GATHERING THE WATER: ABUSE OF RIGHTS AFTER THE RECOGNITION OF GOVERNMENT FAILURE

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One of the many achievements of the late Professor Mike Taggart of the Faculty of Law of the University of Auckland is the most thorough analysis ever made of the leading English case on 'abuse of rights', *Bradford v Pickles*.[2] Published in 2002, Taggart's *Private Property and Abuse of Rights in Victorian England*[3] was the first of the books in the distinguished Oxford Studies in Modern Legal History Series edited by Professor Brian Simpson. Taggart's book is an exercise in what has come to be called the 'legal archaeology' pioneered by Simpson,[4] and he (Taggart) tells us that those to whom he described his research whilst it was in progress typically responded: 'Oh, you are doing a Simpson' (xi). If that were not daunting enough, after he had begun his research, Taggart learned of Simpson's substantial discussion of *BvP* in his 1994 Selden Society lecture on *Victorian Law and the Industrial Spirit*

[1] I am grateful to Gary Armitage, Richard Mullender, Colin Murray, Brian Simpson, Warren Swain and Gary Wickham for their comments. This is the second time Brian Simpson has shown great generosity by assisting me to formulate criticisms of his own work, and on this occasion he has asked me to emphasise that he is not, of course, responsible for the views expressed in my paper, and to explain that his Selden Society Lecture, given at a late afternoon meeting of the society, was not an occasion at which it would not have been appropriate to raise the refinements and qualifications which might well have been made to the arguments advanced in it

[2] *The Mayor, Alderman and Burgesses of the Borough of Bradford* [1894] 3 Ch 53 (ChD); [1895] 1 Ch 145 (CA); [1895] AC 587 (HL). Hereinafter this case will be referred to as *BvP*.

[3] M Taggart, *Private Property and Abuse of Rights in Victorian England: The Story of Edward Pickles and the Bradford Water Supply*, Oxford, Oxford University Press, 2002. Hereinafter this book will be referred to as *PPARVE* and references to it will be made, unattributed, in parentheses in the text.

[4] Though the first important example probably was Danzig's 1978 *The Capability Problem in Contract Law*, what Taggart follows Nyquist in calling 'single case scholarship' is, as Taggart rightly says (195 n 1), 'known around the world as "doing a Simpson"', in proper acknowledgement of Simpson's mastery of the form. In the US particularly, this approach has come to be known as 'legal archaeology': D Threedy, 'Legal Archaeology: Excavating Cases, Reconstructing Context' (2005-6) 80 *Tulane Law Review* 1197. With respect, Professor Threedy *ibid*, 1198 is wrong to say that Simpson 'coined' this phrase. Simpson tells us (AWB Simpson, *Leading Cases in the Common Law*, Oxford, Oxford University Press, 1995, 12) that it was suggested to him by Professor Peter Fitzpatrick, who has personally confirmed to me that he did indeed himself invent this term.

(xi).[5] We may be thankful that Taggart did not abandon his research as he understandably says he considered doing, not only because of the intrinsic value of his book, which discusses the case at much greater length than did Simpson,[6] but because the attitude to the case which evolves in Taggart's book can be very interestingly contrasted to that taken in Simpson's lecture. The disapproval of *BvP* that dominates commentary on the case is powerfully expressed in Simpson's lecture, but this disapproval significantly is much more equivocal in Taggart's book.

The main reason for this, I will argue, is that the dominant attitude to *BvP* rests on an assumption that intervention in the public interest generally is beneficent which Taggart himself stated with pronounced conviction in other work, but which does not survive his very close study of the case. This study shows that the contrast between Pickles' selfishness and the beneficence of the Corporation of Bradford, on which the criticism of *BvP* as an obstacle to a doctrine of abuse of rights rests, is implausible, largely because the Corporation actually went about securing its water supply in a highly objectionable manner. I will explore the implications of this for the attitude we should currently take towards intervention in the public interest, and this will take us on to a consideration of the role of abuse of rights in an area in which Professor Taggart made a first rank contribution: modern administrative law.

The absolutist interpretation of **BvP**

The facts of *BvP*[7] arose from the nineteenth century growth of Bradford, from a market town of some 6,000 inhabitants in 1801, into 'Worstedopolis', the 'worsted' or 'wool capital of the world', which, in 1901, was the ninth largest city in Britain, with a population of over 400,000. This growth of course placed enormous demands on Bradford's water supply and, amazing to say, for a considerable period from 1846 onwards this was substantially met from a single source, the incredibly productive 'Many Wells Spring', which rose some seven miles to the west of Bradford in what was then the

[5] AWB Simpson, *Victorian Law and the Industrial Spirit*, London, Selden Society, 1995. Hereinafter this lecture will be referred to as *VLIS*.

[6] Simpson is very generous in his comparison of Taggart's and his work in his General Editor's Preface to Taggart's book (vii).

[7] This account is based principally on Taggart's book, supplemented by reference to the reported cases, Simpson's paper, some of the accounts of the Bradford water supply to which one is led by Taggart, and my own local knowledge supported by reference to the Ordnance Survey mapping. Taggart's account differs from Simpson's in ways which are sometimes very significant but which, with one exception, I shall pass over silently.

hamlet of Hewenden. By the time of the litigation, it was estimated that the enormous sum of £200,000 had been spent in order to add this spring to the Bradford supply (42). After the municipalisation of the supply in 1854, the Corporation of Bradford undertook extensive works which reduced its dependency on Many Wells, to the point where, in the early 1890s when the facts of *BvP* arose, it was providing less than 4% of the Bradford supply, and by the beginning of the twentieth century, Bradford had a superabundance of supply which made it immune to shortage (21).

The Many Wells Spring was fed by water which gathered under the land of East Many Wells Farm.[8] With one exception, at no time did the Corporation or the private Company which preceded it pay the Pickles family which had owned East Many Wells Farm since the 1790s (12 n 31, 13 n 37) anything for the water extracted from the spring (2). The exception is that, in the 1860s, the Corporation paid the defendant's father £400 to desist from coal mining which it was feared would interfere with the spring. This payment (and a payment of £600 to a third party coal merchant also involved) would appear to reflect the lost value of the coal as the statutory procedure for making this payment would have provided, but unarguably it was indirectly a payment for the water (39 n 56). In the 1890s, the defendant, Edward Pickles, then owner of East Many Wells Farm, devised a similar plan to mine a seam of flagstone under his land. This plan would involve drainage of the water which fed the spring in a way which certainly would seriously interfere with and perhaps extinguish the spring. The litigation was conducted in the two circumstances that Pickles' works certainly threatened the Many Wells supply, but that critical, or even really important, dependency on that supply had ended prior to that litigation.

From the outset, Mr WT McGowen, the long-serving, very highly respected Town Clerk of Bradford, a solicitor by training and clearly a formidable holder of his office (28-32), whose influence on the Corporation's conduct throughout this episode Taggart shows to be great, took the view that Pickles had no real interest in mining and that the threat to the spring was an

[8] A substantial part of the land of East Many Wells Farm was to the west of the mouth of the spring used for the Bradford water supply, and Taggart expresses puzzlement at the Farm's name (12 n 30). Unless my reading of his book is faulty, he seems to be unaware that there is a West Many Wells Farm half a mile to the west of East Many Wells Farm, and, most understandably, he does not fully appreciate (8 n 19) what I know from personal experience to be the case, that in wet weather this area is peppered over more than a mile with welling, in some cases spouting, springs. If, as I presume, this is the reason for the name Many Wells, this would seem to reconcile the name and the site of the Farm. The information about the name of the spring provided by *VLIS*, 9 n 15 does not support my speculation.

attempt to, in a lay sense,[9] blackmail the Corporation into paying for the water (36-8).[10] Mr McGowen's 'intransigent' attitude (72) seems to date back to the defendant's father's success against the Corporation (30, 25). Mr McGowen pressed his view on the Corporation, which Taggart concludes was always minded or even resolved to 'have no truck with Edward Pickles' (72). As for Pickles, by thorough analysis of the proposed works which builds on *dicta* particularly of North J[11] and on clear suggestions in Simpson,[12] Taggart puts it beyond argument that Pickles was, at the very most, only tangentially interested in the stone prior to the litigation (44-7, 72). Negotiations which Taggart describes as desultory (39, 72) understandably therefore having failed, the Corporation refused to pay anything at all, and instead obtained an injunction to prevent Pickles carrying out his plan, which Pickles challenged.

BvP is a classic case because, on what I will call the absolutist interpretation of it, Pickles' motive was deemed irrelevant as he had (as close as it is possible to conceive) an absolute right to do with his land as he wished, and the injunction was lifted by the Court of Appeal, which was affirmed by the House of Lords, because Pickles' motive was irrelevant. The absolutist interpretation cannot be stated more forcefully than it was by Simpson in a paper on *Keeble v Hickeringill* and the common law attitude to the malicious exercise of rights:

> The House Lords, with what can only be called glee, ruled that [Pickles'] motive was quite irrelevant to the legality of his action. Just as the owner of a box of matches can while away the time by striking them to watch them burn simply to irritate a passing boy scout who has urgent need of two to pass his fire-lighting test, so could Mr Pickles abstract the water just to annoy the Mayor of Bradford.[13]

Now, it has long been observed that the absolutist interpretation of *BvP* is wrong,[14] and, especially as Taggart teases out the nuances of Pickles'

[9] Taggart formed such a view of Mr McGowen's character that he (Taggart) believed that McGowen would not have baulked at pursuing criminal proceedings against Pickles if blackmail in the legal sense could have been argued, but, so far as he (Taggart) could say, he thought that, on the contemporaneous law, this could not be argued (43-4).

[10] *VLIS*, 12 notes Mr McGowen's attitude.

[11] *BvP* (Ch D), 60, 63.

[12] *VLIS*, 10-2.

[13] AWB Simpson, 'The Timeless Principles of Common Law: *Keeble v Hickeringill* (1707)', in Simpson above n 4, 45, 74.

[14] In work going back to 1940, Lawson raised doubts about whether the facts of *BvP* showed malice: FH Lawson, 'Notes on the History of Tort in the Civil Law' (1940) 22

supposedly absolute right more thoroughly than anyone else has ever done (chs 5-6, Epilogue), I want to put consideration of the absolutist interpretation as precedent to one side. As we will see, Simpson himself focuses on something much more interesting. I do not wish to deny that much of the *dicta* in the Appeal Court judgments supports the absolutist interpretation, but much of it does not, and, for what it is worth, I myself believe that those Courts, had they not thought Pickles actions had some colour, would have found it entirely possible to distinguish *BvP* from previous authority interpreted as setting up an absolute disregard of motive.[15] Let us also ignore the tedious paradox whether any sane person, even the bad character in Simpson's example of the match burner, can ever act out of pure, disinterested[16] malice, for even the match burner presumably found some gratification in irritating the boy scout, and recognise that Pickles did not do as he did 'just to annoy the Mayor of Bradford' (73). He did what he did to force payment for the water, that is to say, out of self-interest, and what the case was about is whether this form of exercise of self-interest was legitimate.

Prior to the publication of his essay on *Keeble v Hickeringill* in *Leading Cases in the Common Law*, Simpson had already, in his Selden Society lecture, levelled the accusation that the Lords' opinions, particularly the famous speech of Lord Macnaghten, evidence 'a hint of what can only be called glee at the grasping, greedy behaviour of Edward Pickles',[17] and his own opinion of the case is that it is:

> a most striking illustration of the persistence, in the common law tradition, of the individualistic conception of property rights celebrated, over a century earlier, in the passages of Blackstone which I have quoted. The claims of public interest surely favoured the Corporation against Edward Pickles. But Pickles' despotic dominion triumphed in spite of the obvious awareness

(3rd ser) *Journal of Comparative Legislation and International Law* 136, 162, 165 and FH Lawson, The *Rational Strength of English Law*, London, Stevens, 1951, 117. Lawson himself was clearly of the opinion that Pickles was not acting maliciously in the sense of fruitless spite but with the purpose of forcing the corporation to buy him out: FH Lawson, *Negligence in the Civil Law*, Oxford, Clarendon Press, 1950, 17.

15 Taggart cites Lawson to the effect that '[i]t is arguable that Bradford Corporation failed merely because it could find not appropriate form of action' (191), with the strong implication that this was a merely technical argument (152-5), 'worthless', Lawson tells us, in Scots law. But the 1940 paper in which Lawson said this concludes with the observation that the then House of Lords might well have built on the Scots position over abuse of rights, '[t]hough not, perhaps, on the actual facts of the Pickles case': Lawson, 'Notes' above n 14, 165 n 3.

16 Simpson above n 13, 73.

17 *VLIS*, 15.

> of the judges of the potential consequences of their decision. Let there be sanctity of property even if the heavens fall, or even if the City of Bradford is converted into a howling desert.[18]

What really interests Simpson about *BvP* is not the absolutist interpretation but rather the 'clash between private property rights and the public interest' which he believes the case articulates.[19] He is in particular anxious to argue against Blackstone's definition of the right of property as 'that sole and despotic dominion which one man … exercises … in total exclusion of the right of any other individual in the universe',[20] and Blackstone's drawing the following implication of that definition:

> So great … is the regard of the law for private property that it will not authorise the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, without consent of the owner of the land. In vain may it be urged that the good of the individual ought to yield to that of the community.[21]

What Simpson fundamentally finds objectionable about Pickles' actions is not that he could do anything he liked, which he couldn't, but that, as a 'greedy Yorkshireman' motivated by the Victorian industrial spirit, he was the *homo economicus* of his day when, for reasons of his own self-interest, he opposed the public interest in economic development represented by the Corporation of Bradford.[22]

Simpson has been highly critical of the law and economics of the Second Chicago School, and, in particular, has enjoyed considerable success in challenging the treatment of property rights in the work of Ronald Coase. The dismissive reference in his Selden Society lecture to 'some ideal theoretical world' in which, as 'everyone behaves with economic rationality', 'it may well be that absolute rights of private property are perfectly compatible with rapid economic development',[23] is a criticism of Coase's 'The Problem of Social Cost'[24] as an exercise in mere theory. Simpson made

[18] *ibid*, 16-7.

