Introduction

The first part of this chapter sketches the early growth of English public law. The second part tries to describe what it was like to be involved in the modern take-off of public law as it roused itself from its long sleep.

It seems surprising, given the modern prominence of judicial review of governmental acts, that no panoptic history of the public law of England and Wales exists[1]. By public law I mean the body of law, embracing both administrative and constitutional law, by which the state is regulated both institutionally and in its dealings with individuals[2]. This book does not fill that large space: it is, rather, a series of test drillings into a landmass. The vertical drillings are thematic attempts to trace their topic from early days to the present. The horizontal ones take a stratum of time and examine developments in public law within it.

The public law of Scotland does not form part of the history which this book examines. Neither the union of the two crowns in 1603 nor the union of the two states in 1707 brought the English and Scottish systems together. Rather than risk trivialising or misrepresenting Scottish public law, these essays treat it with a respectful silence[3].

History and law

The distinction between the writing of legal history and the making of it was astutely described by Geoffrey Wilson:

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[1] Such a history is, however, coalescing in the still-emerging volumes of the Oxford History of the Laws of England: see, at the date of writing, vol. II (871-1216), ch. 31; vol. VI (1483-1558), chs. 2,3 and 4; vol. XI (1820-1914), Part two. After the unification of England and Wales by the statutes of 1536 and 1543, the public law of the two countries was effectively uniform until the passage of the Government of Wales Acts 1998 and 2006.

[2] Cf. the definition in M. Loughlin, *The Idea of Public Law* (2003), p. 1: "the constitution, maintenance and regulation of governmental authority".

[3] A full account of modern Scottish public law can be found in the Stair Memorial Encyclopaedia*, The Laws of Scotland*, vol. 1, pt. 4, 'Administrative Law' (A. W. Bradley and C. M. G. Himsworth, 2000 reissue). Since the partition of Ireland in 1921 the public law of Northern Ireland has generally tracked that of England and Wales but from time to time has moved ahead of it.

> "... [T]he courts do not operate on the basis of real history, the kind of history that is vulnerable to or determined by historical research. They operate on the basis of an assumed, conventional, one might even say consensual, history in which historical events and institutions often have a symbolic value."[4]

That seems a harsh thing to say about a profession which sets great store by the accurate citation of precedent, but I think it is true. From Magna Carta[5] to *Anisminic*[6] by way of *Entick v Carrington*[7], the common law and the constitutional culture of which it forms part have adopted not the letter of the law but the meanings which it has become appropriate to find in it. The zeitgeist is at least as potent as the scholar.

History has neither beginnings nor endings, but in tracking the history of English public law it has been difficult not to be struck by the modernity of the later Elizabethan and the early Jacobean judges, Edward Coke prominent among them[8], and by the depth, breadth and – in the long term - continuity of the river of jurisprudence which flows from them to us. Elizabeth's reign saw a major increase in the volume of litigation and the emergence of an unprecedentedly high proportion of lawyers in the population[9]. But the late Tudor state was itself the product of centuries of change. Its judges, heirs of a legal culture reaching back to and beyond early modern England, were sensing the first tremors of the constitutional earthquake which, by the end of the 17th century, was not only to settle into the foundations of the modern British state but to gestate ideas of individual rights and lawful governance which have helped to shape the modern world.

Although the radicals of the Civil War associated monarchical and aristocratic oppression with what they called the Norman yoke, counterposing it to the home-grown laws of the Anglo-Saxons, the Norman kings had in fact taken care to adopt and continue the Anglo-Saxon system of law[10]. Alfred's and Aethelstan's codes had been made not autocratically

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[4] Postscript to M. Nolan and S. Sedley, *The making and remaking of the British constitution* (1998), p. 128-9

[5] See Ch. 4

[6] See Ch. 1

[7] See Ch. 3

[8] Although Coke (pronounced 'Cook') features in this book in a generally favourable light, he had and still has many critics. He is the subject of a classic biography, *The Lion and the Throne* (1957) by Catherine Drinker Bowen. A scholarly account of the controversies between Coke, Ellesmere and Bacon, and the background to them, can be found in three articles by the former chief justice of New South Wales, James Spigelman, under the running title 'Lions in conflict': (2007) 28 Aust. Bar Review 254; (2008) 30 Aust. Bar Review 144; (2013) 38 Aust. Bar Review 1.

[9] "In the long history of the relationship between law and society in England, the later sixteenth century must be reckoned one of the most dynamic….It is not surprising that the first fifty years of the life of Sir Edward Coke … coincided almost exactly with the period from the accession of Edward VI to the death of Elizabeth, or that his law reports reflect so much of the social and economic life of middle England": C.W.Brooks, *Law, Politics and Society in Early Modern England* (2008), p.93; see ibid. chs. 4 and 7. The period has also been hailed as a high point of non-litigious dispute resolution: see D. Roebuck, *The Golden Age of Arbitration: dispute resolution under Elizabeth I* (2015)

[10] *The Oxford History of the Laws of England,* II (J. Hudson), p. 487; D. Roebuck, *Early English Arbitration* (2008), ch. 10

but on the advice of their counsellors[11]. Canute's code, four decades before the Conquest, undertook "to secure the whole people against what has hitherto oppressed them", including royal exactions. Such legislation can be intelligibly seen "not as expression of royal will but as royal concession"[12].

