Some Problems of Public Law

I.

NOT many years ago it was an accepted axiom that the highest manifestation of human activity is to be found in the State. Hegel's doctrine, as renewed by the Neo-Hegelians, described the State as the moral leader and as the material Sovereign of the nation. We read, for instance in Bosanquet's Philosophical Theory of the State: "The state is not only the political fabric . . . . it includes the whole hierarchy of institutions by which life is determined."\(^2\) We are very far from such an enthusiastic estimate nowadays. A former colleague of mine, Principal Barker, has found it appropriate to write about the "Discredited State" in an influential American Review,\(^3\) and he certainly does not stand alone in such an attitude.

It is not my intention to discuss the relative merits of these extreme pronouncements. I may be allowed to say, however, that personally I should consider it a relapse into barbarism if Society, after reaching by protracted and strenuous efforts the goal of a democratic State, were to break up into a number of competing groups taking the law in their own hands and granting a measure of loyalty to the nation in accordance with their shifting interests and moods. But this does not preclude the necessity of accounting for the bitter denunciations of the State and the attacks directed against its institutions from different sides. Convinced adherents of the State as the ultimate umpire and protector of social intercourse ought to inquire into the reasons of this widespread discontent and to try to disarm it by improvements and amendments, as well as by contradiction or compulsion.

In taking stock of the vulnerable points in the modern State's position I do not intend to dwell on reproaches leveled at destructive militarism, or at the intolerable burden of taxation, or at red-tape

\(^1\) This paper is a revised version of lectures delivered at the meeting of the Williamstown Institute of Politics in 1923, and at the University of Wisconsin.
\(^2\) P. 150.
\(^3\) E. Barker, Texas Revolutionary Finances, 19 Political Science Quarterly, 612.
bureaucratism. I should like to call attention to one kind of shortcomings which, I think, may be remedied by a consistent policy backed by public opinion. I mean the present state of the law as regards the duties of the State in its dealings with individual citizens. In constitutional law and practice we are chiefly confronted with the powers and rights of the State; occasionally we are informed about limitations of these powers and rights. But there is a vast domain of relations of public law giving rise to misunderstandings, conflicts, encroachments of various kinds, in which claims as to redress and compensation are of daily occurrence. Every State exercises rights of property, enters into conventions, makes bargains and employs labor. Hence possibilities of misuse of power, of breach of agreements, etc. Again, the officers of every State, while levying taxes, enforcing discipline, decreeing sanitary measures, managing educational establishments, may be negligent or act with undue harshness and in an arbitrary manner. Hence the problem of ensuring revision and, possibly, of compensating persons aggrieved by mischievous or malicious exercise of State authority.

Cases of this kind form an important class in the practice of lawyers, but they have more than a technical interest. Administrative law concerns laymen quite as much and perhaps more than criminal or constitutional law—at any rate private individuals are more often face to face with it. And the way such cases are treated is characteristic of the prevailing conceptions as to State Sovereignty, governmental authority and the legal standing of citizens. This is the reason why I venture to raise some questions usually relegated to text-books on Crown practice and to Law Reports. I may say from that outset that a comparative review of English and Continental—particularly French—law on the subject seems the best means of reaching definite conclusions. The treatment of "claims" in the United States is also highly instructive, but it would be impertinent on my part to deal with it here: American readers will easily recognize similarities and divergences with English law. A comparative survey shows, in my opinion, that, while each of the two great systems of Western Europe possesses conspicuous advantages of its own, neither satisfies entirely the requirements of modern democratic society, and that probably the best means of remedying defects would be to combine certain doctrines worked out separately by each of them.