[19] *ibid,* 5, 7.

[20] *ibid*, 6-7, quoting *Comm* II, 2. In my opinion, Simpson overstates the extent to which Blackstone actually treated property rights as absolute, but reasons of space prevent further discussion of this. Taggart raises the relevant issues (109-10).

[21] *VLIS*, 7; quoting *Comm* I, 139-40.

[22] *ibid*, 9, 3, 8.

[23] *ibid*, 6-7.

[24] RH Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1.

a similar criticism of Coase in the course of other of his legal archaeological studies,[25] and has made a direct attack upon Coase[26] of the first importance which should be a focal point of any discussion of the 'liberal economic' and the 'public interest' attitudes towards intervention. I believe that Simpson's argument against Coase is misdirected in large part because he (Simpson) fails to see that Coase is at least as great a critic of the 'ideal theoretical world' in which 'everyone behaves with economic rationality' as Simpson himself.[27] But Coase is also to the forefront of those who have argued against the public interest case for intervention by showing that it is much more difficult, but not impossible, to identify the action required by the public interest than typically is appreciated, and I believe that Taggart's book provides more than sufficient evidence that this was the case in *BvP*.

Though his explicit writings on law economics are entirely *en passant*, Taggart certainly shared Simpson's views about them, and he particularly focused his obvious wrath on the 'public choice' economics which have been to the forefront of pointing out the problems of the concept of the public interest. Taggart's explicit comments on these economics are not, in truth, especially penetrating, and I do not wish to argue against them directly, but I do wish to argue against at least part of Taggart's important views on administrative law from which his views on law and economics arise. Taggart did not come to *BvP* as a tort lawyer. His principal strengths were in public law, and, in particular, he was amongst the first rank of those engaged in the most recent attempt to develop a distinct administrative law appropriate to the Commonwealth jurisdictions still haunted, to varying but always significant degrees, by the ghost of AV Dicey.[28] Taggart was interested in 'the reasons why the common law rejected [an abuse of rights doctrine] and in the light this sheds on the different starting points of private and public law' (166). The rejection of a doctrine of abuse of rights in *BvP* is a 'symbol' of all that Taggart thought wrong about the division between public and private law (201), and in an important 1997 paper on 'The Province of Administrative Law Determined?' he attacked the case as he then understood it:

> The marked difference in public law and private law approaches … is underpinned by the absence of an abuse of rights doctrine

[25] AWB Simpson, 'Victorian Judges and the Problem of Social Cost', in Simpson above n 4, 163, 195.

[26] AWB Simpson, 'Coase v Pigou Reexamined', in G Korngold and AP Morriss, eds, *Property Stories*, New York, Foundation Press, 2004, 9.

[27] I do not wish to enter into discussion of the wider issues here, but I will mention that Coase has accepted some of the specific problems with bargaining solutions that are raised by *BvP* in RH Coase, 'Blackmail' (1988) 74 *Virginia Law Review* 655, 671.

[28] M Taggart, 'The Province of Administrative Law Determined?', in M Taggart, ed, *The Province of Administrative Law*, Oxford, Hart, 2007, 1, 20.

> in the common law. This French-inspired doctrine is widely accepted in civil law countries and the Canadian civil law Province of Quebec, and basically prevents a right-holder abusing the right by exercising it for the sole purpose of harming another or for a purpose other than that for which it was granted or in an unreasonably disproportionate fashion. The common law turned its face against such a doctrine at the end of the 19th century,[29] refusing to investigate the motives or reasons for the exercise of lawful powers by private individuals or corporations, no matter how discriminatory or harmful to the public interest. Nothing could be more at odds with the starting point of administrative law, and the absence of such a doctrine – unless and until this position is re-examined – will hinder to some extent the blending or synthesis of public and private law.[30]

By 're-examined', Taggart meant reversed, and he intended *PPARVE* to contribute to the reversal. But Taggart had sufficient openness of mind that, on examining this great Victorian case on the relationship of citizen and state, he began to see things were not as he imagined. I do not say that Taggart changed his mind about abuse of rights. He didn't. But I do think his book on *BvP* gives great weight to the argument that such a change of mind would be justified, and that he to some extent recognised this.

Gathering the Water

Whilst I certainly would have read Taggart's book in any event, I took it up with a particular, personal interest. Hewenden Beck, the (I think) natural water course fed by the spring harnessed to the Bradford supply, is a sub-tributary of one of West Yorkshire's most important rivers, the Aire, and between 1989 and 1999 I had a house 5 miles north of Hewenden on the other side of the Aire Valley. I knew the area that Taggart describes well from walking there, and, for what it is worth, I must say I was surprised and impressed at his grasp (70) of the geography of a landscape complicated by extensive, impressive Victorian civil engineering works which had in part been allowed to collapse into a confusing decay. Since the time of Taggart's researches, considerable restoration of the works has been undertaken, and Hewenden is in fact a tourist destination in a small way, because of the

[29] *BvP* and *Allen v Flood* [1898] AC 1 are cited here.
[30] Taggart above n 28, 17.

works and because, as it descends, Hewenden Beck runs over an attractive waterfall in a particularly nice bluebell wood. However, I cannot say that the upland landscape around Hewenden gives rise to an immediate feeling of affection. It is bleak and in poor weather harsh, and the principal feeling to which it gave rise in me was admiration for those who had made a living in it without benefit of modern amenities. By far the most famous account of the general atmosphere of this landscape is *Wuthering Heights*, although, to be accurate, Catherine Earnshaw's moors and the now ruined house thought by some to be the inspiration for Wuthering Heights itself are four to five miles to the west of Hewenden. So strong is the pathetic fallacy generated by the unfolding of this strange and morbid story in this sometimes grim landscape that one imagines that this atmosphere will never be better captured.

But in 2006, Robert Edric,[31] the distinguished contemporary Yorkshire novelist, added a strikingly original touch to our conception of the Victorian Yorkshire landscape in his *Gathering the Water*.[32] Edric's story is situated in North Yorkshire some 20 miles north of Hewenden,[33] but whilst this is, at least to a Yorkshireman such as myself, in important ways a quite different setting to that of *Wuthering Heights* and *BvP*, in substantial part it shares its bleakness, and Edric conveys this in a way which, one can say without absurdity, may be compared to *Wuthering Heights*. One critic, making the point, albeit striking rather too facetious a tone doing so, headed her review 'Wuthering Depths'. *Gathering the Water* has gothic features akin to *Wuthering Heights*, but much of its power is derived from a quality completely absent from Emily Bronte's on the face of it deranged narrative, for its gothic features are contrasted to a matter of fact plot which will call *BvP* to the mind of any reader who has studied the common law. Its central character, Mr Charles Weightman, is a surveyor charged with overseeing the 'drowning' of an inhabited valley to create a reservoir which will supply *inter*

[31] Robert Edric is the pseudonym of Gary Edric Armitage. I am very grateful to Mr Armitage for answering questions about his book.

[32] R Edric, *Gathering the Water*, London, Doubleday, 2006. Edric had discussed this theme in 1994 in *The Earth Made of Glass*. The recently published *Salvage* makes up what Edric himself, though not yet his critics, calls his 'flooding trilogy'.

[33] Edric calls his setting the Forge Valley. There is a Forge Valley in North Yorkshire, but it is not the fictional valley of Edric's imagination, which is situated in or near the Nidderdale sytem of reservoirs which were developed principally to serve Bradford and Leeds and which finally made Many Wells much less important (21). Another reservoir serving Bradford and Leeds just to the south of Nidderdale, Thruscross, was created in 1966 by the drowning of West End, a village already largely abandoned for other reasons. During the 'droughts' of 1989 and 1990, the reservoir's level fell so low as to reveal the village, which, most eerily, one was able to walk through. Peter Robinson's crime novel, *In a Dry Season*, turns on the discovery of a body when the waters recede from his fictionalised version of West End.

alia Bradford and Leeds with water. As the story begins, most of the affected population have left the area, but not all, much to the disappointment of Weightman, who had been given a different impression by the Board which employed him:

> To hear the Board men speak, you might think I had been bound for a wilderness of unmapped moor crying out only for the civilising of their scheme. To hear these men speak, you might think I had been handed the crown and sceptre of a fabulous kingdom, as yet unexplored, and over which I exercised sole and absolute dominion. I see now … why they might have encouraged me in such a belief.[34]

Gathering the Water describes Weightman's trials as he tries to remove the remaining population, for, the point of relevance to us is that, as he does so, he is, of course, roundly hated, and, being a man of sensibility, he to some extent comes to hate himself. Abandoned homes (but 'mistakes were … made')[35] are smashed by gangs of 'wreckers' brought in by railway, and Weightman feels his lot to be worse than theirs:

> I cannot ignore the obvious comparison between the wreckers and myself. These other men are skirmishers, come seemingly out of nowhere, destructive and quickly withdrawn; and, allowing the comparison, I find myself little more than a camp follower, a scavenger, benefitting from this brutality, and trudging with my account book through the aftermath, the mess and loss and suffering of battle.[36]

Of course, there is a benefit. The growth of manufacture in what were becoming great cities is 'yet another weight placed upon the scales of loss and gain', but, to those losing their homes through compulsory purchase followed by wrecking, 'the loss was all here and the gain all elsewhere'.[37]

Edric brings to the foreground what does not emerge at all from Simpson's lecture and emerges only incidentally from Taggart's book. They draw a clear contrast between commendable public interest and selfish individualism, but it cannot have appeared like this to Pickles' contemporaries, and, in an important sense, the attitude Simpson is attacking in the judgments, which we will see Taggart shows was shared by significant elements of public opinion, is evidence of precisely this. To contemporaries, the public interest

[34] Edric *loc cit*, 9.
[35] *ibid*, 56.
[36] *ibid*, 58.
[37] *ibid*, 89-90.

must have been, not merely unclear, but contested. Simpson's entire argument rests on the following sentence: '[s]ince economic development was conceived to be broadly in the public interest this conflict could be seen to be between private property and public interest'.[38] But 'broadly' hardly captures the range of things, good and bad, done in the name of economic development in industrialising England, and it will not have been the guide to right action at the time which Simpson retrospectively believes it to have been, even if, a hundred years later, one agrees with it. Was it so clear to contemporaries that the growth of Bradford in this way was in the public interest? If it wasn't, then the badness (71) of Pickles' conduct must be seen in a different light, for the moral quality of that conduct is not entirely defined by itself but by the interest to which it is opposed, and it cannot have been black and white in the way Simpson says and Taggart set out to say (72). Pickles' behaviour is greedy and grasping only if it can be contrasted to the virtue of direct pursuit of the public interest, and this, of course, requires us to know what the public interest was, and to be able to have confidence in the Corporation of Bradford acting in its name.

It is very paradoxical to see Simpson and Taggart so keen to endorse the supply of water to Bradford, and I am at a loss to understand how the Victorian industrial spirit which Simpson so deplores in Pickles and the judges who find for him does not seem to taint the growth of Bradford, one of *laissez faire* capitalism's greatest successes. I have made almost no inquiry into the facts, but, whilst I doubt neither the influence of the public interest nor the overall wisdom of public acquisition of the supply, as a reader of Engels and JB Priestley, I surmise that in Worstedopolis the public interest will have been given concrete form by a powerful class of men who, to use Marx's word (*Träger*), were bearers of the industrial spirit to a far higher degree than the rather pathetic self-proclaimed 'Quarry Owner' Edward Pickles (35), and that their concern for the water supply of industrial Bradford will have been informed by that spirit.[39] I do not want to hold Simpson and Taggart at all responsible for, in the end, an incoherence that is

[38] *VLIS*, 6.

[39] Taggart cites WA Robson in order to pass an excoriating verdict on the performance of the Company in supplying water (18 n 53), but he makes no investigation of the performance of the Corporation, pointing only to a noted local historian's bare statement of a belief that the public acquisition was a great achievement (20). My vestigial research into the matter does lead me to think that Taggart's account of municipalisation has some of the quality of a public interest variant of Whiggism; shall we call it 'Webbism'? I repeat, however, that I do not doubt that public acquisition of the supply was overall a good thing. The best account of the municipalisation of the supply I have been led to by Taggart to A Elliott, 'Municipal Government in Bradford in the Mid-nineteenth Century', in D Fraser, ed, *Municipal Reform and the Industrial City*, Leicester, Leicester University Press, 1982, 111, 118-22 and the PhD on which it is based.

characteristic of all theories of the capitalist state, but to portray Pickles as representing the industrial spirit against the capitalists which used the state to provide a water supply to Worstedopolis is implausible.

The significance of statute

Though the overwhelming preponderance of commentary on *BvP* is solely concerned with the common law position on abuse of rights, the rights of the parties were mainly determined by statute and it is impossible to understand the case without appreciation of the statutory position. The common law argument was a residuum of the statutory argument. The Corporation, in order to distinguish its buying out of the defendant's father's mine from its refusal to buy out the defendant's, had to stress that the defendant's behaviour was illegitimate in a way his father's had not been (50).[40] Though the wording of the relevant provision, which is quoted below, makes no reference to this whatsoever, establishing it would no doubt have helped secure the interpretation of the statute the Corporation required. North J alone of those who heard the case found for the Corporation on the statute. This finding rendered his statement that the nature of Pickles' conduct was irrelevant *obiter*, but, alerted to the possibility of an appeal, he felt obliged to discuss that conduct, of which he manifestly disapproved, even going so far as to use the word 'blackmail'.[41] Once the Corporation lost on the statute, it became essential to mount an argument about the defendant's state of mind in interfering with the supply, for the interference arose from the exercise of rights the Corporation was then obliged to acknowledge him to have. Let us, then, turn to the statute.

Obviously, major works such as taking Many Wells water to Bradford would involve interference with the property of others, and s 233 (supported by other sections) of the Bradford Waterworks Act 1842,[42] the Local Act which incorporated the private Company that first brought the Many Wells Spring into the service of the Bradford supply, gave the Company the right to take the Many Wells water by consensual or compulsory purchase as the

[40] The defendant's grandfather also mined coal prior to the connection of Many Wells to the Bradford supply (23).

