

The State and the Polity

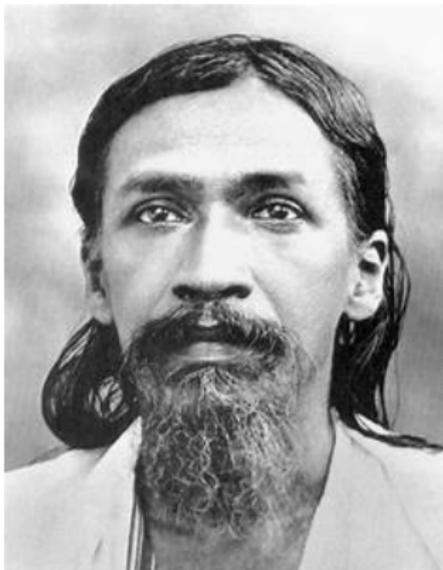
The case for a realist re-appraisal of public law

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THE ESSENCE OF LEGAL REALISM?



Aravind Ghosh,
1872–1950

“But an institution is a very different thing [from a great historical figure], it was made for the use and not at all for the worship of man, and it can only lay claim to respect so long as its beneficent action remains not a memory of the past, but a thing of the present. We cannot afford to raise any institution to the rank of a fetish. To do so would be simply to become the slaves of our own machinery.”

THE REALIST PROJECT IN (ENGLISH) PRIVATE LAW

- Showed how doctrines and ideas which we took for granted were Showing how historically contingent (Atiyah's *Rise and Fall of Freedom of Contract*)
- Questioned doctrinal concepts and categories that had ceased to serve any social purpose (Law Reform Now!)
- Identified the outcomes doctrines had a propensity to produce (Atiyah's *Accidents, Compensation and the Law*)
- Demonstrated that legal doctrine could be interpreted and applied in ways that better served social needs (Fleming's *Introduction to the Law of Torts*)

THE REALIST PROJECT IN (ENGLISH) PUBLIC LAW

- Some influential work—e.g. J. A. G. Griffith showing conservative orientation of decision-making in the courts, limits of parliamentary control
- Neither the breadth or depth of influence that realism has had in private law
- Time for a realist re-appraisal of public law?

DUCK VERSUS DECORATED SHED



Duck



Decorated Shed

WHAT MIGHT A CLASSICALLY REALIST PUBLIC LAW ACHIEVE?

- *De-fetishise* institutions and doctrines, e.g. judicial review, parliamentary oversight
- Identify the social purpose actually served institutions/doctrines (rather than those we think they ought to serve) and thereby to assess their effectiveness
- Emphasis on what institutions and doctrines *don't do* as much as on what they do

EXAMPLE: THE STATE IN PUBLIC LAW DOCTRINE



F W Maitland (and dog)

- Maitland (1901): no worked-out concept of the state in English law:
 - “... we have been, more or less explicitly, trying to persuade ourselves that our law does not recognise the personality or corporate character of the State or Nation or Commonwealth, and has no need to do anything of the sort...”
- Crown was in reality the ‘head of a highly organised corporate aggregate of many’.
- The failure to theorise it beyond a ‘corporation sole’ left the law unable to respond effectively to issues it faced

THE STATE IN THE CONSTITUTIONAL THOUGHT STYLE OF MAITLAND'S DAY

- The state is akin to a person
- Endowed with purpose and rationality, with a *telos*
 - For conservatives, preserving the existing order of society
 - For liberals, as an instrument of social reform
 - For early socialists, as the agent of transformation/collectivisation
- But the constitution of a country was taken to favour a particular type of ordering
- The rule of law exists as a set of restraints designed to protect the liberties of subjects by delimiting how state powers can be exercised and to what ends.
- Task was to restrain tendency towards predation, i.e. acting for self-serving purposes; 'going off on a frolic'

THE ROLE OF ADMINISTRATIVE LAW

- Task of doctrine was to delineate proper purposes from frolicking
- Did this by ensuring that public bodies acted 'within the four corners' of powers
 - *Attorney-General v Fulham* [1921] 1 Ch 440, per Sargant J:
That is an instance I think *although it is immaterial for the present purpose*, of the lighthearted way in which operations are conducted by persons who have not their own pockets to consider
 - *Roberts v Hopwood* [1925] AC 578, per Lord Atkinson
"The council would... fail in their duty if, in administering funds which did not belong to their members alone, they put aside all these aids to the ascertainment of what was just and reasonable remuneration to give for the services rendered to them, and allowed themselves to be guided in preference by some eccentric principles of socialistic philanthropy, or by a feminist ambition to secure equality of the sexes in the matter of wages in the world of labour."

