LEGISLATION AND ADMINISTRATIVE REFORM*

WALLACE PH. GULIA

IN the absence of special circumstances, legislation is not a factor determining Administrative Reform. Administrative Reform depends on the social climate of a country and it can come about as all other changes in the country can come about; legislation is only one such method. If the social climate of the country accepts peculiar standards, be they of bribery, corruption, inefficiency, economic wastage or what not, the legislation will naturally reflect those peculiar standards but the root of the evil will not be the legislation itself so much as the peculiar views on which it is based. Take away those views and the legislation will be swept away; maintain those views and the legislation may get entrenched and become stagnant. The remedy, however, is not to look askance at the law, but at the social climate which has provided for the existence of that legislation.

Legislation becomes necessary only if the social climate had led to an administrative framework based on the legislation and the administrative framework has to be swept away. Otherwise, legislation hardly comes into the picture at all. The significant administrative reforms relating to the recruitment of the British Public Services following the mid-19th century reports on recruitment into the Service as well as the current reforms in Civil Service Recruitment, the Government is currently giving effect to in this country, did not require any legislative complementary measures. The administration sets its house in order in accordance with its lights and within its own framework. If the legislation does not allow enough elbow-room, then legislation will be necessary to get the necessary elbow-room. But that is all.

Then too, legislation will be needed for administrative reforms involving the exercise of powers which were not contemplated before, but which the ruling authorities at any given moment of time consider desirable. Within the democratic framework of Government, as understood in Britain and in this country, Government may

* Paper presented to the Seminar on Administrative Reform organized by the University of Sussex and the University of Malta at a session held at the University, Msida on the 19th May, 1975.

not assume new powers unless it is authorized by Parliament, which in Britain is Sovereign, and in Malta is Sovereign within the Constitution. Thus, for example, the Parliamentary Commissioner came into being in Britain through the relevant Act of Parliament (The Parliamentary Commissioner Act, 1967) because the Parliamentary Commissioner (corresponding mutatis mutandis to the Ombudsman of other countries) required powers which Government did not have in its powers to confer.

On the other hand, since 'power corrupts and absolute power corrupts absolutely' parliament, in the enactment of legislation, should not confer powers on the administration too liberally. The administration should have enough power for the exercise of its functions and no more. If the power conferred is too wide, the citizen becomes faced not with the problem of administrative reform as such, but with the problem of the abuse of discretion which could itself be a factor leading to corruption. In such cases the law may fall into ill-repute but the ill-repute should be laid at the door of the Government of the day which delegated too much power through Parliament on the Administration, and on the Administration, during whose term of office the power is abused. Indeed, it would appear that on many such occasions it is not administrative reform which may be required but a tightening up of the controls over the way in which the power is to be exercised.

As administrative lawyers everywhere would phrase it: Parliament should not confer discretions in too wide a fashion. Where it is at all possible to be specific, then Parliament in evolving the law should try to be as specific as possible so that the exercise of the power will be carried out within the limits contemplated by Parliament, rather than by the bureaucrat who happens to be wielding power subject to the authorization of Parliament.

In the contemporary world it has become increasingly necessary for Parliament to confer powers on authorities in anticipation of problems which would arise administratively. On such occasions it is the duty of Parliament to spell out those powers and the circumstances of the contingency in as much detail as possible to ensure that the power will be exercised only in those situations where Parliament deems it essential that they be exercised.

Whilst this is recognised, it must also be recognized that the more progressive the system and the more sophisticated the need, the more difficult it becomes to evolve water-tight standards which can only be applied in specific and particular fact situations; especially as Parliament legislates for future rather than present-day needs. The more difficult the task, however, the more cautious

should Parliament be in conferring powers on authorities. Otherwise there will be large areas of administrative sectors where it would be possible for 'power to corrupt, etc.'.

In a small country, such as Malta, where the details of administrative control easily assume the semblance of policy, inasmuch as the demarcation between policy and administration is laid down as in other countries where Ministers choose 'to draw the line', explosive situations providing illustrations could easily be multifarious, incidious and frequently met with; will the public road cut across this property or that? Which area will be green and which will be a building site? Will the public street light be placed at this street corner or that? Which import licenses for consumer goods will be issued? Which foreign investments of local capital will be permitted? Which buildings will be requisitioned for public purposes?

In fact one of the supreme merits rightly claimed for the National Assistance Act, (Malta), when it was being enacted in 1956, was specifically this, that henceforth assistance would be payable in terms of law and not of administrative discretion as it had been payable theretofore, subject as that discretion had been to all sorts of sinister influences. If the principle applied in the field of National Assistance, is there any reason why it should not be extended likewise to all those fields where such extension is possible and where experience has indicated that such sinister motives can easily come into play? The task here, consequently, reduces itself to finding out those areas where such abuse of discretion has been taking place and thereafter the evolution of criteria which should be followed in the implementation of the discretion. This may be time-consuming but as it is a man-made problem, a man-made solution should be in sight.

That an effort should be made in the creation of the legislation itself rather than in the application of the legislation by the Courts seems clear in view of the limitations which the Courts both in Britain and in this country have evolved where the control of powers of the administration are concerned. These problems seem to have been overcome to a greater extent that they have been in the United Kingdom and in Malta by some continental countries which have evolved Administrative Courts within the administration in view of the peculiar interpretation given to the doctrine of the separation of powers in such countries. Two such countries are France and Italy; the former with its Conseil d'Etat, the latter with its Consiglio di Stato, where judicial control of administrative acts is not as inhibited as it seems to be in British Public Law systems.