EFFICIENCY AND THE RULE OF LAW IN PUBLIC ADMINISTRATION

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INTRODUCTION

Two features have characterized public administration in the western part of the world during the past twenty years. The first is its growth at what to most people is an alarming rate. This growth, moreover, has been due not to any marked extent to the transfer to the public sector of what were once activities of the private sector, but rather to the expansion of such traditional administrative functions as social welfare, the health services, education and the building and maintenance of roads. The second feature is the constant revision, both in general and in particular, of the administrative system and its methods. Admittedly, at no time during the last 100 years or so has public administration been static or even particularly stable. But ever since the end of the second world war changes have been continuous and far-reaching, while—most important of all—the will to change has been widespread and determined. Anyone concerned with public administration has been faced with an incessant desire for change and with proposals aimed at achieving it. And this state of affairs is likely to continue for a long time to come.

Any assessment of desired and proposed changes in the organization and working methods of public administrative bodies will,

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The original Danish title of the paper was "Effektivitets- og retssikkerhedshensyn i forvaltningen". The translation into English of all the words in the title except one has been easy. But no English word conveys exactly the meaning that lawyers and administrators connect with the word "retssikkerhed". The literal translation of the word "sikkerhed" is security, safety or safeguard. The word "ret" is etymologically the same as the English "right" in, e.g., "the right method", but as a legal term "ret" means law both in the sense of, e.g., the law of the land and the legal position of some legal person. In Anglo-Saxon debates about public administration the term here chosen—rule of law—is normally used in the same sense as "retssikkerhed" in Scandinavian debate. But other words, e.g. "justice", may be used as a contrast to efficiency when the organization and methods of public administration are being discussed.

of course, be affected by the situation prevailing in the particular branch of activity concerned. But certain demands of a general character which provide the basis for an evaluation are present in most concrete situations. Two of them—*efficiency* and *the rule of law*—are the subject of this paper. A third, responsibility to or dependence on "the people" or the people's elected representatives—what is often termed *democracy*—is not considered here.[1]

The question of the extent to which efficiency and the rule of law should be regarded as essential elements of the normal basis of an evaluation of changes in the administration can, of course, be approached in many ways. Two of these are obvious. It is quite a legitimate ambition to try to formulate *advice* as to which of the prerequisites should be given most weight. Another possible task is to *analyse* the two terms in an effort to make it clear what is actually meant by "efficiency" and "the rule of law" in argument, and how these terms are used, in a concrete situation requiring the exercise of judgment, as steps towards a basis for making a decision.

In this paper the chief weight is given to analysis. This is where academic writing may have its particular strength. Regard to a sensible division of labour between the professional practitioners of the social sciences on the one hand and all the many other people on the other who, in one capacity or another, are concerned with public administration will, in my view, prompt university teachers to make their most important contribution at the analytical stage. This does not, of course, prevent scholars from giving advice or agitating. They must have the opportunity of doing this like everyone else, as I propose to do myself at the end of this paper. But the analysis is what counts most.

1. ANALYSIS

1. *Usage*

The simplest way of finding out what words "mean" is to see how they are used by authors who might be expected to write

[1] See, on this matter, Torstein Eckhoff, "Reform av den offentlige forvaltning", *T.f.R.* 1969, pp. 189 ff.

with care and deliberation. In the present case we need to see how the terms "efficiency" and "the rule of law" are used in two kinds of publications. One kind consists of the professional literature on administrative science and administrative law, the two concepts being fundamental to each of these disciplines. Administrative science is the result of the efforts of practically-minded people to increase administrative efficiency. And the close connection between 19th-century French and German works on administrative law—which are the principal sources of inspiration of present-day Scandinavian and Finnish administrative law —and the politico-ideological agitation for the *Rechtsstaat* is well known. The other type of publication consists of the constant stream of official and unofficial proposals for administrative reform. A large proportion of these are orientated more or less explicitly towards efficiency or the rule of law or both.

It is, of course, impossible to examine all these works in detail. But even if one confines oneself to a reasonable selection,[2] it soon becomes evident that the use of language in such writings is neither clear nor consistent.

a. *Efficiency* is used in at least four different meanings, which tend to merge into one another.

Sometimes—although quite rarely—the word is used simply to indicate the degree of *goal achievement.* By this definition administration or a particular administrative activity is efficient if it achieves the specified aim. Thus tax assessment is deemed efficient in so far as it succeeds in taxing the incomes actually earned and liable to tax. And the administration of a big city's parking system is efficient if any illegally parked vehicle attracts some penalty. In judging this form of efficiency, no regard is paid to the economic cost of the operation or to the secondary social and economic cost to the community as a whole.

