RECENT CONSTITUTIONAL TRENDS IN ENGLAND

The scope of this article is not confined to "lawyers' law"; something will be said of changes in political institutions and in the interrelationship of those institutions. Since it will cover a broad field, discussion of individual topics will necessarily be brief; but it is hoped that the references supplied will be helpful to Australian students of law and government who must sometimes find it difficult to acquaint themselves with all the relevant current literature.

I.

It is almost platitudinous to say that the dominant feature of English constitutional development since 1939 has been the concentration of power in the hands of the Executive. Much of the war-time emergency legislation has achieved a hardy longevity; and its survival is not founded on any defence power. Since 1945, moreover, Parliament has enacted comprehensive codes of social security and town and country planning, and has brought several basic industries under public ownership. Government regulation extends to many other spheres of trade, industry, and agriculture. Shortages of essential foodstuffs and other commodities have led to the maintenance of elaborate rationing and licensing systems.

In this social context trends of constitutional importance are apparent. None of these trends is entirely new; all existed before the war, and some were the subjects of lively controversy; but recent developments have thrown them into sharper relief. In the first place, there has of course been a great increase in the legislative, judicial, and discretionary administrative powers of the Executive. The number of statutory rules and orders[1] registered in 1937 was 1,231; in 1947 it was 2,916. The Government has acquired powers to make regulations for "ensuring that the whole resources of the community are available for use, and are used, in a manner best calculated to serve the interests of the community.[2] Administrative tribunals have proliferated; there are apparently nearly a hundred different types of authorities exercising judicial functions outside the ordinary courts.[3] Wide discretionary powers over property have

[1] Now called statutory instruments: Statutory Instruments Act 1946 (9 & 10 Geo. 6, c. 36).

[2] Supplies and Services (Extended Purposes) Act 1947 (10 & 11 Geo. 6, c. 55), sec. 1 (1).

[3] The Attorney-General, 459 H.C. Debates, col. 1229. A list of tribunals is given in the Appendix to *Administrative Tribunals at Work* (ed. Robert S. W. Pollard, 1950).

been subdelegated to subordinate officials. The inevitability of these developments is rarely questioned to-day. The Civil Service has withstood the assaults of Dr. C. K. Allen's rapier and Lord Hewart's bludgeon, though it is doubtless destined to remain the eternal victim of "the national sport of bureaucracy-baiting."[4] But if few will concur with Professor G. W. Keeton's judgment that we are witnessing "the gravest attempt to establish the arbitrary power of the Executive since the execution of Charles I,"[5] it is generally agreed that the present controls over delegated legislation and administrative justice are not the embodiment of perfection.

Secondly, recent legislation has brought into being a formidable array of public corporations.[6] Nationalised industries are administered by the National Coal Board, the British Transport Commission, the British Electricity Authority, the Gas Council, and the Civil Airways Corporation. Public corporations also play an important role in colonial development, in the new planning code, in agriculture, and in the administration of social welfare and the National Health Service. The semi-autonomous statutory authority is not a constitutional innovation. The *ad hoc* bodies of the 18th and 19th centuries were the forerunners of our present local government authorities. Before the recent War bodies like the London Passenger Transport Board, the Central Electricity Board, the Port of London Authority, and the British Broadcasting Corporation attracted a good deal of attention from writers on public administration.[7] But whereas the pre-war corporations were largely free from ministerial (and therefore parliamentary) control, the new corporations are more closely linked to a responsible Minister. There is no uniform organisational pattern, but certain characteristics are common to almost all the corporations administering nationalised industries. First, the Minister is required to appoint the governing board and has power to dismiss them.[8] Secondly, he is empowered to give the boards directions of a general character relating to the exercise of their functions in matters appearing to him to affect the national interest. Thirdly, the individual Acts confer a variety of specific powers and duties on the

[4] S. C. Chrimes, *English Constitutional History* (1947), 42, note 1.

[5] *Elementary Principles of Jurisprudence* (2nd edn., 1949), 287. Cf. his pessimistic views on a possible revival of impeachments: *Legal Responsibility for Political Acts,* (1948) 1 Current Legal Problems, 15.