[41] *BvP* (Ch D), 68. I repeat that I do not want to enter into the discussion of the absolutist interpretation as precedent, but the reader may be interested to note that, shortly before *BvP*, North J had found no difficulty in issuing an injunction against a householder who banged trays together to annoy his music playing neighbour in *Christie v Davey* [1893] 1 Ch 316. This nuisance case was not cited to him in *BvP*. The issues are discussed by Taggart (179-80).

[42] 5 and 6 Vict ch vi.

legitimate means of effecting such interference, under a procedure which included identification of possibly affected land prior to Parliamentary approval (16). But, although the Company bought the land on which the spring actually rose for £2,000 (11); incurred very substantial expense in dealing with affected downstream landowners (14), including building the £6,500, 16 acre Hewenden Reservoir at the boundary of the Pickles' land and in view of their farmhouse (38) to preserve the water supply to others (11, 14); and had every opportunity to purchase sufficient of the Pickles family's interest as to protect the spring (16, 79, 118), it did not do so. The Pickles family were not even formally notified or given a chance to object to the proposed use of Many Wells under the 1842 Act (14).

s 234 (supported by other sections) of the 1842 Act sought to prevent anyone interfering with the Many Wells spring after the Company had purchased it. s 234 was reenacted as s 49 of The Bradford Waterworks Act 1854,[43] one of the Acts which municipalised the private Company, and all the judgments in all the litigation accepted that the two sections were in legal effect identical. s 49 provided:

> It shall not be lawful for any person other than the said Company to divert, alter, or appropriate in any other manner than by law they may be legally entitled, any of the waters supplying or flowing from steams and springs called "Many Wells" … the same, or to sink any well or pit, or do any act, matter, or thing whereby the waters of the said springs may be drawn off or diminished in quantity.

The litigation was required because s 49, which was excoriated in the litigation for its ambiguity, was not drafted in a way which clearly gave the Corporation power to stop Pickles' mining plans.

The parallel I have drawn between Edric's *Gathering the Water* and *BvP* is weak in at least one way. *BvP* could never have arisen if the Many Wells works necessitated physical invasion of East Many Wells Farm (14, 20). The typical circumstance envisaged by Edric is compulsory purchase of a dwelling and Edward Pickles was concerned only with an underground flow of water which it was not clear prior to *BvP* was his property in such a way as to exclude the Corporation's use. Taggart tells us that '[a] constant refrain of Edward Pickles … was that all he wanted to do was … "exercise ordinary

[43] 17 and 18 Vict ch cxxiv. The copy of this Act I have used is in a publication prepared by the Bradford Corporation setting out the Local and General legislation relevant to the municipalisation of the supply: *The Acts Relating to the Transfer of the Bradford Waterworks to the Bradford Corporation*, Bradford, Firth and Field, 1856. This publication is available via Google Books. s 49 is at 173.

landowners' rights'" (35, 35 n 48), but Taggart essentially concludes that Simpson was right to say that *BvP* was a case of first impression about what these rights were.[44] But, after it was found that Pickles had the necessary property in the water, then we must say that, not having bought out the Pickles family, the Corporation wished to use s 49 to curtail their property rights without paying to do so.

Taggart argues that, unless s 49 did just this, it had no purpose whatsoever. This makes the 'clash between private property rights and the public interest' Simpson identifies stark, and is the ground of Taggart's brilliant but, in my opinion, wrong argument that *BvP* is not a case of statutory ambiguity at all but of outright 'disobedience of the legislature' (94). The choice, Taggart would have it, is between an interpretation of s 49 which benefits Pickles by reducing s 49 to nothing, or an interpretation which gives it the effect sought by the Corporation which reduces Pickles' property right to nothing. I myself do not agree with this, for s 49 seems to me to be directed at those without a proprietary interest who interfere with the supply. I can see a value in this even in the circumstances of the case, and the principal ambiguity that arose did so because s 49 was to be used against a defendant whose proprietary interest had not previously been made clear.

This is not a sufficient argument against Taggart, but there is no need to persist with it because, in respect of understanding abuse of rights, I am afraid I see no point to Taggart's interpretation, other than setting up Simpson's stark 'clash', for it runs against the surely unarguable fact that ambiguity *was* perceived by the parties, by contemporary commentators, and by all those who heard the case (88-92), including, as Taggart is obliged to admit, North J himself (87-8). Fundamentally, this is the ambiguity of it being necessary, in order to give s 49 effect, to believe that Parliament had intended to expropriate without compensation, and had not made this *prima facie* implausible construction stick by use of as close as possible to crystal clear language to that effect (91). In my opinion, it didn't use such language because it would not have had such an intention.[45]

There was, I submit, no a 'clash between private property rights and the public interest'. That the public interest could be exercised through compulsory purchase was never at issue in *BvP*. The possibility that 'Blackstone's despotic dominion [might] reign uncontrolled', as Simpson put

[44] *VLIS*, 14.

[45] B Rudden, 'Comparative Law in England', in WE Butler and VN Kudriatsev, eds, *Comparative Law and Legal System*, New York, Oceana, 1985, 75, 83.

it elsewhere,[46] never existed. This was not a case about whether the public interest could be exercised but in what manner it should be exercised. And it seems a point of general agreement that the overwhelming contemporaneous opinion was that the legitimate form of expropriation of private property was compulsory purchase (104-5). The question, then, is why compulsory purchase was not made. Taggart's principal contribution seems to me to show that the failure to buy out the Pickles family was the result of a negligent mistake, or of two negligent mistakes.[47]

I have mentioned that the Company did purchase the land on which rose the particular spring from which it took the water, Trooper's or Many Wells Farm (81), and it would appear that it must have thought it had secured the supply by doing so. However, not only is the eastern boundary of East Many Wells Farm only 20 yards from the mouth of the spring, but the property is largely situate upland of Trooper's Farm (12, 94), and, as Taggart puts it, '[i]t would have been plain as a pikestaff (to anyone who had inspected the property) that the water gushing from the Spring came from underneath the upland farm' (93). Even North J found essentially this as fact.[48] *BvP* may have been a case of first impression over rights to water such as Pickles claimed, but, allowing this, Taggart rightly goes on to say, in serious criticism of the Company, that the unclear legal situation prior to 1842 therefore 'would have alerted even the dimmest of investors and their advisers to the need to ascertain the legal position and make provision accordingly' (108). On the basis of materials available to him (Appendix n 3), Taggart is unable to explain why the Company took the line it did, though he does argue that the actual drafters of the 1842 Act (31) would not have visited the site (93 n 79). However this is, the failure to buy out the Pickles family created a situation in which the Company was exposed to threats to a spring in which it proceeded to make an enormously costly investment and on which it proceeded to place a simply immense reliance. Looking back on this having seen North J reversed by the Court of Appeal, the Corporation's own Water Engineer, Mr James Watson, wrote to Mr McGowen to say that the Company 'must have been little short of simpletons' to put themselves at this risk (61).

[46] In his General Editor's Preface to J Getzler, *A History of Water Rights at Common Law*, Oxford, Oxford University Press, 2004, vi.

[47] In my opinion, there was a third mistake, for the terms on which the Corporation later settled with the defendant's father left them open to the defendant's later actions, and I should have thought it arguable that the Corporation should have done more at that time to secure its interests.

[48] *BvP* (ChD), 56-7.

Simpson quotes Mr Watson's letter to back up his conclusion that '[w]hether the outcome of the case made much sense can well be doubted'.[49] The argument is that, as the Company must have been simpletons to do what they did in 1842, and as s 49 (ie s 234) 'could be interpreted as covering Pickles' scheme',[50] as of course it could, then, in the public interest, it should have been interpreted as covering Pickles' scheme. With some further argument about the Corporation's actions in 1854, this essentially was the position of Mr McGowen (68, Appendix n 3). But it is here that Taggart substantially departs from Simpson and advances the fundamental criticism of the Corporation. For, although Taggart cannot explain the Company's mistake, the conclusion he draws from showing that they made it is that '[i]t is difficult to acquit the actual legal advisers and Parliamentary agents of the promoters of the Bradford Waterworks Company of the charge of negligence in this respect' (118-9). The risk to the spring existing, there is no doubt that everyone except North J who heard this case read s 49 *contra preferentum* against the expropriating authority, and their reward has been to be regarded with contempt or outright animosity. But should statutes be 'benevolently' interpreted to give a green light to public undertakers by covering up the consequences of their negligence to their benefit (98-102, 198-201)? Should common law sweeping up doctrines be invented so that they can be used to do this?

I have spoken somewhat loosely of the Corporation and the Company because, though the Corporation's agents such as Mr Watson might well have said nasty things about the Company, whatever problem the Company caused, the Corporation of course reproduced it in 1854 by adopting s 234 as s 49 and not doing anything else (61). As again contemporary newspaper opinion put it, the Corporation had 'managed to get into a somewhat serious fix' by reproducing the risk to the spring (42),[51] and sympathy with the failure of the s 49 argument was sparse:

[49] *VLIS*, 16. Simpson also conveys Mr Watson's belief, which Taggart shows was doing the rounds in the Corporation, that the Pickles family had lain low by not objecting to their not being included in the register of interests under the 1842 Act in order to be able later to blackmail the company. Taggart shows this to be completely implausible, not least because objecting to the provisions of a Local Act would have been impossibly expensive (13, 27, 94). On the other hand, Taggart also shows that the accusation (noted by Simpson *loc cit*) that the company was attempting to avoid expense by not buying out the Pickles family was equally implausible (94-6). It seems we are just dealing with a mistake which, even with the benefit of Simpson's and Taggart's research, cannot be satisfactorily explained..

[50] *VLIS*, 12.

[51] Mr McGowen thought Pickles was behind the newspaper commentary (43), and, for reasons on which I will not expand, this seems plausible, but it does not substantially diminish the point made.

> The Corporation had no rights over [Pickles'] land – for the absurd clause on which it relied did not in any way give them more than their common law rights. Bradford had made a mistake in the way in which its waterworks were acquired; and it is nothing but right that Bradford should pay for the mistake (69).

Taggart tells us the author of this newspaper opinion 'put his finger exactly on the crucial point' (68). Taggart does much to show that the Corporation, not being nearly so dependent on Many Wells as it had been when it settled with the defendant's father (25), took the line it did towards Pickles because it could not find it in itself to acknowledge its mistake. As I have noted, Mr McGowen certainly was aware of Pickles father's success against the Corporation despite s 49, and, as Taggart says, '[i]t is not clear why McGowen and the Corporation in 1890 thought that "this time" Edward Pickles was in the wrong as a matter of law' (27). Given the very unclear law about water rights (ch 5), general defects in statutory protection of the type offered by s 49 about which the Corporation had been anxious when giving Select Committee evidence (26), the general solicitude about ensuring private property could be expropriated only with compensation (16), behind which lay a settled rule that interpretation of Local Acts should be *contra preferentum* (96-7), the Corporation's decision to litigate, and to continue to the point where the in the end the litigation fruitlessly cost the ratepayer the very large sum of £4,000 (71), was wholly questionable: 'it is at best puzzling and at worst suggests that there may be some truth to Pickles's claim that the deep-pocketed Corporation had threatened "to swamp" him with the litigation' (27).

I believe the impression to which this gives rise, of, as newspaper comment had it, a 'powerful corporation' acting in an 'undignified and unfair', 'high-handed, overbearing and unreasonable' manner (68), is confirmed in what Taggart rightly calls an 'extraordinary' (59) episode during the litigation, about which he does great service in uncovering important information (59-61). After the Court of Appeal had decided to reverse North J but before its judgment was published, Lord Herschell LC, a member of that Court, told the plaintiff's leading counsel, Cozens-Hardy QC, that, if the plaintiff would apply to Parliament for the power to compulsorily purchase the water, the Court of Appeal would not publish its judgment until after Parliament had passed the necessary Local Act. Despite Mr Cozens-Hardy being of the opinion that his client should do as Lord Herschell suggested, it did not do so, and appealed the case to the Lords. Whatever sympathy one has for the Corporation when it became aware of Pickles' mining plan, I submit one can

have none for it in respect of this refusal to accede to a compromise offered in what must have been most awkward circumstances by the Lord Chancellor,[52] which Taggart can only attribute to the Corporation continuing to not being able to admit to its mistake in 1854 (61).[53]

Simpson puts Lord Herschell's offer down to the Court of Appeal being 'not a little nervous of the possibly appalling practical consequences of their decision [which] appeared to enable Edward Pickles to hold the City to ransom'.[54] But, with respect, there never was a threat of ransom. Bradford always had the possibility of obtaining the power to compulsorily purchase Pickles' interest, and Lord Herschell was, I submit, merely trying to bring it to its senses about this. Taggart puts forward, albeit in a footnote (59 n 57), the far more plausible 'competing explanation' of Lord Herschell's offer 'that the Court thought that the Corporation should pay for the water rights'. Simpson then puts forward the Corporation's refusal to reluctance to pay the expense of sponsoring the necessary Bill. I leave this to the reader to evaluate.[55] But Simpson does make it clear that, had the Corporation sought compulsory purchase powers, the price would not have been any extravagant sum Pickles asked but the 'fair price' the compulsory purchase procedure determined. Mr Cozens-Hardy told his client this. Taggart very valuably adds from unreported notes of the proceedings that Mr Cozens-Hardy would have been aware that the Court of Appeal disapproved of the size of Pickles' demands (60 n 58), and that Lord Herschell had predicted that 'the compensation to Pickles probably would not be a very big sum' (60). The Corporation still ignored his advice.

To this picture of deplorable official obduracy I will only add mention of one point where Taggart's account of the facts differs from Simpson's. Pickles 'was not a rich man' (70), and, although he will in the end have been able to recover costs, this episode must have been tantamount to ruinous for him (71), for though he may have won the battle, he lost the war (69). After

[52] It is mere speculation on my part, which is not directly backed up by anything in Taggart, but I should have thought the Corporation's stupidity really was enormous because its refusal of this compromise effectively ensured it would lose in the House of Lords. It may be significant in this regard that their Lordships did not find it necessary to call upon Pickles' counsel (62).

