

Denis Baranger

UNCOVERING THE FOUNDATIONS OF ADMINISTRATIVE LAW?

I. INTRODUCTION

In such a world as ours, foundations are necessarily problematic. The world of yesterday was foundational. But foundations have been sapped. « Modernity » would be a good word for this process of sapping foundations and hoping to build a world that exists without foundations. This world would be a « self-evident » one, one that does not need external justifications but stands as its own justification.

Yet when the existing foundations are sufficiently eroded, there comes a generation of « retrievers of ancient prudence¹ ». They attempt to uncover or rediscover foundations.

Martin Loughlin is emphatically one of those « retrievers of ancient prudence »: « This study », he says, « can [...] be viewed as an exercise in retrieval² », and public law « remains an essentially prudential discourse³ ».

One can engage in historical pursuits for reasons other than foundational ones. In fact, the science of history has been an education of scepticism for many. Yet Loughlin's approach to the history of ideas is foundational. Let us take for granted that *Foundations of Public Law* [FPL] does what its title says it does, spelling out the *foundations* of public law. My question is the following: of what kind of public law is this the foundation? Does his « architecture » of *droit politique* come up as a plausible foundation for our contemporary systems of public law? In order to answer this question, I will focus on two legal cultures that are supposedly sufficiently different to justify one of Loughlin's « foundational » claims, namely that the kind of public law he is talking about has become « universal⁴ »: namely, France and Britain.

My starting point can be summed up as follows: certainly, Loughlin excels at providing an account of a foundational structure for public law. And this foundation is obviously related to the phenomenon known as public law. It may be called the « constitutional » element in public law, or if you prefer, the « constitutional » foundations of public law. I find it more difficult, however, to use Loughlin's scheme when it comes to explaining what we generally mean by « public law » in a modern context – namely

¹ The expression famously used by James Harrington in his *Oceana* about Machiavel.

² M. LOUGHLIN, *Foundations of Public Law*, Oxford, Oxford University Press, 2010 (later: *FPL*), p. 10.

³ *Ibid.*, p. 406.

⁴ See *ibid.*, p. 2.

administrative law: be it the framework of administrative action by the state, the blooming field of « regulation » (the body of public law that regulates many fields of private action), or the judicial review of administrative action. Both in France and the UK, it is suggested, this dimension of public law has not evolved out of the kind of foundations that Loughlin envisages. In fact, it has not evolved from any foundation at all, in the sense that its development is not foundational in nature. In other terms, *FPL* is more a framework for studying the « idealism of constitutional law » than the « materialism operationalized through administrative law⁵ ».

I am far from suggesting that Loughlin has overlooked the kind of development that I am referring to: his earlier works give it much attention. Moreover, although *FPL* considers another dimension of public law, its account of the destiny of public law as *droit politique* in the modern world perfectly envisages the phenomenon of modern administrative law. This appears notably through Loughlin's careful readings of some continental authors. For instance, he uses the French lawyer Léon Duguit as a witness of the post-metaphysical condition of man and society in which « the modern inheritance of public law is in “a condition of dislocation” and in need of a new system to replace it⁶ ». This dislocation is due to a massive, unanticipated, expansion of the governmental sphere. This expansion, in turn, is connected to the moral victory of ordinary life and terrestrial well-being over any sort of metaphysical background. Modern government, increasingly « intervenes in the provision of services, such as education, social security, transport and utility supply⁷ ». This modern world of *services publics* (in French legal parlance) cannot be based on the foundational couple of sovereignty and human rights as first elaborated during the French revolution. Prerogative, says Loughlin, is « sublated », assimilated in the larger perimeter of the modern administrative state. And indeed « prerogative » in the technical, British sense of residual, non-statutory, powers is a good example of this transformation. What was achieved by the *A.G. v. De Keyser* case⁸ was exactly that. Prerogative was « sublated » by statute law, at least in this sense that statute law was supposed to supersede prerogative whenever Parliament thought it fit to set foot on Crown territory. But it took nearly sixty years and the *GCHQ* ruling for prerogative to be fully sublated.

In the next Part, I will attempt to explain why administrative law resists a foundational approach. In Part III, I will show how attempts to provide such a foundation have only been partly successful. Finally, in Part IV, I will explore possible ways of extending Loughlin's understanding of public law as a « distinctive juristic discourse » to contemporary administrative law in France and Britain.

⁵ *Ibid.*, p. 370.

⁶ *Ibid.*, p. 404.

⁷ *Ibid.*, p. 405.

⁸ [1920] A.C. 508.

II. PUBLIC LAW AS (ESSENTIALLY) « SPORADIC AND PERIPHERAL »

A. *The Problem in Historical Terms*

There is reason to think that modern administrative law has not evolved out of a foundational process. Both in France and the UK, administrative law as we know it is a fairly late development. The substantive law of administrative action only developed in the nineteenth century. And despite some heroic origins in the old regimes – e.g., judicial supervision exercised over inferior courts by the King's Council in monarchical France; or the English prerogative writs – judicial review of administrative action is an even later development.

De prima facie, it is not easy to relate the intellectual background of this development of administrative law to the kind of foundational process of « *droit politique* » as expounded in Loughlin's *Foundations of Public Law*. Not only is this a fairly belated transformation, but it is also one that has been for the most part unanticipated. The great authors of *droit politique* that Loughlin so skilfully analyses envisaged a modern state which was mostly based on legislation. In this corpus, the role of the modern judge as a « third giant » in the State was not really anticipated, and if so mostly in a subordinate, mechanical capacity. Nor was the shift towards the primacy of case law and « court-based » jurisprudence, for the most part, anticipated. Bodin, or Hobbes, or indeed Rousseau, would have been surprised, and most probably shattered, at what they would see in modern public law: namely, judges running the day. So a foundational/doctrinal approach to public law takes the risk of looking only at what the intellectual founders envisaged in their blueprint, while underestimating unanticipated developments – the twists and turns which have brought us where we now stand. A quick exploration of the historical development of administrative law in both France and the UK demonstrates this.