The continuity of this process with Magna Carta (and, at least formally, with modern legislative practice) is readily seen, though it may not be how successive monarchs and their ministers saw it. Chief Justice Fortescue in the mid-15th century described the kings of England as ruling politically as well as regally, so that they were without power to tax their subjects without the latter's consent[13]. It was a continuity which, although disrupted by the anarchy of Stephen's reign, was severed neither by Henry VIII's autocratic conduct, which paradoxically depended on repeated Parliamentary endorsement[14], nor by the Interregnum, which initiated reforms that took centuries to restore and consolidate[15].

The laggard in this continuity has been democracy itself[16]. A parliament of knights of the shire and burgesses, or of merchants and landowners, elected by a narrow and generally corruptible electorate, had little claim to the representative quality ringingly but vainly demanded by Colonel Thomas Rainborough at Putney in 1647:

> "[T]he poorest he that is in England hath a life to live as the greatest he; and therefore truly, sir, I think it's clear that every man that is to live under a government ought first by his own consent to put himself under that government."[17]

Almost two centuries after the slow process of electoral reform was initiated in the United Kingdom, and more than a century after the Parliament Act 1911 announced itself as the first step in setting up an elected upper chamber, this is a road we are still travelling down with little in the way of maps or compasses.

The other jaw of the pincer which slowly closed on the monarchical power of making law and dispensing justice began to take shape in the 12th century, when Henry I appointed a

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[11] Hudson, op. cit., p. 21 ff; p. 498-9.

[12] Hudson, op. cit., p. 25

[13] Fortescue, *De Laudibus Legum Angliae* (c. 1470, pubd. 1541), ch. IX: "A king of England cannot, at his pleasure, make any alteration in the laws of the land, for the nature of his government is not only regal but political" - a principle traced by Brooks (n.3 above, p.24) to Book III of Aristotle's *Politics.*

[14] See Ch. 11

[15] See Ch. 4

[16] Not an unusual sequence: see Ch. 9, n.11. But in a remarkable moment of history, though one not to be repeated, the so-called Good Parliament of 1376 had asserted its supervisory power over the king's ministers by impeaching four of them before the House of Lords for corruption and incompetence: see Ann Lyon, *The Constitutional History of the United Kingdom*, p. 105-6. It was by deputing Sir Peter de la Mare to speak for them in presenting the bill of impeachment that the Commons inaugurated the office of Speaker.

[17] *Puritanism and Liberty (The army debates 1647-9),* ed. A.S.P. Woodhouse (1938), p. 58. Major-General Ireton, a lawyer in civilian life, whose regard for private property had prompted Rainborough's call for a universal male franchise, turned Leveller ideology back on its proponents by asserting that the property-owning franchise itself predated the Conquest. "If you make this the rule," he pointed out, "I think you must fly for refuge to an absolute natural right." In the event, that is what the Levellers did.

number of "justiciars of the whole of England" to whose judgment, according to William of Malmesbury, he entrusted "the administration of justice throughout the realm, whether he himself was in England or detained in Normandy"[18]. While England remained administratively divided into Wessex, Mercia and the Danelaw, each with its own customs enforceable at the level of shire, hundred or borough, the *Leges Henrici* boasted that "the king's court … keeps its usages and customs always and everywhere with singular immutability", and commentators now spoke of "the law of the land"[19] – a common law both in the sense that it was no longer the king's law and in the sense that it was the same wherever the king's courts sat.

It was the Angevin kings who, attempting to bring order to a sometimes ungovernable state, brought the beginnings of an independent system of justice into being. The process may with hindsight appear as one of progressive reform, but in its time was regarded as one of consolidation and restoration[20]. Nevertheless, wittingly or unwittingly, the change came.

> "Final concords record at least seventy [men] sitting at the Exchequer as justices between 1165 and 1189… The chief justiciars and twelve other justices account for roughly two-thirds of the named appearances. Thus a core group of justices had emerged …. The group's influence on the court and its law must have been considerable." [21]

From 1176 the occasional dispatch of justices to try important cases regionally was succeeded by their routinely travelling out in eyre – that is to say on circuit – having first taken an oath to do the king's justice to everyone[22]. By the end of the 12th century, sheriffs were barred (though not always effectively) from sitting as justiciars in their own shrievalties. By the end of the 13th, all the judges had served their time as professional lawyers, and justice was on the way to becoming an independent function of the state[23].

