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ADMINISTRATIVE DECISION-MAKING – BALANCING THE PUBLIC INTEREST AND THE RIGHTS OF THE CITIZEN

EFFICIENCY AND LEGALITY IN PUBLIC ADMINISTRATION: WHAT IS THE PRIORITY?

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Introduction and Context

The title of this contribution is intended to stimulate discussion. At one level, it is not possible in a state that describes itself as subject to the rule of law (or as a *Rechtsstaat*, to use the more concise German term) to speak of efficiency having a "priority" over legality, since these values are of such different orders. One may have states that are "efficient", but where the rule of law does not prevail. Indeed, a superficial degree of efficiency may be a distinguishing feature of a despotic regime, at least in the short term. On the other hand, one may have states where the rule of law does prevail, but where there are inefficiencies in public administration. These inefficiencies may in fact deprive the citizen of the quality of life to which he/she might otherwise be entitled, but one would not describe this result as tyranny.

Given the values that EU Member States have chosen to uphold under Article 6 of the EU Treaty (i.e. the "principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law"), it is almost certainly no longer an option for those states to subordinate legality to efficiency. Any government pursuing such a policy would be exposed to internal legal challenge and, very possibly, also to external legal challenge, either before the European Court of Human Rights or (if an EU Member State) under the mechanism of Article 7 of the EU Treaty.

The more pertinent (but less provocative) question is, therefore, how is respect for legality and for the rights of the citizen best preserved whilst ensuring efficiency in public administration? Are there tensions between the two ideals, and how can they be best addressed? In a famous remark, known to all English lawyers, Lord Justice Matthew observed that "in England, justice is open to all, just like the Ritz", the point of the remark being that rights and freedoms might well exist on an equal basis for all, but their enjoyment may be restricted by a person's limited means. If, for example, the cost and delay of litigation put legal remedies beyond the reach of ordinary people, a factual inequality is created. Life presents many such inequalities: if a person has a right to free medical treatment, that right may be of little help if he has to wait for many months to see a doctor or otherwise receive treatment. Equally, a person may have an individual right (e.g. to prevent a highway being built over his land) but that individual right may need to be balanced against the public interest (in this case, the need for better communications). Balancing the requirements of efficiency, the rights of the individual and the public interest is an essential task of any system of administrative law.

There is also the question of competition for resources. No state (at least no European state) is blessed with limitless resources or an unlimited willingness of citizens to pay tax. On the other hand, there are rising expectations as to the scope and quality of services that the public expects government to supply. Inevitably, this leads to increased concentration on the efficiency with which a state uses its resources, and a number of questions are raised of the government, whatever its particular political colour. For example, are services being provided in the most cost-effective way? How can this be verified? Is it efficient for a state to seek to do everything itself in providing services to the public, or are there advantages to be drawn from specialisation and efficiencies in the market economy? Are there new ways in which public services can be supplied, taking advantage of information technology and partnerships with the private sector, such as post offices and tax and benefit offices in supermarkets? A service or function of government may be more efficiently carried out by a private contractor, but where does this leave the accountability of the public administration? Is it justified to leave public law powers to be exercised by private hands? Above all, in an increasingly rights-based and individualistic popular culture, how is the public interest best identified and preserved?

The United Kingdom Experience

Efficiency through the Market?

Although privatisation and "contracting-out" (i.e. the involvement of private sector firms in the provision of services to the public) can be the subject of political controversy, the use of what we now call the private sector has in fact a very long history in the United Kingdom. Indeed, as far back as the 17th and 18th centuries, trading companies – such as the East India Company or the Hudson's Bay Company[2] – were involved in the administration of entire territories. It is also the case that public ownership of utilities – such as water, gas, the railways and electricity – has only had a brief history, being largely privately owned until the mid-20th century. Other European countries have had a similar experience. On the creation

[2] The Hudson's Bay Company did not hand over control of its territories to the Crown until 1870.

of the European Economic Community in 1957, the degree of state ownership of industry was much greater than it is now, and it is not only in the UK that the question has been politically controversial. The merits and demerits of public ownership are for others to debate, and it is noteworthy that the EEC Treaty itself sought to be neutral on the subject[3].