[53] Taggart exactly says that '[t]he Corporation could not admit to being duped in 1854'. On what Taggart shows us, I am most unsure that any party 'duped' the Corporation save itself, but, if it was duped, it was by the Company, not Edward Pickles. I think Taggart is using 'duped' in an unusual way.

[54] *VLIS*, 14-5.

[55] It is inconsistent of Simpson to have the Corporation wishing to avoid this expense and yet give weight to the far fetched possibility of Pickles, a private person of limited means, opposing the Bill were it introduced.

the litigation he continued with his stone works and made repeated offers to sell his land to the Corporation, but the Corporation continued to refuse to deal with him, and he emigrated to Canada in, Simpson no doubt is right to conclude, defeat.[56] For Simpson, this is a tale of evil getting its due reward: Pickles' 'greed … caused his downfall', for his 'very success doomed his plan; it is in the nature of blackmail that the threat must never be carried out. He had so successfully disrupted the underground supply that [he] made the land useless as a source of water'.[57] But Taggart tells us this was not the case (69), and this improving story is unfounded. In June 1897, the Corporation undertook works to tap Many Wells by alternative means, and used the supply, although of greatly diminished relative importance, for a further half century (70). It 'had had in mind this contingency plan' throughout the litigation (69).

In sum, I can only quote Taggart's own principal explanation of the actions of the Corporation, and his evaluation of those actions. The first is that 'the Corporation never did pay for its mistake of 1854, and therefore never publicly admitted to making one' (69). The second is that:

> The Corporation did not take any of the opportunities offered to buy the land or the water rights, neither did it go to Parliament to acquire such rights compulsorily. Instead, it pursued expensive litigation so far as it could go. And when the legality of the matter had been definitively sorted out, the Corporation refused to negotiate (72).

I believe that the material Taggart uncovers shows that the public interest which Simpson and he identify with the actions of the Bradford Waterworks Corporation to be a very slippery concept indeed, and *BvP* is in fact the result of government failure. The Corporation made at least one extremely serious negligent mistake about its business, and obstinately persisted in a course of action consequent upon that mistake to the prejudice of an affected private party, rather than admit that mistake.

Criticism of *BvP* on the basis of the absolutist interpretation, when it is not just wrong, involves, in my opinion, saying the following: a landowner should, at common law, utilise his land in a way which is consistent with the public good as identified by a public body. He should not be able to insist upon being compensated for this. If, as should be the case, a statutory procedure for compensation exists but has negligently and then obstinately not been exercised by the relevant body, this is of no relevance to the common law position, which requires the private party to fill in the gaps left

[56] *VLIS*, 17.
[57] *ibid*, 18.

by the state by surrender of that part of his ownership which is causing a problem for the body which cites the public interest in support of its activities. I do not find this an attractive position. It amounts to a servility I find worrying. The particular thought which led me to write this paper was that I could not see how to distinguish *BvP* understood in this way from the *Congreve* case,[58] surely one of the foundations of modern administrative law, and a number of the common like cases. It is important to question how this servile position could become so dominant that it seems quite unproblematic to the great majority of those who have considered *BvP*, including, in Simpson, one of law's greatest commentators and, in Taggart, a highly distinguished one.

Taggart's engagement with the case led him into ambivalence over this, and, as a result, I think it fair to say his book reads unevenly and, in particular, the paragraph headed 'Time for Reconsideration?' at the end of the last chapter proper reads a little strangely. Taggart gives a list of distinguished commentators who over the course of the 20th century attacked the absolutist *ratio* of *BvP* just as he intended to do, and concludes with the question '[i]s it time to heed these persistent calls for a reconsideration of the common law position' (193). But Taggart's book has shown that these commentators have not understood *BvP* as it can now be understood on the basis of Simpson's and his legal archaeological research, and so the answer to this question to which his book leads is 'I am not sure', which I think was Taggart's position, or 'no', which is mine.

I think that those who understand *BvP* in terms of the absolutist ratio will read this question as merely rhetorical, but in the even more curious 'Epilogue' which follows his last chapter proper, Taggart says that this question was 'deliberately left hanging'. This Epilogue also leaves the question hanging. It really is as if Taggart did not know how to finish his book after his research had disrupted his own original understanding of *BvP*. Looking at this frankly, he says *PPARVE* does not answer this question because this:

> would require another book, and a different kind of book, than this one has become. This is a different book than the one I set out to write. I first became interested in *Pickles* for the light it would shed on the public/private law divide, and the implications of (re)privatisation of public utilities, such as water companies. But I soon got drawn into the fascinating story, and realised the importance of understanding the case in the context of its own time and place. It dawned on me that by projecting

[58] *Congreve v Home Office* [1976] QB 629.

> contemporary concerns back into the past and looking for future guidance, I was misusing historical method in the cause of advocacy (196).

This is very well said. In work published shortly after (the writing of which perhaps overlapped with) his book, Taggart maintained that '[i]t is no doubt time to heed … persistent calls for a reconsideration of [*BvP*]', but writing his book seems to have given him a greater appreciation that the 'the difficulty of doing so … should not be underestimated', in essence because the absolutist interpretation was 'far too simplistic', but more because he was no longer clear about where he stood on the 'tussle between individual autonomy and the public interest'. [59] I have been unable to piece together from Taggart's subsequent writings what, in the end, he thought could be done about *BvP* in terms of concrete law reform. He maintained his general position, but entered into no detail, perhaps because the difficulties of reform, especially reform based on importations from the civilian tradition, were given greater weight (165) than they would have been were Taggart still of the mind with which he began his research. But, in the end, it had all became rather more abstract: 'a clash of values'.[60] I can, however, confidently say that someone whose last work evidenced a commitment to the wide use of *quantum meruit* in determination of utility pricing by courts[61] would not agree with the view of the case that, in essence, I had formed prior to reading Taggart's book, but which I think his book confirms: that development of a doctrine of abuse of rights would be a serious mistake. It is a mistake which follows from a view of the relationship between citizen and government that has been dominant but which we should now abandon, the key to which, in Taggart's case, is to be found in public law. Public law discussion of this issue must, of course, begin with Dicey.

Taggart and Dicey on administrative law

Reflecting on Emerson's maxim that 'to be great is to be misunderstood', I have long thought that Dicey must be a truly great figure because he is in a league with Karl Marx and Adam Smith when it comes to being subject to

[59] M Taggart, 'The Peculiarities of the English: Resisting the Public/Private Law Distinction', in P Craig and R Rawlings, eds, *Law and Administration in Europe*, Oxford, Oxford University Press, 2003, 107, 114.

[60] *ibid*.

[61] M Taggart, 'Common Law Price Control. State-owned Enterprises and the Level Playing Field', in L Pearson *et al*, eds, *Administrative Law in a Changing State*, Oxford, Hart, 2008, 185.

criticisms which are based on a complete lack of sympathy with his work. I am afraid I simply cannot see the justice of an attack, even when mounted by one of our most distinguished administrative lawyers, on 'the denial of the subject [of administrative law] expressed in Dicey's insular individualism',[62] when this denial made good sense in Dicey's own time, even if one doesn't agree with it, and, I will argue, makes even better sense now, even if one doesn't agree with it.

The key to understanding Dicey is the apparent truism that, born in 1835 and dying in 1922, he was, as one of his biographers has put it, a 'Victorian jurist', whose views were, it appears, essentially settled by the 1860s.[63] As an 'old Liberal' extremely concerned about the extension of the franchise, it is inevitable that some of what he said now seems antediluvian, and either silly or unsavoury or both as a result. In his 1942 essay in defence of Kipling, Orwell began by saying that '[i]t is no use pretending that Kipling's view of life, as a whole, can be accepted or even forgiven by any civilised person',[64] and surely something milder but essentially like this must be said of Dicey's view of democracy. But just as Orwell recovered the profound good sense in Kipling, I believe we must now see the similar but much greater sense in Dicey. Writing of a 'popular faith in the English Constitution' 'which in 1905 has become almost incomprehensible', Dicey asked '[w]here shall we now find the ardent believers in the Constitution of England? If they exist at all, they belong in spirit to the past'.[65] Dicey has lacked for readers who can penetrate the period veneer of passages like this to see the importance of what he says, and, in particular, that, '[f]or all its conservatism, much of Dicey's constitutional writing *also* reflects a salutary concern with the need to impose effective inhibitions on power and the defence of the citizen from power's all-inclusive claims'.[66] Though he celebrated classical liberal values with an enthusiasm which causes embarrassment to almost any legal academic who reads what now seem to be purple passages indeed, Dicey was not remotely foolish enough to end his life as a triumphalist liberal, and the preponderant tone of his work in the twentieth century (putting his entanglement with Home Rule aside) is a melancholic if not pessimistic

[62] R Rawlings, 'Distinction and Diversity: Law and the LSE', in R Rawlings, ed, *Law, Society and Economy*, Oxford, Clarendon Press, 1997, 1, 7.

[63] RA Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist*, London, Macmillan, 1980, 22.

[64] G Orwell, 'Rudyard Kipling', in *All Propaganda is Lies*, *Complete Works*, vol 13, London, Secker and Warburg, 150, 151.

[65] AV Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century*, Indianapolis, Liberty Fund, 2008, 312-3.

[66] D Sugarman, 'The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science' (1983) 46 *Modern Law Review* 102, 110.

recognition of an 'ominous' growth of 'collectivism'. It is remarkable that one of the most acute analysts of the shift in English political culture and government that has produced the maximalist[67] welfare state is preponderantly now thought in public law circles to have been something of a fool about just this.[68]

Jennings acutely observed that, from 'the Whig point of view', Dicey saw the constitution as 'an instrument for protecting the fundamental rights of the citizen, and not as an instrument for enabling the community to provide services for the benefit of its citizens,'[69] though, to complete one's understanding of Dicey's position, one should add that Dicey, for reasons he thought good, wanted to keep it the way he saw it. Dicey extolled sovereignty of Parliament and the nineteenth century law and institutions that embodied it; insisted that sovereignty of Parliament as a wonderfully valuable understanding and practice of government rested on the nineteenth century liberal political culture which it was uniquely fit to institutionalise; and foretold the consequences for the practice of government of the replacement of that political culture with a collectivist one, a process I have said that he believed was ominously gathering force towards the end of this life, the main constitutional sign of this being the initial development of an administrative law akin to *droit administratif*. So far as one can tell, Dicey did not even toward the end of his life, overall believe the game was up,[70] but he did believe things were 'vehemently' going in the wrong direction.[71] I am sufficiently misanthropic to be able to imagine him at this time, in his late seventies, saying to himself: go ahead continuing to do what I am counselling you not to do and see where you end up. And, in the welfare state in the maximalist form it has taken as we survey it 88 years after Dicey died, we have done it, and we have ended up somewhere like where he said we would.

Dicey's principal objections to collectivism were that it would promote extensive, ill-advised improving projects that are 'likely to cause huge loss, and it may be ruin, to England',[72] and will necessarily involve a 'marked

[67] I take the terminology from N Barry, *Welfare*, Milton Keynes, Open University, 1990, 105.
[68] WH Greenleaf, *A Much Governed Nation*, *The British Political Tradition*, vol 3, London, Methuen, 1987, ch 7. There are extremely valuable references to Dicey in *The British Political Tradition passim*.
[69] WI Jennings, 'In Praise of Dicey' (1935) 13 *Public Administration* 123, 132.
[70] Dicey above n 65, 387.
[71] *ibid*, 377.
[72] *ibid*, 397.

decline' in 'reverence for [the] rule of law.[73] These quotations are taken from the updating 'Introductions' he supplied in 1914 and 1915 to the last editions he saw in print of his two great works on the constitution. I want to quote at length one of these passages in the belief that it will not be familiar to all readers:

> [I]t is more than possible that English legislation may … combine disastrously the defects of socialism with the defects of democratic government. Any grand scheme of social reform, based on the real or supposed truths of socialism, ought to be carried out by slow and well-considered steps taken under the guidance of the best and the most impartial of experts. But the democratic idea that the people, or any large number of the people, ought to have whatever they desire simply because they desire it, and ought to have it quickly, is absolutely fatal to that slow and sure kind of progress which alone has the remotest chance of producing fundamental and beneficial social changes. Democratic legislation, on the other hand, ought to have the advantage of harmonising with, or at any rate not going much beyond, the public opinion of a given time. But this harmony between law and sentiment is easily contemned [*sic*] by socialists, who feel that they know better than do the electors of England what is really good for the English people. Hence it is all but certain that great changes planned by enthusiasts will, if they seem to be popular, be carried out with haste and without due consideration as to the choice of means proper to a given end, and, on the other hand, that on some occasions a party of self-called reformers will force on the electors changes which, whether good or bad, are opposed to the genuine convictions of the people.[74]

As we now live under a system of government which has authoritatively been described as having a 'chronic tendency to hyper-innovation' which has led to 'an age of fiasco',[75] who, other than a very staunch collectivist indeed, can now maintain that Dicey was entirely wrong about the changes to the constitution that makes possible these grand schemes? But, if one wished to describe the development of modern public law in a phrase, one would say it has been based on maintaining precisely this. As a matter of intellectual history, the twentieth century growth of collectivism in the advanced

[73] AV Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th edn, London, Macmillan, 1915, xxxviii.

