

# Reimagining Administrative Justice: Human Rights in Small Places

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## Subject

Administrative law

## Other related subjects

Human rights

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In *Reimagining Administrative Justice: Human Rights in Small Places*, Margaret Doyle and Nick O'Brien present us with what they describe in the book's preface as "an intellectual challenge to settled thinking", a "constructive, perhaps unexpected, vision" (p.vii) of what **administrative justice** could and should look like. **Administrative justice**, they suggest, is intimately tied to **human rights**:

"It is in the **small places** of ordinary daily life ... that **human rights** and **administrative justice** matter most, and where they share common roots as a political response to the post-war social democratic moment." (p.2)

Both concepts, however, have lost sight of their original and connected animating purposes, they argue. In this book, the authors aim to "reunite" (p.3) them in a single frame that can return **administrative justice** to its potential for enhanced social **justice**.

So, what went wrong with **administrative justice** and **human rights**? What untethered them from their foundations? Doyle and O'Brien point the finger at two culprits. First, **administrative justice** has, in the last few decades, "fallen under the sway of law's empire" (p.69):

"The common law mentality ... directed the translation of **administrative justice** as a political vision of the relationship between the individual and the state into something much narrower."

Such a mentality privileges individual liberty, the adversarial testing of evidence, the promulgation of legal precedent, and the standardisation of legal process (p.45). The institutions of **administrative justice**, such as tribunals, have increasingly come to resemble the court system from which, the authors assert, they were at first expected to stand apart. **Administrative justice** thus now prioritises the individual, strives for systemisation, and aspires to "closure", in the sense that individuals' grievances will be brought to a conclusion, even if it is one of disappointment (pp.5-6).

Secondly, **administrative justice** has fallen for the "seductive embrace of neoliberalism" (p.3):

"Through a steady process of incremental erosion both **administrative justice** and **human rights** have become complicit ... with the values of the marketplace, consumerism, individualism and the New Public Management. They have unwittingly become the agents of that neoliberalism that has stalked the public realm since the 1970s and hollowed out the common good." (p.47)

The authors set out a reform agenda that can bring **administrative justice** back into alignment with the post-war social democratic moment. Inspired by the post-war history of design (Ch.4), they propose the organising values of community, network and openness. Community is offered as a counterweight to the individual:

"The immediate post-war idealisation of the state and desire to serve the common good came under increasing pressure from

the interests of the individual user as a ‘consumer’.” (p.67)

Network is proposed as an alternative to system:

”If system implies hard borders, severe boundaries, control, order and consistency, the notion of network implies something softer, more fluid and potentially more complex and unpredictable.” (pp.67–68)

In contrast to closure, the value of openness is suggested “as an expression of the need for transparency, lightness, and airiness; more than that, ‘closure’ is recognised as an unworthy ambition” (p.68).

The ombudsman is then presented as the paradigm **administrative justice** institution that can capture these “extra-legal” values and ambitions:

”In adopting investigation as the primary tool of its work, the ombud rejects a focus on the ‘atomised’ user as victim, on bounded system, and on the resignation of closure. Instead, in prioritising community, flexible network and open-ended investigation, the ombud reconnects **administrative justice** with the values of democracy and **human rights**.” (p.86)

Yet, the authors also imagine how a network of additional community-focused institutions might similarly contribute to their vision of **administrative justice**. These include:

”mediation practices that focus on recognition and reciprocity rather than resolution, inquiries that adopt participative processes ... and tribunals that openly link with other mechanisms and institutions to facilitate more sustainable, collaborative and collective outcomes rather than maintaining an assembly line of appeals.” (p.127)

As the above quotations suggest, this book is a combination of high vision and basic design. It challenges what it sees as individualistic, neoliberal thinking in current **administrative justice** scholarship and policy, proposing instead a model of **justice** that puts community and relationships at its centre. And it offers a foundational design sketch of a network of institutions that can speak to each other, better recognise the ongoing and open-ended nature of state-community relations and promote social **justice**.

The book itself is not as exhausting as the above whirlwind summary might suggest, but it comes close to it at times. The scale of ambition is dizzying, particularly in light of the short length of the text. The authors take us on a non-stop tour of enquiry, from post-war reconstruction to the world of cultural design, to a comparative analysis of contemporary ombudsmen, to **administrative justice** theory, touching on film and literature along the way. It is a highly erudite, intelligent and engaging text.