[6] See Sir Arthur Street, *The Public Corporation in British Experience* (Institute of Public Administration, 1947); D. N. Chester, *The Nationalised Industries: A Statutory Analysis* (Institute of Public Administration, 1948); W. Friedmann, *The New Public Corporations and the Law,* (1947) 10 Mod. L. Rev. 233, 377; William A. Robson, *The Public Corporation in Britain to-day,* (1950) 63 Harv. L. Rev. 1321; and Vol. 21, No. 2, of the *Political Quarterly,* which includes a series of valuable articles on the nationalised industries.

[7] E.g., W.A. Robson (ed.), *Public Enterprise* (1937); Lincoln Gordon, *The Public Corporation in Great Britain* (1938).

[8] In 1949 two members of the board of the Overseas Food Corporation were dismissed by the Minister of Food, ostensibly on the ground of lack of competence.

Minister concerned; for example, the power to approve schemes of large-scale capital development. On the other hand, the corporations preserve a substantial measure of independence; they are free from political control by the Treasury and the Minister in matters of day-to-day administration; they are in varying degree financially autonomous; their employees are not members of the Civil Service; they are able to determine their own internal organisation within the framework prescribed by Parliament. Parliament has sought to give the new corporations the greatest possible freedom of action consistent with the maintenance of central and popular control, and thus to escape the disadvantages of direct administration of public services by government departments. Nevertheless, tendencies towards bureaucratic over-centralisation have been noticed in some of the corporations. Friendly critics concede that they are insufficiently amenable to parliamentary supervision[9] and too remote from their employees[10] and the consumer.[11] That the dangers are appreciated is shown by the wording of the Iron and Steel Act 1949, which provides that "it shall be the general duty of the (Iron and Steel) Corporation so to exercise their powers as . . . (c) to secure the largest degree of decentralisation consistent with the proper discharge . . . of their duties . . "[12] The question of parliamentary control will be further considered below; the problems created by the "curse of bigness" will be solved only by internal re-organisation and the development of more adequate techniques of consultation with employees and consumers.

The rise of the public corporation has had an important incidental effect upon the machinery of government. It has accentuated the crisis of local government. The nationalisation of gas and electricity has deprived many local authorities of interesting and profitable functions; they have been supplanted by regional area boards that are not responsible to democratically elected bodies. Again, the management of hospitals has been handed over to regional hospital boards. Other statutes have transferred the responsibility for rating and valuation[13] and poor relief[14] to central agencies. The loss of functions by local authorities has been accompanied by a persistent increase in central control and particularly in financial control. Local authorities have been partly compensated by the acquisition of new powers, especially in relation to town and country planning; but these gains have been primarily made by the larger authorities—the administrative counties and the county boroughs.

[9] E. C. S. Wade, *The Constitutional Aspect of the Public Corporation,* (1949) 2 Current Legal Problems 172; H. R. C. Greaves, *The British Constitution in 1949,* (1950) 3 Parliamentary Affairs 431, at 435 *et seq.*; Ernest Davies, in (1950) 21 Political Quarterly 150; Kenneth Bradshaw, in Cambridge Journal, September, 1950.

[10] G. D. H. Cole, in (1950) 21 Political Quarterly 160.

[11] J. A. G. Griffith, *ibid.*, 171.

[12] 12 & 13 Geo. 6, c. 72, sec. 3 (1).

[13] Local Government Act 1948 (11 & 12 Geo. 6, c. 26).

[14] National Assistance Act 1948 (11 & 12 Geo. 6, c. 29).