The most general use of the word efficiency is rooted in the thought processes of managerial economics, where production is customarily called efficient it if leads to the greatest possible return measured in money. On one fundamental point administrative activity is similar to industrial production, in that it suffers from a constant shortage of resources. On the other hand, the money yardstick—at any rate on what is known as the

[2] This paper is based essentially on Scandinavian legal writing. See, for a list of references, the author's paper to the Twenty-sixth Meeting of Scandinavian Lawyers in Helsinki, 1972.

output side, i.e. the results of the activity—is seldom directly applicable. The managerial-economic starting point is therefore changed and the administration is described as efficient according to how far a given result is achieved at the least possible expense or the best possible result is achieved from prescribed expenditure. The idea is often briefly expressed as follows: the question of efficiency in administration is a matter of achieving *the best possible target results at the least possible expense.*

This definition raises various difficulties. First, it must be possible to keep ends and means apart, and this, in a concrete situation, is obviously far from easy. Secondly, the very concept of aim is woolly. Does it mean the consequences of the administrative activity for society, e.g. the demographic, political, psychological or family consequences of children's allowances? Or does it relate to the more obvious end product of the administrative activity: the decisions made, the money paid out, the accounting procedure gone through? Finally, this usage of the term efficiency presupposes that not only expenditure on the administrative activity but also the aim can in some way be quantified; for otherwise no assessment of the degree of efficiency is possible. And quantification of the aim of an administrative activity is by no means always possible, at any rate if by aim anything more than the most obvious administrative end product is meant.

There is, therefore, especially outside professional literature, a certain tendency to use the word efficiency in simpler and less well-thought-out meanings. It is, for instance, not unusual for efficient administration to be equated more or less deliberately with administration where the officials are *cost-conscious.* Simplification and economy are therefore not infrequently used as synonyms for efficiency. One also sees, although more rarely, a tendency to equate efficiency with a *rational consideration of the organization of the administration.* The background to this last example of usage is easy to see. Senior officials have always tried to act rationally when required to give advice or when they themselves determine the material content of some specific administrative programme. By contrast, their deliberations have by no means always been so detailed and rational when it comes to the practical and administrative organization of the programme. On the contrary, there has been a tendency to stick unthinkingly to traditional and tried methods. In the light of this, it is easy to see that efficient organization of the administration can come to mean organization on the basis of carefully considered alterna-

tives and a choice between them that is based on an appreciation of the consequences of the alternatives.

b. The term *the rule of law* is also used in various meanings which have a tendency to merge into one another.

In jurisprudential literature in general, and more particularly in civil law, the term "the rule of law" is most frequently used as synonymous with *predictability or uniformity.* The rule of law obtains where individual cases are judged and decided in accordance with general rules so that persons subject to the law can foresee with reasonable certainty the legal consequences of their own actions and those of others. According to this usage, the rule of law stands in contrast both to discretion, in the sense of deciding each individual case on its merits, and to arbitrariness.

Related to this usage is one which equates the rule of law in the administration with the administration's *implementation of existing legislation.* The rule of law demands *correct decisions* from the administration. Thus in tax assessment, for example, the rule of law means the taxing of each and every taxpayer at the exact amount required by the law.

The most general use of the term "the rule of law" in discussion of the organization of public administration is, however, entirely different and less abstract. The rule of law in this case is a matter of *protecting the individual* from the administration. Sometimes there are references to defence against injustice and arbitrary decisions. Sometimes a broader perspective is adopted, and the rule of law is said to be a question of organizing the administration's activities in such a way that they show consideration and goodwill towards the citizen.

There is currently a tendency for this latter use of the term "the rule of law"—which like the word efficiency only concerns the administration's methods and not the content of its activities —to merge into another meaning which also affects the substance. Thus the term "the rule of law" is often used so as to imply that the demand for the rule of law becomes a claim for *respect for the individual,* expressed not only in the actions of the administration but also in the content of the rules of law which the administration applies to the individual. This attitude is based more or less consciously on a liberal tradition, on an assumption that the individual vis-à-vis the public authorities is entitled to a legal sphere which the administration must respect. The claim for the rule of law in this sense implies a political demand, or one based on natural law, namely that respect

for the individual shall be observed by the legislature also; at any rate, it embodies the assumption that this demand is part of a live and active cultural heritage and consequently is a suitable basis for choosing the form and content of the public authorities' activities.

c. It is thus not surprising to note that usage is unclear and inconsistent.

The terms "efficiency" and "the rule of law" are highly loaded. To call administration efficient is to praise it; similarly, anything capable of strengthening the rule of law will immediately attract sympathy. The emotional overtones in the two terms become even more apparent when they are used in a negative context. To say that administration is inefficient or that it is acting against the rule of law is to criticize it sharply. It is the general experience that such loaded words are often used rather to produce an emotional effect in the reader or hearer than to describe adequately a certain state of affairs. Such habits of language are hardly conducive to clarity and consistency in the use of specific terms.