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[18] Hudson, op. cit., p. 262

[19] Hudson, op. cit., p. 491

[20] See D. Roebuck, *Mediation and Arbitration in the Middle Ages* (2013), p. 17-18, esp. n.4. Roebuck makes the point that 'reform' did not acquire its modern connotation of progress or innovation until the end of the Middle Ages; indeed Raymond Williams, *Keywords,* allocates the change in usage to the 18th century. Its original meaning was repair or restoration – a return to a more orderly past.

[21] Hudson, op.cit., p. 503. Roebuck, op. cit*.,* p.23, cites a contemporary account of a royal justiciar of the early 13th century "so sedulous and practised" that his colleagues "are overpowered by the labour of Pateshull, who works every day from sunrise until night", making other justiciars redundant. Such judges still exist.

[22] Hudson, op.cit., p. 505

[23] It was not until much more recent times, however, that the administrative and judicial functions of local justices of the peace were separated from one another. For centuries JPs administered most of the Elizabethan Poor Law (with the consequence, according to Henderson, *Foundations of English Administrative Law, p. 143)* that "much of the early development of modern administrative law is to be found in the cases on the poor law". From the Statute of Artificers 1562 until the late 19th century JPs were empowered to fix wage rates and punish workers for absenteeism or substandard work, as well as to redress certain grievances against employers. Until the reform of municipal corporations in 1835, much of the government of the shires was conducted at their quarter sessions: see W. R. Cornish and G. de N. Clark, *Law and Society in England 1750-1950*, p. 19-21; S. Anderson, *The Oxford History of the Laws of England*, XI, p. 454-461. JPs continued to license pubs and betting shops until the late 20th century.

Law as reported

It has been suggested more than once that in the sixteenth century the training of lawyers in the Inns of Court, dependent as it was on the oral transmission of legal doctrine, did not furnish a stable basis for the development of a precedent-based system. It was supposed that a void in law reporting was astutely filled by Coke with his reports, in large part recording his own decisions and giving him an undeserved influence on the development of the common law. Modern scholarship[24] questions the premise: it is now known that a considerable variety of printed and manuscript reports of cases supplemented the oral transmission of the common law both before and in Coke's time. The Year Books, blackletter reports of cases in law French, ran from the early fourteenth century to the mid-sixteenth, and Chaucer's serjeant-at-law, in the late 14th century, owned both statutes and law reports[25]. In such a context Coke's most significant decisions are legitimately regarded both as weathervanes of legal history and as a source of constitutional principle. Coke had a chequered career[26], both in and out of royal favour, but he did not plough a lone furrow.

The growth of public law

The developments I have touched on were not simply the conditions from which public law, as part of the common law, was to emerge. They were themselves public law developments, restructuring the state and the individual's relation to it as drastically as anything in the succeeding centuries to which the essays in this book relate. They may have initially changed little, but they created the conditions for change.

> "… [I]f we look closely at fifteenth-century England, we see a social world in which the rule of law as we know it played a relatively small part. The major common law courts were generally under-used …. Private disputes were settled either by resort to violence or by informal arbitration, and there was no very highly developed public law to which constitutional disputes could be referred. By comparison, if we turn from the fifteenth to the mid-seventeenth century, there at first sight appears to be abundant evidence of change. … [T]he common law and common lawyers were deeply involved in many of the constitutional disputes of the early Stuart period."[27]

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[24] See J. Baker, *The Oxford History of the Laws of England*, vol. VI, ch.26;

[25] "In termes hadde he caas and doomes alle
That from the tyme of kyng William were falle" (*Canterbury Tales, Prologue,* Folio ed, p.20)

[26] See Bowen, *The Lion and the Throne* (1957), fn. 7 above. He also has a chequered reputation, principally because of the venom with which, as Attorney-General, he prosecuted Sir Walter Raleigh on what was without doubt a trumped-up charge of treason: "Thou art a monster! Thou hast an English face but a Spanish heart … Thou viper!... I will prove thee the rankest traitor in all England." But one wonders whether Coke's rancour was any worse in its time and place than that displayed in 1972 by Governor Reagan's special prosecutor, Albert Harris, towards the young university teacher Angela Davis: "Not only is there enough evidence to send this case to trial, there is enough to take this young woman and lock her in a green gas chamber and drop cyanide pellets into the acid and put her to death."

[27] Christopher W. Brooks, *Law, Politics and Society in Early Modern England* (2008), pp. 8-9

It is with that metamorphosis that most of the history examined by this book begins. It is a story with no clean breaks or fresh starts. The endeavours first of monarchs and then of their ministers to reserve legislative and judicial powers to themselves form a recurrent theme in it. But so does their eventual acceptance of the hard fact that they could not raise taxes or govern without the advice and consent of those who controlled land and trade, nor administer consistent law and justice except through a professional judiciary, nor themselves stand aside from or above the law.