Indeed the smaller local authorities, the county districts, have had to relinquish their main responsibilities for such services as education, police, fire services, and town and country planning to their hierarchal superiors. The sickness of local government will not be cured without a drastic reconstruction of the present outmoded system of local authorities and a rational redistribution of their functions. As long as the structure of local government remains inefficient, centripetal tendencies, with all their dangers, will continue to grow. But every suggested reform meets with fierce opposition from the representative associations of those classes of local authorities whose status the reformer seeks to diminish. In 1945 Parliament established a Local Government Boundary Commission with power to review, and make orders for altering, the boundaries and status of local authorities. The Commission came to the conclusion that it would be useless to alter boundaries without re-allocating functions; and in its Report for 1947[15] it made comprehensive suggestions (which were strictly outside its terms of reference) for the general re-organisation of local government. This valuable document provoked much discussion, but no action was taken until 1949. The action taken was to dissolve the Commission![16] The motives of the Government were understandable; agreed reforms seem out of the question, and any imposed reform is likely to arouse far more hostility than enthusiasm—but the health of local government is too precarious for the resolution of the doctor's dilemma to be long delayed.[17]

Before we turn to parliamentary and judicial controls over the Executive, a few words must be said about tendencies towards concentration of power at the highest level of government. Inner Cabinets existed before the War;[18] most Prime Ministers have placed a special confidence in the advice of a chosen few among their colleagues. Since the War the Inner Cabinet has, it would seem, acquired an institutional form. The present Cabinet, like Mr. Churchill's War Cabinet,[19] works largely through a complex network of *ad hoc* and standing committees, some of which have authority to make major executive decisions without reference to the Cabinet. The most important standing committee of the Cabinet to-day is said to be the Economic Policy Committee, which comprises the Prime Minister and his three or four most influential colleagues (including,

[15] House of Commons Papers, No. 86 of 1948.
[16] Local Government Boundary Commission (Dissolution) Act 1949 (12, 13 & 14 Geo. 6, c. 83).
[17] For discussions of the problem, see W. A. Robson, *The Development of Local Government* (2nd edn., 1948); G. D. H. Cole, *Local and Regional Government* (1947); Frank Jessup, *Problems of Local Government in England and Wales* (1949).
[18] Jennings, *Cabinet Government*, 196 et seq.
[19] Sir John Anderson, *The Machinery of Government* (Romanes Lecture, 1946).

of course, the Chancellor of the Exchequer).[20] This pyramidal structure may be shortlived, but this seems unlikely. If Mr. Attlee is *primus inter pares,* it must be said of his colleagues that some are more equal than others.

II.

Sir Ivor Jennings has aptly described the main functions of Parliament as being "to serve as an outlet for individual and collective grievances, and . . . to warn a Government when it is becoming unpopular."[21] To-day, as in the past, it discharges these functions effectively.[22] Space does not permit a discussion of some interesting developments that have taken place during the period of Labour government; for example, the reform of the electoral system;[23] the new interpretations put upon the doctrine of the mandate;[24] the increase in the use of Standing Committees to discuss Public Bills in the Commons; the great importance of private meetings of the Parliamentary Labour Party; and the uneasy relationship between an overwhelmingly Conservative Upper House and a Socialist House of Commons, culminating in the use of the machinery provided by the Parliament Act 1911 to reduce the Lords' suspensory veto over Bills.[25] Three aspects of the work of the Commons will be touched upon: Control over expenditure, over the nationalised industries, and over delegated legislation.

(A) Twenty-six days of the session are devoted to discussion of matters of supply in the House. Most of these supply debates take place in Committee of Supply, a committee of the whole House, the Opposition choosing the topics it wishes to discuss. Debates in Committee of Supply are nominally upon the Estimates of individual Departments; in practice they have for long centred around the general policy of the Department rather than around specific items of extravagance. Such genuine parliamentary control over expenditure as exists is provided by two Select Committees of the House—the Public Accounts Committee and the Select Committee on Estimates. So valuable have these committees proved that it is surprising to learn that they have no counterparts in Australia.[26]

[20] See Francis Williams, *The Triple Challenge* (1948), c. 5; W. A. Robson, *The Machinery of Government 1939-47,* (1948) 19 Pol. Q. 1; Herman Finer, *The Central Planning System in Britain,* (1948) 8 Pub. Adm. Rev. 237; *The Economist,* 2 October 1948 and 21 January 1950.