Let us start with an examination of the methods employed in dealing with conflicts arising from the economic attributions of the
State. What happens in cases when complaints are raised against the State on the ground of illegal or wrongful exercise of powers over property, or of infringement of agreements, or of damages for which a private person would be liable to offer compensation. The Common Law starts in this respect from the well-known maxim "The King can do no wrong." Translated into general terms this means that the State or the People, as they say in America, cannot be compelled to acknowledge or make good wrongs by means of actions applicable to disputes between private individuals. If redress is to be obtained it must be sought by petition, as from inferiors to a privileged superior. Historically, this inequality of position was a very real and irksome drawback. In the thirteenth and fourteenth centuries, for example, there was no clear distinction between the petition of right and the petition of grace and, although actual wrongdoing was sometimes admitted by Kings, e.g., by Henry II, the juridical impossibility of making the King responsible was clearly established. The King could not be prosecuted in his own Court on the strength of a writ issued from his own Chancery. Some facilities were afforded in case of simple restitution and of objections to arbitrary seizure by fiscal officers (Traverse in Office), but the main channel open to complaints remained that of a petition which might lead occasionally to the satisfaction of just claims, but might also in many cases end in a scandalous denial of right. In spite of the overthrow of personal government the immunity of the State from prosecution was not abrogated: if anything it was strengthened by the victory of the national monarchy under the Tudors and Stuarts with the doctrine of absolute sovereignty of the State. It is from the revolution of the seventeenth century that we have to date the development of modern procedure on the subject. The dividing line may be drawn at the Bankers' case (1696, 1698 and 1701) and I beg leave to examine it in some detail because, as it seems to me, it has not been adequately treated in the books. It arose out of the misgovernment of Charles II, who borrowed money right and left to stop the gaps produced by his profligate life and reckless commitments. After refusing to pay the capital at the specified terms he concluded an arrangement with his creditors promising to pay 6% interest from the proceeds of the excise. These payments also came

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5 See, e.g., Notebook of Bracton, Case 1106.
6 14 How. St. Tr. 1.
into arrear and, on the fall of the House of Stuart the creditors, of whom the principal was Sir Robert Vyner, demanded execution from the Crown revenue. Their claim was made in the Exchequer and acknowledged by that Court, but challenged by the Attorney General (in the Exchequer Chamber) before the Lord Keeper of the Great Seal, Somers, and nine Judges of the High Court as assessors. All these Judges except one—the Chief Justice of the Common Pleas, Sir G. Treby—declared in favor of the claim, and of the method of obtaining payment, but Somers, acting on his personal authority, overruled the decision of the Court of Exchequer, on the ground that the case had been conducted wrongly—there could be no direct action against the Treasury; the proper way to obtain justice was by petition of right. This meant that the case had to go for trial by permission of the Crown. The arguments used to justify this decision apart from a technical review of mediaeval and sixteenth century precedents, were characteristic in so far as they revealed the political background of the Lord Keeper's decision. Sir G. Treby had urged the necessity of reckoning with State interests and State commitments and Lord Somers followed his lead in this respect.

Treby said, among other things: "Suppose the king be indebted to the petitioners, and also to the army, the fleets, &c. Now who shall direct the payment of these debts, the barons, or the treasurer? Who is the best judge of the state of the kingdom, and of its necessities? So that suppose there was only 4000£ in the exchequer, and we were threatened with a foreign invasion, how shall this money be disposed? Says the treasurer, to raise men to pay the army and our fleets, that by their assistance we may prevent the enemy from coming amongst us. No, say the barons, we must pay the bankers with this money, though at the same time we open the gates, and let in Hannibal to our utter ruin and destruction. My lord Coke, in his 4th Institut. treating of the court of the exchequer, takes notice of the oaths taken by the treasurer, and also by the barons. In the treasurer's oath it is mentioned, that he is to keep and dispense the king's treasure safely; but in the baron's oath, there is not a word of this matter taken notice of: which to me is an argument that the treasurer is judge in point of issuing money, whether it be due and payable or not, and to whom, in what manner, and when it shall be paid, &c. And this I take to be the true reason why no action can be brought against the treasurer, because he acts as a judge, and not as a minister of the court; for he is not attendant to it, as sheriffs, bailiffs, &c., are. So I take it, 'may be paid,' is enough for the barons
to say; but 'must be paid,' is only for the treasurer to say. Cro. El. 545, Babington's case."