Let me begin with the French example. It is generally accepted that the birth of modern administrative law can be dated from an 1872 case named *Blanco*. *Blanco* is not a *Conseil d'État* case but a *Tribunal des Conflits* case. The *Tribunal des Conflits* is a court of exclusive jurisdiction appointed to rule whether a case should be decided by a public law court or by a private law court. It does not decide on the merits of the case, but only on the issue of jurisdiction. The *Blanco* case stands as authority for what is called the « autonomy » of French public law (*droit administratif*). The « autonomy » of French Public law is twofold. First, the substantive rules of public law are separate and distinct from the private law rules in the *Code civil*. Second, this special body of rules is adjudicated by a special body of courts: the *juridictions administratives*.

Thus, if you read the *Blanco* ruling literally – and indeed why should you not do so – what you read is that:

State liability for torts caused to private persons by [state] employees working in public services *cannot be governed by the principles of the Code civil*, [which regulates] the relations between two private persons. This liability is neither general nor absolute. It is governed by special

rules, depending on the needs of public service⁹.

This ruling presents public law, not as something based on the kind of foundations that Loughlin envisages, but as a side development – a « lateral » (for lack of a better word) body of rules. French public law thus arose as an adjunct development to the body of private law codified in the 1804 Civil Code. Historically and conceptually speaking, French administrative law does not stand as the *foundation* for the rest of the legal system. Rather, it aims at protecting the special « rights of the state », to use the often overlooked standard set out in the *Blanco* ruling.

The history of administrative law in Britain, on the other hand, is markedly different from that of the French *droit administratif*. In fact, for a long time, the English system developed under the assumption that it had nothing resembling a *droit administratif*. To describe the birth of a body of administrative law in Britain would be a massive task. But let me point out two features that should be as little controversial as possible. I do this in order to lend some legitimacy to the claim that the strategy at play in British efforts to understand public law does not always consist in « reducing [public law] to a species of ordinary law, » a method which, according to Loughlin, « ensure[s] that the nature, method and functions of public law will be misconstrued¹⁰ ».

The first of these features is the rise of quasi-judicial bodies: *i.e.*, the acquisition of legislative and judicial functions by the executive. In *Justice and Administrative Law: A Study of the British Constitution*, W.A. Robson noted in 1928 that « [o]ne of the most striking developments in the British Constitution during the past half-century has been the acquisition of judicial powers by the great departments of State and by various other bodies and persons outside the Courts of law¹¹ ». He described the purpose of his study as one of « examin[ing] in detail the nature and scope of the judicial functions exercised by government departments and other public and private bodies ». In other words, administrative powers in Great Britain were initially envisaged as quasi-judicial powers. And the history of administrative law in the United Kingdom is a history of the rise of delegated legislation.

The second of these features involves the evolution of judicial review from what we might call « weak » review to « strong » review. It is common knowledge that there has long been an existing judicial framework for the review of administrative action, one based on the time-worn prerogative writs. But for a very long time – say from the heroic cases of the

⁹ [Emphasis added] (« [La] responsabilité, qui peut incomber à l'Etat pour les dommages causés aux particuliers par le fait des personnes qu'il emploie dans le service public, ne peut être régie par les principes qui sont établis dans le Code civil, pour les rapports de particulier à particulier. Que cette responsabilité n'est ni générale ni absolue; qu'elle a ses règles spéciales, qui varient suivant les besoins du service ».)

¹⁰ *FPL*, p. 6.

¹¹ I quote from the second edition : W.A. ROBSON, *Justice and Administrative Law : A Study of the British Constitution*, London, Stevens and sons Limited, 1947.

17th century to *Wednesbury* – this was a « weak » form of judicial review, one that consisted of a limited test for legality. Administrative entities were expected to come up with evidence that the power that they claimed to have was grounded either in statute or in common law precedent. I would call this the « can you please show some ID? » approach to public law. If the public authority could show its jurisdictional ID, it would walk free and unfettered.

Take the case of prerogative powers. For a long time courts were only willing to review the existence and extent of the prerogative, but not its « manner and exercise ». It took the *GCHQ* case (1985), anticipated in 1976 by the Court of Appeal in *Laker*, to allow a move forward in this regard. As in the case of statutory powers¹², this move was deeply connected to the greater concern for individual rights, and especially for procedural rights. The history of administrative law in the common law courts is deeply connected with the history of procedural rights. Dicey was very much concerned with « private rights ». But he saw constitutional law guarantees as best suited to protect them.

The failure of « foundational » guarantees to sufficiently protect individual rights has opened the path to « non-foundational » protections, such as those offered by judicial review. This is a major shift. The topical case in this regard is *Dyson*¹³. *Dyson* explicitly acknowledges the failure of ministerial responsibility as a proper tool for the defence of individual rights:

If ministerial responsibility were more than the mere shadow of a name, the matter would be less important, but as it is, the Courts are the only defence of the liberty of the subject against departmental aggression¹⁴.

(*Dyson* then showed the way for courts to take over the business of defending individual rights.)

One could say that, in this move from weak to strong (or at least stronger) control, judicial review has to a significant extent ceased to be « inevitably sporadic and peripheral, » in the famous terminology of Stanley de Smith¹⁵. Indeed, in the words of Maurice Sunkin, who in turn quotes other scholars:

[I]t is now commonly assumed that: “the effect of judicial review on the practical exercise of power has [...] become constant and central”. It is said that judicial review is a “new and important stage in the public policy process¹⁶”.

¹² See *Ridge v. Baldwin*.

¹³ *Dyson v. Attorney-General* [1911] 1 K.B. 410.

¹⁴ *Ibid.*

¹⁵ S.A. DE SMITH, *Judicial review of Administrative Action*, London, Stevens, 1959, p. 1.

¹⁶ S. JAMES, « The Political and Administrative Consequences of Judicial Review », *Public Administration*, 74, 1996, p. 613 (quoting from S.A. DE SMITH, H. WOOLF & J.A. JOWELL (eds), *Judicial Review of Administrative Action*, London, Sweet & Maxwell, 1995, p. VII).

Yet, however intense the review of administrative action in the UK might have become, it has not lost some of the core features that made it « sporadic and peripheral ». It remains sporadic, despite the rising quantity of AJRs and judicial review rulings, because it is court-based, and thus inherently casuistic. It also remains essentially peripheral, because it is very much based on « remedies, not principles », to quote from the words of Lord Wilberforce in the *Davy* case¹⁷.