[21] *The Law and the Constitution* (3rd edn.), 169.

[22] *Pace* Mr. Christopher Hollis, who combines a slashing attack on "party dictatorship" with proposals for radical reforms in his *Can Parliament Survive?* (1949).

[23] Representation of the People Act 1949 (12 & 13 Geo. 6, c. 68).

[24] See T. E. Utley in *Cambridge Journal,* November 1949, for an able but one-sided analysis.

[25] Parliament Act 1949 (12, 13 & 14 Geo. 6, c. 103).

[26] L. F. Crisp, *Parliamentary Government of the Commonwealth of Australia* (1949), 163 et seq.

The Public Accounts Committee was first set up in 1861. Its duties are to see that public money is spent only for purposes authorised by Parliament, to ensure that proper methods of accounting are observed, and to detect waste and extravagance. Performance of this last duty leads it into investigation of the administrative machinery of departments and the procedure adopted in making contracts. In examining the Appropriation Accounts it has the assistance of the Comptroller and Auditor-General, whose reports and comments form the basis of the Committee's work. It is perhaps unfortunate that the reports it lays before the House relate to matters that have arisen not less than sixteen months previously; but the House rarely debates its reports unless they disclose grave impropriety, and in any event they are addressed primarily to the Treasury and to the Departments concerned. It is said that the Departments hold the Committee in considerable awe, and that its reports are almost always implemented. Its prestige rests in large measure upon the fact that political bias is absent from its proceedings; "the atmosphere in the Committee is judicial rather than political."[27] It is significant that its chairman is always a prominent member of the Opposition.

It would be out of place to discuss further the work of the Public Accounts Committee; its place as a constitutional check upon irregularity and administrative inefficiency has long been established. Admiration of the virtues of the Estimates Committee is, however, a recent phenomenon. When Jennings wrote in 1939 that the Committee was "not completely useless"[28] his praises were no fainter than those of other informed observers. It has had a chequered career; during the two Wars it was superseded by stronger committees, but since 1946 it has acquired an abundance of vigour.[29] Its duties are to examine such of the Estimates as it thinks fit, to suggest the form in which they should be presented, and to propose economies without encroaching upon the sphere of policy. In recent years the Committee has generally "interpreted the word 'Estimates' to mean current activities,"[30] and, instead of attempting the hopeless task of rushing through large blocks of Estimates without the benefit of adequate information, it has investigated selected aspects of administration where grounds have existed for suspecting maladministration and extravagance. Its 36 members have been hard-worked; subcommittees have visited East and West Africa and the British Occupation Zones in Germany and Austria, and the results of their inquiries are embodied in voluminous reports. Its criticisms have ranged from the administrative costs of government hotels for distinguished overseas visitors to the costs of homes for juvenile de-

[27] Basil Chubb, *Parliamentary Control of the Public Accounts,* (1950) 3 Parliamentary Affairs 450, at 455.
[28] *Parliament,* 312.
[29] See Chubb, *The Select Committee on Estimates, 1946-8,* (1949) 2 Parliamentary Affairs 284.
[30] Chubb, *loc. cit.,* at 287.

linquents; it has made a valuable report on Organisation and Methods in the Civil Service; inevitably, it has probed into the Tanganyika Groundnuts Scheme. Its reports have been treated by the Government with a respect comparable to that accorded to the reports of the Public Accounts Committee. Disparagement has given place to eulogy, and the Committee is regarded as one of the more successful constitutional devices of the post-war period.