A further explanation of the lack of clarity in usage is to be found in the fact that the meaning of words can quite legitimately vary in different contexts. It is particularly important to establish whether the terms "efficiency" and "the rule of law" are being used to describe conditions forming the basis for reaching a decision on some administrative problem or have some other function. If the two terms are intended as arguments in favour of different solutions to an administrative problem, then one of the meanings of "efficiency" and "the rule of law" set out above is obviously inapplicable. If efficiency means achievement of the aim at any price and the rule of law means the unconditional application of existing legislation, the terms cannot be used as a basis of choice between different administrative methods of procedure. Efficient tax assessment leading to the correct assessment of all incomes earned is, of course, identical with that assessment which conforms most closely with the rule of law in the sense of applying current legislation.

If the meanings indicated above are set aside, however, one finds on analysing usage that, despite all the woolliness, something important about the bases of evaluation is denoted by the terms "efficiency" and "the rule of law". If the solution of an administrative problem is judged on grounds of efficiency, the tendency is to put most weight on the rational consideration of

ends and means and on cost consciousness. If it is judged on grounds of regard for the rule of law, what matters most is the degree of protection given to the individual by the solution.

2. *Effects*

An examination of usage is, of course, not the only way of trying to arrive at the exact meaning of the terms "efficiency" and "the rule of law". Another method is to attempt to establish the meaning of these two bases of evaluation by considering their effects. What kinds of proposals for solving administrative problems are advocated on grounds of efficiency on the one hand and the rule of law on the other?

To examine in detail all the administrative changes which have been proposed in the Scandinavian countries during the last two decades would be an impossible task. But a concise survey of the *kinds of solutions* which have been put forward on grounds either of efficiency or the rule of law will give some idea of the more important effects of the two bases of evaluation.

a. Solutions based on grounds of *efficiency*.

Here, the largest and most typical group involves the use of *machines*. If solutions of this kind loom so large nowadays, it is chiefly because of the dramatic opportunities provided by the use of computers in administration. At present computers are mainly used either to reorganize traditional and fairly isolated administrative routine work which was formerly done mainly or wholly by hand or to store information. Typical examples of this first application, which is expanding rapidly, are accounting, the calculation and payment of social benefits and the calculation and levying of taxes. The use of computers for storing information is also growing, and in a long-term perspective it is here that computer potential throughout the entire field of administration is greatest. The first step has been the transfer of existing registers to computers. Examples from Denmark are the Central Register of Persons, the central registers of motor vehicles, of real property and of firms liable to sales tax, etc. The next step will come when the use of automatic data processing permits the storage and combination of information and easy access to it on a scale as yet unknown. Examples of the use or proposed use of these techniques are integrated registers of all information relating to breaches of the law and to medical treat-

ment. But outside these two main heads data-processing technique is also used, or its use is being proposed, on grounds of efficiency. Typical examples are stock control in the defence services and the use of data processing as an aid to providing the basis for decisions in large, complicated economic problems. Internationally, the best example was provided by the calculations which preceded the decision regarding the location of London's third airport.

But the computer is not the only form of machine suggested on grounds of efficiency. Other random examples are the increased use of normal office machines, the switch from manned lighthouses and lightships to automatic installations, mechanical postal sorting, the storage of library newspaper files on microfilm, and the motorization of postal collection and delivery services.

Other solutions proposed on grounds of efficiency and not based on the use of machines can best be surveyed by dividing administrative activities into a few main groups.

A large number of proposed changes concern the *handling of individual cases* and the office work connected with these. A typical example of the efforts being made to improve efficiency in the handling of such cases is the use of the so-called flow sheet. This means that, before any changes are considered, the existing procedure is minutely examined and a diagram of the customary path of the handling of any individual case is plotted.

As regards the actual handling of cases, typical changes proposed are: cases to pass through the smallest possible number of hands, i.e. not two levels if one will do, and not two people in the same instance where one will do; officials to be no more highly qualified than is necessary to handle the case; no written communication where oral communication will suffice.

As regards office procedure, typical proposals are: well-thoughtout filing and logging systems ; careful consideration of the best, simplest and cheapest design of forms ; precise instructions for typing, duplicating and other modes of copying.

Other proposals based on regard for efficiency relate to the *organizational structure of administration.* They will be familiar to anyone with the slightest knowledge of private or public administration, most of them deriving from scientific management as originally applied to private industry. Typical proposals are the amalgamation of small administrative units—resulting in Denmark, for example, in the closing down of a large number

of small customs posts and post offices. Service and staff agencies should be separated from the rest of the administrative system and be grouped in large specialized units. Action on these lines in Denmark has meant that there is now a special centralized administration of the state's multifarious loans to the private sector and a centralized state procurement system which is particularly highly developed where the buying of printed matter is concerned. Distribution of authority among bodies of equal status should be on a functional basis—an example being the efforts to bring all forms of education under the authority of the Ministry of Education. Within an individual organization, classification by function is preferable to other forms of classification, e.g. by geographical area or by items. The people at the top of the organizational pyramid should have as few individual cases for consideration as possible, and should instead be free to concentrate on planning and direction. Typical examples of efforts in this respect are the numerous proposals to the effect that authority should be delegated from departments and ministries to directorates or local authorities. Other instances are proposals for organizational changes in departments in order to strengthen planning, e.g. the setting up of planning units, constant emphasis on the steering function of the budget and efforts to develop special methods of long-term planning.

