# BOOK REVIEWS

*Judicial Review of Administrative Action,* by S. A. DE SMITH, M.A., PH.D., Professor of Public Law in the University of London. (Stevens and Sons Ltd, London, 1959), pp. i-xlviii, 1-486. Price £4 17s. 6d.

It is only twenty-five years ago that Lord Hewart dismissed the term 'administrative law' as 'continental jargon'. Anyone who knows Professor de Smith's slightly ironical sense of humour will guess the satisfaction it gave him to quote that remark early in the first chapter of a work of half a thousand pages on *one aspect* of the administrative law of England. Professor de Smith has been one of that small group of men which, over the last twenty or thirty years, has endeavoured to correct the Englishman's vision of law in administration which Dicey had so successfully distorted. His occasional writings have made us familiar with his simple and succinct style, his remarkable grasp of detail, and the clarity and order which he manages to impress on what is often unwieldy and difficult material. The present work, which incorporates much of his earlier writings, is his first *magnum opus.* It is also, as he mentions in his Preface, the first book of its kind to be written by an Englishman. It seems safe to say that, though for this reason a pioneering book, it will remain the standard work in its field for many years to come.

Its field is not the whole field of administrative law (whatever the boundaries of that vast collocation of rules and practices may be). Professor de Smith has chosen to concentrate his attention on aspects of the interaction of the 'administration' and the traditional courts of the land.[1] Perhaps it would be as well here to explain what Professor de Smith means by the 'administrative action' of his title, for the word 'administrative' is used variously: it consists, in his own words, of 'the acts, omissions, orders, decisions and determinations of Ministers, local authorities, other public corporations, public officials and administrative tribunals' (Preface, v).

It is hard to theorize and generalize in the area of administrative law, as anyone who has ever attempted to teach it will attest. The bones of the subject are not principles but remedies, and they are extraordinarily loosely jointed. 'In private law the forms of action may still rule us from their graves', comments the author; 'in administrative law they retain a conspicuous vitality and a long expectation of life' (page 17). To the variety of common law (or what was once common law) must be added the bewildering overlay of statute; 'it may well be that the law can be stated most accurately (though at very great length) by a succession of commentaries on the interpretation of individual statutes and statutory instruments' (page 25). Fortunately for the reader, this is not the plan Professor de Smith has adopted for the presentation of his material. Nor does he content himself with exposition remedy-by-remedy. After a valuable Introductory Part in which he discusses the place of judicial review in English administrative law and the classification of governmental functions ('ministerial', 'administrative', 'legislative' and 'judicial'), he examines separately the principles and scope of judicial review (Part Two) and the judicial remedies (Part Three). There is, quite inevitably, some overlap and repetition, but it is a welcome defect. The systematic

[1] Not the whole of it, for not all the activity of the courts can aptly be described as 'judicial review' (page 16).

examination of principle which we find in Part Two is of the first importance if English administrative law is to become other than a clumsy heterogeneity of particular procedures.

There is so much that might be said about this book and its contents that a reviewer must be selective. I shall choose, therefore, to say something of its value for Australians.

Were it no more than an examination of English cases, the book would of course be of great value to the Australian lawyer. The system of prerogative writs (or orders), the newer public law remedies of injunction and declaration, are all familiar features of our own legal scene, and (subject to my later remarks) the English cases are as relevant and as useful as in many other areas of the law. Our statutes, too, are built on a similar pattern.

But the book is far less insular than this. One of its great merits is the wealth of citation from Commonwealth and American jurisdictions—nearly two hundred cases in all. The Australian lawyer will see here many a local reference, set in a wider perspective which he will find stimulating and useful.