(B) Parliamentary control over the new public corporations is exercisable in a variety of ways.[31] Debate may take place on a Bill or statutory instrument relating to a corporation. The Opposition may decide to debate the affairs of a corporation on a Supply day. The Government may find time for a debate on the annual report and accounts of a corporation when they are laid before Parliament. (The reports must set out any directions given by the Minister to the board, but in some cases the Minister has the power to withhold directions if he deems it contrary to the national interest to publish them.) Again, Ministers may be questioned about the activities of the corporations. Nevertheless, parliamentary control has not hitherto been very effective. In the first place, the Minister is responsible to Parliament only for "action that he may take in relation to a board, or action coming within his statutory powers which he has not taken."[32] Therefore the Minister cannot be called to answer for matters of detailed administration; for he has only a general directional power over the corporation. This seems reasonable enough; but in marginal cases Ministers have generally disclaimed responsibility, and in any case they cannot be compelled to answer even if their interpretation of their responsibility is incorrect.[33]

Secondly, it is often difficult to know to what extent a Minister has actively intervened in the affairs of a corporation. Ministers have preferred to influence the boards by private consultations rather than by formal directions, and it is said that "boards have complied with ministerial wishes even against their own judgment rather than be directed."[34] Where the extent of ministerial intervention is uncertain Parliament has difficulty in making constructive criticisms.

Thirdly, the few debates that have taken place on the corporations[35] have not been altogether satisfactory. The Opposition has tended to use the alleged shortcomings of a corporation as a stick with which to belabour the Minister, and the Minister in reply has tended to defend every act and omission of the board. The prevailing climate has been rather that of the Committee of Supply than of the Estimates Committee. This is not to say that the time is ripe

31 For references see note 9, *supra*.
32 Lord President of the Council, 445 H.C. Deb. 566.
33 For the present rule with regard to the tabling of parliamentary questions, see 451 H.C. Deb. 1635-43.
34 Ernest Davies, 21 Pol. Q. at 152.
35 Three debates, each lasting six hours, took place in 1949, on the National Coal Board, the British Transport Commission, and the Overseas Food Corporation.

for setting up a committee analogous to the Estimates Committee to scrutinize the administration of the nationalised industries. For the present it is perhaps best to continue with the existing methods of parliamentary supervision, in the hope that a more accommodating spirit will be shown both by responsible Ministers and by the Opposition and that more time will be made available for full-dress debates. Not until the time comes when issues of nationalisation cease to inflame partisan passions—and at present the Greek Kalends seem as near—will it be possible to supervise the corporations by select committees endowed with the necessary detachment.

(C) A statute which confers the power to make regulations usually requires that the regulations when made shall be laid before parliament. Frequently the further requirement is added that they shall be subject to annulment upon an adverse resolution of either House. Occasionally they require approval by affirmative resolution. The period within which adverse resolutions have to be moved has been standardised at forty days after the date of laying before Parliament;[36] the period for moving affirmative resolutions is fixed by each individual Act. Also, an Act may provide that regulations shall be laid in draft, subject to an adverse or affirmative resolution, before being made.

In England, as in Australia,[37] the great majority of regulations escape challenge in Parliament, and for much the same reasons. Between 1919 and 1938 the House of Commons spent on an average 1.6 days each session on delegated legislation. If greater interest has been shown by the Opposition since the War, this has been motivated largely by dislike of the political policy expressed in instruments that impose economic controls.[38] Although the practice of laying statutory instruments before Parliament is neither useless nor even unimportant, the task of detailed scrutiny cannot be adequately discharged except by a small committee. Such a committee —the Select Committee on Statutory Instruments, consisting of eleven members—was set up by the House of Commons in 1944.[39] Its present terms of reference are to consider each statutory instrument laid, or laid in draft, before the House and subject to the negative or affirmative resolution procedure, and to decide whether to call the special attention of the House to it on any of the following grounds: That it involves taxation or expenditure; that the parent Act purports to make it immune from challenge in the courts; "that

[36] Statutory Instruments Act 1946, sec. 5.

[37] Crisp, *op. cit.*, 252, 303 note 32.

[38] See Christopher J. Hughes, *Prayers to Annul Delegated Legislation—House of Commons, 1947/8,* (1949) 27 Public Administration 111.