In the matter of *staff,* there are also typical proposals based on considerations of efficiency. Precise job descriptions, standards of the work to be expected of civil servants and methods of assessing performance are suggested. Other characteristic examples are the weight to be given to post-entry training for leadership and to the guidance of new staff.

The proposals so far mentioned are the most numerous and important. But there are in addition a number which not only concern method and organization but also affect the very *basis of the administrative activity.* Here are some typical examples. The administration should be continually on the look out for tasks which are no longer strictly necessary, and superfluous activities should be abandoned. Statutes and statutory instruments should be as precise and unqualified as possible. A plethora of exemption clauses—"hair-splitting justice"—will prove expensive. The exercise of discretion calls for highly qualified staff and should therefore be resorted to as little as possible; decisions in accordance with fixed rules have, moreover, the advantage of facilitating the transition to mechanical processing or delegation to subordinates.

b. Solutions based on regard for *the rule of law.*

These are not quite so numerous as those based on regard for efficiency but are almost as varied.

Chief among them is the tendency to *judicialize* the administration by transferring characteristics of the courts of law to it.

The tendency to judicialize relates first of all to *procedure.* The committee that prepared the Norwegian Administrative Procedure Act put the matter bluntly: "To follow court procedure in dealing with administrative cases would, if it were possible, be the best guarantee of the legal rights of the private individual being upheld."[3] This is an extreme view and one from which, in the debates on the rule of law and efficiency in administration, many have dissociated themselves. All the same it does say something of central importance. The changes in administrative procedure proposed on grounds of regard for the rule of law involve in fact a close approach to traditional court procedure. This is particularly true of such proposals as: the extension of the private party's rights of defence by the provision of information about initiatives which the administration proposes to take, access to documents and the right of reply; reasoned decisions; a high degree of impartiality in those dealing with individual cases; and oral rather than written proceedings between the authority and the private party involved. One may even meet the argument that the rule of law is strengthened if administrative procedure is regulated—as is the case with court procedure in the Scandinavian countries—by detailed codes.

Proposals are also being made to transfer judicial features other than those concerned with procedure. *Neutrality,* it is claimed, should be strengthened, and not only through stricter rules on bias. There is also a tendency—at any rate in fields where the public authorities have claims on the citizens—to try to transfer to administration the characteristic triangular situation of the courts, the deciding authority being a neutral umpire or arbitrator between two disputing parties of equal status. The proposals are broadly consistent with a demand for an administrative structure in which the administration would have two authorities in a dispute—one making a decision on a neutral basis, the other acting against the private individual. A similar structure is demanded in cases involving administrative appeals.

[3] *Forvaltningskomiteens innstilling,* 1958, p. 5.

The next most important group of proposals relating to the rule of law are those concerned with the *external control* of the administration. The tendency to strengthen external control has led to the introduction in Denmark and Norway of the Swedish/Finnish type of Ombudsman and the Swedish/Finnish system of public access to documents held by the administration. In Sweden and Finland the elaboration of the existing system of administrative courts has been the most pronounced expression of the tendency to strengthen external control. The comprehensive reform of the administrative courts introduced in Sweden in 1971 is the clearest example of this. The reform includes the creation of new local administrative courts, the setting up of at least two instances in any administrative dispute, and uniform rules of procedure for all administrative courts. In Denmark and Norway the constant emphasis on the importance of the judicial review exercised by the ordinary courts of law and the almost complete abolition of statutory provisions excluding judicial review is an expression of a similar tendency. A further example is the extension of the courts' control over detentions made by administrative authorities without a judge's order and over similar phenomena which have occurred in all countries.

Judicialization and the extension of external control are the chief examples of efforts to strengthen the rule of law, but there have of course been others.

The importance of the *independence* and personal ability of *officials* is often emphasized. There is also a tendency to regard the presence of a reasonably large proportion of *lawyers* in the higher ranks of public administration as a guarantee of the rule of law. The traditional *thoroughness in handling cases* and the traditionally strenuous official efforts to clarify an issue are also prized as guarantees of the rule of law.

As with proposals based on regard for efficiency, efforts to ensure the application of the rule of law do not stop at administrative organization and procedure but are also directed at the *substance* of the matter. It is customary, for example, to find that regard for the rule of law is given as a justification for proposed restrictions on the scope of administrative discretion. Great stress is also laid on equality, objectivity, and the like. In addition, the importance of establishing precedents by the publication of discretionary decisions is emphasized. Where rules are applied, regard for the rule of law requires them to be clear and consistent, so that citizens can foresee what the actions of the adminis-

tration will be. It even happens that the drift of proposals based on regard for the rule of law is that no changes in the existing law should be made which would involve too great a leap forward in the development of law, it being thought preferable to build step by step on inherited judicial tradition.