[74] Dicey above n 65, 397

[75] M Moran, *The British Regulatory State*, Oxford, Oxford University Press, 2003, 171.

capitalist countries no doubt is based on the development of welfare economics, put into modern shape by AC Pigou in 1912,[76] which gave a fundamental theoretical justification to piecemeal but extensive state intervention by means of transfers backed by coercion. Such extensive intervention has required a public law which normalises coercion in the public interest. The process by which this has been brought about in respect of administrative law has been felicitously described by Harlow and Rawlings as giving the 'green light' to state action, as opposed to the 'red light' observed by Dicey,[77] and it has involved ridiculing Dicey and those broadly taking his position in the twentieth century, of whom Allen[78] and Hewart[79] have been the most common Aunt Sallies.[80]

Whilst a sense of proportion must be maintained about this, the green light has involved unacceptable arbitrariness underpinned by an even more unacceptable authoritarianism, to the point where the late Professor Griffith argued, to my mind convincingly, that what were called the liberal democracies can no longer be properly described as such at all.[81] It is to Taggart's great credit that he draws attention to an important aspect of this not typically noted in the leading works of the new constitutional and administrative law but revealed in detailed accounts of specific parts of the welfare system:[82] the 'Kafka-like'[83] aspect of normal life for many intended beneficiaries of the welfare state which undermines their conception of their own selves.[84]

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[76] AC Pigou, *Wealth and Welfare*, London, Macmillan, 1912. In 1920, Pigou expanded this book in 1920 to produce what remains the foundational work of welfare economics: AC Pigou, *The Economics of Welfare*, 1952 reprint, New Brunswick, Transaction Books, 2002.

[77] C Harlow and R Rawlings, *Law and Administration*, 3rd edn, Cambridge, Cambridge University Press, 2009, ch 1.

[78] CK Allen, *Bureaucracy Triumphant*, Oxford, Oxford University Press, 1931.

[79] Lord Hewart of Bury, *The New Despotism*, London, Benn, 1929.

[80] M Taggart, 'From "Parliamentary Powers" to Privatisation: The Chequered History of Delegated Legislation in the Twentieth Century' (2005) 55 *University of Toronto Law Journal* 575. In this paper, Allen and particularly Hewart are contrasted, much to their disadvantage, with John Willis, whom Taggart greatly admired: M Taggart, 'Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: The Case of John Willis and Canadian Administrative Law' (2005) 43 *Osgoode Hall Law Journal* 223.

[81] JAG Griffith, 'The Political Constitution' (1979) 42 *Modern Law Review* 4-5.

[82] Taggart, 'From "Parliamentary Powers"' above n 80, 612-3.

[83] Lord Plowden, 'Foreword', in J Simkins and V Tickner, *Whose Benefit?* London, Economist Intelligence Unit, 1978, 11.

[84] '[F]reedom in the management of a personal income' was one of the 'essential liberties' Beveridge sought to preserve in his conception of the welfare state: WH Beveridge, *Full Employment in a Free Society*, London, George Allen and Unwin, 1944, 21. For but the latest authoritative description of the consequences of the arbitrariness of welfare support which, concerned with myriad improving goals, pays little regard to this freedom see Economic Dependency Unit, *Dynamic Benefits*, Centre for Social Justice, London, 2009, pt

In my opinion, Dicey has been anathema to modern administrative lawyers because they have not placed the same value on liberty that he did. There is a good reason and a bad reason for this. The good reason is that modern public law works with a superior idea of freedom than did Dicey. Dicey's views belong to what TH Marshall called the 'civil' stage of the development of a full sense of citizenship, and the welfare state is our attempt to institutionalise the 'social' stage. One way of understanding the relationship between the stages which may be found in Marshall[85] is to say that social citizenship is needed to make formal civil (and 'political') rights, and therefore freedom, actual. I myself think it is a strong criticism of Dicey[86] to argue that his belief in the efficacy of the remedies of ordinary law turns on an equation of civil citizenship with actual citizenship which is wrong, leading him to think that tortuous liability for personal wrongdoing[87] could be 'the *primary* means of calling officials to account', which rightly has been called a 'deterrent theory of liability … in which the deterrence is symbolic'.[88] The facile way he does this draws the plausibility it has from the, to contemporary eyes, incredible smallness of the size and scope of the government he had in mind, but, nevertheless, it is a rather puzzling attitude as, legal developments proper aside, his views must have been formed in a cultural atmosphere of which the Chancery of *Bleak House* and the Circumlocution Department of *Little Dorrit* were important constituents.[89]

1. On the admittedly bad, indeed in my opinion unacceptable, example of the social fund, written from as sympathetic a viewpoint as it is possible to take when one knows the facts, see T Buck and R Smith, eds, *Poor Relief or Poor Deal?* Aldershot, Ashage, 2003, pt 2. The law, if such it can be called, is updated in T Buck, *The Social Fund*, 3rd edn, London, Sweet and Maxwell, 2009.

85 eg TH Marshall, 'Citizenship and Social Class', in TH Marshall and T Bottomore, *Citizenship and Social Class*, London, Pluto, 1992, 1, 16: 'The right to education is a genuine social right of citizenship [a]nd there is no conflict with individual rights as interpreted in the age of individualism [f]or civil rights are designed for use by reasonable and intelligent persons, who have learned to read and write. Education is a necessary prerequisite of civil freedom'. For Dicey's view of state provision of education see Dicey above n 65, 195-8.

86 It is a criticism that can readily be restated and applied to modern administrative law: A Hutchinson, 'The Rise and Ruse of Administrative Law and Scholarship' (1985) 48 *Modern Law Review* 293.

87 C Harlow, *Compensation and Government Torts*, London, Sweet and Maxwell, 1982, 18.

88 C Harlow, *State Liability*, Oxford, Oxford University Press, 2004, 23-4. Professor Harlow has been anxious not to throw out the baby with the bathwater, and has sought to find a defensible role for tort in the control of government in the works just cited and elsewhere.

89 Dicey above n 65, 300 n 32 said that, in the Circumlocution Office, Dickens 'attacked the action of the State as compared with that of individuals'! This is one of the few actually outright silly things I have read in Dicey.

But, turning to the bad reason, and if the anachronism may be excused, Dicey had a clarity of view about what would be involved in the pursuit of actual citizenship which modern public law has quite wrongly failed to appreciate. In the last edition of de Smith on which Professor Street worked, the basic point that is urged against Dicey's insistence that the executive be 'governed by the same principles applied to ordinary citizens in private disputes' is that this 'is impossible':

> Once government vests wider discretionary powers in public authorities and creates special tribunals outside the ordinary court system there are no private law principles which can be applied when the powers or proceedings of an authority or tribunal are called into question. Like it or not, the common law courts were forced to develop a system of principles of administrative law.[90]

I submit this is a *petitito principii*. What Dicey urged is impossible only if we like the state we get with administrative law, but, of course, modern public law *does* '[l]ike it'. In the heroic mode which they adopt when they consider their actions, as it were, constitutionally, administrative lawyers see themselves as opposed to executive power, ensuring, as Lord Denning put it in 1949, that the 'welfare state' does not become a 'totalitarian state' by ensuring that 'the new powers of the executive' are '[p]roperly exercised'.[91] But the heroic mode involves a blindness about the workaday involvement of administrative lawyers in the extension of the new, arbitrary powers,[92] the proper control of which somehow seems never to be able adequately to be established, and so we are brought to where we are. The creation of modern administrative law has, as Professor Street tells us, been a process by which it has become 'an accepted phenomenon in normal times' that 'our activities are interfered with or controlled by government in the public interest', and if there has been a distinct lack of interest in principle about this until relatively recently, this has been because a 'yearning for certainty' based on the application of 'strict legal rules' has not been uppermost in the minds of 'administrators' who 'maintain that they cannot run the modern state like that' and want 'flexible' 'standards'.[93] This has yielded a law which 'has been

[90] SA de Smith, *Constitutional and Administrative Law*, 5th edn, Harmondsworth, Penguin, 1985, 534. Professor Brazier retained the passage in 8th edn, 1998, 504.

[91] Lord Denning, *Freedom Under the Law*, London, Stevens, 1949, 126.

[92] The spirit of this involvement is captured in WA Robson, *Justice and Administrative Law*, 3rd edn, London, Stevens, 1951. I cannot hope to improve on Professor Rawlings description of this work as 'the classic "greenlighter's" handbook': R Rawlings, 'Poetic Justice: The Case of the London Tube', in D Dyzenhaus *at al*, eds, *A Simple Common Lawyer*, Oxford, Hart, 2009, 223, 224 n 5.

[93] H Street, *Justice in the Welfare State*, London, Stevens, 1968, 69, 8-9.

pragmatic, empirical, even adventitious',[94] but this is acceptable because '[w]e look to the state to provide us with security and assistance in so many forms'.[95]

From Dicey's perspective, all this has the look of inevitability. Nevertheless, Dicey has been roundly criticised for just not seeing the issue, with his apparently acerbic conversational retort to a French legal academic that 'in England, we know nothing of administrative law, and wish to know nothing of it' doing signal service in exposing him to ridicule in way one feels was intended by WA Robson, a public lawyer of diametrically opposed inclination to Dicey, who brought it to wide attention.[96] But I think some feeling of guilt must motivate this criticism, which is not merely exaggerated but egregious. Putting Dicey's great contribution to the founding of comparative law in the UK in general, and in relationship to constitutional law in particular,[97] to one side, his views about various components of the *omnium gatherum* of what is now called administrative law were nuanced[98] in a way which will be found surprising by many of his critics, his approval in principle of 'executive legislation' on a French model being a marked case in point.[99] In relationship to the issues that specifically concern us here,[100] Dicey himself, despite what is often said,[101] was perfectly well aware that 'there had been built up since 1832 a whole scheme of administrative machinery',[102] in part because even 'sincere believers in *laissez faire* [had] found that for the attainment of their ends the improvement and the strengthening of governmental machinery was an absolute necessity',[103] and

[94] de Smith above n 90, 5th edn, 545; 8th edn, 515.

[95] Street above n 93, 1.

[96] WA Robson, 'The Report of the Committee on Ministers' Powers' (1932) 3 *Political Quarterly* 346. For Robson's criticism of the attitude he thought this anecdote illustrated, see Robson, above n 92, 28, 423. Robson, it must be recalled, wanted a *droit administratif* in exactly the sense Dicey did not. The contemporary attention paid to this anecdote is no doubt due to its being found in the frontispiece of Harlow and Rawlings above n 77, xii.

[97] AV Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th edn, London, Macmillan, 1959, 205.

[98] I do not mean only that they changed in the way to which attention was drawn by FH Lawson, 'Dicey Revisited', pt 2 (1959) 7 *Political Studies* 207. Wade's outstanding introduction to the 10th edn of *An Introduction to the Study of the Law of the Constitution*, *loc cit*, drew heavily on this paper, which he saw in proof.

[99] *ibid*, 52.

[100] Our focus is on the rule of law, but in relationship to sovereignty, how much criticism has rained down on Dicey in ignorance of his many statements to the effect that 'Parliamentary sovereignty… was a an instrument well adapted for the establishment of democratic despotism.' Dicey above n 65, 217.

[101] Taggart notes the criticism of 'Dicey's periodisation' (159).

[102] Dicey above n 65, 217 n 6.

[103] *ibid*, 217.

in part because of the 'obviously and admittedly true' fact of the growth of collectivist government functions:

> During the last fifty years [prior to 1915], and notably since the beginning of the twentieth century, the nation as represented in Parliament has undertaken to perform a large number of duties with which before the Reform Act 1832 no English Government had any concern whatsoever.[104]

Dicey believed that it would be 'conceivable', up to a point, that 'in a country such as England, where the strict rule of law had been for generations accepted by the people, a great number of administrative questions might, in the nineteenth or even the twentieth century, have been wholly left for their determination to the law courts'.[105] This is to say, even a considerable growth of the state might be deplorable but tolerable. But this could be so only up to a point. Dicey not merely saw the 'distinct merits' of, in essence, efficiency to be gained by extending powers to the executive which were not subject to ordinary law,[106] but he believed it was *impossible* to extend the range of powers sought by collectivism without isolating their exercise from ordinary law, and thereby creating the arbitrary rule of administrative law in his pejorative sense. :

> when the state undertakes the management of business properly so-called, and business which hitherto has been carried on by each individual citizen simply with a view to his own interest, the Government … will be found to need that freedom of action necessarily possessed by every private person in the management of his own personal concerns.[107]

Such freedom of action, backed by the state's power of coercion, is bound to create arbitrary authoritarianism (as well as have good effects).

There is really nothing much that distinguishes Dicey's position from the position stated by the learned editors of de Smith in criticism of him, except the conclusion that is drawn. For Dicey insisted that, as a technical matter if it may be put this way, a growth of arbitrary power and a loss of liberty were inevitable costs of the improving policies of collectivism - this was one reason for his loathing of collectivism – but, unlike those editors, he was not prepared to meet these costs. It was in the twentieth century, in laws such as the National Insurance Act 1911[108] and *Local Government Board v Arlidge* of

[104] AV Dicey, 'The Development of Administrative Law in England' (1915) 31 *Law Quarterly Review* 148, 149.
[105] *ibid*, 149-50.
[106] Dicey above n 65, 371.
[107] Dicey above n 104, 150.
[108] Dicey above n 65, 367.

1915 as he interpreted them, that Dicey came to believe that there was being created 'in England a system bearing a marked resemblance to the administrative law of France'[109] which 'saps the foundation of that rule of law which has been for generations a leading feature of the English constitution'.[110] But, as I have said, he believed that the issue was undecided, and his last position seems to have been that *ultra vires*, impeachment and enforcement by the ordinary courts ('in some means or other' to be developed) of what 'the spirit of judicial fairness and equity [and] the rules of fair dealing' would require of a government department's conduct would perhaps suffice. So long as 'the ordinary law courts can deal with any actual and provable breach of the law committed by any servant of the Crown', this would still preserve 'that rule of law which is fatal to the existence of true *droit administratif*'.[111]

In setting himself against administrative law as law other than ordinary law, Dicey, then, sought to prevent the growth of collectivism in a precise way it is important to appreciate. He not only saw administrative law in the pejorative sense he gave it as a necessary consequence, but also, if I may put it this way, as a necessary condition of collectivism, and so, by working against the development of such administrative law, he believed he could work against the development of collectivism. Logically, he was right, but practically one might think this a rather forlorn effort, the stance of a constitutional law Canute against the tide of economic forces which, standing on our copies of *Das Kapital* volume one and *The Great Transformation*, we now can clearly see. But Dicey was well aware that it was a background collapse of faith in *laissez faire* that was driving matters,[112] and we have seen that he cannot be accused of excess of confidence in the success of his attempt to make the limited and in a sense tangential contribution a constitutional lawyer might hope to make. It seems to me the height of cheek to blame Dicey for prejudicing 'whole generations against administrative law in any form'[113] when, once his readers understand the 'sense' in which he meant administrative law, the 'paradox' of his denial of administrative law 'disappears'.[114] Robson's anecdote relates to a conversation which must have taken place in the earliest years of the twentieth century, and, at that time, Dicey could say that the English knew nothing of administrative law because, as he understood it, they didn't. If his

[109] *ibid*, 371.
[110] Dicey above n 104, 150.
[111] *ibid*, 151-3.
[112] Dicey above n 65, 363-4.
[113] de Smith above n 90, 5th edn, 534; 8th edn, 515.
[114] HVR Wade and CWF Forsyth, *Administrative Law*, 10th edn, Oxford, Oxford University Press, 2009, 20. Professor Forsyth puts the point as a criticism of Dicey.

tone was acerbic, this can be put down to his fear that in the near future they would.

