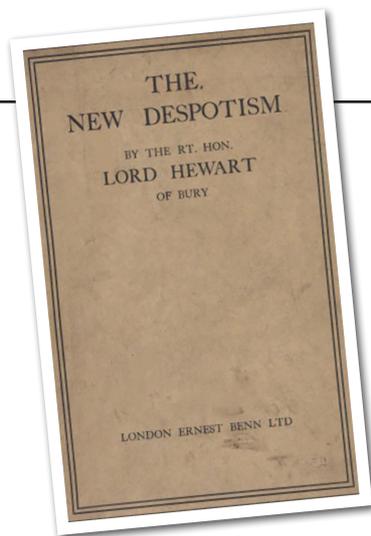


BOOK REVIEW

THE NEW DESPOTISM¹

By Lord Hewart
(London, Ernest Benn Limited, 305 pp.)
@1929

REVIEWED BY MIKE SPORER, SPORER MAH SIMPSON

“It might perhaps be well if the amateurs of the new despotism, in their moments of leisure, were to refresh their memories with the opinions which the ancient philosophers so clearly expressed about tyranny.”

– THE RT. HON. LORD HEWART OF BURY,
LORD CHIEF JUSTICE OF ENGLAND, 1929

By the time Lord Hewart issued his 1929 warning about the dangers of the administrative state, bureaucratic encroachment on the legislative and judicial branches of government had been on the rise in England for decades.

In 1898 the English constitutional scholar A.V. Dicey travelled to the United States and gave a series of lectures at Harvard Law school.² Dicey told the American students that while the demarcation point could not be fixed with precision, 1865 was probably the year; from that time forward, the forces that fuelled the administrative state were on the ascent.³

Dicey, partial to judge-made law and the role of the ordinary courts in the development of legal rights and English liberty, was concerned. “The greater the intervention of the government,” he said, “the less becomes the freedom of each individual citizen.”

Other legal notables, who had spent their formative years in the private bar – a safe distance from the later influence of the schools and the views that came to hold sway there – were opposed to a self-aggrandizing executive that was expanding its footprint at the expense of the ordinary courts.

On May 3, 1911, the bench and bar stood shoulder to shoulder to address the issue in London. On that occasion the Master of the Rolls and a leading member of the bar gave a speech that was covered in *The Times* under the headline: “Encroachments of the Executive: The Master of the Rolls on a Modern Danger.”

The Master observed that the Monarch was no longer a threat to freedom. But while that battle had been won there was, however “another danger that was much more real – namely, encroachment by the executive.” The executive was encroaching on the rights of the people. But there was more. The Master also reported he had seen “signs of attempts by the executive to interfere with the judiciary.”⁴

The Master it seems, was encountering statutes that granted ministerial discretion to alter substantive rights and liberties, and he had observed efforts to oust the judiciary from reviewing the burgeoning administrative state. The Master warned that a bureaucrat was “very apt to be a despot, if free from the interference of the courts of justice.”⁵

But there was good news. The Master was confident the bench would stand firmly against encroachments by the executive on the judiciary: “[A]gainst all such attempts” reported *The Times*, “he thought he could pledge his colleagues and himself to offer a strenuous resistance.”⁶

The Times records, for posterity, that the crowd gathered in London cheered upon hearing those words.

But the resistance, it seems, fell short. And then the Great War soon accelerated the rise of executive power and the administrative state – as wars almost always do.⁷

By 1929, Lord Hewart was sounding the alarm.

He didn’t provide a detailed response to the problem in *The New Despotism* or follow the implications of the growing administrative state to their logical conclusions – others would do better job of that in the years that followed.⁸ What Lord Hewart offered was a limited – but timely – warning to people who loved freedom and the rule of law.

“This little essay is obviously not intended to be more than a brief introduction to a topic of large, and unhappily growing, dimensions,” he wrote. “An exhaustive examination of the pretensions and encroachments of bureaucracy – the new despotism – must await greater leisure and another occasion. Yet it seemed to be high time that, at any rate, a note of warning should be offered.”⁹

Lawyers in British Columbia might feel it is high time that, at

any rate, Lord Hewart’s warning be revisited.

And why not? New books for the trial lawyer abound. They are reviewed in this space on a regular basis, and there is no shortage: books on mediation, arbitration, cross-examination, story-telling, focus groups, jury bias, repressed memories, crocodiles (or was it the Reptile?), heuristics, statistics, looping questions, snooping questions, headline questions, leading questions.... maybe it is high time to focus on a book that raises fundamental questions.

And so we dust off an old copy of Lord Hewart’s *The New Despotism*. In the erstwhile common law jurisdiction of British Columbia, as the tort system is consumed by the administrative state, as the courts are ousted by the Civil Resolutions Tribunal, as the executive assumes juicy new discretionary powers – all part and parcel of “caps” legislation – it would seem timely, if not long overdue.