The style of the text, however—at least for this reviewer—was at times disconcerting. For example, in discussing ombudsmen, we are told that: *\*J.S.S.L. 73*

”ombuds’ techniques ... prioritise a different mode of sensing that is tentative, tempting, reflexive and uncertain. This sensory mode, adopting sight, sound and touch, works particularly well with **administrative justice** because of its immediacy and its everyday reach.” (p.79)

These moments of rhetorical flourish will appeal to some, perhaps even to many. For my own taste, however, it was somewhat perplexing and I struggled at times to discern exactly what the authors meant. The bigger point, perhaps, is that this is quite an unconventional academic book. One gets a sense of this from the very first line of the preface: “This book comes from the head and the heart ...” (p.vii). It becomes readily apparent that the authors are genuinely passionate about the subject, specifically about the individuals and communities who experience **administrative justice** in this country. In addition to the “challenge to settled thinking”, this is very much to be welcomed.

Yet, there are some serious difficulties with Doyle and O’Brien’s thesis that should not go unmentioned. First, their history of **administrative justice** in this country is flawed; secondly, they focus too heavily on the notion of community as the central focus of **administrative justice**; thirdly, their design fantasy is largely (though not entirely) silent about the conditions under which public administration takes place; and finally, the voices of ordinary people are missing from their design thinking. These objections are set out in turn.

Doyle and O'Brien present us with what, essentially, is an origin story of **administrative justice** in the UK. And they tell it for a specific reason: it has normative work to do. **Administrative justice** famously is a contested concept—something the authors recognise. So, any theorist who asserts one particular conception as being worthy of privilege needs to offer some good reason. The origin story of post-war social democratic reconstruction is the “good reason” put up by Doyle and O'Brien. In essence, their argument is that their conception of **administrative justice** is best because this is how it was meant to be. They repeatedly return to notions such as “social citizenship roots” (p.21), “originating aspirations” (p.69), “social democratic origins” (p.78), or “original political vision” (p. 32). There are two problems here. First, so what if post-war reconstruction is the true origin of **administrative justice**? Should we be tied to origins despite the passage of time and the changes in a pluralist society that come with it? Originalism is not without its problems.<sup>1</sup> Secondly, Doyle and O'Brien's origin story is false. Most authors, such as Harlow and Rawlings<sup>2</sup> or Loughlin,<sup>3</sup> would begin their historical narrative of **administrative justice** much earlier than the post-war period. Craig, of course, has recently taken us back even further.<sup>4</sup> The better view, perhaps, is that the story of **administrative justice** is as old as the story of administration to which we might attach **justice** concerns. So, the selection of the post-war period as a point of historical origin seems somewhat arbitrary in this light. The authors, perhaps—like many of us who were born and educated during *les trente glorieuses*—are guilty of a nostalgic attachment to social democracy and a romantic *\*J.S.S.L. 74* desire to return to those times. But with a longer historical perspective, the three decades that followed the second world war look like a mere blip on a darker timeline.

The second objection is that Doyle and O'Brien make too much of community as the core focus of “authentic” **administrative justice**. As noted above, they are critical of what they see as the centrality of the individual within current **administrative justice** thinking and propose “community” as a superior concern: “[the] individualist tendency is at odds with the daily experience of ordinary life as ‘relational’” (p.21). This is all well and good, and there is clearly some merit in this. However, the better view is that *both* the individual *and* the community matter. The challenge for **administrative justice** is, surely, to resolve the tension between the interests of individuals as the subjects of administration and the interests of the community as the collective beneficiaries of public administration?<sup>5</sup> Indeed, there is evidence of this very tension within Doyle and O'Brien's text when they talk about what the core focus of **administrative justice** should be. Despite their strong talk of community, they also at times focus on the individual, such as in their discussion of the film, *I Daniel Blake*:

”[a] re-understanding of how humane and democratic values and principles might inform the relationship between the individual and the state is the essential material of **administrative justice**.” (p.16)