Yet it is important for him to remember that the book is written primarily for the English lawyer. It is not, as Professor de Smith emphasizes, a comparative work, and for the most part Australian cases are cited for their value as persuasive authorities in English courts. Thus the Australian references, though numerous, are not, and do not purport to be, fully comprehensive, and the emphasis placed upon them would not always accord with that which an Australian lawyer would adopt.[2]

In his first chapter, for example, Professor de Smith discusses, *inter alia,* the law of 'Crown privilege', and bases the modern English rules, of course, on *Duncan v. Cammell, Laird and Co.*[3] The inconsistent Privy Council decision in *Robinson v. South Australia* (No. 2)[4] is relegated to a footnote. But for the Australian lawyer the matter is not nearly so simple. Both these decisions are *prima facie* binding upon our courts. It is probable, though not certain, that the Privy Council is not bound by the House of Lords.[5] The High Court has never stated what action it would take in the event of such a conflict of authority. If he is trying to guess the course which the High Court might follow in this particular dilemma, the Australian lawyer needs to know (amongst other things) the High Court's own views prior to both of these cases,[6] and the State decisions subsequent to 1942 (which seem uniformly to prefer *Duncan* to *Robinson*).[7] He will not find the dilemma discussed nor these references given in the present work.

Two or three further instances may be given.

The Victorian at least must note that there is a decision of O'Bryan J.

[2] I have not repeated the omissions which Professor Sawer noted in the review of this work which he published in (1959) 33 *Australian Law Journal* 246.

[3] [1942] A.C. 624.

[4] [1931] A.C. 704.

[5] Cowen, 'The Binding Effect of English Decisions upon Australian Courts' (1944) 60 *Law Quarterly Review* 378.

[6] *Marconi's Wireless Telegraphy Co. Ltd v. The Commonwealth* (1913) 16 C.L.R. 178; *O'Flaherty v. McBride* (1920) 28 C.L.R. 283; *Griffin v. South Australia* (1925) 36 C.L.R. 378.

[7] *Ex parte Falstein* (1948) 49 S.R. (N.S.W.) 133; *Ex parte Ross* (1953) 70 W.N. (N.S.W.) 174; *Honeychurch v. Honeychurch* [1943] S.A.S.R. 31 (High Court refused special leave to appeal (1943) 66 C.L.R. 672); *King v. Bryant* (No. 2) [1956] St. R. Qd 570; *Seeney v. Seeney* [1945] Q.W.N. 21; *Coonan v. Richardson* [1947] Q.W.N. 26; *Hubbard v. Hubbard* [1949] Argus L.R. 18.

which seems directly at variance with the much criticized English case of *R. v. Metropolitan Police Commissioner, ex parte Parker* (the cab-licence case);[8] this Victorian decision is *R. v. City of Melbourne, ex parte Whyte;*[9] Professor de Smith cites it twice, but not in his principal discussions of *Parker* (pages 132, 287-288).

The same Victorian judge has discussed the question of whether mandamus is a writ of right in a case to which Professor de Smith gives no reference.[10] There are local cases, too, on prohibition as a writ of right which the Australian lawyer needs to know but to which he will find no reference here.[11]

It is not merely a matter of remedying the occasional omission, but of altering the emphasis. For the Australian, the starting-point of his argument will often be a High Court or State Supreme Court decision rather than the English case or cases to which Professor de Smith gives most of his attention. Thus, in discussing the test for that degree of 'bias' in a tribunal which will justify the setting-aside of its decision, Professor de Smith chooses the formula of 'real likelihood' (pages 149-151). In this country today, we would almost certainly use the 'high probability' test which the High Court advocated in *R. v. Australian Stevedoring Industry Board,*[12] a case which Professor de Smith mentions only in a footnote (page 158, note 33, and in further references in other sections of the work).

Finally, there is, I think, one general warning to be given. This is an area of law characterized, as Professor de Smith constantly underlines, by a very large amount of judicial discretion; 'in the tapestry of the law', as he puts it, 'the juridical norm and the creative discretion of the judge are closely interwoven strands. Nowhere is the pattern more intricate, or more fascinating, than in the law relating to judicial review of administrative action' (page 51). The manner in which that judicial discretion will be exercised will be influenced in any particular community by such things as the prevailing attitudes towards government in that community and the way its legislators and administrators habitually conduct themselves, by what Walter Lippmann called its 'public philosophy'. It cannot be safely assumed, therefore, that the pattern of rules and practices found in one community can successfully be transferred to another. In England, administrative law is characterized by judicial self-restraint (Chapter 1, *passim*). This is at least in part due to a justified reliance on the alertness of Parliament to check abuses of administrative discretion[13] and to the fact 'that on the whole, public administration in England is carried on with a remarkably high degree of integrity and responsibility' (page 25). Can Australian judges have equal assurance on these matters? Whatever the answer to that question may be, it is at least so clear as to be trite that Australia is no replica

[8] [1953] 1 W.L.R. 1150. [9] [1949] V.L.R. 257.