3. *Spokesmen and interested parties*

To find out more about a basis of evaluation it is also reasonable to ask who is advocating the basis and who—particularly as a group in society—is likely to benefit from a solution reached on that basis.

Put in this way the questions may easily seem offensive and be construed as being preparatory to an attack. An attempt to arouse antagonism by pointing to selfish motives is, of course, a frequently used and often successful weapon in polemics.

This, however, is not the intention. It would be foolish to deny that many people applaud judgments which would bring no advantage whatever to them or the group to which they belong. But it would be equally foolish to deny that in at least as many cases there is a connection between the basis of evaluation and the interests of the individual or group. Western European politics of the last 100–150 years are certainly much more easily understood if this simple truth is borne in mind.

It is therefore both reasonable and relevant to try to identify the advocates for and the parties interested in efficiency and the rule of law.

a. Easiest to identify are *the advocates of the rule of law.* Mainly these tend to be lawyers.

There are, of course, several reasons for this. First, lawyers have the expertise necessary to convert the basis of evaluation into effective administrative and technical solutions. Secondly, their training and practice make them ready to concentrate on individual cases. They have therefore a good opportunity to notice the—possibly isolated—abuses and mistakes which inevitably occur in any administrative body. For that reason alone, therefore, they feel à special urge to try to find solutions capable of providing a remedy for abuses and mistakes. But it is well not to shut one's eyes to a third reason. In the Scandinavian countries it was until recently customary for the senior officials in public administration to be recruited mainly from among

persons with legal training. This is no longer the case. As a group in public administration lawyers are under pressure. They have become fewer in relation to the total number of officials. Moreover, the very tools of their trade—rule-making and the subtle application of rules in concrete situations—are under attack. Other technical methods, planning of many kinds, computer programming, performance and programme budgeting, command of statistical/mathematical systems and the like are becoming increasingly important for those working at the highest administrative levels. But if solutions based on regard for the rule of law such as those mentioned under 2 (b) above are adopted, the position of the lawyers will be strengthened. They will often be suited to administer the solutions, and—a feature which is probably more important—the ideals and values which the lawyers have traditionally made their own will be strengthened. One of the arguments for judicializing administrative procedure can be stated in broad terms as follows: a steadily increasing proportion of individual administrative decisions is prepared and taken by officials without legal training. A general administrative procedure act concerned chiefly with the right to be heard, reasoned decisions, information about the right to an appeal, strict rules relating to bias and wide access to the right of appeal will not only ensure the preservation of the thoroughness and impartiality which characterize good judicial handling of cases even if lawyers are ousted, but will also extend these benefits to areas of the administration which are so new that lawyers have not had time to dominate them.

b. *The advocates of regard for efficiency* form a less clearly defined group. Its most easily recognizable members are, of course, the professional management consultants. But these are not nearly such dominant spokesmen for efficiency as the lawyers are for the rule of law. Nor have they the same need to push themselves forward. The efficiency experts are not on the defensive. Quite the reverse. But their relatively obscure role is related to the fact that there are other, more diffuse groups who speak up for considerations of efficiency. One of these consists of people to whom the increasing costs of the administration are particularly alarming. They include a great number of politicians, a large section of the press and, in some countries, taxpayers' associations. In the United States taxpayers' associations have been influential in instituting a drive for efficient public administration. Another important group of advocates of regard for efficiency consists of

industrial leaders. They are accustomed to applying solutions based on regard for efficiency and inevitably become impatient of any hesitation in doing the same in public administration.

c. The question who are the *parties interested* in the two bases of evaluation cannot be given a precise answer. As citizens and taxpayers we all have an interest in administration being as efficient as possible—at any rate in the last three of the four senses of the word efficiency mentioned under 1 (a) above. And as individuals we are all interested in protection against abuses and lack of consideration on the part of public authorities.

As regards the *rule of law,* however, two rather more precise considerations are warranted.

It could justifiably be said that regard for the rule of law chiefly benefits *minorities,* i.e. groups who in a given situation are threatened or feel themselves threatened by those in power. Two examples in support of this view which seem to me typical may be cited.

In 1940, when the political climate in the United States was still characterized by the private sector's opposition to the policy of the New Deal, President Roosevelt vetoed one of the precursors of what is now the American Federal Administrative Procedure Act. In justification of his veto the President said: "The bill that is now before me is one of the repeated efforts by a combination of lawyers who desire to have all processes of government conducted through lawsuits and of interests which desire to escape regulation."[4]

The other example goes beyond the limits of the situation of the administration, but it certainly concerns the question of the rule of law. The only area in which the various parties of the French Left have been able to come together in recent years has been in the series of campaigns and movements in favour of far-reaching personal freedom extending to political matters and directed against the behaviour of the police towards demonstrations, against restrictions on the freedom of the press, against severe sentences in politically tinged cases, and so on.