And it is only as remedies have evolved, that judicial review too has evolved. In *O'Reilly vs Mackman*, Lord Diplock famously stated that:

[T]he distinction in substantive law between what is private law and what is public law has itself been a latecomer to the English legal system. It is a consequence of the development that has taken place in the last 30 years of the procedures available for judicial control of administrative action.

This statement served as a preface to a narration of the change of administrative law, a change that took the form of a Dworkinian chain novel: first came the *Shaw* case (1952); then the Tribunals and Inquiries Act 1958; culminating in the R.S.C., Ord. 53. In between, Diplock could mention such landmark cases as *Ridge v. Baldwin*¹⁸, *Anisminic Ltd. v. Foreign Compensation Commission*¹⁹, and *Padfield v. Minister of Agriculture, Fisheries and Food*²⁰. That chain novel, as developed by other judges or scholars, could include *O'Reilly* itself, and be continued in later cases. In fact, many other chain novels (with new episodes continuously appearing in the form of sequels and prequels) could be written about other developments in the law, such as the story of the « taming of the prerogative », the narrative of the rise of « procedural fairness » over the ashes of « natural justice », or the pre-HRA mythology of « bringing rights home ».

Is there a foundation to be found within such narratives? Directly? Or by reading between the lines? Or does the narrative (or, more generally, the narrative style in British public law) itself work as a foundation, a kind of mythical story of origins?

This raises a (deceivably) simple question: why does this have to be a narrative at all? A narrative is a stylistic device adapted to the depiction of a series of events. Why does public law take such a shape? And why is there a story to tell? Why did it take so long for common law courts to move from *weak* to *strong* judicial review? And in the era of « strong review », why did the « strengthening » begin only in the 1960^s? And, finally, why is it itself an ongoing process and not one that has occurred once and for all, in a wholesale fashion?

¹⁷ « English law fastens, not upon principles but upon remedies » (*Davy v. Spelthorne BC*. [1983] APP.L.R. 10/13 at para. 27).

¹⁸ [1964] AC 40.

¹⁹ [1969] 2 A.C. 147.

²⁰ [1968] A.C. 997.

For instance, in the period spanning from *A.G. v de Keyser*²¹ (1920) to *GCHQ* (1994), why did the Appellate Committee of the House of Lords refrain from entering the field of the « manner and exercise » of prerogative? Or, to take yet another example, why is it, in the terms of Lord Mustill, that as far as judicial review is concerned « standards of fairness are not immutable²² »? And is this true in the first place? Why was it (in the eye of the law) alright for administrative bodies to disregard procedural fairness in the (recent) past?

Social sciences – history, sociology – can suggest answers, or at least patterns, to legal science, and legal scholarship can be tempted to turn to the social sciences in order to solve such a quandary. For instance, the solution can be expressed in historical terms, but then the rationality of the entire process of change, taken as a whole, is hard to envisage, if only because we find it hard to understand why justice, which should be immutable, was not done from the beginning. And also because nothing (and especially not the reading of law journals and law reports) tells us that we stand at the end of history. Another case might come up, another statute. To say, as did Oliver Wendell Holmes, Jr., that « the life of the law [...] as been experience » is to say that the law's logic is only apparent retrospectively, while conceding at the same time that new chapters (and thus new endings) can be added eternally.

Thus, if narratives work as foundations, they are a shifting foundation, ones that move across time. Common lawyers are used to the metaphor that the common law is constantly changing while at the same time immutable. But metaphors can work like drugs: they are likely to generate both delusion and addiction.

B. The Conceptual Problem: The State and its Avatars

The problem does not only appear in a historical form. It also appears in conceptual terms. This is emphatically the case of the notion of « the state » in public law. I will try to show (1) that administrative law is a field where some very serious hindrances come in the way of those who attempt to make the state a foundational concept of public law; (2) that the state does indeed play a role in administrative law, but in both my sample jurisdictions (*i.e.*, France and the UK) it is through more local conceptual embodiments – what I call “avatars”. And along the lines suggested above, these embodiments operate in a way that is « lateral » or « peripheral » rather than is foundational.

²¹ [1920] A.C. 508.

²² *R. v. Secretary of State for the Home Department*, ex p. Doody [1994] 1 A.C. 531.

1. The state as the *sine qua non* of public law?

Loughlin defends the view, quite convincingly, that « the concept of the state is [...] the *sine qua non* of public law²³ ». He makes a plea for the « indispensability of the concept of the state for public law²⁴ ». At least in the French and British concept, though, administrative law has done extremely well without a concept of the state. Of course, the state is not entirely absent: it lies hid somewhere in the background, « shrouded in darkness, veiling his approach with dark rain clouds, » as the God of the old testament²⁵. But the *Rechtsdogmatik* of administrative law has managed to keep it just there. At least in France and Britain, the state has not become a foundational concept of administrative law.

In France, to be sure, the unity of « public law » has in fact been based by some Third Republic authors on the notion of the State. When Maurice Hauriou wrote his « principles of public law » (1910), he found that the state was the unifying concept sitting between constitutional and administrative law:

[I]nto legal reality (*dans la réalité juridique*), one has to distinguish a certain number of cases in which public lawyers (*publicistes*) have effectively dealt with the problem of the state as a whole²⁶.

Carré de Malberg could also note that « by public law, what is meant is the law of the state (*Staatsrecht*)²⁷ ». And this was not only a statement made by constitutional lawyers. Hauriou had built his *Principles of Public Law* (1910) on the general idea that there was a « régime d'Etat » – *i.e.*, a set of legal rules, principles and mechanisms specific to the state. Roger Bonnard, another important administrative lawyer of the Third Republic, had begun his *Précis de droit administratif* with the claim that « one cannot reach a scientific understanding of administrative law without taking as a basis a theory of law and of the State²⁸ ».

On the other hand, Olivier Beaud has more recently argued that the « State » is relatively absent from the vocabulary of public law. And while some Third Republic authors had claimed that the state was the key concept of public law, others successfully defended the view that the state was

²³ *FPL*, p. 183.

²⁴ *FPL*, p. 183.

²⁵ Psalm 18-11. See also 97-2: « Clouds and thick darkness surround him; righteousness and justice are the foundation of his throne ».

²⁶ « Il fallait découper dans la réalité juridique » un certain nombre de problèmes qui ont été traités par les « publicistes qui [...] en France, ont véritablement traité *le problème de l'Etat dans son entier* ».