Somers' judgment was eventually reversed by the House of Lords, but the latter's decision, though officially enrolled, was not provided with any grounds constituting what is termed the reason for decision (ratio decidendi) and was probably suggested by the necessity to put an end to a flagrant hardship without further delay. It was in the nature of a compromise; the plaintiff's receiving satisfaction only up to half the amount claimed. As to the law on the subject Somers' views were accepted in spite of the reversal, so that, for instance, Lord Blackburn, in giving his decision in Thomas v. the Queen (1874) referred to Somers' opinion in the Bankers' case as binding. The net result was that claims against the Crown, instead of being examined and settled by direct proceedings in the administrative tribunal of the Exchequer, were finally directed into the channel of petition of right and subjected to limitations arising out of the political prerogative of the State.

In substance, Somers had not the slightest intention to suppress claims and to block avenues towards redress. On the contrary, he stated emphatically that the subject had the right, not only to claim restitution of property, but also redress and compensation in case of infringement of agreements. Only he assigned these easies to the jurisdiction of ordinary courts and thereby contributed indirectly in accordance with the maxim "The King can do no wrong" towards their treatment from the point of view of the responsibility of the officers rather than from that of the liability of the department or of the State at large.

This feature remained characteristic of the English Crown practice and makes it impossible to regard the method of petition of right as a mere formality. No doubt the high standard of judicial independence and equity which is universally recognized as a conspicuous attribute of the English Bench guarantees full impartiality of decision. But the sword of justice is suspended over the heads of the acting officer, while the Crown or State remains immune in principle, though it may sometimes grant assistance to its servants.

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7 14 How. St. Tr. 1, 26.
8 14 How. St. Tr. 1, 106.
9 Prof. Holdsworth thinks that the decision in the Lords stopped the development of the Petition of Right for more than a century. The History of Remedies against the Crown, 38 Law Quarterly Review, 141 (1921). I do not find any evidence as to fluctuations of the law in this respect.
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by way of grace. And secondly, as the King can do no wrong, there
is no legal way of claiming compensation from the State in case of
tort—that is in case of mistaken orders, negligent execution of duty,
misunderstanding, delay, and the like. In all these respects indi-
vidual officers may be prosecuted, only for personal misbehaviour,
but there is no claim for compensation against the Crown. The lead-
ing case on this point is Tobin v. the Queen (1864).11

A man-of-war engaged in the suppression of the slave trade under
Captain Sholto Douglas seized, on the coast of Florida, a merchant
vessel under strong suspicion that the ship had been used for slave
trading, the evidence being that it contained appliances for putting
up a second deck under which the slaves were to be hidden. The
ship ought to have been taken to St. Helen, but in view of the bad
weather Captain Douglas used the power given by the Act of 5 Geo.
IV, c. 113, s. 73, and sank the ship. An action was brought in which
the owners tried to prove that the ship was engaged, not in slave
trading, but in perfectly honest trade. The question as to whether
Captain Douglas had, as a matter of fact, made a mistake or not is
immaterial, the juridical problem was whether a petition of right
would lie, that is whether the Crown as such could be made liable for
compensation, and the judgment of the Court of King's Bench was
emphatically against granting redress in this way. It held that the
officer had acted within his legal power, and in using his discretion
he was acting on his personal responsibility, so that any action for
damages should have been directed against him and not, by petition
of right, against the Queen. The economic aspect of this decision
was that, supposing he had acted wrongly he would have been
adjudged to pay some £20,000 compensation which he probably was
quite unable to do. In other words, the remedy would be nugatory.
Indeed in that very Act which enabled the officer to destroy a slave
ship, there is a clause (s. 73) to the effect that the Crown may
recompense or reinstate an officer to the value lost in damages which
he might incur by committing a mistake. But such instance on the
part of the Crown would have been a pure act of grace.