The comparatively long tradition of private ownership in the United Kingdom has shaped the law relating to public administration. For example, in the UK when a government department makes a contract for the provision of services to it or to the public, it relies on the general law of contract in the same way as a commercial company or any other economic operator. There is no special code of contract law applying to contracts made by government departments or local authorities, unlike the position in some European countries – notably France[4]. Although there are technicalities relating to the legal personality of Government departments, there is no statutory code governing the terms and nature of contracts that the government makes for the purposes of public administration. The contracts remain ones subject to private law.

Indeed, the common law of England and Wales has been somewhat hostile to any principle that government, or public authorities of any kind, should benefit from any special rules applicable only to the administration. Such special rules can be seen as inconsistent with the principle of equality before the law, in other words that no person is above the general law[5]. It has long been the law that a servant of the Crown (e.g. a member of the Home Civil Service) has no special immunity or defence if he commits an unlawful act but can be made personally liable for his wrongdoing[6]. On the other hand, if the Crown (i.e. the government) acts on the basis of purely private law powers (as it would when entering into a contract for the supply of goods or services), it is very doubtful if a decision by government to enter into such a contract would be subject to judicial review, since no issue of public law or the exercise of public law powers would be involved[7].

The present concerns with efficiency and making taxpayers' money go further have led to re-examination of functions and services that were once supplied "in-house", with many of them being passed to the private sector. The object of these kinds of programmes has been to import a measure of competition into the provision of services by government and by so doing to obtain at least some of the benefits of competition in a market economy. Although government itself has no "competitors" in the exercise of its public functions, this is not the case with many of the support and advisory functions involved in the exercise of public powers. Many of these functions have long been carried out by the private sector, and private sector operators can provide comparisons to check whether what is being done within government is being done efficiently. In the case of services, such as the maintenance of buildings or equipment (even defence equipment, such as tanks or aircraft), the provision of legal advice and other support services, there is, generally, no question of the private sector provider exercising any kind of public law power over other citizens. In general, there is also no real issue of accountability, since the government or local authority remains responsible for those who act on its behalf. Equally, few would question the principle that the government should spend the taxpayers' money as efficiently as possible when it buys goods and services.

This process of securing efficiency has been taken further in a number of countries, notably in the United Kingdom, and has led to a re-examination of those functions that were traditionally those of government. In some cases, private sector contractors have been vested with public law powers, from the management of public sector pension schemes to the running of certain prisons. For example, in the United Kingdom, private sector contractors have undertaken by contract the design, construction, maintenance and financing of certain prisons and the creation and running of Secure Training Centres for young offenders. In these

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[3] See, for example, article 295 of the current EC Treaty: "This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership." [cf. Fearon v. Irish Land Commission (1984) ECR 3677].

[4] Contracts made by government bodies are governed by *droit administratif* rather than *droit civil*.

[5] "Every man, whatever be his rank or condition, is subject to the ordinary law of the Realm and amenable to the jurisdiction of the ordinary tribunals….with every official from the Prime Minister down to a constable or collector of taxes under the same responsibility for every act done without legal justification as any other citizen." See A.V.Dicey, *The Study of the Law of the Constitution*, (1885).

[6] "..the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown." See Feather v. The Queen (1865) 6 B&S 257; Raleigh v. Goschen (1898) 1 Ch. 73].

[7] Cf. R v. Disciplinary Committee of the Jockey Club *ex parte* Aga Khan (1993) 2 All ER 853.

arrangements, the private sector consortium agrees to provide the service of caring for and keeping in custody prisoners and young offenders. The novel feature of these arrangements is the fact that, in addition to constructing the buildings, the private sector also assumes responsibility for the management and financing of the prison. The private sector makes the investment in the construction of the prisons or secure centres and recovers the cost of its investment by charging the public sector (in this case the Prison Service and the Home Office) based on a daily rate for the number of places that are made available.