²⁷ « Il faut entendre par droit public, le droit de l'État [*Staatsrecht*] » (*CTGE*, I, p. 1).

²⁸ « On ne peut pas arriver à une connaissance scientifique convenable du droit administratif sans prendre appui sur une théorie du droit et de l'État » (R. BONNARD, *Précis de droit administratif*, Paris, LGDJ, 1940, p. 21).

unnecessary to the *rechtsdogmatik* of French administrative law²⁹ ». A careful sifting of cases and legislation established that instead of the state per se, what mattered for the establishment of administrative law was simply, as shown above, its autonomy from private law (as defined earlier in this paper: substantive autonomy of rules and procedural autonomy of a distinct body of administrative courts); and (2) its distinctive « process of public service » (« *procédé du service public* »).

In the United Kingdom, the relative absence of the State is even more easy to diagnose. British law knows of a Crown, or in the modern parlance of such lawyers as Diplock, Roskill, or Denning an « executive government » – which in fact has retained a great deal of the inherent features of the crown. But it notoriously lacks an operational, legally meaningful, concept of a State, as Loughlin himself notes:

In the British constitution [...] the crown or monarch (and there is still some confusion over these terms) continues to this day formally to represent the *Staatsgewalt*³⁰.

One could even contemplate the idea that there is something corresponding to the German concept of *Staatsgewalt* in British law. Loughlin's approach, in *FPL* (which is more wide-ranging as it defends the notion of a « universality » of public law) but also in other previous works such as *Public Law and Political Theory*, appears as a systematic, but also massively counterintuitive, defence of the existence of *Staatsgewalt* in British law. And its level of systemic elaboration matches its level of counterintuitiveness. Loughlin is not alone in taking this stance. His attitude is typical of what took place in British public law in this regard: if the State has to play a role at all in that branch of the law, it is always through a process of intellectual activism. Activist lawyers, judges or academics, come to believe that the state matters, and as a result, they defend a change of vocabulary – and beyond vocabulary, a transformation in the underlying political philosophy of public law. This has been the work of the school that Martin Loughlin has called « the functionalist school » in the LSE and elsewhere. This is also the legacy of certain conspicuous (as well as relatively heirless) judges such as Diplock or Denning. But, be that as it may, the State is *never* a self-evident feature of British law.

It is certainly interesting to investigate into the reasons for this disappearance of the state (for which we could re-use Hegel's magnificent phrase, « the sleeping soul of the state »). One is certainly the triumph of case law. If case law has been so prevalent amongst the sources of administrative law, it is because legislation has failed. The massive development of enabling legislation, creating new powers as well as new public-law bodies, has not been met by the establishing of general, transversal, principles ruling the whole field. Legislators are notoriously bad

²⁹ Olivier Beaud sees the Paris public law professor Gaston Jèze (1869-1953) as the main operator of this « disappearance of the state ». With Jèze, « the state disappears, because it is replaced by service public and its ancillary concepts ».

³⁰ *FPL*, p. 223.

at codifying. The codification of administrative law has thus been the business of judges. This is obvious in the French case as well – for instance through the line of cases establishing « general principles of law » defining the core, unwritten, requirements of legality³¹.

Additionally, in both France and the UK, judges had symmetrical and equally powerful reasons to ignore the state as much as possible. In France, administrative judges stand at the very core of *Staatsgewalt*. There is no precise distinction between the executive government, the higher administrative bodies, and the administrative court system. The *Conseil d'État* is legal counsel to the executive; the top administrative court; the place where many higher administrative officers come from. It has no need of the state because, in many regards, it is the State. In the UK, it is the same.

2. A process of differentiation

The absence of a State that would be a visible, conspicuous foundation of administrative law is thus a feature of both the British and French public law systems. Yet, in both cases, the State can exist differently, through different phenomenological « strategies ». If one agrees with my suggestion that administrative law has developed as a non-foundational, « lateral » or indeed « peripheral » process, this leads to an investigation into smaller, less visible, manifestations or emanations of the state in the conceptual framework of administrative law.

I would suggest that the keyword here is « differentiation ». This process is central to an understanding of the *Rechtsdogmatik* of both French and British public law. The legal identity of the State is found in this process of differentiation: the State manifests in the process by which it struggles to distinguish its own rights, prerogatives, immunities, etc., from the private rights that govern relations between private persons. The State's power (*Staatsgewalt*) thus appears in the negative, as simply a power to derogate from private law and private arrangements. It is not foundational. Intellectually, it is derivative in the sense that you need to know what private law is before you can see the derogations from that private law that identify the public law.

The legal word for this in France is « *dérogatoire* ». It does not translate easily in English. Rules of public law *derogate* from rules of private law. They appear as deviations from the normal, common, rule applicable to private arrangements. Dicey may have overlooked this. He saw French public law as foundational: the state came first; it stood above the individuals; the law of the state was a kind of superior law administered by

³¹ The new « Code des relations entre le public et administration » (enacted in 2015 and in force since January 2016) does not really detract from this argument: it compiles existing legislation and codified case law. Despite some inevitable changes, it is far from amounting to a revolution or a « clean slate ». The code is part of an ongoing process of codification « *à droit constant* » (with no changes in the law) in France since 1996. Yet case law has never stopped to shape French public law, maybe today more than ever.

separate courts. French public law was a kind of institutionalized, judicialized, reason of state.

Another word that would deserve a closer look here is that of « *prérogatives* ». As a French term of art, « *prérogatives de puissance publique* » are powers special to public authorities. In contract law, for instance, one such *prérogative de puissance publique* consists in the power to modify unilaterally the content of a contract. Another one, in the course of administrative action, is the power to execute one's own decisions without needing to have recourse to a court injunction.

In other terms: the sacrosanct autonomy of public law is an autonomy which has been gained *from* a pre-existing something else – namely private law. The autonomy of public law has been acquired at the expense of a previous inhabitant of the legal field. What has been acquired has been taken away from private law. The primacy of public law, as evidenced by *dérogations* and *prérogatives* (two words with the same latin root: *rogatio*, *rogare*) is not absolute and foundational. In fact, as a close reading of the landmark case of *Blanco* would suggest, French public law is lateral to a whole body of private law, which in fact it presupposes. The State presupposes an existing civil society, and public law presupposes the *Code Civil*.