Our readers will recall that Lord Hewart wanted the public to see the dangers – rather than be fooled by the promises – of the administrative state: “It is right that the public should be made thoroughly aware of the price which they are invited, or compelled to pay,” wrote Lord Hewart. “If they were really aware of it, they might well think that the price was too high, and that they would prefer to forego the particular commodities which are so expensively to be obtained.”

The new despots played their high card, flashing that familiar ace at Lord Hewart they would keep up their sleeve and use – over and over again – in the decades to come: a complex, modern world had dawned, they explained soothingly, and that meant the old rules no longer applied.

Lord Hewart answered them in *The New Despotism*: “The argument, or the suggestion, is that the functions of the state in relation to the individual have gradually come to be so enormously enlarged and intensified in comparison with what they used to be that there is no other way of grappling with the increased volume of legislative business. Parliament, it is said, simply has not time to deal with these matters, and therefore, if they are to be dealt with, the new despotism, however evil, is a necessary evil,” he wrote. “It is to be regretted that those who really believe this doctrine do not dare to state it in plain terms.”¹⁰

But plain language and cogency of thought were not the preferred arsenal of the new despots – they never have been. They preferred spinning questions of fact into questions of motive. All that Lord Hewart and the lawyers of his day cared about, said the new despots, was their own pocketbooks, the money to be made from lawsuits.

Lord Hewart’s response still resonates, perhaps particularly so in British Columbia in 2018: “Those who favour or defend the accumulation of despotic power in the hands of anonymous officials sometimes suggest the question whether what is really desired by their opponents is that there should be an endless stream of litigation. The question, of course, lacks honesty,” he wrote. “It implies, without having the courage to allege, that the aim of the despot in arrogating to himself despotic powers is to save the citizen the burden and the expense of lawsuits. A person who would believe that, is willing to believe anything.”¹¹

Lord Hewart saw what was happening to the legal system: (1) the “growing tendency to transfer decisions on points of law or fact from the Law Courts” to the discretion of the Minister, departments or agencies; and (2) the increase in what were referred to as “Henry VIII clauses” – statutes that allowed substantive legal rights to be altered or changed by subordinate bodies, for example by administrative or ministerial discretion, without the need to raise and debate the issue openly in Parliament.

He questioned where it would end. Lawyers who nearly ninety years later have, for example, reviewed the recent “caps” legislation and regulations thereto, might well feel they have at least a partial answer for the late Lord Chief Justice.

And he had other questions.

“The reasonable citizen may well be tempted,” wrote Lord Hewart, “sometimes to ask the questions: For whose benefit and at whose request is this mountain of statutes, and this still greater mountain of rules, orders, and regulations built up from year to year?”

A good question. The current government of British Columbia that introduced the “caps” legislation was not responding to marches or protests or rallies in the streets. If memory serves, there weren’t any.

But if the people never demanded the changes, then for whom was the tort system squashed?

“For whose benefit?” asked the Lord Chief Justice of England in *The New Despotism*.

For whose benefit? Indeed. ▽

1 Hewart, Gordon. *The New Despotism* (London: Ernest Benn Ltd., 1929)

2 Dicey, A.V. *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century*, 2nd ed. (London: MacMillan & Co. Ltd., 1962) at p. 64 and 66.

3 Although Dicey did not mention the fact, 1865 was also the year the great 19th century English liberal Richard Cobden died. His death makes 1865 at the very least a symbolic demarcation point, as a wise, reliable and authentically liberal voice, who spoke to the limits of state power, fell silent.

4 Hewart, p. 144-145

5 Hewart p. 144-145

6 As reported in *The Times* and noted in Hewart at 144. There is no suggestion that those were the precise words of the Master as there was no verbatim reproduction of the speech. However, this was the sentiment expressed by the Master of the Rolls, as reported in the *Times*.

7 On the relationship between war and the state, and in particular the role of war in the growth of state power, see for example, Higgs, Robert. *Crisis and Leviathan: Critical Episodes in the Growth of American Government*, (New York: Oxford University, 1987). See also Lord Hewart at 21, 98, and 194.

8 Others examined the question after Lord Hewart and at greater depth. Three years later, James M. Beck, the former Solicitor General of the United States, wrote a book that covered the American experience: Beck, James M. *Our Wonderland of Bureaucracy: A Study of the Growth of Bureaucracy in the Federal Government, And Its Destructive Effect Upon the Constitution* (New York: MacMillan and Company, 1932). Twelve years after Beck’s book, a broader warning was issued by the classical liberal economist F.A. Hayek: see Hayek, F.A. *The Road to Serfdom* (Chicago: The University of Chicago Press, 1944). Hayek explicitly takes up Lord Hewart and his concerns at page 83. After benefitting from discussions with the lesser known Italian legal theorist and lawyer Bruno Leoni, Hayek examined the question in more detail in *The Constitution of Liberty* in 1960, and still further in his three volume *Law, Legislation and Liberty*, published in the 1970s.

9 Hewart, at p. v

10 Hewart, 152-153.

11 Hewart, P. 154-155.