A private sector contractor does not need any special statutory authority (in the UK at least) to construct a building that may subsequently be used as a prison. It is quite different when it is a matter of conferring authority on a private person to detain a person in custody. Without specific authority for such a function to be carried out by a private person, the detention would be unlawful. It was, therefore, necessary for Parliament to enact provisions that made it lawful for the prison and STC contractors to act on behalf of the Secretary of State in these respects[8]. In another UK example, private sector contractors can be authorised under part II of the Deregulation and Contracting Out Act of 1994 to exercise certain functions of a Minister, but excluding any function which a Minister is required to exercise personally (for example, in the case of an instrument that must be applied "under the hand" of the minister[9]), the exercise of the jurisdiction of any court or tribunal holding the judicial power of the state, the exercise of any function that would necessarily interfere with, or otherwise affect, the liberty of an individual and the exercise of any function involving a power or right of entry search or seizure.

Apart from these specific exclusions there is also the consideration that the Minister must first obtain an affirmative vote on the draft order in each House of Parliament. There is therefore a substantial degree of political control over the extent to which public functions can be carried out by private sector contractors. The Minister, nevertheless, remains accountable to Parliament for the expenditure by his department in relation to the contract. A special rule in the 1994 Act provides that anything done (or not done) by the contractor in connection with the exercise of the function is to be treated for all purposes as done (or not done) by the Minister. The only exceptions are for criminal proceedings (so that the Minister does not become criminally liable for any crime committed by the contractor) and in relation to the contract between the minister and the contractor (to avoid the absurd result that a breach of contract by the contractor would become the minister's responsibility). The rule is stricter than the common law rules relating to an agent and prevents any avoidance of legal responsibility or of Ministerial accountability to Parliament.

These examples may help to show that efficiency in public administration cannot be an end in itself, but has to be accommodated within legality, accountability and respect for the rights of the citizen. A judgment has also to be made by the legislature as to the adequacy of arrangements to ensure supervision and accountability in any case where powers are exercised over the citizen, and the greater the degree of discretion given to the private sector contractor, the greater the need for such accountability and supervision.

In the UK, the powers have generally been used to permit contractors to assist central and local government in providing support services that may incidentally involve the exercise of statutory powers such as the registration of companies, the running of public sector pension schemes, functions in relation to highways, and administrative functions in relation to local taxation. There does not seem to have been much enthusiasm by either the Conservative or Labour Governments to contract-out functions that are close to the core functions of government.

Ensuring Efficiency with Legality and Respect for the Citizen

In a state governed by the rule of law, it is axiomatic that efficiencies must be sought within the framework of law and not outside it. For a public servant, the question is not so much of fixing priorities between these two values, but of seeking ways to ensure efficiency, whilst ensuring that the government or public body acts lawfully at all times.

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[8] See section 84 of the Criminal Justice Act of 1991 and sections 1-11 of the Criminal Justice and Public Order Act of 1994. The Management of Offenders and Sentencing Bill proposes to extend these powers to enable prison custody officers (i.e. private sector employees) to conduct searches in accordance with prison rules and to exercise limited powers of detention over persons visiting a prison.

[9] One example is the issue of warrants under s.5 of the Intelligence Services Act 1994.

Ensuring legality with efficiency depends on a number of factors. There must be a respect for the rule of law on the part of those entrusted with public functions, but this respect must be combined with systems to ensure public accountability for the expenditure of public money. Respect for the rule of law is easily stated as a principle and is one with which few would disagree. The more difficult aspect is making this respect for the rule of law a central thread in the fabric of public administration. The way this is done will vary from country to country, and, in particular, the degree to which the judiciary is involved in the external review of administrative action may be markedly different[10]. However, essential factors include a clear set of legal principles relating to the exercise of public power, a mode of behaviour that is clearly understood by the public servants of the state together with a shared set of values and ethics that is accepted at all levels, and adequate systems of auditing, oversight and redress.