Inhabiting and permeating these changing structures and institutions have been the substantive principles of public law. By the mid-17th century a practice manual was able to say of what was now the Upper Bench:

> "This Court hath authority to Quash Orders of Sessions, Presentments, Endictments &c made in inferior Courts, or before Justices of Peace or other Commissioners if there be cause, that is, if they be defective in matter or form … But this Quashing is by favour of the Court, for the Court is not tyed Ex Officio to do it…"[28]

These and other principles of judicial review have waxed, waned, slumbered and woken, but in the long term matured in response to continuing change in the society and polity which law inhabits. By the beginning of the 18th century the reactive interventionism of the late Tudor judges was being developed and nuanced, in particular by Chief Justice Holt, who, in a case decided in 1700 on the amenability to judicial review of Welsh justices of the peace who had been granted statutory powers for the upkeep of Cardiff bridge, said:

> "[T]his court will examine the proceedings of all jurisdictions erected by Act of Parliament. And if they, under pretence of such Act, proceed to incroach jurisdiction to themselves greater than the Act warrants, this Court will send a certiorari to them, to have their proceedings returned here."[29]

In the centuries since then public administration has changed massively, and public law has changed with it. Whether it will be allowed to go on doing so is one of today's great questions.

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[28] Style, *Practical Register* (1657), quoted in E. G. Henderson, *Foundations of English Administrative Law* (1963), p. 107. The King's Bench was renamed the Upper Bench during the Interregnum. Styles' account of the judicial review jurisdiction highlights two important facets of it: (a) the focus on judicial proceedings, which, until *Anisminic,* drove courts to look for quasi-judicial functions in order to render decisions justiciable, and (b) the discretionary character of relief.

[29] *R v Glamorganshire Inhabitants* (1700) 1 Ld. Raym. 580. See also *Groenvelt v Burwell* (1700) 1 Ld. Raym. 454; E. G. Henderson, *Foundations of English Administrative Law* (1963), pp. 101-116; Wade and Forsyth, *Administrative Law* (10th ed.), pp. 509-521.

Autobiography as history

My own walk-on part in the more recent phase of this process has posed a problem in writing these studies. While it has been the stimulus for the entire exercise, it has also inexorably affected my view of events. As a barrister, although I sometimes acted for public authorities, the bulk of my public law work was bringing challenges on behalf of individuals to uses and abuses of state power. As a judge, I must have decided as many cases and applications in favour of public authorities as against them, though I have not counted. But it would be idle to claim that any judge goes into court with a blank mind (an open mind is something different), any more than does a historian sitting down to write, and it would be disingenuous for me, as I believe it would be for any judge, to pretend that my own experience had no bearing on my thinking and my decision-making. But the bearing is rarely linear, and that is what makes both litigation and adjudication interesting.

It is also why, in delivering the lectures which form the basis of this book, I resorted from time to time to anecdote. It helped, or so I hoped, to make the content a little more vivid and the topics a little more immediate. In editing them for publication I have eliminated most of these minor vanities or relegated them to footnotes. In place of them, there follows here, segregated from what I have attempted to make a reasonably objective set of historical essays, an anecdotal sketch of my encounter with public law as it began, in the last three decades of the twentieth century, to stir into life after two generations of torpor. These were my formative years.

They were also, as it turned out, the formative years of the modern body of common law by which the machinery of state is still both regulated and guarded – for, as I have stressed elsewhere, public law is as much concerned with the protection and validation of good administration as it is with controlling abuses of power. A checklist of these developments, to a number of which I had the good fortune to contribute either at the bar or on the bench, would include the duty to give reasons for decisions, the enforcement of policies which have generated legitimate expectations, the injection of fair procedures into public consultation, the recusal of decision-makers for apparent bias, the justiciability of decisions for error of fact, the proportionality of decision-making, the expansion of standing for public interest challenges – none of them dreamed of in the philosophy of *Wednesbury*[30].

My present topic, however, is not these developments, nor the handful of high-profile cases which form the epistemic framework of modern public law – *Ridge v Baldwin, Anisminic, Padfield, British Oxygen, O'Reilly v Mackman* - but the largely unnoticed groundswell of judicial review applications heard from the early 1970s in the Queen's Bench Division of the High Court, and more rarely the Court of Appeal and the House of Lords, which filled the

[30] See Ch. 1

many spaces around the leading cases and gave shape and substance to today's public law jurisprudence.

The lion stirs

When I was called to the Bar in 1964, public law was not taught except as a footnote to constitutional law, and was not a recognised field of practice. Public law briefs went, if anywhere, to the town and country planning bar, who at least had some knowledge of the workings of local authorities[31]. Challenges to central government or to statutory bodies were a novelty and a puzzle to most of the legal profession. Nevertheless, the atmosphere at ground level was beginning to change. Three things, I think, were playing a part.

