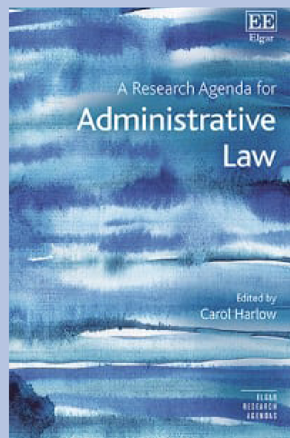
A Research Agenda for Administrative Law edited by Carol Harlow

Patrick Birkinshaw
University of Hull



Carol Harlow (ed) (2023) *A Research Agenda for Administrative Law*, published by Edward Elgar ISBN: 978-1-80088-375-8.

On page 10 of the first edition of one of the most influential United Kingdom (UK) legal texts in the 20th century, published in 1959, Professor Stanley de Smith hoped that his treatise on judicial review would inspire other scholars to build on the research that he had produced in his work. Carol Harlow describes how the purpose of her edited work is, following the publisher's guidelines, to "reflect on the future of research in a given subject area" *viz*, administrative law, a part, I add, of public law. Whereas de Smith's work focused on judicial review, Harlow has taken a very broad view of the domain of administrative law. This is to be expected from a lawyer who has been at the forefront of research in administrative law for many years and who was a member of the Ministry of Justice committee reviewing judicial review. The subject is not confined to the courts. It is in its broadest sense the law relating to public administration and the enormous changes that that administration has undergone. Its purview covers policy development, rule-making, grievance redress, management, efficiency, effectiveness and accountability in the public sector, promotion of the public interest, openness and transparency to name a few. Increasingly, responsibilities are assumed by private parties either off-loaded by the public sector or by private entities by way of contracts with public bodies. Increasingly, we

witness entities that transcend national boundaries and whose impact on the public interest and repositories of power have attracted the attention of global administrative lawyers. All, of course, taking place in a world of artificial intelligence (AI) and digitization. As my former professor used to say addressing first-year students: there are only two problems with public law. One is defining public; the second is defining law. After that plain sailing.

The essays in this work pick on particular topics of interest, pointing out research vistas for the young researcher. The authors are well-known experts in their fields and the chapters are well presented. I will outline briefly the areas covered and then examine more closely several of the chapters.

Elizabeth Fisher examines research in judicial review. As she expresses it, imagining and developing method in a subject that has been fragmented and polarized. Within judicial review, different approaches are adopted, and one may be the constitutional context. A broader approach based on public administration may be preferred but underlying the choice should be a “reflexive relationship with method”. How is one to proceed? Maurice Sunkin pursues the area of judicial review to examine the research that might take place on an examination of the impact of judicial review on public administration as well as its impact on, for instance, different groups of litigators or the administration itself. Robert Thomas looks at immigration and its heavy resort to tribunals. Janet McClean concentrates on disaggregating power in the executive for accountability purposes. What do we mean by the “Crown” for instance when we subject official action to analysis to establish responsibility or liability in a variety of English, New Zealand and Canadian examples?

I pause to reflect on the use of the Crown as a metonym for the state. In English usage, power rarely resides in the Crown meaning monarch. If we advert to the frequent—and frequently criticized—bifurcation of the Crown into its personal and political (governance) capacities, political power does not reside in the Crown, or it is not supposed to. The Crown as governance is dissolved into a labyrinth of natural and corporate entities and the powers of these bodies constitute the powers and body of the Crown. The Crown is their repository not their source, a point made by Stephen Sedley (2015: 228). Many years ago, F W Maitland pronounced whenever anyone asserts that the Crown has the power to do this or to do that, never be content until you know precisely who has the power. The Crown is a convenient cover for ignorance, he continued, especially

when the Crown is used as a representation of the nation and a symbol of comforting solidarity (1908: 418).

Alexander Horne and Michael Torrance review parliamentary oversight of the legislative process and delegated law-making given added spice by Brexit, Covid regulations and devolution. Joanna Bell and Sarah Nason write on judicial review in a more realistic context given executive attacks on judicial review and developments such as regional sitings for the administrative courts and how these have affected judicial review. Other developments include systemic review of policy and policy development and crowd funding for litigation.

Harlow's chapter on administrative justice in new contexts shows her panoramic grasp of detail and milieus and is an interesting account of many of the areas highlighted such as tribunals, internal grievance devices and ombudspersons. While the areas offered by Harlow have been pretty well studied, including by Harlow herself, new areas are highlighted such as online justice, global or internationally based schemes and "watchers" of the quality of the ombuds themselves. The chapter does bring home the very rich seam that administrative justice offers, and has offered, to younger researchers.

Jason Varuhus commenced with a challenging denial of the binary existence of public and private law (PL/PL) in common law jurisdictions. His belief is that the public/private divide—a "fundamental" division—is overstated and initially, I believe, the chapter is overstated. It is problematic to rely on the PL/PL division in legal reasoning, he asserts. Before he gets to the research outlines and excavation of appropriate legal reasoning in contested areas of PL/PL controversy, he seeks to persuade the reader that there was never anything reflecting a public law tradition in England. From a sensible position that one should not adopt a Procrustean approach to the division between PL/PL, he asserts that the existence of a "distinctive field of public law is unknown to the history of the common law". Of course, there was no *droit administratif* as necessitated in France by the separation of powers and the incapability of the civil courts to rule on administrative matters. He points to the development of prerogative writs as no evidence of a system but his treatment of *mandamus* is skimpy. There is no mention of the Star Chamber, *cursus scaccarii* in the Exchequer Chamber, the closest we came to a form of administrative law in England (Holdsworth 1956: 238-239), other writs such as *scire facias* and *quo warranto* and interpretation of prerogative powers. Of course, these were common law processes, but this does not deny their public law content and provenance, laws that are

dealing with matters of state, or put another way, "officialdom". Even the Star Chamber administered the common law through a special process. Sedley has written about the development and mainly, but not totally, short-lived reforms of public law in the interregnum (2015: chapter 4). If I may be so bold, the province of public law is the establishment and distribution of governance and governmental powers and the exercise and control of power on behalf of the public interest. Its provenance is not confined to the formally public. It may cover bodies who are acting on behalf of the public or as its surrogates or whose powers challenge those of government.