As a recent illustration of the insufficient character of a redress
restricted to pursuits of agents and unavailing against the principal,
let me cite the petition of right of Major Archer Shee (T. L. R. 1910;
July 19th)12 on behalf of his son, an Osborne cadet, who had been
suspected of tampering with a money order and had been sent down

11 16 C. B. (N. S.) 310, 33 L. J., C. P. 199, 10 Jur. (N. S.) 1029, 10 L. T.
762, 12 W. R. 835.
12 The Times Law Reports, 1910, July 19.
by the administration of the school. Eventually he cleared himself, but there could be no talk of coming back to the institution from which he had been ignominiously removed, and the father demanded £10,000 compensation for the material and moral wrong suffered by the boy.

Sir Edward Carson, as counsel for the plaintiff, tried to put the case on the basis of breach of contract, pleading that a parent who entrusts his boy to a school enters into an implied contract with the school authorities in regard to their behaviour as well as to the discipline to which his son was to be subjected. The Attorney General, on the other hand, relied on the privileged situation of the Naval Authorities as regards cadets as well as other subordinates under their order. The Court of Appeal allowed the plaintiff to proceed by petition of right, but reserved general questions as to privilege. The Court held—

(i) That the trial of the action should take place before the question of the prerogative of the Crown was argued.

(ii) The defence of the Crown did not put in issue the question of the prerogative and they gave leave to the Crown to amend their pleadings so as to raise the question of the prerogative as a point of law.

(iii) They gave the suppliant costs.

Unfortunately, the case was compromised by the concession of a substantial payment on behalf of the Admiralty. This half-way result is characteristic of the whole matter. While the Crown in Great Britain is holding on to a privileged position which was well in keeping with a view of the State as incommensurably above its citizens in a trial, this absolutistic doctrine is giving way as regards the institution of local government: although their authority is in reality a fractional manifestation of the political union of the people at large, it is not regarded as a kind of shield protecting these institutions from the consequences of their errors of commission and omission. A County Council is liable, in cases in which a Department of the Central Government would be immune. I will cite as an example—

Morris v. Carnarvon County Council (1910).13

The plaintiff, a girl of six years of age, was a scholar at a school under the control of the defendants as the local education authority. Two of the rooms in the school were connected by a heavy door which swung in both directions. On November 4, 1908, the plaintiff

arrived late at the school, and, contrary to the instructions given in the case of a child arriving late, the plaintiff went into the room where the other pupils were assembled for call over. She was told by the teacher to leave the room, and she proceeded to do so and went to the swing door. She opened it herself, and as she was going through, it swung back and injured one of her fingers, which subsequently had to be amputated. At the trial of an action to recover damages in respect of this injury, the jury found that the defendants were guilty of negligence in allowing the door to remain as it was, and, in answer to a further question, found that the door as originally constructed was not suitable for use by infants. On these findings, judgment was entered for the plaintiff. If a similar action had been brought against the Board of Education, it would have failed.

Some of the Dominions, e.g., the States of the Australian Commonwealth, have recognized the justice of extending the application of the common rule of law to disputes between individuals and the State as to wrongs alleged to have been committed by the latter. The laws of Victoria and of New South Wales open a way for claims of compensation for torts attributed to departments of the Government. A significant case came before the Judicial Committee of the Privy Council from Australia.\footnote{14} The Hon. J. S. Farrell, Secretary for Lands of the Colony, was nominal defendant.

The government by their servants entered the lands of the plaintiff; they lit fires thereon—burned grass and fences—and conducted themselves so negligently that the fires spread. It was held that justice requires that the subject should have relief against a Colonial Government for torts as well as in cases of breach of contract or of detention of property wrongfully seized into the hands of the Crown.

The anomalous character of the situation is recognized on all sides\footnote{15} "and the English Courts have admitted claims in tort against certain corporations wielding governmental duties," e.g., the Corporation of Trinity House which supervises lighthouses and pilotage, while they have denied a similar liability of other institutions of the same kind.\footnote{16} A commission has been sitting for some years under the chairmanship of the present Chief Justice, Lord Hewart, for the purpose of drawing up proposals of reform. Nothing has been known as to the results of its labours.

Paul Vinogradoff.

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Oxford University.
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\footnote{15} Cf. Robertson, Proceedings by and against the Crown.

\footnote{16} Moore.