– ***Legal Rules and Principles***

A good starting point for the United Kingdom is the Bill of Rights of 1688, which confirmed the doctrine of the common law that the Crown had no power to dispense with the law. It followed that no Crown servant – even a Minister of the Crown – had any authority to require any other Crown servant to act in breach of the law. There was, and still is, no defence of superior orders to excuse a public servant from his/her wrongdoing[11].

This ancient principle that the operation of law cannot be suspended by the executive is of obvious importance to the citizen, but it also serves to protect the individual civil servant, who might otherwise be at risk of pressure from Ministers to secure some political objective of the day for which there was no legal authority. The principle is reinforced by a number of mechanisms internal to central government, such as the provisions of the Civil Service Code and the right of the legal adviser to a government department to have the question of legality referred to the Attorney General or Solicitor General for a determination. Much of this takes place confidentially within the government machine (reflecting the principle that legal advice is generally confidential), but it is nonetheless a real safeguard, and the rules are well understood.

In the United Kingdom system[12], the review of administrative decision-making may take the form of an appeal to a Minister or administrative tribunal (if this is provided for, as is often the case, in the relevant statute under which the decision is made), an application for judicial review or complaint to a relevant ombudsman or other form of alternative dispute resolution. Although the principles of judicial review provide the framework within which the executive must operate, the role of ombudsmen and regulators in relation to 'maladministration' is becoming of increasing importance in protecting the individual from high-handed officialdom, and has the great advantage for the citizen of avoiding the often prohibitive expense of litigation. Above all is the long and vigorous tradition of Parliamentary oversight of the executive, with the Government being accountable for all its actions to both Houses of Parliament.

The principles of judicial review have developed rapidly in the last fifty years. They are conveniently explained in a handbook "The Judge Over Your Shoulder" issued by the Treasury Solicitor's Department[13]. This explains the legal and constitutional limits to the exercise of executive powers under the headings of legality (i.e. acting within the scope of any powers conferred by Parliament and for a proper purpose), procedural fairness, unreasonableness and compatibility with rights under the Human Rights Act 1998 and Community law.

Legality is concerned with the question of whether the decision-maker has been given the power to do what he intends, and whether the power is being used for a proper purpose. As most powers have been

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[10] For example, the judicial review of administrative action in the United Kingdom, being concerned essentially with the decision-making process, is probably less intensive and less likely to re-open the merits of a decision than is the case in France, but the ombudsman system deals with many matters which in France would go before a *tribunal administrative*. There are also a large number of specialised tribunals in the United Kingdom system, which need to be taken into account when making comparisons.

[11] Cf. L.J. Atkin in Mackenzie - Kennedy v. Air Council (1927) 2 KB 517 – "individual servants of the Crown who themselves commit torts cannot escape liability by pleading the commands express or implied of the Crown".

[12] Or more accurately, in the legal systems of England and Wales, Scotland and Northern Ireland, since the UK is not a unitary State with one legal system.

[13] The handbook is available on the website www.tsol.gov.uk/our_publications.htm.

conferred by Parliament[14], the question is largely one of statutory interpretation. The courts have devised rules of construction to determine the intentions of Parliament, and s.3(1) Human Rights Act 1998 requires the court to interpret statute to give effect so far as is possible to the rights conferred by the European Convention on Human Rights. If the power is used for a purpose for which it was not created to achieve, the decision will be invalid[15]. Allied to the need for a proper purpose for the power is the requirement to take all relevant factors into account and to disregard irrelevant factors.

Procedural fairness is largely self-explanatory. The statute conferring the power may (and frequently does) itself prescribe a procedure to be followed. This may, for example, require public consultation to be conducted before a decision is reached. In any event, the decision maker must follow a fair procedure, which may involve giving the person affected an opportunity to make representations[16]and of being informed of the material facts or reasons for a decision[17]. The requirements of procedural fairness also require that the decision-making process should be free of actual or potential bias and should be seen to be so. Bias will be inferred, not only from a pecuniary or proprietary interest in the subject-matter of the decision, but also from conduct of the decision-maker which suggests he will not act impartially[18]. Clearly, a need to act fairly arises whenever rights, property or interests may be affected by the decisions of a body exercising a public function, but the same may arise whenever a decision-maker makes an express or implied promise that a benefit will continue or that a hearing will be given before any decision is taken which may affect the person's rights of interests. These are said to give rise to a "legitimate expectation"[19]. The decision-maker may nevertheless break the promise if an overriding public interest requires it. It is for the decision-maker to decide if the overriding public interest exists, but the court will review that decision if it has been improperly reached[20].