The chapter then analyses subject areas that have occupied the courts and more novel areas that are emerging which raise deep questions about the best legal instruments to tackle traditional interests of administrative law: power, abuse, distortion, accountability. If I may, is there a law of public contracts distinct from ordinary contract? Should there be a public law of tort based on a "control" theory or overall responsibility theory which courts have rejected? Should bank managers be subject to review for rejecting loans or mortgages? Should Elon Musk be subject to more effective legal controls and, if so, which? And why? After the introduction, I found the discussion on related matters very interesting and challenging and a rich area for future research investigation.

The theme of contractual governance is taken up by Richard Rawlings, co-author with Harlow of a law in context text which truly broke new ground in administrative law. The criticism that government contracting has been the Cinderella of the legal curriculum has long been made and Rawlings' own remonstrance and plea for greater involvement by the academy in this area seems at first sight to be gainsaid by the large number of references he cites on the subject, although Turpin's 1972 work on *Government Contracts*, and works by others in the 1950s and 1960s, are not among those. On a personal note, when I was asked to be the FIDE rapporteur on public procurement and European Community (EC) law at its 1990 conference, the future importance of EC law and its impact first came home to me, not just in contracting but generally. My adoption of an interest in EC law had been slow and I was obtuse. Rawlings traces the growth of contract techniques in governance in more recent years and indicates numerous possibilities for academic research, including the impact of the new domestic procurement regime to replace the European Union (EU) directives and the development of the market relations between the UK and devolved states. Quite rightly, he addresses the theme of publicization, meaning the incorporation of public law standards of fairness, transparency and public responsiveness with such

objectives as financial regularity, oversight, management and delivery within a state/private entity contractual framework. Administrative lawyers, he writes, must not bury their heads in the sand ostrich-like and ignore government contracts, which may sound a little hectoring but he is right to spell out why this is such an important area for research.

Tony Prosser's chapter on regulation covers an area that is comparatively new to the UK context in its association with privatization and regulatory agencies, although we have had more basic forms of regulation for centuries. He analyses different types of regulatory techniques and different instrumentalities in the modern era in an accessible and clear manner. Like Rawlings, he indicates the post-Brexit and nominally EU-free climate in which regulation will have to take place and its impact on the subject area and has graphic illustrations of the failings in combatting the Covid pandemic.

Paul Daly, Jennifer Raso and Joe Tomlinson investigate the impact of AI and the digital world on the administrative sphere and administrative lawyers' experience and exposure to online technology.

The final chapter comes from Joana Mendes. This chapter alone in the book engages in high theory and is to be welcomed as an inclusion for those researchers who wish to take this route. The author poses the question of whether EU law owes too much to national systems of law built on liberal constitutionalism. The message seems to be that as the EU assumes more of the responsibilities of nation states it takes on the additional responsibilities of integration, cooperation and compromise. A system of law built on individual liberty and its normative values is not best placed to address the challenges of multilateral cooperation.

Mendes places great store in the work of the Italian jurist Santi Romano from the 1930s and 1940s. Well-known in Italy, little of his work is published in English. The central idea of Romano's work that the author adopts is law as "institution" and its place at the centre of Romano's theoretical construct. Law as institution is much more extensive than normative instruments and provisions. Law owes existence to an executive, administrative, socio-economic and political matrix, the societal "humus" as she describes it. I was minded of the United States realists' dichotomy between "law in the books and law in action". Mendes accepts that her approach may be seen as "esoteric" (298, 301) but I wonder whether there is such a divergence between the techniques of national law and EU law where the former has numerous problems from interpenetration of authorities, public/private collaboration and the growing resort to soft law and a lack of transparency. Sometimes the message gets lost in

a complex delivery of ideas wrapped up in technical terms or phrases: “morphology”, “syntony”, “imbrication”, “liminality” and there are some examples of poor proofreading—“the tents of liberal constitutionalism”, I take it should read “tenets”? She does raise some important and interesting challenges and the comparative and theoretical gauntlet will be one taken up by administrative and EU lawyers in all member states, and rightly so.

This volume is a rich collection of ideas on areas for future reform in administrative law. Nearly 50 years ago I was present at a conference organised by Jeffrey Jowell and Martin Partington on welfare law and policy, law and the poor. Harlow was present and as a young lecturer I found much in the presentations to set me on my course of research in public law. So much has changed, not least in the academy itself, and I hope this work will inspire young academics to take up the cudgels and to be bold and adventurous in confronting the challenges posed by seeking justice and fairness and responsiveness in complex and often opaque organizational structures.

About the author

Patrick Birkinshaw *is Emeritus Professor of Public Law, University of Hull.*

Email: p.birkinshaw@emeritus.hull.ac.uk.

References

de Smith, Stanley. *Judicial Review of Administrative Action*. London: Sweet & Maxwell, 1959.

Holdsworth, William. *A History of English Law* volume I. London: Sweet & Maxwell, 1956.

Maitland, F W. *The Constitutional History of England*. Cambridge: Cambridge University Press, 1908.

Sedley, Stephen. *Lions Under the Throne*. Cambridge: Cambridge University Press, 2015.

Turpin, Colin. *Government Contracts*. Harmondsworth: Penguin, 1972.