8. Theory of administrative law

Contrasting approaches to the role of public law and public law theory

Harlow & Rawlings, Law and Administration (2nd edn., 1997), pp. 1-4, chs. 2-4 (Outline of Theories):

• Theories of constitutional or administrative law often are rooted in political theories and manipulated to fit e.g. Rule of law being employed by Hayek to fit his laissez-faire political and economic belief.

• Red light theories are those which see the aim of administrative law as being to curb state activity so as to protect the individual. This is associated with Dicey, placing the courts at the centre of the constitution and espousing general apolitical principles of JR. The red light theory tends to be supported by those who want a smaller state. An example of a red-light theory in practice is the court’s ruling in Anisminic

• Green light theorists see administrative law as existing to help the state meet certain policy objectives. They tend to minimise the role of the courts and underplay the existence of general principles. Instead they emphasise the role allotted to political institutions i.e. taking a ‘functionalist approach’ to the allocation of functions. They want to encourage efficiency in the governing process. It basically comes down not to resisting interventionism, but to make the policy efficient and provide justice for individuals. Such theorists generally prefer political to legal accountability. They don’t want the courts to interfere with functions allocated by statute as this is to substitute in the court for the rightful decision maker.

• In reality, there are many shades in between red and green light theories, and most people occupy a middle ground.

• The growth in administrative tribunals and ouster clauses etc leads to fundamental questions about whether government or the courts should have the last say.

* Tomkins, ‘In Defence of the Political Constitution’ (2002) 22 OJLS 157:

  o Different theories of administrative law disagree over law, state, control and liberty
  
  o Red light theorists believe (1) that law is superior over politics; (2) That the administrative state needs to be kept in check; (3) The best way to do this is through rule based adjudication in the courts; and (4) that the goal of the public law project should be to improve liberty. It helps but is not necessary to be a small-government ideologue to support this theory.
  
  o Green light theorists challenge the above. They say (1) that law is merely a type of political discourse and is not superior to administration; (2) that public administration is not a necessary evil but a positive good; (3) That administrative law is not to stop bad practices but to promote and facilitate good administrative practices and that rule based adjudication is not necessarily the best way to do this; and (4) that liberty is to be promoted, but liberty in a collective sense i.e. the liberty that is only possible through interventionist government e.g. action against homelessness.