This is not only a French phenomenon. « Differential judicial protection » of public bodies and civil servants (« *protection judiciaire différenciée* », in the words of Sabino Cassese³²) is a common feature of British administrative law as well. But, despite this common approach, the mental worlds and the intellectual tools could not be more different. To say, as in Britain, that an administrative power is « quasi-judicial » is more or less to take a different course from pretending that it is « exorbitant³³ » or « *dérogatoire* », as in French legal parlance. In the case of Britain, power of administrative supervision is relegated, more or less artificially, to the function of common law courts through their capacity of administering the ordinary law of the land. In the case of France, the administrative power is shown to be special and incommensurable with the ordinary law of the land, and thus assigned to a special court system.

A similar asymmetry can be seen in the approach to state liability for tort. France has not moved away from the *Blanco* principle, which, as we might recall, holds that « state liability for torts caused to private persons by [state] employees working in public services cannot be governed by the principles of the Code civil ». Conversely, the Crown Proceedings Act 1947 aims at treating the Crown as an ordinary litigant, and thus at bringing the Crown into the orbit of ordinary law. Despite this difference, however, in many tort cases the outcome of the case will be the same. In fact, both systems have created a « differential judicial protection » of administrative

³² S. CASSESE, *La construction du droit administratif. France et Royaume-Uni*, Montchrestien, Clés, 2000, p. 144.

³³ An « exorbitant » power is (etymologically) one that is « outside the orbit » of ordinary law.

action, and even by using a similar language. French administrative law granted « privileges » to administrative bodies (« *privilège du préalable, privilège de l'action d'office* »), while in Britain the Crown has been granted a « Crown privilege » (albeit later to be termed a « public interest immunity »).

III. IN SEARCH OF A FOUNDATION

Both in France and the UK, there have been attempts to provide « foundations » (and indeed constitutional foundations) to administrative law. These undertakings, with both their measure of (relative) success and of (relative) failure, are highly instructive. I will address them in turn.

A. France: The Search for the « Constitutional Bases » of Administrative Law

Earlier on, I referred to the fact that, historically and conceptually, French administrative law does not stand as the foundation for the rest of the legal system. It was not born at the core, but in the penumbra of both private law and, to some extent, constitutional law. Yet this was an unsatisfactory state of things for French lawyers. They tried hard to find a foundation, preferably in line with the French culture of legal sources. Administrative law was based on case law: the case law of the *Conseil d'État*. This did not stand as a satisfactory foundation, should a foundation be needed. French law does not have a theory of precedent. Even worse, in doing so, public law contravened the express rejection of the power of the judiciary to review administrative action as articulated in the Act of 16/24 July 1790.

The search for foundations was initially a conceptual exercise. In the later part of the nineteenth century, a school of thought supported the view that the basis of French administrative law was « *service public* » – the particular ends that were pursued by administrative entities. At the same time, another school of thought defended the view that administrative law was based on « *puissance publique* » (« public power » – the particular powers that administrative entities could use to pursue these ends – rather than « *service public* »).

Both had arguments in their favour. But it took Georges Vedel, an eminent public lawyer of the twentieth century, to formulate the issue in terms of foundations. In 1954, he expressed the view that it was « the constitution [that was] the necessary basis of the [...] rules of administrative law ». This, he took as self-evident: « this results », he said, « from the very nature of the constitution, the foundation of the legal order and the charter of the state organisation ». He then set out to uncover these foundations. He noted that « *service public* » was by no means a proper candidate: « Not only is it in crisis, but also because it introduces a rupture between

constitutional principles and administrative law³⁴ ». Vedel took the view that it was impossible to base administrative law on « material » – *i.e.*, activity-based – concepts such as « *service public* ». Instead, he purported the view that public law was built on more « formal » foundations: namely, acts of parliament, understood as a pure legal form; and the constitution, understood not as a certain content but merely as a certain legislative procedure endowed with the character of « rigidity » (*i.e.*, entrenchment).

Administrative law was thus based on *puissance publique* rather than *service public*. And *puissance publique* was in the main exercised by the executive power. « Administration *stricto sensu*, » said Vedel, « is nothing but the exercise of *puissance publique* by executive authorities ». It remained for Vedel to identify a convenient constitutional peg upon which to hang this notion of *puissance publique*. He found it in Article 3 of the Constitutional Statute of 25 February 1875 – even though this clause in fact said precious little about the actual power of the executive (except that the French President « executed laws »).

That this constitutional clause could appear as the constitutional foundation of the whole body of administrative law could come as a surprise to anyone not versed (and trained) in the French way of approaching the problem of legal empowerment. The authors of the Constitutional Statute of 1875 had not intended by any stretch of the imagination for Article 3 to envisage a system of administrative law. Vedel was certainly well aware of that, but his own theory of sources – drawn from Carré de Malberg – was (1) that the intentions of the drafters was irrelevant; and (2), that what matters is what courts have made of this provision. In accordance with this second observation, it took another resource for Vedel to make good his claim – that of case law: « We will not turn », said Vedel, « to theoretical speculations in order to point us towards the constitutional basis of administrative law. Rather, we will ask case law (jurisprudence) to do so ».

According to Vedel, « theory » was an easy target that could thus be quickly set aside. But in fact, his anti-theoretical stance was intended to hide the very obvious fact that the Emperor was naked. The constitution said nothing about administrative law. But another tenet of Vedel's theory of sources was that the constitution was that the constitution in fact *had* to say something about administrative law. And if the written law of the constitution appeared to remain silent, Vedel was theory-bound to make it talk: through recourse to the « oracle » of that law: the *Conseil d'État*.