One was legal aid. The 1949 Legal Aid and Advice Act was a major element of the welfare state. In addition to paying for legal advice, it provided public funding for anybody who had a viable claim or defence but could not afford a lawyer. High street solicitors, the first stop for potential litigants, were surprisingly slow to recognise legal aid as a respectable source of income, but by the 1960s local firms were beginning to make use of it and the Bar was beginning to benefit from the briefs it generated. As a result, in my first few years at the common law bar, publicly funded work for tenants paying excessive rents for substandard accommodation formed a significant part of my practice. Because only unfurnished tenants had Rent Act protection, how little furniture could deprive a tenancy of protection became a crucial question[32] in private law. But both the introduction of a statutory fair rent regime for unfurnished tenancies[33] and the innovative use of public health legislation to secure repairs to badly neglected private and council lettings[34] began to demonstrate how porous the frontier between public and private law was. Here too legal aid was able to help.

In 1968 the Society of Labour Lawyers published a slim book, *Justice for All*, which encouraged the setting up of law centres – non-profit legal practices funded by a combination of local funding and legal aid fees, and directed specifically to the needs of people who ordinarily had little or no access to law or lawyers. The law centres, of which the first was set up in North Kensington in 1970 and which within a decade had come close to 50 in number, were a second catalysing element in the revival of public law. Their work was backed up by voluntary bodies such as the Child Poverty Action Group, whose specialist in-

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[31] For a striking example, see the account of the genesis of *Bromley LBC v GLC* [1983] AC 768 (the 'Fares Fair' case) [1995] PL 499 (H.B.Sales and A.W.Bradley)

[32] See *Woodward v Docherty* [1974] 1 WLR 966

[33] Rent Act 1965

[34] See *GLC v LB Tower Hamlets* (1984) 15 HLR 54

house lawyers operated at a high level of expertise[35]. Much of my work at the bar in and after the 1970s came from law centres and specialist advice centres.

The years after 1968 saw a third phenomenon which contributed to the revival of public law: newly qualified lawyers who wanted to do socially useful work. The availability of local authority grants to enable students from less affluent backgrounds to enter universities or professional training played a part in this. So did the political atmosphere, which at times encouraged a dangerous sense that personal commitment was a substitute for competence. The established profession was quick to stigmatise what it dubbed the Alternative Bar, but the generation which followed mine into the profession has changed the profession's own sense of what is worthwhile. Today, pro bono advocacy is a well-regarded stratum of practice at the bar, and the major City solicitors' firms today compete for prestigious pro bono work.

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With these springboards, the takeoff of public law in the last quarter of the 20th century - a recurrent aspect of the themes traced in the second part of this book – was owed at least as much to the unsung cases which from the 1970s began to bring elements of justice to some of the obscurer corners of public administration as to the great landmark cases which all modern students know.

The problems of low-income tenants, for example, were as much due to the neglect of their statutory duties by local authorities as they were to rackrenting on the part of private landlords. But while tenants had by definition a contractual relationship with their landlords, they had no private law relationship with the local authorities which had a statutory duty to monitor disrepair and structural danger, or with the rent tribunals and rent officers whose duty was to set fair rents. How then did one go about dealing with a council which left rented houses running with damp, or a rent officer who had refused to adjourn a hearing which the tenant was prevented by illness from attending? The answer to the first question lay as often as not in little-known and little-used enforcement provisions of the Public Health Acts, to which I will come. The answer to the second, if there was one, had to lie in a public law obligation on the part of the rent officer to act fairly. But how did you enforce such an obligation? It had to be by the use of the prerogative writs or orders which my generation had at best glimpsed on the constitutional law course.

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[35] See the entry in the *Oxford Dictionary of National Biography* on Henry (later Mr Justice) Hodge, the CPAG's first in-house solicitor. As the entry records, government eventually co-operated, to its own benefit, in selecting test cases to resolve complicated questions of benefit entitlement.

So it was that, in a state not far from terror, I found myself rising to my feet in the court of the Chief Justice, Lord Parker, who in those days took the entire judicial review list - the Crown Office list - in the course of a half-day pause in a week of criminal appeals[36], to apply for an order of certiorari to quash an entry made in the rent register in the tenant's absence, and an order of mandamus requiring a hearing which the tenant could attend. The three judges listened politely to my argument ("Tell us where the shoe pinches," Lord Parker would say when you were about two minutes into your case) before taking up their pens and turning to the Treasury Devil: "Yes, Mr Bridge?" I still recollect the elation of hearing Nigel Bridge concede the claim and realising that I had won a case.