In sum, Dicey could hardly have more strongly insisted that the government should be confined within the framework of the 'administrative law' he believed to be a very effective check on arbitrary power, the ordinary law of the nineteenth century constitution.[115] Those blaming Dicey for this have not clearly seen his meaning because, being on the whole happy enough with a growth of government functions in the public interest, they have been so preoccupied with this interest that they have almost sublimated the fact that departure from the ordinary law *does* involve the extension of arbitrary power. Their own thinking ultimately involves a denial of the Austinian analytical connection between law and coercion in the general climate of tergiversation about this established by Hart, for it would appear that the public interest acts as a sort of moral whitewash for arbitrary power.

Professor Loughlin adds to the stock of superior criticism of Dicey in his essay in Taggart's *Festschrift* when he acknowledges that 'Dicey may have been correct in his assumption that administrative law eroded the foundations of the post-1688 settlement'. But he goes on to say that this 'simply pushes back discussion to … more basic questions', the first of which is '[h]ow does a historic, evolutionary constitution acquire normative status? Can such immanent normativity retain its authority in the light of social, economic and cultural change'.[116] This may be a criticism of public law at some fundamental philosophical level, but how can it be a criticism of Dicey, who had no doubt about, and gave good reasons for, the normative status of the nineteenth century British constitution, and clear indications about what would be the result of collectivist social, economic and cultural change?

I do not doubt that Dicey was wrong about this in ways which undermine his view of the constitution. It is a rare fair criticism of Dicey from the

[115] I think some understanding of this lies behind Taggart's criticism of 'Dicey's persistent denial of any useful distinction between public and private law' (Taggart above n 61, 204), which represents one of the regrettable 'peculiarities of the English' (Taggart above n 59). But this is rather strangely put as Taggart generally denies this distinction himself, and I am not entirely sure what he means. If he means, as the fact that he makes this point in the course of a strong criticism of Harlow leads one to suspect, that he actually wants a really separate administrative law, then, for what it is worth, I am at complete odds with him, for, like Harlow above n 88, 22, I believe that Dicey's principle of equality within unitary government is overwhelmingly attractive. I do not, however, think he really means this.

[116] M Loughlin, 'Why the History of English Administrative Law is Not Written', in Dyzenhaus *et al*, eds above 92, 151, 175.

perspective of modern administrative law, which Loughlin forcefully restated in the paper I have just mentioned, that he (Dicey) seriously underestimated the role of 'administrative law', of a type of which he could not have approved, in the nineteenth century constitution he celebrated. We have seen that Dicey was not ignorant of the growth of administrative law involving a great expansion of state functions. 'Nor', he observed, 'is the importance of this extension of the activity of the State lessened by the consideration that its powers are in many cases exercised by local bodies, such, for example, as County Councils',[117] because '[i]t should never be forgotten that powers given to local authorities are, no less than powers possessed by the central government, in reality powers exercised by the state'.[118] This growth was part of a process I have said that Dicey found deplorable but was ultimately prepared to tolerate because it did not involve the creation of an explicit *droit administratif*.[119] It seems that Dicey was so preoccupied with this mark of the erosion of the rule of law that he did not place sufficient weight on the way that the growth, and, more important, centralisation[120] of local functions meant that, even in its absence, those functions could not plausibly be said to be under the control of the ordinary courts. As even now the great works of administrative law wisely follow de Smith's counsel and do not attempt to 'achieve a full mastery of the subject' because this 'requires an encyclopaedic range of knowledge which is hardly worth acquiring',[121] one has to be careful about what exactly one thinks it reasonable to ask Dicey to say about the range of local authority functions in the first modern attempt to describe the detailed law of the British constitution before one can pronounce oneself dissatisfied with what he did. Nevertheless, Dicey's views on local authority functions do seem to underestimate the significance of what was seen as an 'organised oligarchism'[122] by contemporaries writing from Dicey's perspective.

[117] Dicey above n 97, 389. See also Dicey above n 65, 197-8, 201-4, 206-11.

[118] *ibid*, 206 n 65.

[119] Dicey above n 97, 389.

[120] I use this term because it was the term in contemporaneous use (it was the subject of one of John Austin's few works in addition to his lectures), but a modern must take care to see the differences between what the term connotes now, when we have a very powerful central state and an emaciated local tradition, and what it connoted then, when the opposite obtained: RM Gutchen, 'Local Improvements and Centralisation in Nineteenth Century England' (1961) 4 *Historical Journal* 85, 86.

[121] de Smith above n 90, 545.

[122] J Toulmin Smith, *The Metropolis and Its Municipal Administration*, London, T Saunders, 1852, 25. Loughlin above n 116, 174 n 91 draws attention to other works of this important defender of traditional forms of responsibility and accountability in 'local government' against centralisation. On Toulmin Smith see WH Greenleaf, 'Toulmin Smith and the British Political Tradition' (1975) 53 *Public Administration* 25.

Far more telling against Dicey, in my opinion, is his failure to take account of what he surely should consistently have criticised as the arbitrariness inherent in the prerogative powers, for, as Harlow and Rawlings justly put it, '[t]he state does not need to possess special powers "in its own name" if those powers are held by government ministers acting in the name of the Crown'.[123] One might go so far as to say that modern administrative law has been an attempt to fill this 'gaping hole'[124] in Dicey's constitutional architecture, but even if this is so, the way it has been done paradoxically has enormously expanded 'the capacity for executive action to regulate the economy free from effective Parliamentary control',[125] and, the point I am arguing, Dicey should play in an important role in our attempt to remedy this.

It is, of course, only by public lawyers that these matters are principally discussed through reflection on Dicey. By far the most generally influential warning that the growth of collectivism will be harmful is that of the neo-liberal movement in economics and politics, and its principal expression ('[t]he classic *cri de coeur* Taggart has it (163 n 114)) remains Hayek's 1944 *The Road to Serfdom*. This is a book avowedly in the Diceyan tradition, bringing Dicey's lamentation of the decline of the English liberal tradition into the era of the established welfare state.[126] Just like Dicey's great books, *The Road to Serfdom* has, of course, been immensely successful in one sense, but a complete failure in another, for the growth of collectivism which it was intended to counter proceeded apace, and, writing of *The Road to Serfdom* in 1946, Orwell told us why this would be so in the peculiarly direct way so characteristic of him:

> Hayek's able defence of capitalism … is wasted labour, since hardly anyone wishes for the return of old-style capitalism. Faced with a choice between serfdom and economic insecurity

[123] Harlow and Rawlings above n 77, 9. The nature of Dicey's theoretical mistake is set out in well known works by Sir William Wade and Professor Harris to which they refer *ibid*, n 31. An understanding of this mistake in the context of a theoretical tradition of analysis of 'the state in the common law tradition' is begun in J Allison, 'Theoretical and Institutional Underpinnings of a Separate Administrative Law', in Taggart, ed above n 28, 71, 74-9.

[124] Harlow and Rawlings above n 77, 9.

[125] P Craig, 'Preorgative, Precedent and Power', in C Forsyth and I Hare, eds, *The Golden Metwand and the Crooked Cord*, Oxford, Clarendon Press, 1998, 65, 89. Hewart, of course, saw this in a way, and hence the title of his book.

[126] FA Hayek, *The Road to Serfdom*, *Collected Works* vol 2, Chicago, University of Chicago Press, 2007, 194.

> the masses everywhere would probably choose outright serfdom, at least if it were called by some other name.[127]

As it happens, Orwell's own depiction of the consequences of choosing serfdom in *1984* is, in my opinion, undermined by a failure sufficiently to link serfdom to the affluence serfdom bought,[128] which leads to a sort of excess of tyranny, more appropriate to the totalitarian countries, in Orwell's account of Winston Smith's subjugation. Nevertheless, I do not know of any other advocate of the welfare state who has put the trade-off between welfare and liberty in quite this clear a way, which rather illustrates his 'power of facing unpleasant facts'.[129] Richard Crossman's outstandingly brave but utterly unfailing 1956 attempt to persuade socialists to take Hewart seriously,[130] commendably cited by Harlow and Rawlings,[131] is the closest statement by a figure of real influence of which I am aware.[132] Socialists could say that the advantages of social citizenship are so great that we should pay the cost of the growth of arbitrary power to obtain them, and perhaps putting it this clear way might have helped in achieving the necessary balance between affluence and serfdom.[133] But we should not be surprised if frankness over this was rare and that there normally was equivocation over the necessary cost. This has been expressed in what Hegel surely would have called the 'monotonous formalism' of the interminable number of attempts by Labour Party theorists and theorists *manqué* to strike

[127] G Orwell, 'The Intellectual Revolt', in *Smothered Under Journalism*, *Complete Works* vol 18, rev edn, London, Secker and Warburg, 2001, 56, 59.

[128] This is rather better done in the concentration on serfdom of the privileged elite in *Brave New World*, but Orwell was generally critical of what he saw as the 'hedonistic principle' in left-wing thought: G Orwell, 'Review of [*inter alia*] *Brave New World*', in *A Patriot After All*, *Complete Works*, vol 12, London, Secker and Warburg, 2001, 210, 211.

[129] G Orwell, 'Why I Write', in *Smothered Under Journalism* above n 127, 316.

[130] RHS Crossman, *Socialism and the New Despotism*, Fabian Tract 298, 1956. Hewart is not himself even mentioned in this Tract.

[131] Harlow and Rawlings above n 77, 45-6.

[132] Drawing on 1980 *dicta* of Lord Hailsham which he valuably brought to wider attention, Lord Cooke has given a contemporary statement: 'The [administrative law] jurisdiction is inherently discretionary. This is not always convenient for either practitioners or academics, but it is the simple truth': Lord Cooke of Thorndon, 'The Discretionary Heart of Administrative Law', in Forsyth and Hare, eds above n 125, 203, 220. But I for one cannot place any real weight on this. However it may have been for others, I doubt that Lord Cooke, in his confidence in his ability to identify the public interest, ever found this truth particularly inconvenient.

[133] As Hewart above n 79, 152-3 argued, in my opinion compellingly.

a middle ground,[134] with 'middle' doing miraculous work, which reached their nadir in Mr Blair's[135] and Lord Giddens' 'third way'.[136]

One ground on which this equivocation could be based is of great importance to us. In his 1945 response to *The Road to Serfdom*, EFM Durbin, one of the most distinguished and influential economists of the nascent welfare state, rather disparaged Hayek for insufficiently appreciating the strength of the British tradition of liberty, which meant that:

> in this country we have no need to fear the development of a centralised administration. We have a long tradition of increasing democracy combined with the growing activity of the State … it would be a thousand pities if [Hayek's argument] should lead any of us to doubt our power to combine freedom with [social] security and science with flexibility in the conduct of our economic affairs. If we have "economic planning" it will … fulfil the wishes of our people. It will be the servant of our freedom and will bring another part of our common life within the control of our social wisdom.[137]

Now, this is a rather ill-directed charge to level at Hayek, whose entire political thought was, as I have said, an attempt to restate nineteenth century liberalism for the twentieth century, and whose fundamental lament in *The Road to Serfdom* was that the British were no longer being true to their strengths. But, even if we allow that Durbin's confidence had some purchase at the time it was made, at the time of the creation of Beveridge's welfare state, what Durbin was wrong and Hayek right about is that the strengths of the British political tradition on which Durbin relies are strengths which collectivism inevitably works against. Though I will not argue it here, leaving the reader to take it for what it is worth, it is my view that the experience of the maximalist welfare state has shown that positive and negative liberty, civil and social rights, and freedom and social justice are, choosing my word carefully, inimical, and this places a persistent tension at the heart of the

134 P Diamond, ed, *New Labour's Old Roots*, Exeter, Imprint Academic, 2004.

135 P Mandelson and R Liddle, *The Blair Revolution*, London, Faber, 1996 and P Mandelson, *The Blair Revolution Revisited*, London, Politico's, 2002. For administrative law, the formal middle ground is captured in the title of Hancher and Reute's review of Harlow and Rawlings: L Hancher and M Reute, 'Forever Amber' (1985) 48 *Modern Law Review* 243.

136 T Giddens, *The Third Way*, Cambridge, Polity Press, 1998.

137 EFM Durbin, 'Professor Hayek on Economic Planning', in, *Problems of Economic Planning*, London, Routledge and Kegan Paul, 1949, 91, 106.

institutions of the welfare state and our thinking about them, including administrative law and our thinking about it.[138]

This tension has been relieved in the case of administrative law because, until recently, the sacrifice of legality for effectiveness has not been sufficiently regretted during a period in which, as the student of regulatory theory has so far seen perhaps more clearly than the public lawyer,[139] the advance of the public interest by means of soft law 'draws gasps of admiration for the efficiency of what is in effect lawlessness'.[140] To the extent this is so, Durbin could not consistently say that the British political tradition will protect one and then go on to undermine that tradition, or, at least, it has turned out that he would not have been able to do so over the middle and long terms. It is as if Durbin were sawing away the branch on which he sat, whilst not realising he had a saw in his hand. The link that Hayek stressed between executive contempt for the rule of law and irrationality in policy formulation has been graphically illustrated by the normalisation of government failure in the hyper-innovative state. But, although developed by Hayek and others in economic and philosophical ways which are of a sophistication which rather starkly contrasts with the period artlessness of Dicey's views on *laissez faire*, the fundamental issues are stated by Dicey.