The proper reading of Article 3, for the sake of Vedel's argument, came from the *Conseil d'Etat* decision in 1918 in the *Heyriès* case. The First World War and the extension of executive powers during the time of hostilities generated a certain amount of litigation before the administrative courts. In most cases, special acts of Parliament with a retrospective effect

³⁴ p. 26. Vedel says: « solution de continuité »: originally, a medical term of art that refers to « the displacement, rupture or dissolution of previously connected physical structures ». (R. ALLEN, *David Hartley on Human Nature*, SUNY Press, 1999, p. 122). This medical meaning is now almost forgotten in France and the expression is widely used in non-medical contexts.

had validated wartime administrative measures that would have otherwise been bound to be annulled, as they were obviously *ultra vires* at the time at which they had been adopted. A legislative draftsman's slip of the pen caused a *décret* (a regulation enacted by the *Président de la République*) to be omitted from the scope of a 1915 act of indemnity. The decree's purpose was to suspend some procedural rights granted by statute to civil servants, notably the right to access their administrative file before a disciplinary sanction is issued against them. Suspension of acts of Parliament is normally not a power which belongs to the *Président de la République*, not because of an explicit prohibition of the type contained in the British Bill of Rights of 1689, but, implicitly, because of the hierarchy of norms in the French legal system. There is in French administrative law a « fundamental rule », namely the principle of legality, according to which « regulations and decrees are subordinate to Acts of parliament and cannot undertake anything against them ». At the same time, this hierarchy of norms reflects a hierarchy of state agencies and functions: how can a holder of a subordinate, « administrative » function be able to set aside statutes passed by the « representative of the national will », namely Parliament?

The *Conseil d'État* nevertheless managed to rescue the decree from illegality by first observing that Article 3 of the Constitutional Statute of 25 February 1875 placed the President at the head of the French administration and mandated him to carry laws into execution. As a result, it argued, « it was incumbent upon him to make sure that, at all times, public services ... would be in working order ». Wartime necessities certainly played a part in the reasoning which led to affirming the legality of the decree. But the *Conseil d'État* was careful to ground this decision, in want of an appropriate statute, on a constitutional basis.

The decision was welcomed by Maurice Hauriou as a « break with the unhealthy habit of defining the executive power [*sic*] only by the duty to carry statutes into execution ». « This mission, » continued the Toulouse professor, « is twofold: [first], to ensure the proper functioning of the administration (and also of government); [second], to carry statutes into execution. This truth [...] is now unveiled. It took the war. But, under such a light, some truths are glaring ». Hauriou stood first among the holders of the minority view on the executive: he believed that executive power could not be made to collapse into an administrative function. Especially, he did not see it as subordinate: he saw it as the primary activity in the state.

One could have taken another view of the matter. Indeed, if justified by necessity, executive suspension of procedural rights need not have been deemed illegal – or more precisely, its illegality could have been excused by relevant provisions in the constitution. But one could also analyse the decision of the *Conseil d'État* as a rather unconvincing attempt to find at any cost a legal basis for an administrative decision that was otherwise doomed to be annulled. Viewed in this light, it stretched the notion of how executive actions could be authorized by written law (either statutory or constitutional) to the point where such a requirement had become entirely fictional. Under appropriate construction, Article 3 of the Constitutional Act of 25 February 1875 (which made no reference to war powers or « necessity ») could be made to justify almost anything.

Another case to which Vedel referred was *Labonne*. In *Labonne* (1919), in which the *Conseil d'État* decided that the President enjoyed inherent (*i.e.*, non-statutory) national police powers over the whole territory. The facts (and the point of law) of this French case are remarkably close to those of the British *Northumbria Police* case³⁵. Absent a statutory enactment empowering the executive to enact a police regulation, courts took recourse to a supposedly inherent police power that, in the UK, derived from the « prerogative » (revived and probably extended despite its supposedly residual nature); and in France derived, despite the lack of a textual authorization, from « *pouvoirs propres* ».

Vedel himself acknowledged that the *Labonne* case did not mention the constitution, that it is outside the « visas » through which French courts formulate the premises of their judicial syllogism (« *vu la constitution, et notamment son article 3, etc.* »). But, said Vedel, « it is self-evident [*il va de soi que*] that this foundation cannot be other than the [written] constitution. Where else would the president draw such powers? » He later said that this same theory also applied to the Constitution of 1946 and then to the Constitution of 1958.

Vedel's theory of « *bases constitutionnelle* » is of interest to us for several reasons. First, it is based on the idea that administrative law should have a constitutional anchor. And second, at the same time there is the fact that precious little by way of such a « constitutional peg » could be found in the actual text of the written constitutional enactments of 1875, 1946, 1958. What then should be done? What Vedel does is to amalgamate the constitutional text with *Conseil d'État* case law. He therefore does not need to cite the Constitution. Rather can simply quote from *Conseil* decisions offering particular construction of constitutional text. *Heyriès* is a shaky foundation for public law; *Labonne* is even worse. Indeed, proponents of the « public service school » could have come up with equally convenient constitutional pegs for their particular theory of « *services publics* » as the constitutional foundation of administrative law. In fact, the 1946 Constitution expressly mentioned « *services publics* » in its preamble clause, while it said *absolutely nothing* of « *puissance publique* ».

What is interesting about Vedel is precisely how persuasive his legal reasoning turned out to be, despite the weakness of his « philological » argument and the poverty of the evidence he was able to muster to support it. When he says about *Labonne* – that « it is self-evident [*il va de soi que*] that the foundation for this decision has to be the constitution » – is as unconvincing an assertion as can be. At the same time, Vedel nevertheless ended up setting out what would be accepted as the orthodox account of French public law for the decades to come. His account of « constitutional bases » would become a kind of « noble lie », or at least a remarkably efficient one. This may have been because Vedel himself was not a distanced intellectual, with no tie with the making of positive law. He was an « embedded lawyer », very close to the higher circle of civil servants and

³⁵ *R. v. Home Secretary, ex p. Northumbria Police Authority* [1988] 1 All ER 556.

judges. He himself would become a member of the *Conseil constitutionnel* in the 1980's. What he has to say has almost always been approved by judges in extra-judicial statements. And it has also frequently been confirmed by evolutions in the case law of French top courts. For instance, while the constitution was silent on the existence and limits of the jurisdiction of administrative courts, such jurisdictional delineations have been (belatedly) constitutionalized by the *Conseil constitutionnel* by way of an unwritten, judge-made principle³⁶. The normative category used for that sake was that of *principes généraux reconnus par les lois de la République*. Was this a confirmation of the existence of *bases constitutionnelles*, or an admission that there was nothing of the kind?