Then there was the case of Charles Bullen. As a condition of drawing unemployment benefit Mr Bullen was required to be available for work. Since he was a poet by profession, not a lot of work was available. His prolonged unemployment triggered a statutory power to have him sent by a tribunal to what was in effect a labour camp, where the long-term unemployed were required to do menial and repetitive work for minimal remuneration. On the day of the tribunal hearing, however, Mr Bullen had secured a job interview with Woolworths. You might have found it hard to think of a better reason for an adjournment; but in Mr Bullen's absence the tribunal ordered him to a labour camp. The High Court quashed their decision, holding that the question was not the metaphysical *Wednesbury* question whether any tribunal in its right mind could have failed to adjourn, but simply whether what they had done was plainly unfair[37].

More public law issues than you might have expected were fought out in the criminal courts. We successfully prosecuted several local authorities under the public health legislation as landlords of houses in a state so prejudicial to health as to constitute a statutory nuisance.[38] On other occasions prosecutions brought by local authorities or the police arose out of public law provisions. I spent a good deal of time in the mid- and late 1960s defending Kentish travellers who had been driven on to roadside verges through the methodical use by local authorities of their new power to fence and ditch the commons on which gipsies had traditionally camped, without using the concomitant power to open proper caravan sites in lieu, even when the power was made a duty[39].

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[36] By the time Parker's successor, Lord Widgery, retired in 1980, the list had become badly backlogged. Lord Justice Donaldson was given the task of clearing it, which he did before being appointed Master of the Rolls. Widgery's successor as chief justice, Lord Lane, stopped presiding in the Queen's Bench divisional court (i.e. a court of two or more judges), and the divisional court itself gave way, following the passing of the Supreme Court Act 1981 (now renamed the Senior Courts Act), to the specialist panel of single judges who now compose the Administrative Court.

[37] *R v SW London Supplementary Benefits Appeal Tribunal, ex p Bullen* (1976) 120 Sol.Jo. 437

[38] *R v Newham Justices, ex p Hunt; R v Oxted Justices, ex p Franklin* [[1976] 1 All ER 839 (Held: a private citizen, in contrast to a local authority, could prosecute for statutory nuisance under s.99, Public Health Act 1936, without first serving an abatement notice.) In the great majority of these cases I was instructed by local law centres and advised by a capable public health inspector, David Ormandy.

[39] Caravan Sites and Control of Development Act 1960, ss.23 and 24; Caravan Sites Act 1968. For the history, see *R v Lincolnshire County Council, ex p Atkinson* (QBD, 22 Sept. 1995) [1997] JPL 65, cited by ECtHR in

Yet other prosecutions arose out of public law disputes. One was the prosecution helpfully brought by Hounslow council against the campaigner Erin Pizzey, alleging that her Chiswick Women's Refuge, the first in the country, was a house in multiple occupation for the purposes of the Housing Act 1961 with consequent restrictions on its occupancy. By the time she was prosecuted for breaking the limit of 36 occupants which the council had set, 75 desperate women and their children, for whom local authorities had done nothing, were living in the house. The defence that the house was in the collective occupation of a single fluctuating community, not of multiple households, was accepted by the local magistrates. The council's appeal reached the House of Lords[40], where a not unsympathetic panel included two former Lord Chancellors, Dilhorne and Hailsham. Half way through my submissions Hailsham looked hard at Dilhorne and asked:

> "If my noble and learned friend were to invite me to his country house for the weekend, would I cease to be the head of my own household and become a member of his?"

At the lunch adjournment the court reporter came over to me and explained the bizarre intervention: Dilhorne had never invited Hailsham to his country house[41], and Hailsham didn't mind who knew it.

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One of the rewards of doing public law cases in the renaissance years was the occasional chance to push a new boat out. It had to be done tentatively and not to travel too far from shore, but if the facts were right it could be done. When Brent Council in 1984 set about merging two of its schools after a perfunctory public consultation, parents considered that they had been ignored and that closure and merger had been a *fait accompli*. I spent a long Sunday in my chambers preparing the case (one of many reasons for not being a barrister) and persuaded Mr Justice Hodgson next day that Brent had failed to meet the legitimate expectation of the parents that they would be given grounds for the proposals in sufficient detail and in sufficient time to allow a considered response. That the set of criteria on which we succeeded have become part of the common law has been one of the real rewards of the job[42].

Chapman v UK (27238/95). The breaches of duty proved largely non-justiciable because the Act directed all complaints to the Department of the Environment, which consistently failed to deal with them.

[40] *Simmons v Pizzey* [1979] AC 37: "Neither 36 nor 75 is a number which in the suburbs of London as they exist at the present time can ordinarily and reasonably be regarded as a single household" (per Lord Hailsham).

[41] DIlhorne, a graceless man, was a descendant of Sir Edward Coke. Given the task of advising on who should succeed Harold Macmillan as prime minister in 1963, he had sidelined the extrovert Hailsham in favour of the lacklustre Sir Alec Douglas-Home (see *ODNB,* cap. Buller).