The third objection is that they make too little of the conditions of public administration itself as an **administrative justice** concern. It is now common in the literature to note that the term “**administrative justice**” has a dual meaning: it may refer either to the **justice** of government administration, or to that part of the **justice** system that concerns itself with government administration. A **reimagining** of **administrative justice**, particularly when concerned with issues of fundamental design, must, surely, embrace both? Yet, Doyle and O'Brien spend most of their text focusing on **administrative justice** institutions such as the ombudsman, tribunals and inquiries. This is to repeat an error, common in legal scholarship, in focussing predominantly on modes of redress rather than on the **justice** of primary decision-making practices in public and quasi-public agencies. If the socio-legal research of **administrative justice** has taught us anything, it is that, first, very few grievances end up as instances of redress and, secondly, that the capacity of various **administrative justice** institutions to systematically influence the **justice** of primary decision-making is limited. This is why researchers such as Mashaw<sup>6</sup> and Adler<sup>7</sup> have focused on primary decision-making: it is there that individuals and communities first experience the “**justice**” of administration. Doyle and O'Brien do briefly acknowledge the work of Mashaw and Adler, but only to dismiss it. In discussing Mashaw's and Adler's models of **justice** in primary decision-making, Doyle and O'Brien suggest that: *\*J.S.S.L. 75*

”[w]hat is lacking is any preference for the public good ... To that extent, socio-legal models of this sort are prefatory to an individualistic ethos and a neo-liberal politics that is in tension with the relational and demosprudential vision advanced in this book.” (pp.134–135)

This is a bizarre interpretation of that body of work. The better reading would be to frame the models of **justice** as an attempt to capture the variety that we can see in discussions about what is the best way in which decisions within public administration should be made, particularly as they relate to citizen-state relations. The benefit of this approach is that we can observe the value sacrifices that are made when one model is privileged over another. In many ways, such models of **justice** represent competing ways of resolving the tensions, referred to above, between individual and community interests. They are different ways of conceptualising the “public good”, and they help to structure debate about which version of the public good is best for particular policy sectors or areas of administration—a matter on which Doyle and O'Brien's book is entirely silent.

The final objection relates to the authors' method of design, which is central to the book. They make much of the need for co-production in design. They applaud the way in which post-war urban design regarded the voices of the communities who would inhabit a space as essential to the "co-design" process. In light of this conviction, we would expect to hear the voices of citizens in Doyle and O'Brien's design sketch for **administrative justice**. As those who are (or may be) subject to **administrative** processes, surely the voices of ordinary people should inform the design sketch? It is surprising that those voices are missing from the text. Consider, for example, Doyle and O'Brien's discussion of the importance of speed (or lack thereof) in the **administrative justice** process:

"Part of the problem ... is that in our desire for speed we expect frictionless exchanges ... There is a dumbing down inherent in making everything friction-free, complete, non-difficult. What the institutions of **administrative justice** should aspire to, instead of a mechanistic seamless system whose cogs are well oiled, is a bit of grit, some resistance. Resistance makes us think." (p.125)

Try telling that to someone waiting for a decision or review. But equally importantly, is it not likely that what the subjects of **administrative** process regard as **justice**, what value trade-offs they would prefer, will vary according to context? Perhaps speed is exactly what most people want in one situation, but not in another. Shouldn't we at least try to find out? And shouldn't those voices be included in design thinking?

**Reimagining Administrative Justice** is an informative and provocative read. Yet despite the forwards-facing tone of its "re-imagination" agenda, the text proved to be largely backwards-facing. It works well as a lament for the loss of the social democratic welfare state which withered in the neo-liberal turn of the 1970s—and *\*J.S.S.L. 76* there is much to sympathise with in this regard—but the book's call for its return remains theoretically and methodologically under-developed.

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## Footnotes

- 1 See, e.g. C. R. Sunstein, "Five Theses on Originalism" (1995) 19(2) *Harvard Journal of Law & Public Policy* 311–316.
- 2 *C. Harlow and R. Rawlings, Law and Administration, 3rd edn (Cambridge University Press, 2012)*.
- 3 *M. Loughlin, Public Law and Political Theory (Oxford University Press, 1992)*.
- 4 *P. P. Craig, UK, EU and Global Administrative Law: Foundations and Challenges (Cambridge University Press, 2015)*.
- 5 See, e.g. J. D. B Mitchell, "The State of Public Law in the United Kingdom" (1966) 15 *International and Comparative Law Quarterly* 133–149; *P. Cane, "Theory and Values in Public Law" in P. P. Craig and R. Rawlings (eds), Law and Administration in Europe: Essays in Honour of Carol Harlow (Oxford University Press, 2003)*.
- 6 *J. Mashaw, Bureaucratic Justice: Managing Social Security Disability Claims (New Haven: Yale University Press, 1983)*.
- 7 *M. Adler, "Understanding and Analysing Administrative Justice" in M. Adler (ed), Administrative Justice in Context (Oxford: Hart Publishing, 2010)*.