

**ADMINISTRATIVE POWERS OVER
PERSONS AND PROPERTY**

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ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY

A COMPARATIVE SURVEY

By

ERNST FREUND



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INTRODUCTORY NOTE

The Commonwealth Fund in 1920 set aside certain funds for the encouragement of legal research and appointed a committee to recommend projects and to have executive responsibility for the carrying on of such research as might be approved. That Legal Research Committee was constituted as follows:

†JAMES PARKER HALL, Dean, the University of Chicago Law School, *Chairman*,

MAX FARRAND, late Adviser in Educational Research, the Commonwealth Fund, *Secretary*,

CHARLES C. BURLINGHAM, of Burlingham, Veeder, Masten and Fearey, New York,

BENJAMIN N. CARDOZO, Chief Judge of the Court of Appeals in the State of New York,

JOHN G. MILBURN, of Carter, Ledyard and Milburn, New York,

ROSCOE POUND, Dean, Law School of Harvard University,

BARRY C. SMITH, General Director, the Commonwealth Fund,

HARLAN F. STONE, Associate Justice, United States Supreme Court, resigned and succeeded by

CHARLES E. HUGHES, of New York.

The Committee decided to devote a portion of the funds to studies in administrative law—a branch of the law which, by reason of the striking growth of regulative and fiscal legislation since the beginning of the century, has been rapidly gaining in importance, and the problems of which command the attention of the legal profession and of students of government alike. It therefore appointed a special Committee on Administrative Law and Practice consisting of:

ERNST FREUND, Professor, the University of Chicago Law School, *Chairman*,

WALTER L. FISHER, of Fisher, Boyden, Kales and Bell, Chicago,

FELIX FRANKFURTER, Professor, Law School of Harvard University,

FRANK J. GOODNOW, President, Johns Hopkins University.

The Committee was of the opinion that administrative practice could best be studied by the investigation of some of the new govern-

† Died March 13, 1928, while this note was in press.

mental activities in special fields, and these investigations have been carried on in the main under the direction of Professor Frankfurter. A study of the Federal Trade Commission by the late Gerard C. Henderson, published in 1924, was the first fruit of this part of the program. There has also been published a brief study on administrative procedure in connection with statutory rules and orders in Great Britain by Professor J. A. Fairlie of the University of Illinois (1927), and there are now in progress investigations of the Interstate Commerce Commission and of certain phases of administrative rule-making powers.

For the purpose of gaining a comprehensive view of the major problems of administrative law it was also decided to make a comparative survey of administrative powers in regulative legislation, which would reveal the extent to which statutes operate through powers, and the relative use of licenses and orders, and of discretionary and non-discretionary action. This part of the work was undertaken by the Chairman of the Administrative Law Committee, and the result is submitted in the present publication.

It is hoped that the book will stimulate further research in administrative law.

PREFACE

The following Survey presents somewhat the appearance of a systematic treatise on administrative law, and it should therefore be pointed out that it covers only one section of the subject, namely, powers determinative in their nature and exercised with regard to private rights which are in a sense of a normal character. The limitation can perhaps be more clearly expressed by specifying aspects of administrative law not covered. These are:

1. Powers exercised over dependents, defectives, and delinquents, or what is now generally designated as public or social welfare administration. Since in this field large discretion is conceded to be legitimate, legal problems are of relatively minor importance as compared with problems of social service technique.

2. Powers exercised within the governmental organization or by virtue of governmental right of property or under contract, and the corresponding liabilities. There are comprehensive treatises on the law of municipal corporations and of public officers with which the legal profession is familiar and which fall mainly within this division, but there has been no systematic treatment of "service" powers so far as they relate to state or national government.

3. Powers exercised by way of preparing for judicial action or by way of carrying out judicial mandates, or what may be called "enforcing powers." A legal study of law enforcement, whether designated as a branch of administrative law or not, pursued in a comprehensive and systematic way, would be of great interest and importance, but would present very different problems from those discussed in the present study.

4. Powers of an administrative character similar to those discussed in the present publication, but vested in courts of justice. These, like enforcing powers, are so closely tied up with judicial constitution and procedure that they would require a separate study.

5. On the Continent of Europe, administrative supervision is co-extensive with legislative control, and university courses in administrative law therefore cover the entire field of regulative legislation. We define administrative law more narrowly; and yet it is true that the economy of administrative powers cannot be fully understood without realizing to what extent it is possible, and is the legislative practice,

to dispense with them. A comprehensive study of the ways and means of regulative legislation is therefore a logical complement to the present study. It is needless to say that this likewise lies beyond the scope of this volume.

A study of law based on the text of statutes presents the inevitable drawback that the data set forth are apt to be superseded by the progress of legislation. The present volume endeavors to summarize, from the point of view of administrative powers, an era of regulation which combined respect for private right with a growing sense of the social obligations of property and business, and which fully recognized the paramount claims of public interest. That seemed to be the dominating note of the legislation of the end of the nineteenth and the beginning of the twentieth century. The plan was at first to carry the survey down to the beginning of the World War; but eventually this plan was adhered to only for Germany, while the statutes of the other jurisdictions were examined to the end of 1925. But not even this limitation has been strictly observed. Where later developments were significant, they have been noted, if it could be done without undue labor. Thus the changes of the revenue law by the act of 1926 have been taken into account, but not the changes of the state administrative organization in New York by the act of the same year; a study of that act left the impression that alterations, so far as they affected problems discussed in this book, were in many respects nominal rather than substantial, and did not warrant the labor of purely formal corrections extending through the entire book. It would have been impossible to deal adequately with German post-war legislation, which is still largely in a state of transition; and in Germany more than in the other jurisdictions there is a new order of things. German pre-war legislation presented in many respects a model of the traditional type of administrative powers, and it was for that reason that Germany was selected as one of the four jurisdictions surveyed. The new German law can no longer be described as conservative. It is, of course, possible that this new law foreshadows developments to come also in England and America; in that event administrative law will assume a new aspect, and the picture presented in this book will be of the past; but the change will not come in a day, and it will not come until our constitutions are altered or receive a new interpretation.

Readers of the legal profession should be warned that they must not expect to find in the book a repertory of case law such as is appropriate to a treatise intended for the use of the practitioner. While

it is hoped that principles are adequately supported or illustrated by judicial decisions, an exhaustive citation of cases would, in view of the scope and the nature of the study, have served no valuable purpose and would have swelled the book far beyond its present size.

Where so many statutes are cited, errors are inevitable, and indulgence is asked for such as may be discovered.

Since some features of the present volume may appear to reflect Continental methods of legal writing, the meagerness of reference to treatises and articles will perhaps be noted. Systematic discussion is, however, so much more represented by German and French than by English and American writers that an adequate notice of theories and controversies would have given the book an even more unfamiliar and foreign aspect. It seemed, therefore, wiser not to enter at all into the views of other writers. Great benefit has naturally been derived from the abundant French and German literature on administrative law.

I desire to express my great obligation to the Commonwealth Fund for making the publication of this study possible.

E. F.

UNIVERSITY OF CHICAGO

February, 1928

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