[42] *R v Brent LBC, ex p Gunning* (1985) 84 LGR 168, 189, approved *R (Moseley) v LB Haringey* [2014] UKSC 56. At about this time I was grumbling that the innovative work of some of the first-instance judges was being

So by 1988 the High Court was examining the business of government with rather more knowledge and acuity than before. When Derbyshire County Council decided to close one of its secondary schools, the Secretary of State's approval, which was required by law, was slow in coming. Finally, however, an official in the Department of Education phoned the county council to say that a letter approving the closure would shortly be in the post. She asked that this be kept confidential until the letter arrived, with the predictable consequence that within hours the local press knew about it and were on the phone to the local MP for a comment. The MP (who had children at the school and was a member of the party in government) stormed into the Department of Education and pointed out to the Secretary of State that closure of the school could cost him his seat. The letter giving permission was retrieved from the departmental out-tray, and when the replacement letter arrived it refused permission to close the school. Derbyshire contended that it was of no effect: permission to close the school had already been given by phone. The parents, for whom I was acting, contended that there was only one valid decision, and that was the letter of refusal.

Towards the end of the first day's argument in the divisional court, Lord Justice Watkins asked why the departmental file, which plainly formed a key part of the relevant history, was not in court.

> "Files of this kind concern the formation of policy at the highest level, my lord" said counsel for the Secretary of State. "They are never produced in court."
>
> "On my desk by 10 tomorrow morning," said the judge[43],

and the court rose. Next day, there was the departmental file on the school. Pinned to the front of it was a memo which read:

> "Minister. The local authority and politicians of all colours are pressing for an early decision. If you are content to approve I will, of course, speak to [the local MP] on Monday. Approve?"

Alongside the last word was a handwritten tick, identified as his personal tick by the minister in an affidavit which went on to assure the court that it had been administered only after studying the entire file.

The outcome was a judgment which held the letter of refusal to be the single valid decision:

> "Here the LEA, and in due course the objectors, were entitled as a matter of good administration, of fairness and in fulfilment of a legitimate expectation to have from the Secretary of State that which would in law be regarded as an approval (or, as the case may be, a rejection or a modification) of the LEA's proposals, not a mistaken, unauthorised and

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"frustrated by the Court of Appeal, which distributes its work among judges not all of whom have much acquaintance with administrative law. It is becoming axiomatic that if you are going to win a public law case on civil rights you have got to win it at first instance" ('What Next?', *Public Interest Law* (1986), ed. J. Cooper and R. Dhavan, ch. 18).

[43] Tasker Watkins, who had won a VC in the war, usually got his way.

> confidentially expressed telephone message. That seems to us to be good common sense too."[44]

As I have said, public law is about good administration as well as bad.

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I mention these cases because, although many of them were obscurely reported, if reported at all, and are barely referred to in the textbooks, they reflect the substantive change in legal culture and reasoning which, with a following wind from the high-profile cases, began to shake public law out of the long sleep which forms part of the history traced in this book. They were, to be sure, islands of success in a sea of frustration; but the mood of the common law was changing from quiescence to vigilance. Principles which in earlier cases had been forgotten or abstractly proclaimed were now being applied in response to the merits of real cases, and new principles were being developed.

Daylight in prisons

The slow but accelerating movement of legal history was nowhere clearer than in relation to the prison system, on which up to the 1970s public law had made no impact at all. The senior judges had sent out a message that prisoners, by definition undeserving, must put up with whatever conditions were their lot. They could not come complaining to the courts.

> "If the courts were to entertain actions by disgruntled prisoners," said Lord Denning, "the governor's life would be made intolerable."[45]

But by 1979 the Hull prison riots had driven the courts, confronted with some serious denials of due process, to hold that the boards of prison visitors, when adjudicating on disciplinary charges, were obliged to proceed fairly[46]. This, however, left intact the inner bastion of prison discipline, governors' adjudications. The Court of Appeal, likening them to decisions of a military commander in the field or of a ship's master at sea, went on holding them immune to legal challenge, however unfairly they were conducted[47].

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[44] *R v Secretary of State for Education and Science, ex p. Hardy* (CO/354/88; 27 July 1988) DC (Watkins LJ and McNeill J)

[45] *Becker v Home Office* [1972] 2 QB 407. My own first encounter with Lord Denning was when I tried, in the same year, to compel the board of visitors to hear counsel on behalf of Frankie Fraser, the Kray brothers' enforcer, who was facing a charge of mutiny: *Fraser v Mudge* [1972] 1 WLR 1132; see Sedley, *Ashes and Sparks*, ch. 20

[46] *R v Board of Visitors, Hull Prison, ex p St Germain (No 1)*[1979] QB 425; *(No. 2)* [1979] 3 All ER 545

[47] *R v Deputy Governor Camphill Prison, ex p King* [1985] QB 735

The Joshua whose trumpet brought this wall down was a prisoner named Mark Leech, then both a professional con artist and an expert barrack-room lawyer, subsequently a reformed character running a charity for ex-prisoners. It was on Leech, as luck would have it, that a deputy governor chose to practise a textbook denial of natural justice. Having heard a prison officer read out the details of a disciplinary charge, the governor announced that he found the case proved.