B. Britain: « A Foundation with Too Much Sand and Not Enough Rock³⁷ »

Outsiders may have intellectual privileges that insiders don't enjoy. This may be the case when they come to observe at a certain distance a controversy in which insiders are fully immersed. Take for instance the debate over the foundations of judicial review in the UK. At the end of the day, it seems, what matters is not who is right and who is wrong. That is a question for insiders. What seems more relevant to the outside observer is the structure of the whole debate and what the adversaries have in common.

Vedel's discussion of « *bases constitutionnelles* » in France and the conflicting theories developed in the course of the British « *ultra vires* » controversy have a major point in common. They are all source-based (or maybe should I say « source-oriented »). They try to uncover a foundation of administrative law and / or of judicial review of administrative action using terms of sources. In so doing, they each reflect a deeply national and idiosyncratic approach to legal empowerment. In France, the approach to legal empowerment is textual. For an administrative body to enjoy a certain power, there has (as much as possible) to be a written enactment. Other options – such as the « *pouvoirs propres* » in *Labonne* – are unsavoury and as a result marginal. Wherever supporting text cannot be found, the courts will be attempted to disguise what are best understood as inherent administrative powers under some cloak of a written authorization, however implausible it might appear.

In the UK, things have changed little since the *Entick v. Carrington* formula: adequate legal empowerment of public bodies must come either from the common law or from statute. As a matter of fact, it is striking to note that the *Entick* formula is perfectly mirrored in the structure of the « *ultra vires* vs common law » controversy about the foundations of judicial

³⁶ Décision n° 86-224 DC du 23 janvier 1987, « Loi transférant à la juridiction judiciaire le contentieux des décisions du Conseil de la concurrence ».

³⁷ J. G. McK LAWS, « Judicial review: the ghost in the machine; principle in public law », *Public Law*, 1989.

review. The *Ultra Vires* school reads a whole set of substantive rules into enabling statutes, hence taking seriously the principle of parliamentary supremacy. Conversely, the common law school identifies the common law, *Entick's* second source of empowerment, as being the principal basis of the supervisory power of courts over administrative decisions.

In both countries, legal scholars have sought to build the foundations of public law on a broader national theory of legal sources. And they have been trapped in that very theory, which is by necessity a formal theory of law. In both countries, the theoretical language is somewhat autocratic. The French understanding of sources (there *has* to a constitutional basis for administrative law and this constitutional basis *has* to be written) was the only available solution. Yet it was an extremely disappointing one, as the constitution was silent on administrative law. In the UK, the « Vedel » approach is more or less mirrored by the *Ultra Vires* school. What the theory of the written constitution does in France, the supremacy of parliament achieves in Britain. The solution *has* to come from the intention of Parliament. In Christopher Forsyth's approach, for instance, parliament *must* have meant to say something about the framework for judicial review of the powers that it devolves to administrative bodies.

As a result, in both countries, the religion of written law collapses into the defence of an unwritten framework set up by the courts. Each formal theory of sources ends up justifying exactly the reverse of its very premises: courts, not legislators, make the law.

CONCLUSION: TOWARD A « LOUGHLINIAN » FRAMEWORK FOR CONTEMPORARY PUBLIC LAW?

So far, in both France and the UK, attempts to unveil foundations for public law – in the sense of the law controlling public bodies in the exercise of discretionary powers and the management of public services – have not been entirely successful. In France, the discussion has foundered, mostly for lack of theoretical interest on the part of administrative lawyers. In the UK, it has taken a much more elaborate and analytical bent. Several important books and a wealth of articles have been devoted to the issue. But the external observer is bound to find that the controversy somewhat lingers, maybe because of its inherent formalism. As I have said earlier in this essay, it is framed in formal terms – in terms of a national theory of which sources (statute law vs common law) governs it from above. This is may be why some interesting attempts have been made (notably by Mark Elliott) to reframe the debate in terms of a « constitutional foundation » of judicial review. It is also remarkable that the controversy should focus on judicial review rather than substantive administrative law. Stanley de Smith has prevailed, and John Griffith – to whom *FPL* is dedicated – has lost. And France has never had a John Griffith in the first place.

At this stage, scepticism seems to be the most tempting option: should we not just accept that retrieving the foundations of public law *qua* administrative law is a lost cause? Should we not accept that while there is a

foundational component to public law, which is generally called « constitutional law » there is also a non-foundational dimension to that field? Moreover, administrative law may not be the only « non-foundational » zone in the territory of public law. For instance « government » and « governmental powers », or the « state of emergency » (« *état d'exception* », « *Notrecht* ») as objects dealt with by constitutional lawyers, may also belong within that perimeter. But administrative law, especially when it is approached from the point of view of judicial review, is the legal framework that most encompasses the discretionary powers enjoyed by public bodies. Such « discretion », however, is a notoriously elusive concept, for which foundational reasoning does not provide very satisfactory explanations. You simply just know it when you see it – when its « manner and exercise » has exceeded its limits, or has been unreasonable; when you are faced with particular, casuistic, occurrences of « *ultra vires* » or « unreasonableness ».

Such pessimism is not necessarily justified, however. Despite all that has been said above, there may still be reasons why certain foundations of (contemporary) public law should be framed in terms akin to those identified in *FPL*. Let me just spell out here some avenues for future research.

A. Administrative Discretion: Potestas or Potentia?

FPL's fascinating discussion of the modern theory of power in juristic discourse could shed some useful light over the field of administrative law as well. It would seem to me, at least *de prima facie*, that the concept of « power » at play in administrative law is a concept of power as *potestas* – that is, to follow Loughlin, power as « rule-generated authority³⁸ ». Judicial review is based on that notion: administrative power is a *jurisdictio*; jurisdiction has, in the famous words of Lord Greene in *Wednesbury*, « four corners ». This is very obvious in the case of statutory power, maybe less so in the case of prerogative. But even prerogative has limits, however indeterminate those limits may be.

Conversely, constitutional law tends to approach power as *potentia*: as a kind of natural, self-generating, power; but also a kind of power over which law has a limiting, confining, capacity of some kind. Also, constitutional law is public law in the (Loughlinian) sense of a « power-generating law³⁹ ». Most of the time, administrative powers are (or have to be) generated, not generating.

But at the same time, as detailed above, the whole story of modern administrative law in both France and Britain shows us that discretionality is often a kind of Hobbesian *potentia* that is constantly eluding attempts to cabin it into a mere implementation of superior law. Administrative law is, in the words of Olivier Beaud, « the state in action ». Here, the « state » is

³⁸ *FPL*, p. 165.