Unreasonableness concerns those relatively rare cases where the court will review the substance of the decision, rather than the process by which it is reached. The court will only intervene if, in the words of Lord Diplock in the GCHQ case[21]if the decision "is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it". Although this test is a high one (and does not generally involve any question of the courts substituting their own policy views) it is clear from more recent cases that in any where an interference with human rights is in issue, the courts will require more by way of justification before they are satisfied that a decision is reasonable[22].

– ***Values and Ethics in the Civil Service***

An important safeguard for the rule of law is provided by the rules of conduct and shared values and ethics of those involved in running public administration. External review is of limited effect if those within the administration do not support the principles of fairness and legality on which review is based. Their commitment to these principles requires encouragement and support.

Following a number of scandals in public life in the first part of the 1990s, the then Prime Minister (John Major) set up a body called the Committee on Standards in Public Life, which issued its first report in 1995. This report recommended that seven principles, namely those of selflessness, integrity, objectivity, accountability, openness, honesty and leadership should apply to all public life. Just before that first report

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[14] There are a few exceptions, known as 'prerogative' powers, such as the making of Treaties, the issue of passports or the conferring of honours, which are not based on statute.

[15] A well-known example is Wheeler v. Leicester City Council [1985] AC 1054, HL where the Council used its powers to control recreation grounds to ban a rugby club on the grounds that some of its members intended to play in South Africa. The House of Lords held that the true intention was to punish the club, even though it had done nothing unlawful.

[16] The principle is derived from the maxim *audiatur et altera pars* common to most European legal systems.

[17] Cf. R v. Secretary of State for the Home Department *ex parte* Fayed [1998] 1 WLR 763, CA where Mr Fayed was held to be entitled to be told of the concerns which led the Home Secretary to refuse him a certificate of naturalisation, despite the fact that the legislation did not require any reasons to be given.

[18] As in R. v. Inner West London Coroner *ex parte* Dallaglio [1994] 4 All ER 139, CA where a coroner had displayed a hostile attitude to an applicant, describing her as 'unhinged' and then refused to stand down or resume an adjourned inquest.

[19] This may be compared with the doctrine of 'confiance légitime' in French administrative law.

[20] See R v. North and East Devon Health Authority *exparte* Coughlan [1999] Lloyd's Rep. Med. 306 CA.

[21] Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 HL.

[22] Cf. R. v. Ministry of Defence *ex parte* Smith [1996] QB 517.

was published, the Prime Minister issued a Civil Service Code, which confirmed a number of important legal and ethical principles that now form part of the terms and conditions of employment of every civil servant. There is a corresponding duty imposed by the Prime Minister on Ministers not to ask a civil servant to act in breach of the Civil Service Code.

The Code confirms the duty of all public officers "to discharge public functions reasonably and according to the law". They have a "duty to comply with the law, including international law and treaty obligations, and to uphold the administration of justice". The Code also includes ethical principles such as requiring civil servants to conduct themselves "with integrity, impartiality and honesty", to give "honest and impartial advice…without fear or favour, and make all information relevant to a decision available", to deal with the affairs of the public "sympathetically, efficiently, promptly and without bias or maladministration" and to ensure the "proper, effective and efficient use of public money".

There has been considerable discussion in the United Kingdom as to whether the rules of conduct of the civil service ought to be placed on a statutory basis (as is the case in a number of European countries). The Public Administration Select Committee of the House of Commons has published its own Civil Service Bill[23], and the government has responded by publishing its own Bill[24], with views invited by the end of February 2005. As yet the Government has made no announcement about a possible Bill.