[10] *The Queen v. City of Richmond* [1955] Argus L.R. 917, 925. See, too, *R. v. Rogers* (1869) 6 W.W. & a'B. (L.) 138, 140, *per* Stawell C.J.

[11] *R. v. Wasley* [1914] V.L.R. 635; *R. v. The President of the Commonwealth Court of Conciliation and Arbitration* (1916) 22 C.L.R. 261, 266, *per* Isaacs J.; *R. v. Joyce, ex parte Meredith* [1927] V.L.R. 481. And on prohibition to correct jurisdictional error see *Potter v. M.M.T.B.* [1957] Argus L.R. 683. [12] (1953) 88 C.L.R. 100.

[13] '. . . behind the practice of judicial self-restraint lies a partly concealed policy decision—a decision that Ministerial responsibility to Parliament shall be deemed by the courts to be an appropriate safeguard against the erroneous exercise of widely framed statutory powers' (page 18).

of the Mother Country. We need to 'know ourselves', to examine our own public life with care and honesty, and to tailor our public law to its particular conditions, needs and philosophies. An unthinking adoption of the English models for the judicial review of administrative action would do no service to our community.

I hope it is obvious that nothing I have written is intended to disparage Professor de Smith's great and valuable book. Although he must use it with some caution, for the various reasons I have suggested, no Australian lawyer working in the field of administrative law can afford to be without it. That is a claim often lightly made, but in this case I have no doubt whatsoever that it is justified.

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*Law and Opinion in the Twentieth Century,* edited by MORRIS GINSBERG. (Stevens & Sons Ltd, London, 1959), pp. i-viii, 1-407. Australian Price £2 19s.

During the academic year 1957-1958, a series of seventeen public lectures now published in this book was given at the London School of Economics by a distinguished group of English lawyers, philosophers, historians and social scientists. The scheme was suggested by Dicey's *Law and Opinion in England During the Nineteenth Century.* As the Editor, Professor Morris Ginsberg writes in his preface:

> What we had in mind was at once a continuation of that work to take account of the developments since it was written and a widening of it so as to explore not only the field of legal changes, but the wider aspects of social policy. Dicey, in his day, saw a 'close and demonstrable connection during the nineteenth century between the development of English law and certain known currents of opinion'. Whether he thought this connection to be causal in character is not clear. In any case, no assumption of a direct causal connection was made in planning the course. The aim of the lectures was rather to explore the possible relations. It was expected that the answer would be found to be different in different fields, and it was left to each lecturer to define the connection as he saw it in his own particular domain.

The book is in three parts, the first of which is entitled Trends of Thought. This includes five chapters: the first by the editor on the Growth of Social Responsibility, a chapter on the Legacy of Philosophical Radicalism by Mr J. P. Plamenatz and three chapters on the major English political traditions and philosophies. Professor W. L. Burn writes on the Conservative Tradition and its Reformulations; Mr R. B. McCallum on the Liberal Outlook and the late Professor G. D. H. Cole on the Growth of Socialism. This section of the book is well written, perceptive and stimulating; it furnishes a philosophical and political framework in which the patterns of legal change and development are better discerned and understood. Mr McCallum's chapter on the Liberal Outlook is a particularly fine piece of writing.

The second part is entitled Legal Developments, and the contributions are by a group of well-known lawyers. Professor Dennis Lloyd writes on the Law of Association; Professor J. A. G. Griffith on the Law of Property (Land); Professor L. C. B. Gower on Business; Sir David Cairns on

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