Not all solutions based on regard for the rule of law favour all minorities equally. The judicialization of administrative procedure and easy access to judicial review mostly favour

[4] Quotation taken from *The Federal Administrative Procedure Act and the Administrative Agencies,* Proceedings of an Inst. Conducted by the N.Y. University School of Law, New York 1947, p. 557.

groups able to exploit the opportunities available under these systems for defending their own interests. Most frequently these will be either relatively well-off groups or groups accustomed to what are known as intellectual activities. This lop-sidedness is of course recognized and efforts are frequently made to redress the balance by, for instance, the grant of free legal aid, the award of costs from public funds, and the administration's duty to appear as plaintiff in the courts when a private individual wishes to test, e.g., an administrative detention. Ombudsman control and a major official effort to investigate individual cases have, however, no such lop-sided effect.

4. *Two different attitudes?*

The first three sections of this analysis of efficiency and the rule of law have been fairly solidly based on texts or concrete examples. The comments which now follow are purely in the nature of free-hand drawing.

As we have seen, the terms "efficiency" and "the rule of law" are not capable of precise definition as bases for evaluating solutions to administrative problems. On the other hand, analysis shows that the two bases of evaluation contain cores which are clearly different.

The question now arises whether one can arrive at a reasonably adequate insight into these cores by considering efficiency and the rule of law as expressions of two different attitudes to administrative organizations and their relationship with their clients.

Regard for efficiency is an attitude which has led to or accompanied scientific triumphs, technological progress, industrialization and all the other marks of what is termed western civilization. Its most prominent characteristics are *division of labour* and *rationality*. It is based on the belief that a rationally organized division of labour is a possible and suitable method of running both the organization itself and its appurtenances so long as the aims are carefully set out and means are chosen which are capable of achieving the desired result rationally and without unnecessary effort.

The other attitude—finding expression in the demand for the rule of law—is mainly characterized by a certain *mistrust* of man's capacity to equip and run organizations rationally, to

survey all desirable aims and to choose the most efficient means of achieving them. On the face of it, it is well that organized activity should be determined by fixed aims and based on plans designed to achieve them. But in practice this is true only up to a certain point. Sooner or later things always go wrong. This is a fact which must be taken into account, and the solution must be chosen in such a way that the individual does not have to pay more than is necessary for the inevitable failings of the organization.

II. THE AUTHOR'S RECOMMENDATIONS

1. *A conclusion from the analysis*

To draw an unambiguous conclusion from the foregoing analysis of the concepts of efficiency and the rule of law is not easy. If one is to advise how much weight should be given to regard for efficiency and the rule of law in various situations, it is reasonable to try to indicate as precisely as possible what one means by efficiency and the rule of law.

The essential thing in both efficiency and rule-of-law considerations is to have certain ideals—an ideology if you like—and certain means traditionally considered suitable for realizing the ideals.

The ideals behind efficiency considerations are rationality—chiefly by thinking in terms of ends and means—and cost-consciousness. The means are first and foremost the use of machines, the greatest possible simplification and standardization of the handling of cases which cannot be dealt with by machines, and organizational methods leading to an extensive division of labour, i.e. specialization, and the location of decision-making as close as possible to the facts involved.

The ideal behind rule-of-law considerations is protection of the individual citizen, who must not be allowed to suffer for the shortcomings which are bound to crop up in the carrying out of any administrative programme. The means are (a) the judicialization of the administration's organization and procedure—in particular a high degree of neutrality on the part of authorities making individual decisions and a procedure which will ensure correct results while giving the citizen a feeling of participation and the chance of defending himself—and (b) intensive control

of the administration's activities, especially by checks which citizens themselves can take the initiative of using, such as judicial review and Ombudsman surveillance.

2. *To what extent are efficiency and rule-of-law considerations generally valid as bases of evaluation?*

When changes in an administrative body's organization and methods of work are being debated, it is often affirmed that there is no clear conflict between efficiency and the rule of law. Speed in dealing with problems and complaints and certain minimum guarantees against abuses and mistakes, it is said, can just as well be based on efficiency considerations as on rule-of-law considerations. Slow and laborious administration does not serve the rule of law; and administration which arouses violent opposition because its conduct conflicts with generally accepted ideals of the degree of protection due to the individual is not efficient.

This, of course, is true enough. But it does not follow that there is in general no conflict between regard for efficiency and regard for the rule of law or that these factors cannot form the main basis of evaluation when a choice has to be made among several possible administrative solutions. In many cases both the ideals behind the two different considerations and the means traditionally used to realize them are relevant, and it makes a real difference to the administrative structure and working methods whether the emphasis is laid on one set of considerations or on the other. A clear example is provided by the general administrative procedure acts now in force in many countries. The purpose of these statutes is to judicialize administrative procedure, and in my view they would not have been enacted if the main emphasis had been on regard for efficiency.