[39] The work of the Committee has been discussed in several recent articles: See J. A. G. Griffith, *Delegated Legislation—Some Recent Developments,* (1949) 12 Mod. Law Rev. 297; Richard C. Fitzgerald, *Safeguards in Delegated Legislation,* (1949) 27 Can. Bar. Rev. 550; A. H. Hanson, (1949) 27 Public Administration 275; S. A. de Smith, (1949) 2 Western Political Quarterly 515; and K. C. Wheare, Journal of Politics, November 1949.

it appears to make some unusual or unexpected use of the powers conferred" by the parent Act; that it purports to have retrospective effect in the absence of express authority in the parent Act; that there appears to have been unjustifiable delay in publication or in laying before Parliament or in notifying Mr. Speaker why an instrument required to be laid before the House needs to come into operation before being so laid; that for any special reason it requires elucidation. Before drawing the attention of the House to any instrument the Committee must give the Department concerned an opportunity to furnish oral or written explanations. It has no power to concern itself with the merits of any instrument. All of its terms of reference (except possibly the third) deal with aspects of delegated legislation which, although of constitutional importance, would normally escape the attention of the House; and in that fact lies its indispensability. It is fortunate in having the assistance of counsel to Mr. Speaker, especially as that office is now held by Sir Cecil Carr, whose knowledge of delegated legislation is unrivalled. The Committee's duties are, however, onerous. Up to the end of the 1947/48 session it had examined some three thousand instruments and had made fifty-two routine reports and eight special reports (containing observations and recommendations of a more general scope) to the House. It had found it necessary to draw the attention of the House to only fifty-five instruments,[40] and of these the majority were reported on the grounds of undue delay. Where an instrument is reported it is often the case that no action by the House is contemplated; the Department concerned will remedy the matter. In any event, there is no guarantee that action will be taken in the House to annul an instrument on the strength of the Committee's report.[41]

The Committee's task is unspectacular, but its work has already shown practical results. Departmental procrastination has been reduced. The drafting and intelligibility of instruments have improved. In its special reports the Committee has brought to light recondite matters of constitutional significance; for example, the doubtful propriety of sub-delegating delegated powers without express statutory authority. What is still more important, the very existence of the Committee has had a salutary effect upon the Departments and their draftsmen.[42] The Select Committee on Statutory Instruments may not be the most important safeguard against the misuse of delegated legislative powers,[43] but it stands as an example of a modest constitutional experiment that is substantially fulfilling the purposes it was designed to serve.

[40] In the 1948/49 session it examined 1300 instruments but drew the attention of the House to five only.
[41] See S. A. de Smith, 2 Western Political Quarterly at 523.
[42] Perhaps the figures quoted in note 40 are significant.
[43] See Griffith, *op. cit.*, 12 Mod. Law Rev. 297 at 306 et seq. for a valuable discussion of the importance of prior consultation of interests.

III.

The principles that underlie judicial review of administrative action are in large measure common to the English and Australian legal systems. In each, the ordinary courts of law determine whether the Executive or a special tribunal has exceeded or abused its legal powers. In each, the means for securing redress are similar, although of course by no means identical.[44] But it is probably true to say that the relationship between the courts and the Executive has undergone greater changes in England than in Australia during recent years.

Before the recent War it was often asserted by writers on public law that many of the superior court judges were out of sympathy with, or lacking in understanding of, the purposes of modern collectivist legislation,[45] and that they were too ready to seize upon opportunities of quashing executive acts of which they disapproved; the maxim *boni iudicis est ampliare iurisdictionem* was sometimes implemented with enthusiasm. To-day the atmosphere is altogether different. In the first place, it is now comparatively rare for the validity of a ministerial regulation or order to be successfully challenged. The reason for this lies primarily in the habits of parliamentary draftsmanship; it is usual to empower a public authority to take such action "as it thinks fit" when "it is satisfied that" (or when "in its opinion") certain conditions precedent to the exercise of its powers exist. In a long line of cases the Courts have held that these phrases preclude them from inquiring into the appropriateness of the action or the existence of the conditions precedent;[46] the authority's assertion that it was so satisfied is sufficient, and only if its *bona fides* is successfully impugned or possibly if there is shown to have been no evidence whatsoever to support the assertion[47] can the *ultra vires* doctrine be applied. (It must be mentioned that whilst

[44] See, for example, W. Friedmann, *Declaratory Judgment and Injunction as Public Law Remedies,* (1949) 22 A.L.J. 446.