THOUGHT STYLES AND SUBSTRATE: A NOTE ON METHOD

- Like Maitland, we approach this question historically, looking both at the reality of the state, as well as its juristic conception
- Doctrine primarily concerned with the legality of the actions of persons/institutions
- Informed by a set of concepts existing “beneath the surface” (Atiyah) forming the “inner premises” (Stewart) of the law
- Mary Douglas on *thought styles*: ... a thought style develops as the communicative genre for a social unit speaking to itself about itself, and so constituting itself.”

WHAT IS THE STATE?

- In substance, *pluralist*: the state is inherently capable of reflecting any ideological position
- In structure, *polyarchic*: an apparatus which reflects the contestation and lack of consensus that is an inevitable part of a pluralist political order
- In form, *a complex system*: a set of hierarchies for command and control to deliver policies reflecting the ideological positions of the governing coalition.

TWILIGHT OF THE 'TELEOLOGICAL' /PURPOSIVE CONCEPTION

- Rise of Liberalism, then Socialism—electorate were voting for very different teloi
- Incompleteness of the victory of socialism in/after 1945—simply adopting a different telos was not an option

CONSEQUENCES

- Became clear that *no* conception of the telos could command the acceptance across the broad sweep of the electorate
- No attempt to hold fast to any understanding of the purposes of the state could withstand popular pressure (Great Reform Act, Corn Laws, People's Budget, Irish Home Rule, etc.)
- Loss of faith in objective answers to these questions reduces the idea of predation to a bare rump
- The idea that rules of public law were directed towards amelioration of unconstitutional, predatory behaviour thereby deprived of any substantive content

THE STATE IN THE LATE TWENTIETH CENTURY CONSTITUTIONAL THOUGHT STYLE

- The state has no inherent purpose, but it is instead a neutral apparatus, capable of adopting a range of different goals, as directed by the dominant coalition in society (pluralism)
- Politics no longer conceived as an enterprise of crafting wise laws on settled constitutional principles, but as an arena of “conflict, bargaining and agreement” (Dahl) in which different groups compete for power/influence (polyarchy)
- Instead of a person, the state is now conceived as a *complex system*, comprising different sub-systems, each with their own influencers, organisational missions and task environments—resulting in different organisational priorities

THE TASK OF ADMINISTRATIVE LAW

- Concerned as much about the relationship between different internal sub-systems, as between the state and the citizen
- Policing hierarchies of command and control, ensuring that different sub-systems follow the direction set by the appropriate director
- Since there are no objectively correct answers to policy questions, ensuring that appropriate factors inform simplified decision-making models
- Acceptance that models will be radically simplified and processes 'just good enough'.
- The question is whether the models and processes were those demanded by those higher in the hierarchy
- Illustrative cases:
 - *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014
 - *Bromley London Borough Council v Greater London Council* [1983] AC 768

THE RESULT: SECURITIES AGAINST MISRULE

“The here proposed system of arrangements has for its object, as the title imports, the applying, to such of the evils as are most apt to be produced by the immediate agency of the Monarch or those in authority under him, such remedies as present the least unpromising chance of obtaining the application of them at his hands.”

“Whatsoever may be the chance which the here proposed remedy affords of being productive of the desired effects, the smal[l]ness of it affords not any ground of objection to it: for under a Monarchy, such being the nature of the case as not to admitt of any other, the option isthis or none.”

“The case in which [security against misrule] is most needed is that in which, the laws being altogether at the command of the rulerthe very work of their hands, no violation of law can be needed for the accomplishment of the misrule.”

IN TODAY'S LANGUAGE

- When dealing with an executive with untrammelled authority, the only effective limits on its power are those to which the executive consents
- That individual interests were given minimal protection was a feature, not a bug
- The sort of restraints likely to be acceptable neither substantive nor procedural; based on formal conditions attached to the exercise of power

WHAT HAS HAPPENED TO THE *polity*



Salmond

- Recall Maitland (1901) "...our law does not recognise the personality or corporate character of the State or Nation or Commonwealth..."
- Elaborated by John Salmond:

The notion of the state as an incorporate community is to this day unknown to English law; there is no *respublica* of which men can be members or citizens. The Crown is a corporation in law; but the nation, the aggregate of the subjects of the Crown, has no recognized legal identity or personality.

WHAT WE ARE MISSING

- Matters beyond supporting hierarchies of command and control
 - Administrative constitutionalism and law's hortatory function
 - The mediatory function of law and the role of the polity *in* the State