– ***Dealing with Maladministration***

A notable development of direct relevance to the individual has been the creation of 'ombudsmen' to deal with complaints by members of the public of injustice caused by maladministration[25]. The earliest of these dates back to the creation of the Parliamentary Commissioner for Administration (PCA) under Parliamentary Commissioner Act 1967. Local Government Ombudsmen were created in 1974 to consider complaints of maladministration involving local government. There are now also statute-based ombudsmen for health services, housing, legal services, private financial services and pensions and non-statutory ombudsmen for a arrange of matters including prisons, probation services and estate agents.

'Maladministration' is not defined, but in introducing the Bill which became the 1967 Act the then Minister, Richard Crosman, referred to "bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness and so on". These factors, which have since become known as the "Crosman catalogue" are much wider than those for judicial review. "Injustice" is also not defined, but is left to the ombudsmen to determine on a case-by-case basis what injustice means. The ombudsmen have that it includes financial loss, the denial of some benefit or entitlement, a missed opportunity, distress and being put to avoidable time and trouble.

The ombudsman system is able to provide redress to the individual which judicial review does not offer. It also has the advantage (in the author's view) of credibility within the administration, since the ombudsmen are generally experienced and senior administrators and their reports command acceptance within the administration as a means of improving standards.

– ***Systems for Auditing and Oversight***

The Committee of Public Accounts is one of the most senior of the Committees of the House of Commons, having been first appointed in 1861. The committee is appointed "for the examination of the accounts showing the appropriation of the sums granted by Parliament to meet the public expenditure, and of such other accounts laid before Parliament as the Committee may think fit"[26]. The committee bases its work on reports by the Comptroller and Auditor General[27], presented to parliament in accordance with the National Audit Act of 1983. The Comptroller and Auditor General (who is an officer of the House of Commons and independent of the government) has a duty to report on departmental accounts and must state whether funds have been applied for the purposes intended by parliament. The Comptroller and

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23 HC 128-i (2003-04) published in January 2004 – see www.parliament.uk/parliamentary_committees/public_administration_select committee.cfm.

24 The consultation paper and draft bill are on the Cabinet Office website: www.cabinetoffice.gov.uk.

25 It should be noted that judicial review is of limited use to the individual who may have suffered loss form administrative action, since it rarely involves any question of compensation or similar redress.

26 Standing Orders of the House of Commons, SO 148.

27 An office created by the Exchequer and Audit Departments Act of 1866, although there was an Auditor of the Exchequer in 1314.

Auditor General may also conduct inquiries into the "economy, efficiency and effectiveness" with which a government body has applied public funds, so as to examine value for money as well as regularity and legality.

An important feature of the administration of central government is that the permanent head of each department (or "accounting officer") is personally responsible to the Committee of Public Accounts for the propriety and regularity of the public finances of his/her department. If a minister in charge of a department is contemplating a transaction which the accounting officer considers would be improper or irregular, it is the officer's duty to set out his/her objections in writing and to remind the minister of his/her duty to inform the Comptroller and Auditor General in the event that his/her advice is overruled. If the minister decides nevertheless to go ahead, the accounting officer will seek a written instruction from the minister and pass the relevant papers to the Comptroller and Auditor General[28]. Such instances are rare, but they provide an example of cases where possible conflicts between the interests of efficiency and those of legality can be resolved.

The interaction of principles of legality and a desire for efficiency is most likely to be scrutinised as an aspect of the audit of public finances. However, other mechanisms will be important, such as conferring on the public a "right to know" (in the UK the Freedom of Information Act of 2000 came into force in January 2005), and review by specialised parliamentary committees with powers to pursue their own lines of inquiry.

Clear legal rules, robust values and ethics within the public service, effective systems for dealing with maladministration, and rigorous internal and external oversight are all necessary for all governments if legality and efficiency are to be guaranteed for the public they serve.

[28] For an occasion when a transaction against the advice of the accounting officer was subsequently found to be unlawful, see R v. Secretary of State for Foreign and Commonwealth Affairs *ex parte* World Development Movement Ltd (1995) 1 WLR 386.