The constitutional significance of abuse of rights

In a sense, the mischief at which Simpson's lecture and Taggart's book are directed may not be a great one for it must be questioned whether the mischief which a private law doctrine of abuse of rights is to remedy exists at all.[141] Taggart tells us that *BvP* is 'seldom cited' (195), and, when he reviews the common law (chs 6-7), he draws on some fine scholarship to show that common law and equity are replete with conditions for the exercise of rights that amount to specific limits on abuse of rights or, to put it the other way around, amount to requirements of good faith. It seems strange but characteristic that Taggart spent a great deal of time adopting

138 T Poole, 'The Reformation of English Administrative Law' [2009] *Cambridge Law Journal* 142, 164-5.

139 R Creyke and J McMillan, 'Soft Law v Hard Law', in L Pearson *et al*, eds, *Administrative Law in a Changing State*, Oxford, Hart, 2008, 377.

140 P Goodrich, 'Law's Labour's Lost' (2009) 72 *Modern Law Review* 296, 310.

141 In 1940, Lawson described *BvP* as surrounded by contrary authority, in tort and elsewhere, and easily confined to 'its own little island of fact': Lawson, 'Notes' above n 14, 161. In 1951, he described *Allen v Flood* and *BvP* as 'exceptional': Lawson, *Rational Strength* above n 14, 117.

Haar and Fessler's use of certain private law good faith requirements to the regulation of public bodies[142] without asking how it was possible for the private law to do this for those bodies and not for itself. In the law of contract and tort with which I am familiar, there is, in my opinion, no such thing as the 'unlovely *Pickles* doctrine'.[143] In respect of the use of land, I myself believe that the law of nuisance, based as it is on a balancing of opposed legitimate interests, can readily do the work done by abuse of rights, indeed can hardly avoid doing so, although Taggart does not seem to think this (188-91) and Simpson certainly does not,[144] which is something that gives me great pause. There do, however, seem to be particular problems arising from the physical nature of underground water flows,[145] which I will ignore, though, in a most interesting fashion, they may make these flows of *water* refractory to regulation by a law of *land*.

For our purposes here, all this is by the by. Having noted in his essay on 'The Province of Administrative Law Determined?' that 'there are many doctrines in the common law (quite a few of which have an equitable origin) which place limits on private law's instinctive privileging of self-regarding behaviour', Taggart went on to say that 'legislative interventions are even more numerous and invasive'.[146] And surely the most important issue is that we must evaluate abuse of rights knowing that since, *BvP*, '[s]uccesive waves of regulatory legislation have left little room for [self-interested] behaviour' (193).

BvP really speaks not to direct reform of the law of abuse of rights but to an attitude to the relationship of citizen and state which informs our conception of the relationship of private and public law. In particular, one now has to ask whether it is now wise to seek further to add to the extensive powers of government under primary and secondary legislation by having a background sweeping up doctrine of abuse of rights. Recognition of the problems of doing so may be traced back at least to Blackstone,[147] but they were set out for moderns by FH Lawson in 1950:

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142 CM Haar and DW Fessler, *The Wrong Side of the Tracks*, New York, Simon and Schuster, 1986.

143 Getzler above n 46, 316.

144 Simpson above n 25; *VLIS*, 18-28 and Simpson above 26.

145 The principal modern discussion of which is Getzler's volume in the Oxford Studies in Modern Legal History Series: Getzler above n 46, reviewed by Taggart in (2005) 25 *Legal Studies* 337. Getzler's account of the absolutist interpretation is standard: *loc cit*, 315-6.

146 Taggart above n 28, 5.

147 *Comm* I, 139: 'it would be dangerous to allow any private man, or even any public tribunal, to be the judge of the common good, and to decide whether it be expedient or no'; quoted in *VLIS*, 7.

> it is clear that as soon as the theory of abuse of rights passes the stage where subjective malice is the sole test, it is really a socialist doctrine. It implies that a man's right is no longer, as it were, a sphere within which he is sovereign, over which he may dispose according to his own view of his interests and his ideas of right and wrong; it is to be subject to the control of society in the person of the judge, who exercises his a veto over his decisions in accordance with what he considers to be the purpose for which society has conferred the right.[148]

Taggart (158) cites this passage, and his scholarship allows him to identify another to similar effect but expressed in more florid language by HC Gutteridge,[149] Reader and then Professor of Comparative Law in the University of Cambridge between 1930-41, whom Bernard Rudden described as 'undoubtedly' 'the most influential academic comparatist' of the period between the wars.[150] Apart from some slighting language, Taggart engages with these passages only by making reference to a 'more balanced' treatment of social limits upon private rights in a 1934 commentary by VE Greaves, a Russian émigré lawyer, upon the Soviet Civil Code! One cannot doubt that this Code made the social ontology of private rights in land more clear than did the nineteenth century common law, but we should not allow ourselves to be made dizzy with the success of this argument against 'insular individualism'. For surely this clarity was bought at a cost, one insisted upon by Greaves.

Having noted that the frankly political dominance of the courts by the Soviet government 'deprives the administration of justice by the Soviet courts of the stability which is a typical attribute of justice in all non-communist countries', Greaves fatefully predicted that it was 'not impossible to surmise that the Soviet government will suddenly adopt a new social or economic policy materially differing from the present social-economic aims of the Soviets, and as a result, all rights lawfully acquired under the now existing policy may be left without protection, if their exercise should no

148 Lawson, *Negligence* above n 14, 18-9. This passage reworks views Lawson had advanced 10 years previously: Lawson, 'Notes' above n 14, 164.

149 HC Gutteridge, 'Abuse of Rights' (1933-5) 5 *Cambridge Law Journal* 22, 43-4. I myself find this an exemplary paper, one which sees the problems with *BvP* as known through the absolutist interpretation, and weighs up the pros and cons of reform carefully and with what seems to be useful comparative analysis, though I am in no position to maintain an opinion of the accuracy of that analysis.

150 Rudden above n 45, 85.

more correspond to the new social or economic purposes of the state'.[151] After the chaos of the initial attempted revolutionary restructuring of the Russian economy, the Bolsheviks were obliged to retreat to a period of substantial acceptance of capitalist economics under the 'New Economic Plan'. This period of relative quiet and success involved limited interference with the ownership of agricultural holdings. It is this period that Greaves reviewed in his paper. His predictions of the future were to be borne out by the forced collectivisation of agriculture, to which, of course, rights in land recognised only in so far as they served the public interest, were no obstacle at all. In the first sentence of the paragraph Taggart otherwise quotes, Lawson had referred to, precisely, the Soviet Code as 'probably' 'the most famous statement' of the principle of abuse of rights, which, Lawson had said in an earlier version of this discussion, 'has its natural affinities with public rather than private law'.[152]

I am not making the ridiculous and distasteful accusation that Taggart, or the strain of administrative law he represents, would endorse anything like collectivisation, but I am asking where the stopping point in the trumping of the individual interest by the public interest is? Just consider Simpson's attitude to the irritation of the boy scout. What sort of 'communitarian'[153] regulatory regime does Simpson have in mind that would actually ground realistic legal prevention of this bad behaviour?[154] Sadly, we have examples of the answer, and not merely in the fiction of Orwell. Taggart came to *BvP* with the intention of throwing it down and with it the distinction between the public and private law as he understood it, and though, to his credit, he did not carry this through, he does not supply this stopping point in a theoretically defensible manner. It is to this that I now turn.

The public interest and the feint of the state

Taggart's writings on public law, which can be traced back to a prize winning paper on administrative tribunal procedure published in 1981, are very markedly the product of their time because almost all of them are dominated by a concern to oppose the privatisation and marketisation of

[151] VE Greaves, 'The Social-Economic Purpose of Private Rights', pt 2 (1934-5) 12 *New York University Law Quarterly Review*, 441, 465-6.

[152] Lawson, 'Notes' above n 14, 164.

[153] Simpson above n 46, vii.

[154] I am trying to make a wider point than the narrower point that, however, is of the greatest importance, which is that it is inconceivable that such a doctrine will not interfere, in ways which we simply cannot see how to control, with legitimate economic competition.

much of the service provision which the maximalist welfare state had taken to itself. Perhaps the most striking instance of this is that, when called on to write a chapter on 'The Nature and Functions of the State' for a work of reference, he did not seek to provide the *Rechtstheorie* for want of which Dicey has been so often castigated, but a prolonged criticism of the new public management![155] This intensity of focus might be explained by the fact that the New Zealand experiment with 'Rogernomics' arguably was the most jarring, if this is a strong enough word, experience of new public management in the advanced capitalist countries, as Taggart's colleague in the Faculty of Law at Auckland, Professor Jane Kelsey, has made clear in an internationally influential body of work.[156] Concluding that the argument against the new public management had been in an important sense lost, Taggart argued for continued governance of privatised services, such as the water supply, by public law principles, and he was hardly alone in believing this made it urgent to attack the distinction between private and public law in the way we have seen in his essay on 'The Province of Administrative Law Determined?' His attack on *BvP* was given particular impetus by the way he thought it might well sanction the removal of the particular obligations of public law from privatised services: '[o]n the hoarding around the level playing field … one can imagine the great graffiti artist's deviant scrawl "*Pickles* Rules Okay"' (200).

In a paper on 'British Socialists and the British Constitution' which has greatly influenced my thinking on these matters, Anthony Wright has shown just how happy were the leading theorists in and around the Labour Party with the latitude the elective dictatorship allowed them to pursue the public interest as they defined it.[157] They 'had a crash constitutional education' in the 1980s as they witnessed 'Mrs Thatcher's march through the constitution'.[158] If one substitutes David Lange for Margaret Thatcher and Roger Douglas for, say, Keith Joseph, one can say that Taggart got his own constitutional education in this way, and his central concern has been to get lawyers, who '[a]s a group … were rather slow to appreciate the impact of these changes [and] the threat to their subject posed by "the contracting

[155] M Taggart, 'The Nature and Functions of the State', in P Cane and M Tushnett, eds, *The Oxford Handbook of Legal Studies*, Oxford, Oxford University Press, 2003, 101.

[156] Taggart cites J Kelsey, *The New Zealand Experiment: A World Model for Structural Adjustment?*, Auckland, Auckland University Press and Bridget Williams Books, 1995 in Taggart above n 61, 203 n 96.

[157] For a most influential celebration of power the elective dictatorship gave to the pursuit of the socialist definition of the public interest not mentioned by Wright, see A Bevan, *In Place of Fear*, London, Heinemann, 1952, 100.

[158] A Wright, 'British Socialists and the British Constitution' (1990) 43 *Parliamentary Affairs* 322, 337. 322.

state'",[159] to face up to that threat. This is so in a way which it is uncomfortable but essential to note.

Taggart's very strong criticism of the new public management of course implies that the old public management based on extensive direct provision was better, and, indeed, he very much believed this was so. I do not doubt he was right, but I must depart from the way he saw the issues. Having embarked on the reinvention of administrative law, Taggart has said disparaging things about *Wednesbury*,[160] *ultra vires*,[161] etc,[162] but, except in relationship to its becoming clear how little the old ways offered the left-wing administrative lawyer opposed to the new public management, these were persuasively measured criticisms which led to Taggart insisting on the need for a concept of judicial deference appropriate for the era of social rights[163] which appeals even to one like myself who sees this era as a bout of self-indulgence by those enamoured of the administrative law of human rights which will either create a lot of mischief or be seen to be a reinvention of the wheel. Taggart does not, in fact, seem much disturbed by what went on under the old public management. His reviews of the subject are basically paeans to the likes of Robson,[164] who, if he was subjected to the same standard of criticism as Dicey has been, would widely be called an *apparatchik*, and, in a paper in the *Festschrift* for Sir William Wade which I read with some amazement, Taggart reviews the UK and Commonwealth law of compulsory purchase prior to Thatcher and finds nothing much to complain about! We are told that the 'administrative law doctrine of *ultra vires* has been a potent weapon in ensuring private property is only taken for authorised public purposes',[165] and, in sum, that the 'leitmotifs in Sir William

159 Taggart above n 28, 2. The hortation was extended to the international level in M Taggart, 'The Tub of Public Law', in D Dyzenhaus, ed, *The Unity of Public Law*, Oxford, Hart, 2004, 455, 479.

160 M Taggart, 'Reinventing Administrative Law', in N Bamforth and P Leyland, eds, *Public Law in a Multi-layered Constitution*, Oxford, Hart, 2003, 311 and M Taggart, '*Associated Provincial Picture Houses Ltd v Wednesbury Corporation*' (1948)', in P Cane and J Conaghan, eds, *The New Oxford Companion to Law*, Oxford, Oxford University Press, 2008, 55.

161 M Taggart, '*Ultra Vires* as Distraction', in C Forsyth, ed, *Judicial Review and the Constitution*, Oxford, Hart, 2000, 427.

162 M Taggart, 'Rival Theories of Invalidity in Administrative Law', in M Taggart, ed, *Judicial Review of Administrative Action in the 1980s: Problems and Prospects*, Auckland, Oxford University Press, 1986, 70.