It is important, therefore, that in every choice of a solution to an administrative problem consideration should be given to both efficiency and the rule of law. Where it is decided that the main emphasis should be on efficiency, the risks to the rule of law should be borne in mind. Where regard for the rule of law carries the day, the consequent cost should be recognized.

But attitudes to proposed administrative changes can never, of course, be decided solely by balancing efficiency against the rule of law as these concepts have been described under (1) above.

In the first place, there are administrative areas in which to weigh regard for efficiency against regard for the rule of law

does not make sense. Where administrative activities affect the individual only indirectly and at long range, regard for the rule of law carries very little weight. Attitudes to the method of planning the public authorities' future use of their economic resources or—to give a specific example—of repairs to a naval vessel do, of course, affect the individual indirectly, but not in a way that allows the rule-of-law attitude and its traditional manifestations to provide any reasonable guidance in the choice of an administrative system.

In the second place, even where balancing regard for efficiency against regard for the rule of law does make sense, it is never possible to evaluate a specific administrative solution on the basis of these considerations alone. The basis of evaluation must be much broader. Often the evaluation complex behind the word democracy must also be included. Most important of all, however, the special circumstances of the administrative area concerned—such things as the kind of activity involved and the social aims—must also be taken into account.

In the third place, the connection between the ideals behind regard for efficiency and the rule of law, respectively, and the means traditionally used to realize them can by no means be taken for granted. It is easy to conceive of a situation demanding a choice, where one or another set of ideals ought to influence the outcome but where the means usually adopted to realize the ideals cannot be applied.

There are no cure-all solutions. The choice of administrative methods must—like most other choices—be based on the laborious and uncertain weighing up of a number of essential conditions. Efficiency and the rule of law are only two among several conditions and they do not always give real guidance.

The comments which follow are intended to illustrate the varying importance of regard for efficiency and the rule of law in different situations. Each of the situations chosen concerns a normal everyday administrative activity involving the citizen. Internal administrative operations and functions similar to those of the legislature, i.e. rule-making, are not included.

3. Various situations in which efficiency and rule-of-law considerations are significant bases of evaluation

a. The balance between efficiency and rule-of-law considerations is particularly significant in two classical forms of ad-

ministrative activity. The first form is *regulation by legal norms and decisions;* it consists of regulating the behaviour of the members of society by legal directives, particularly in the form of permits, exemptions, prohibitions, orders and similar concrete decisions describing the desired conduct or undesired and enforced by the powers of the state. The second consists of *collecting money* from the citizens in the form of taxes and duties.

These two forms of administrative activity are the traditional area with which the rule of law is concerned, and in our society it is here that we find a tendency to give particular weight, often excessive weight, to regard for the rule of law.

Generally speaking, it is right that this should be so. The greater the damage the individual can suffer from mistakes or administrative high-handedness, the more weight must be given to rule-of-law considerations.

Another characteristic feature of this area is that the means used to realize the ideals associated with the rule-of-law concept are particularly suitable here.

This, however, does not alter the fact that regard should also be paid to efficiency considerations and all that goes with them.

To some extent this can be done without any conflict with rule-of-law considerations. Rule-of-law considerations in the administrative procedure do not, for instance, affect all stages of the handling of individual cases. Such considerations only concern relations between the administrative body and the citizen. It is reasonable and just that in the many other steps involved—from the first recording of the complaint until it is finally filed away—efficiency should be the first consideration.

But even where regard for efficiency conflicts with the rule of law, efficiency should still in my view be taken into consideration. No decision to solve an administrative problem should be made until the greatest possible rational consideration has been given to the cost of alternative administrative methods. It is neither possible nor right for everything to be measured in money terms, and there is a tendency at present for particular weight to be given to values—such as the rule of law—which are incapable of being measured in such terms. This does not, of course, alter the fact that before reaching a decision it is sensible to recognize the items which *can* be measured in money, even when the decision is finally based on other considerations than those associated with managerial economics.

b. *Cash payments to the individual citizen* play a very large

role in our society and call for an overwhelming number of individual administrative decisions. At present the most important decisions relating to cash payments involve the transfer of income via public funds from some groups of citizens to others and the provision of grants aimed at furthering some particular activity in the private sector.