> "Excuse me," said Leech, "You haven't heard my defence."
>
> "I'm not interested in your defence," said the deputy governor.

With this on the record (in those days a prison officer used to take a written note of disciplinary proceedings), the only possible answer was non-justiciability. But one of the strengths of public law litigation is that government does not fight to win at all costs: it will sometimes recognise that to win a particular point in a particular case may distort the development of the law, and Treasury counsel will modify their arguments accordingly. So it was that in Leech's case counsel for the Home Office, John Laws, made it clear that they did not wish to protect the governor's position by rolling back the Hull prison decision on the justiciability of board of visitors' decisions. Governors' adjudications had to be, if anything, an exception to what was now the rule.

The main problem for the Home Office's argument that prison discipline would collapse if prisoners could challenge governors' adjudications was that the events which gave rise to the pair of cases which eventually came before the House of Lords were comically out of kilter with the solemnity of the argument. Leech had been charged with having a biro adapted for smoking cannabis concealed in the ceiling of his cell. His co-appellant, Prevot, had a glamorous French wife who had arrived for a visit wearing a fur coat, under cover of which he was alleged to have enjoyed some marital comfort in breach of the Prison Rules. The governor had refused to let him call his wife, or any of the sixteen other prisoners in the visiting room at the time, to support his indignant denial that any such thing had occurred. The sight of Nigel Bridge, now the presiding law lord, trying to keep a straight face as I opened the facts was an object lesson in the relevance of merits. The law lords unanimously allowed the two appeals[48].

The daylight that Leech's case and a series of other cases let into the prison and parole systems[49], intensified (not initiated) when the Human Rights Act came on stream in October 2000[50], formed an important element in the reawakening and renewal of English public law. It did not acquire a high public profile, but it formed part of the groundswell of

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[48] *Leech v Deputy Governor, HMP Parkhurst*; *Prevot v Deputy Governor, HMP Long Lartin* [1988] AC 533.

[49] See generally Owen and Macdonald, *Prison Law* (4th ed., 2008)

[50] See *Daly v Home Secretary* [2001] 2 AC 532

jurisprudence which was able, as the culture of judicial abstentionism receded, to turn principle into practice[51].

I have argued in the past, and still believe, that the test of a civilised system of law is not how it treats the respectable and the virtuous but whether it can apply an equal standard of justice to the marginal, the unrespectable and the undeserving. Public law in England and Wales, at its best, has in my lifetime shown itself able to do this.

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Making history

At least one other occasion sticks in the memory. One morning in 1967 I was waiting for a case in which I was briefed to be called on in the Divisional Court while judgment was delivered on a claim that had been heard a few weeks earlier about the amenability of the criminal injuries compensation scheme to judicial review. The scheme had no statutory foundation: it consisted simply of a White Paper setting out the circumstances in which compensation would be paid ex gratia to victims of violent crime. Mrs Lain, a policeman's widow, was contending that she came within the scheme; the government was contending that whether she did or not, the court had no power to construe or enforce the scheme – it was a pure exercise of the royal prerogative and not justiciable.

> "The Board," submitted Treasury counsel, "is subject to control by the Crown, by whom it has been constituted, and not by this court."

It was when Lord Justice Diplock, in his customary monotone[52], began delivering the second judgment, rejecting the Crown's claim that it stood above or outside the law, that it dawned on me that I was listening to legal history in the making.

It was not for another seventeen years that *Ex parte Lain*[53] received Lord Scarman's accolade[54] as a case as important in its day as the *Case of Proclamations*[55] had been three and a half centuries before. In turn, a few years later, I was able to build on it in preparing and arguing *M v Home Office*[56]; and again, some years after that, in deciding *Pankina v*

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[51] See further Ch. 10, 'Public law and human rights'; Ch.12, 'Standing and "sitting" in public law'

[52] Diplock, when in the Court of Appeal, used to read his judgments almost inaudibly from a manuscript which he would then pass to the shorthand writer. His manuscripts, the shorthand writer told me many years later, were as illegible as his delivery was inaudible. It was only when he came to correct her typed drafts that Diplock's sharp and lucid prose emerged. Once in the House of Lords, all his judgments were delivered in print.

[53] *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864

[54] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 407. See further Ch. 6.

[55] (1611) 12 Co.Rep.74

[56] [1992] QB 270 (CA). See further Ch. 3, and S. Sedley, *Ashes and Sparks* (2011), ch. 28, 'The Crown in its own courts'.

Home Secretary[57]. These are the long roads which make history practical and practice meaningful.

[57] [2010] EWCA Civ 719 (CA) (upheld on alternative grounds by the Supreme Court [2012] UKSC 33)