tribunal or another time or place. That the Board was not subjected to ministerial interventions was, however, not for the want of trying by various people. It was not unusual for someone to solicit the minister to give direction to the Board on a matter that was clearly within the exclusive jurisdiction of the Board to determine, and the people so trying included lawyers acting for clients.

21. 1 W. and M., 2nd sess., Ch. 11, (1689) 3 *Statutes at Large*, 275, 276.

22. This of course adds to the gravity of the secret law problem explained above.

issuing instructions, or urging others to make decisions, in violation of statute law.[23]

One might expect that in any parliamentary democracy this revival by ministers of the old Stuart claim to be above the law would result in an outcry from the press. But that did not occur. On the contrary, editorials appeared that condoned and even applauded ministerial actions that were incompatible with the constitutional principle of the supremacy of the legislature.[24]

One might also expect that senior public servants would decline to accept ministerial decisions that are a violation of statute law. But if one of them does, the probabilities that he will be dismissed or resign may well be greater than the probabilities that this will occur to the minister.[25]

It is, of course, impossible to determine exactly the extent to which illegal or improper directions are issued in the executive branches of government. There is no screening process and no tally sheet. To achieve accuracy in a quantitative measurement of the practice is, however, less important than to identify the influences likely to promote its expansion or contraction. To whatever extent there exists in government a lack of fidelity to statute law, the study of constitutional law will only be a remedial influence to the extent that it focusses on matters, such as the parliamentary process and conduct in public office, that are not systematically covered in the literature of litigation.

The Use of Private Law for the Pursuit of Public Policy Objectives

This paper has focussed so far on the intrusion of private law in public administration. At least a passing mention should be made of a collateral matter — the potential of private law for the pursuit of public policy objectives independently of public administration. Much has been written on this elsewhere,[26] and no exhaustive coverage will be attempted here. But it may be helpful to comment on two points.

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23. See, E.G.: "McGeer Asks Trustees to Roll Back Wage Pacts", *Vancouver Sun*, 2nd January, 1976, in relation to the *Public Schools Act*, R.S.B.C. 1960, Ch. 319, S. 142.
24. E.G.: "Teachers: A Legal Smokescreen", *Vancouver Province*, 9 Jan. 1976.
25. E.G. the resignation of Mr. F. A. McGregor as Combines Commissioner. See *Parliamentary Debates*, Commons, 1949, Vol. II, pp. 1438, 1503–1506.
26. See, E.G.: A. M. LINDEN, "Tort Law as Ombudsman", (1973) 51 *C.B.R.* 155.

Next after debt claims, the largest category of civil litigation is probably claims for damages for personal injuries. In this area, suggestions are sometimes heard that tort liability can play a useful role in the prevention of injuries. For reasons that have been explained elsewhere,[27] the potential of tort liability in this respect is very limited.

With regard to injuries that are the immediate consequences of their causes, the frequency of tort claims and the severity of the damages are not likely to be sufficient to have regulatory significance. In highway transport as well as in other areas of activity there is surely a public will that the levels of acceptable risk should be lower than the points at which they would settle if tort liability were the controlling influence. This does not deny that tort liability may have some value as a preventive influence in some circumstances. But it is not an alternative to a regulatory system that can provide for testing, inspections and sanctions without waiting for injuries to occur.

In any event, many disabilities are not an immediate consequence of their causes. For example, when carcinogenic substances are introduced into the market, the work-place, or the atmosphere, it can be 20 years before they produce their disabling and lethal results. Tort liability has little preventive value in relation to these kinds of hazards.

In areas where tort liability is alleged to have preventive value, it is usually argued that this is useful as an auxiliary influence for safety, not as a total alternative to regulatory legislation.

There are, of course, many areas where reform or development in private law could be valuable for achieving public policy objectives. But the structures and procedures that have been adopted for reform in private law tend to screen out or minimize public policy objectives rather than give them any kind of priority. Routine reform and development occurs primarily in appellate adjudication. But the formal adherence of English and Canadian judges to the declaratory theory of the judicial role appears to have precluded the development in the appellate courts of these countries of the procedural flexibility appropriate for quasi-legislative functions. Revisions of rules or principles are made in response to arguments presented on behalf of parties having limited interests in limited issues. A far wider range of interests and issues can be affected by the revisions that result.