This area illustrates an important aspect of the process of weighing efficiency against rule-of-law considerations. In most cases this weighing-up process covers the whole of the administrative activity, i.e. the basic rule, the administrative organization, and the handling of cases. But in the organization of cash benefits or grants to the individual there is a tendency for the weighing-up process to be concentrated on the first stage, i.e. the basic rule. Take an imaginary but typical example. Disablement or age can lead to the loss of the use of limbs. In modern society it is the practice to give compensation for this by the payment of cash benefits out of public funds. But how should this be done—by paying a benefit to alleviate the consequences of the disability in the particular individual, or by paying a fixed amount to all who do not have the full use of their limbs? If the first—individualized—way is chosen, all the traditional means of safeguards may be applied. Choosing the second way—that of paying a fixed amount—means that all the precise procedural instruments traditionally used to strengthen the rule of law become irrelevant. Any mistakes that might occur in the handling of fixed disablement benefits would be in the nature of accidents and would as a rule be easy to put right. The choice of a standardized pattern makes the individual cases the province of the computer and the programmer.

Situations where the choice has been in favour of the more standardized rather than the individualized benefit are already common and there is reason to believe that situations involving this sort of choice will occur with increasing frequency in the future. Characteristically, the advocates of regard for efficiency want as many of the public benefits and grants as possible to be standardized and thus capable of being programmed, and they speak contemptuously of "hair-splitting justice".

Where the choice made is in favour of individualized benefits, the administrative problems are exactly the same as those characterizing regulation and collection of money. Rule-of-law considerations must be given equal weight. The individual's need for protection against abuses and high-handedness are as great as in regulation of tax collection.

c. Social services such as education, the treatment of the sick and handicapped, the care of social drop-outs, etc., and the giving of advice are increasingly characteristic features of our society.

In this area there is a clear and repeatedly stressed demand for efficiency. Social services form the most expensive and at the same time the most rapidly expanding field of public activity. Many of the traditional tools of efficiency are well suited to the purpose, but this is far from true of them all. On the other hand, the growing importance of social services means that it is increasingly essential for the individual to receive the service he requires and to do so under satisfactory conditions. The need for protection of the individual is thus clear. But the means whereby efforts are traditionally being made to strengthen the rule of law are not particularly adequate in this field.

The problems can be illustrated by one or two random examples.

Hospitals and similar treatment centres in our society are run at a relatively high standard even though the treatment is either free or very cheap. This leads, of course, to the problem of queues. The administrative body is faced with having to decide who shall receive treatment. Who is to be admitted when there is a shortage of beds? And who is to be admitted to the best clinics when there are differences in quality?

How are these queue problems to be resolved? Are the rule-of-law ideals also to be brought into the decision-making process and are the traditional rule-of-law methods applicable?

One could, of course, abandon ideals and let "connections" and other forms of petty corruption decide the issue. One could also try to achieve a rough, quadrangular form of justice by, for instance, applying the principle *prior tempore, potior jure,* or by drawing lots. But one could also strive to achieve individual justice. In such a case a relevant basis of assessment, acceptable methods of demonstrating its applicability in individual cases, and serviceable controls would have to be found. The rule-of-law ideals would obviously be important, although the merest reflection is enough to show that the traditional rule-of-law methods would not be applicable in all circumstances.

As regards the actual treatment, the difficulties would be even greater. Efficiency considerations and traditional methods of increasing efficiency could, of course, be applied to working out methods in broad terms and to the day-to-day system of dealing with patients. But here, too, there are snags. And it is difficult

to find valid expression for that regard for the individual which lies at the heart of the rule-of-law concept and which must also be taken account of in this area of administration. The traditional efficiency and rule-of-law considerations and their customary manifestations provide small guidance in reaching decisions over such problems as: What proportion of the available medical effort should be applied to difficult, rare and new forms of treatment, e. g. transplant surgery, and what proportion to more everyday medical treatment? Who is to carry out a particular operation? What kind of diagnosis is treatment to be based on?

The difficulties are perhaps most plainly apparent when one considers a branch of the social services which is likely to become increasingly important: the giving of advice, particularly in the form of family guidance. The aim is for a team of social workers to try to improve, by the subtle and varied application of a long list of treatment and aids, the conditions and behaviour of families.

In this kind of work the ideals of both efficiency and the rule of law are clearly relevant, but the traditional means of realizing them are of doubtful value.

Family guidance is expensive. But mechanization, standardized procedure, intensive specialization and all the other aids to efficiency are only to a minor extent possible if the ideals of family guidance are to be realized.

Family guidance raises equally obvious problems regarding the rule of law. When it is successful, a close human relationship is established between the social worker(s) and the family. This relationship can easily result in the members of the family becoming dependent on the social worker, and the dependence can easily be abused. Clearly, however, the traditional means of applying the rule of law, such as the introduction of judicialized procedure and judicial review, are, with the best will in the world, not directly applicable.

There is reason to suppose that efficiency and rule-of-law considerations in administration will become particularly important in the social services. But it is here that new thinking is most needed. It is up to jurists to do all they can to find practical and serviceable ways of protecting the individual's right in this field without creating at the same time intolerable expense, delay, trouble, and the severance of those human contacts which, in this field perhaps more than in any other, are vital.