163 M Taggart, 'Proportionality, Deference, Wednesdbury' [2008] *New Zealand Law Review* 423.

164 Taggart, 'From "Parliamentary Powers"' above n 80.

165 M Taggart, 'Expropriation, Public Purpose and the Constitution', in Forsyth and Hare, eds above n 125, 91, 105.

Wade's work – resisting arbitrariness and preserving individual liberty – can be seen at play in this area'.[166]

There is a passage in Wade's *Administrative Law* which Taggart quotes repeatedly throughout his work, including in *PPARVE* (199-200), which is too long and too familiar to quote here in full but which has *BvP* in mind when it contrasts the 'unfettered discretion' of the private actor with the restraints on a public authority, to which 'unfettered discretion is inappropriate' because such an authority 'possesses powers solely in order that it may use them for the public good'.[167] Taggart finds this so congenial a passage because he has a naïve belief in the self-certifying worth of things done, not in the pursuit of self-interest, but in the public interest. This reaches a point which brought a wry smile to my face at least in Taggart's well known 'list of public law values' which 'includes openness, fairness, participation, impartiality, accountability, honesty and rationality'.[168] His omission of the core value of administrative law – the extension of government power without too punctilious a regard for any or all of the preceding values when they are believed to hamper pursuit of the public interest – is unaccountable unless one sees just how great was his belief in that interest. His entire work is motivated by the belief that 'more is expected of the state' than of private action, but, whilst one hopes that this is so, Taggart does not seem to be aware that, though the criticism of government failure does not fail to point out instances of want of virtue on the part of those holding power,[169] the fundamental criticism is of virtue itself, for that an effort to act in the public interest is made with virtuous intent is a necessary but not remotely a sufficient condition of success in doing so. When Hegel told us that, with Robespierre, virtue was a serious matter, he (Hegel) was not pointing to a viable form of politics.

In his work on expropriation, Taggart is happy if the working of administrative law has ensured that taking took place only when it was in 'the public interest', as if this was the end, rather than the start, of the problems. I believe *BvP* is an illustration of these problems. Nevertheless, in the 'Epilogue' to *PPARVE*, Taggart suggests that the Appeal Courts in *BvP*, perhaps influenced by a notion of 'the equality of state and citizen … so admired by AV Dicey (97), were wrong to construe s 49 *contra preferentum* against the Corporation, because the Corporation was not the Company:

[166] *ibid*, 112. See also Taggart above n 159, 468.
[167] Wade and Forsyth above n 114, 296-7.
[168] Taggart above n 28, 3.
[169] He minimises incidences of these episodes in a striking passage in *PPARVE* (200), which contains an even more striking reference to a tort as an adequate remedy for them.

> The fact that the original adventurers (who had established the [C]ompany for personal gain) had sold out to the local municipality, which was a creature of statute and guardian of the welfare of its inhabitants, was not treated as relevant … Any public interest in the continued supply of water to Bradford was trumped by Pickles' absolute property right (198).

That Taggart can maintain this after what he has shown of the conduct of the Corporation of Bradford is worthy of discussion only because his influential views are what Louis Althusser would have called 'symptomatic' of a most important attitude towards the public interest which I hope to criticise here, in essence, a bias towards believing that 'public' equals 'good'. The problems of virtuous action backed by coercive powers, identified by Dicey, are that it may lead to a vanguard, authoritarian lack of respect for the opposed views of others in the belief that this disregard is in their (via the collectivity's) interest, and that, in this disregard, avoidable policy mistakes can and will be made. The twentieth century has far, far worse cases of this than the growth of the arbitrary and foolish exercise of executive power in the welfare state made possible by administrative law, but the maximalist welfare state is a case of it.

And, entirely contrary to Taggart's view, this has got worse over the last thirty years. Taggart's concern to somehow preserve governance in the public interest over privatised or marketised provision can now be seen to misunderstand what the new public management has actually meant. In my opinion, the undoubtedly extensive reengineering of the technique of public management never called into question the role of the national state, and the development of quasi-markets as a response to the initially successful neo-liberal critique of government failure has meant that the national state has not 'contracted',[170] been 'hollowed out',[171] 'retreated',[172] or 'shrunk'[173] since the 1970s, much less come to an 'end'.[174] After a period of initial retrenchment, the share of gdp under state management in the advanced capitalist countries had actually increased (prior to the immense deficits

[170] I Harden, *The Contracting State* (Buckingham: Open University Press, 1992).

[171] R Rhodes, 'The Hollowing Out of the State: The Changing Nature of Public Service in Britain' (1994) 65 *Political Quarterly* 138.

[172] S Strange, *The Retreat of the State* (Cambridge: Cambridge University Press, 1996).

[173] HB Feingenbaum *et al*, *Shrinking the State* (Cambridge: Cambridge University Press, 1999).

[174] K Ohmae, *The End of the Nation State* (New York: Free Press, 1995). The corollary point that the common understanding of globalisation is mistaken is made in L Weiss, *The Myth of the Powerless State* (New York: Cornell University Press, 1999) and PQ Hirst *et al*, *Globalisation in Question*, 3rd edn (Cambridge: Polity Press, 2009).

incurred in response to the credit crunch),[175] but much of that management is now of a quasi-market form, the change of technique having proven to be a most effective way of (to adapt a felicitous phrase) 'bringing the state back in'.[176] The state has, very successfully, not retreated in the face of the neo-liberal critique, but feinted away from it, and resumed growth. I have argued this point in terms of regulatory theory elsewhere,[177] and I am happy to abandon the argument I had drafted in terms of administrative law for this paper because in an, in my opinion, pathbreaking essay in Taggart's *Festschrift* that must provoke a fundamental shift in administrative law theory, Professor Harlow has shown 'that colonisation of the private by the public is the true characteristic of contemporary government and that the state, far from ceding power to the public sector, was everywhere active behind the scenes'.[178]

I will give only one brief illustration here. Rawlings has recently examined the attempt to introduce a partial but very substantial privatised element into the running of the London Underground. He rightly describes this, 'the UK's flagship scheme' of public/private partnership, as a 'spectacular failure' and hopes that 'lessons are learned about the functional limitations of contractual ordering and the importance of vindicating public law values like transparency and accountability'.[179] But, of course, the 'contractual' verdict on running the Tube in its modern form is that one shouldn't do it. What is meant by saying the Tube is an instance of the public good variant of market failure is that the market would not do it, and this is why the Tube since 1933 has effectively been a public concern. And when the pressures on the public running of the Tube, manifested in familiar deferred 'long-term maintenance and renewal' and 'worst-case instances of conventional procurement'[180] that left the late twentieth century Tube with the 'ageing (commonly Victorian) infrastructure',[181] the deficiencies of which were brought to general attention by the Kings Cross fire, there seemed to be no way of getting the requisite finance together for an adequate response on the basis of continuing to run the Tube as a purely public concern, the

[175] FG Castles, 'Testing the Retrenchment Hypothesis: An Aggregate Overview', in FG Castles, ed, *The Disappearing State* (Cheltenham: Edward Elgar, 2007) ch 2.

[176] PB Evans *et al*, eds, *Bringing the State Back In*, Cambridge, Cambridge University Press, 1985. The summary of what has happened in S Vogel, *Freer Markets, More Rules* (Ithaca: Cornell University Press, 1996) 269 is exemplary.

[177] D Campbell, 'Relational Contract and the Nature of Private Ordering: A Comment on Vincent-Jones' (2007) 14 *Indiana Journal of Global Legal Issues* 279.

[178] C Harlow, 'The "Hidden Paw" of the State and the Publicisation of Private Law', in Dyzenhaus *et al*, eds above n 92, 75, 77-8.

[179] Rawlings above n 92, 246.

[180] *ibid*, 233.

[181] *ibid*, 225.

public/private partnership was devised. It just is not accurate to regard this as a private matter. The entire thing was driven by a public authority in defiance of the market verdict on the Tube, with a non-market outcome sought and the conduct of the project stipulated in detail by that authority. It is, in my opinion, the principal shortcoming of regulatory theory, and of both the new public management and its public interest critics, including those in administrative law, that it just is not understood that that one cannot create a 'market' to realise a social goal postulated by the state, for the essence of a market is that it produces order in the absence of such a goal, and the imposition of such a goal destroys the market.[182]

What annoys Rawlings is that a new form of management was adopted despite it being able to be predicted that it would be worse than the old, but that this form departed from what the market would have done and what would have been done on old public administration principles and practices does not stop this being a new form of *public* management. Financial sense, accountability, etc are casualties in this episode, but they were casualties of the public sector trying to expand its activities, not merely beyond the limits of the market but beyond its own previous limits, and I am at a loss to understand how administrative lawyers, and their fellows in the other theoretical enterprises of the maximalist welfare state, fail to see this. Administrative law has been[183] based on breaking down the Diceyan limits to executive power. In the new public management, it has perceived its own self as a limit, and has pretty successfully broke itself down. That this is regarded as a criticism of the private sphere just shows the extent of the theoretical problem that has beset regulatory theory in general and administrative law in particular, which, if the unfairness to certain distinguished, honourable contributors who are exceptions be allowed, has typically failed to look its essential role in the great extension of arbitrary power in the face.

[182] D Campbell, 'The Hybrid Contract and the Merging of the Public and Private Law of the Allocation of Economic Goods', in D Campbell and ND Lewis, eds, *Promoting Participation*, London, Cavendish, 1999, 45. Reasons of space preclude me from applying the argument of this paper to Dicey's conception of the division between private and public, of the nineteenth century collapse of which under Mill's influence he gave an acute analysis summarised in Dicey above n 65, 378.

[183] I have tried to avoid direct citation of what I regard as very poor criticisms of Dicey, but I am impelled to mention Lord Sedley's recent throwaway reference to Dicey's 'xenophobic and counterfactual insistence that Britain, unlike France, had no body of administrative law': S Sedley, 'On the Move' (8 October 2009) 31(19) L*ondon Review of Books* 3-5. It is not that Lord Sedley is no better than others in coming to terms with Robson's story, it is that he calls one of Britain's greatest comparative lawyers a xenophobe when writing for a readership almost all of whom will not be able to know any different.

Conclusion: Socialism, citizenship and the crisis of the welfare state

I believe Taggart started on his researches into *BvP* with the intention of showing it was wrong, for he came to the case wishing to further tip the balance for the claimed public interest against the private interest. In the course of his researches, he began to see that this was unwise, and, whilst he never sorted out his thoughts on this, leaving his book something of a tangle at the end, and not developing the reform of *BvP* in his subsequent public law works, he rightly and commendably all but abandoned his initial intention. He concentrated instead on the nature and scope of administrative law, which was, as it were, to look at things from the opposite direction, which was more congenial to him. But his lack of enthusiasm for actual reform of the law of abuse of rights after writing his book was not really carried through to his theoretical position on the clash of values involved in the distinction between public and private law, for the appeal of a doctrine of abuse of rights in the abstract at least never waned for one who retained his naïve belief in the public interest.

As it has been developed in its maximalist form, the welfare state has not known, continues not to know, and cannot know, any principled bounds. When Dicey wrote the first edition of *An Introduction to the Study of the Law of the Constitution*, the state consumed 9% of gdp. When Pigou wrote the first edition of *The Economics of Welfare* it consumed 13%. When Marshall wrote *Citizenship and Social Class* it consumed 32%. Prior to the response to the credit crunch, it consumed almost 50%. That response will take it well in excess of 50%. This has to stop, but one cannot see how as the welfare state has failed to confine itself to the minimalist provision of welfare floors and is beset by a maximalist clamour for the satisfaction of social rights which knows no theoretical limit. The results of this have been pretty much as Beveridge said they would be: 'to give by compulsory insurance more than is needed for subsistence is an unnecessary interference with individual responsibilities. More can be given only by taking more in contributions or taxation. That means departing from a principle of a national minimum, above which citizens shall spend their money freely, and adopting instead the principle of regulating the lives of individuals by law'.[184] All one would add is that Beveridge did not make explicit here what he certainly knew,[185]

[184] *Social Insurance and Allied Services*, Cmd 6404, 1942, para 294.
[185] WH Beveridge, *Why I am a Liberal*, London, Herbert Jenkins, 1945.

that the law which would develop would principally be the administrative law of the maximalist welfare state.

Now, Beveridge's welfare state has been in one crisis or another for longer than I have been alive – Marshall gave 1952 as the date of its first.[186] But, recognising the possibility of crying wolf, I do still wish to state that, if they wish the welfare state to survive, its citizens must now appreciate that social citizenship has costs as well as benefits, and is a matter of duties, especially the duty of restraint, as well as of rights. In particular, they must reassert the primacy of the private in the allocation of economic goods. Whilst, even before the current acute worsening of the situation, the fundamental problem is the fiscal burden of a system that knows no limit, another grave problem is a loss of liberty. This is inevitable because the welfare state rests on coercion, and, whilst it would be wholly wrong to say that the coercion has not been subject to control, it is essential that those on the left now develop a principled opposition to 'the growth of a powerful and uncontrolled surveillance state'[187] which they have played the main part in fostering.

I am aware that I have allowed a personal note to intrude upon this paper in a way not normally thought proper in academic writing. I must beg the reader's further indulgence because I am afraid I am now going to conclude by deepening this personal note. I write as a socialist whose views are a, I hope not unmediated but certainly clear enough, reflection of his having been born in 1958 into a working class, mining community in the North East of England. My family, most of the friends of my childhood and adolescence, and myself have been greatly enriched by the welfare state. A necessary condition of my now being an academic writing this paper was my being provided with a very heavily subsidised grammar school, undergraduate and postgraduate education by the welfare state. I write this paper because I wish to defend the welfare state. But the way now to defend it is to shrink it. We will not do this whilst we maintain the approvingly naïve attitude towards yet further, indeed unlimited, extension of the state which would be embodied in the adoption of a doctrine of abuse of rights. Lawson was right to criticise this attitude as socialist when socialism was identified with statism. Socialism now requires the revival of a Diceyan recognition of the cost to liberty of collectivism which will allow us to look the problem of virtuous authoritarianism and government failure in the face and shrink the state in response to it. But I find this congenial as, in my opinion, the only possible justification for socialism has ever been that it is necessary, as

[186] TH Marshall, *Social Policy*, 1st edn, London, Heinemann, 1952, 92.
[187] Harlow above n 178, 79.

Orwell said in 1940, to 'preserve and even enlarge the atmosphere of liberalism'.[188]

[188] G Orwell, 'Inside the Whale', in *A Patriot After All* above n 128, 86, 110. It is an issue whether, even at this early time, Orwell had already rather given up on this under the influence of a belief in a coming general totalitarianism.