A possible solution might be to counterbalance revision through appellate adjudication by having branches of private law reviewed episodically by a commission designed to consider the various private and public interests affected, and to recommend legislative reform.

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27. T. G. ISON, *The Forensic Lottery*, Staples Press, 1967, Ch. 5.

But this solution has not been adopted. The provincial law reform commissions actually established seem designed to reinforce rather than to solve the problem.

The term "private law" tends to become synonymous with "lawyer's law". Whether consequently or coincidentally, law reform commissions have usually consisted exclusively of lawyers. Their primary orientation and source of input is the legal profession. This structure is designed to reflect the interests of clients for whom lawyers normally act rather than public interests that are more obscure, more remote in time, more dissipated, unorganized, or which for other reasons do not produce an inflow of legal work.

An example of the problem can be seen in the absence of control over fraud and other predatory practices in marketing. It has been argued elsewhere [28] that predatory practices in credit marketing can be controlled most effectively not by direct regulation, or by any other kink of "add-on" approach, but by abolishing a limited category of debt claims. Law reform commissions are, however, not designed to absorb that type of proposal. When reform takes place in the law relating to credit marketing and chattel securities, the primary interests recognized as requiring protection are those of the credit grantor, the manufacturer and the distributor — the major clients of the legal profession. The *bona fide* purchaser from the credit grantee is usually considered and his interests protected. But the protection of consumers against fraud and other predatory practices in marketing tends to be glossed over, sometimes by the dubious assertion that this can be covered separately in consumer protection legislation.[29]

If a law reform commission is to counterbalance the influence of appellate adjudication in rule-making and to consider public as well as private interests, it is surely vital that some of the commission members, and perhaps a majority, should come from disciplines other than law, and from background occupations that are not connected with the major clientelle of the legal profession.

Conclusions

While it has not been the purpose here to produce a catalogue of remedial measures, it is suggested that at least the following would be helpful.

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28. T. G. ISON, "Small Claims", (1972) 35 *Mod. L. Rev.* 18.

29. See, E.G.: *Debtor-Creditor Relationships*, Part 5, *Personal Property Secutiry*, Law Reform Commission of British Columbia, Ch. XVI, 1975.

1. The curricula of law faculties should include, at least by sample, social legislation of a regulatory and service nature. In many faculties, this is already the situation.
2. The study of constitutional and administrative law should include topics, such as those mentioned above, that are not covered in the literature of litigation.
3. It would be useful to have a public official, analogous to an auditor-general, whose function would be to monitor and prevent the production of secret law, and who would have authority to direct publication.
4. An application for mandamus should not be defeated simply because the interest of the applicant in the performance of the public official is not greater than that of the public at large.
5. The institution of an ombudsman to deal with private complaints against a public official could be counter-productive. In any event, it is probably less urgent than the need for an ombudsman who would be disqualified from dealing with complaints and whose function would be to make spot-check reviews.
6. The role of legislative counsel, as explained above, should be very different in the preparation of social legislation from what it is in the preparation of private law, and it could require a different type of person.
7. When developing new institutional structures in public law, the provinces should be entitled to include in the range of available options appointments to a superior court of specialized jurisdiction.
8. To counterbalance reform through appellate adjudication, law reform commissions should include some members, and perhaps a majority, from disciplines other than law and from background occupations not closely associated with the major clientelle of the legal profession.

The main purpose of the paper, however, has been to explain the intrusion of private law in public administration.

In its substantive rules, public law has developed to a large extent independently of private law. But in its institutional, procedural and conceptual framework, public law is not sufficiently independent: on the contrary, it has suffered from the intrusion of private law. The consequences of this intrusion may include the use of secret law, the absence of remedies for under-achievement in public administration, the production of useless, misleading and wasteful legislation, and a failure of the legal system to accommodate the priorities that society may wish to assign to public policy objectives.