³⁹ *Ibid.*, p. 12.

employed not as a foundational concept, but as a body in constant motion, and correspondingly, the core concepts of legal thinking in the field of administrative law are not foundational but pragmatic. The state is approached through what it does (e.g., public services, public order, etc.) and what it does is not predictable *a priori*. Legislation is continually buffeted by new changes in the needs of society. And its inevitable, resulting pathologies are dealt with by case law. Yet, in this non-foundational process of state development, the original concern of constitutionalism – facing the State's *potentia* realistically in order to set some restraints to its tyrannical tendencies – has reappeared in administrative law. The governing concept of judicial review, in both our sample jurisdictions, is legality. In France, legality absorbs all the grounds of judicial review. In the UK, legality *stricto sensu* is only one of the main grounds of the superior court's supervisory jurisdiction of administrative action. But viewed *lato sensu*, legality – sometimes called lawfulness – actually covers all these grounds: legality *stricto sensu*; reasonableness; procedural impropriety; and maybe today proportionality.

This process of a progressive building of a set of anti-arbitrary principles in administrative law is a possible explanation for that quest for a foundational narrative that I referred to earlier in this essay. In this sense, the struggle for legality in administrative law is an almost exact counterpart to the earlier struggle for « rule of law » in the constitution of the state. The « revolution of judicial review » almost explicitly mirrors the seventeenth century « paper wars » against the political absolutism of the Stuart State. This has been a common feature of judicial opinions for a long time.

The court's reasoning in *Dyson v. Attorney General*⁴⁰ is a perfect modern example of this:

It has not, since the Commonwealth at any rate, been the practice of the Crown to attempt to defeat the rights of its subjects by virtue of the prerogative.

Since *Dyson*, such language has remained a commonplace of legal writing in Britain. The Human Rights Act is the modern Bill of Rights. And should the HRA be abolished, common law rights – and more generally the common law itself – are ready to take over. The defence of a common law foundation for judicial review offered by Paul Craig and others could read as a continuation of Coke's defence of the common law as the utmost guarantee against arbitrary power. The repeated attempts of the same eminent lawyer to establish a continuity between the seventeenth century cases dealing with prerogative writs with modern judicial review is evidence of exactly the same phenomenon⁴¹.

All-in-all, the phraseology of judges and scholars in modern Britain constantly refers back to that heroic era of the seventeenth century. This is

⁴⁰ [1911] 1 KB 410, at 421.

⁴¹ See for instance : P. CRAIG, « Prerogative, precedent and power », in *The Golden Metwand and the Crooked Cord – Essays in public law in Honour of Sir William Wade*, QC, Clarendon Press Oxford, 1998.

probably not accidental, nor is it merely rhetorical. The birth of administrative law in Britain may have been « sporadic and peripheral ». Yet it reflects a foundational quest for justice, or, in Loughlin's language, for « right ordering ».

B. The « right ordering » of administrative law?

This is where Loughlin's position as a « retriever of ancient prudence » is probably the most remarkable. His claim that public law is about the « right ordering » of society is very timely, precisely because it would appear as very untimely to most contemporary public lawyers. Contemporary public law has been dominated by a fear of embedding a certain theory of justice into positive law. Legal ordering should be a neutral ordering, one that does not choose between competing moral and political values. This rise of the neutral state has corresponded with the rise of the principle of equality as the core value of modern public law.

Why not, however, approach the work of judges, administrators, and scholars in terms of a pursuit of « right ordering » in the context of a blooming sphere of discretionary administrative powers? I take right ordering to mean the inherent, sometimes not completely elicited and self-conscious, notion of justice at play in a legal and political system. Modern lawyers in the field of public law have not given up the hope of identifying such a concept of political right or right ordering (the *recta ratio* of the modern age). But administrative law has not built upon an existing theory of justice. It has created it along the way, by means of what Loughlin would call « institutionalised practices »:

[H]istorical investigation often reveals that such institutionalized practices are partial, limited, and contingent expressions of more general ideas of right ordering [...] these practices incorporate the ways in which subjects themselves perceive the nature of the activity of governing⁴².

Why not apply this formula to the « institutionalized practices » of British administrative tribunals, ministers and departments – in fact, the whole sphere of what Diplock called « executive government » in his *GCHQ* ruling – judges of the superior courts of common law? And in France, of civil servants and *Conseil d'État* judges?

In fact, it is quite evident that courts and scholars have pursued a certain idea of (political) justice in creating the modern framework of public law. This is the « political right » element of administrative law. It is in part explicit, in part underdeveloped, and in all cases largely unexamined⁴³. But the changes in the scope or intensity of review reflect parallel changes in the moral philosophy of polis. Every judge is a Dworkinian Hercules. And

⁴² *FPL*, p. 9.

⁴³ Although there are some remarkable counterexamples, such as T.R.S. Allan's *Law, Liberty and Justice*, or indeed many of Loughlin's own works. It is remarkable that such works of legal literature have no obvious counterparts in French administrative law.

while he or she often has his or her timing wrong, at the end of the day some sort of « updating » takes place. Take for instance the rise of proportionality. Or the way in which reasonableness has developed from a simple criterion of « non-absurdity » in *Wednesbury* (« outrageous defiance of logic ») into a keyword for a set of elaborate tests of legality⁴⁴ in response – sometime successful, sometimes less so (such as the apparently defunct « super-Wednesbury⁴⁵ ») – to the evolving demands of justice of the contemporary world.

At the same time, the « new architecture of public law⁴⁶ » is distinctive in the sense that it is at odds with some of the most foundational aspects of constitutional law – democracy being one of them. I will not develop this further in this essay, but certainly what has been said herein about the « non-foundational » nature of administrative law is very much in line with the discussions about the « democratic deficit » not only of EU law but more generally of many fields of administrative law as well.

Denis Baranger is Professor of Public law at the University Panthéon-Assas (Paris II).

⁴⁴ Paul Craig's « umbrella sense » of *Wednesbury*.

⁴⁵ « Apparently » because of the way in which some scholars seem to interpret *R (Rotherham MBC) v Secretary of State for Business, Innovation & Skills* [2014] EWHC 232 (Admin).

⁴⁶ *FPL*, ch. 15.