[45] For example Jennings, *Judicial Process at its Worst,* (1937) 1 Mod. Law Rev. 111, and *The Courts and Administrative Law,* (1936) 49 Harv. Law Rev. 426; John Willis, *Statute Interpretation in a Nutshell,* (1938) 16 Can. Bar Rev. 1.

[46] See *R. v. Comptroller-General of Patents, ex parte Bayer Products Ltd.,* [1941] 2 K.B. 306;
Point of Ayr Collieries Ltd. v. Lloyd George, [1943] 2 All E.R. 546;
Carltona Ltd. v. Commissioners of Works, [1943] 2 All E.R. 560;
Robinson v. Minister of Town and Country Planning, [1947] K.B. 702;
Taylor v. Brighton Borough Council, [1947] K.B. 736;
Re Beck and Pollitzer's Application, [1948] 2 K.B. 339;
Attorney-General v. A. W. Gamage, Ltd., [1949] 2 All E.R. 732;
Land Realisation Co. Ltd. v. Post Office, [1950] 2 All E.R. 1062;
Thorneloe and Clarkson Ltd. v. Board of Trade, [1950] 2 All E.R. 245;
Nakkuda Ali v. Jayaratne, (1950) 66 T.L.R. 214.
See also *Liversidge v. Anderson,* [1942] A.C. 206.

[47] *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation,* [1948] 1 K.B. 223; *Thorneloe and Clarkson Ltd. v. Board of Trade,* supra; *Re Bowman,* [1932] 2 K.B. 621.

Parliament has sought to bar access to the Courts by conferring absolute discretionary powers on the Executive, it has also swept away the indefensible immunities previously enjoyed by the Crown in civil proceedings[48] and has made available legal aid and advice to persons of modest means).[49] Further, the Courts have been reluctant to apply the criteria of natural justice to decisions made by Ministers in matters closely related to the discharge of their political responsibilities. For example, a typical situation under recent town planning legislation is for the Minister to be empowered to make a draft order and then to decide whether or not to confirm the order after receiving objections to it and conducting a public local inquiry through one of his departmental inspectors. In a leading case[50] the House of Lords held that the Minister's decision in such a situation could not be impeached on the ground that he was biased in favour of confirming his own order. The House supported its conclusion by holding that the Minister's functions were administrative, not judicial. The case exemplifies the flexibility of legal terminology where a Court wishes to arrive at a commonsense conclusion.[51] By adopting a self-denying ordinance and refusing to interfere with executive action where to do so would be to frustrate the intentions of Parliament or the obvious requirements of the administrative process, the Courts have avoided the danger of becoming the targets for partisan criticism.[52]

During recent years the Courts have also shown greater readiness to give effect to the social purposes of collectivist legislation.[53] The "mischief rule" of statutory interpretation is once more coming into its own. The modern outlook is well expressed in the words of Denning, L.J.: "(The judge) must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature."[54]

[48] Crown Proceedings Act 1947 (10 & 11 Geo. 6, c. 44).
[49] Legal Aid and Advice Act 1949 (12 & 13 Geo. 6, c. 51).
[50] *Franklin v. Minister of Town and Country Planning,* [1948] A.C. 87.
[51] See S. A. de Smith, *The Limits of Judicial Review: Statutory Discretions and the Doctrine of Ultra Vires,* (1949) 11 Mod. Law Rev. 306; H. W. R. Wade, *"Quasi-Judicial" and its Background,* (1949) 10 Camb. L.J. 216; Bernard Schwarz, *Law and the Executive in Britain* (1949), c. 7; and H. A. Hill, *Complete Law of Town and Country Planning* (4th edn., 1949), 1283 et seq.
[52] See Bernard Schwartz, *The Changing Role of the United States Supreme Court,* (1950) 28 Can. Bar Rev. 48, for similar trends in America.
[53] The decision of the House of Lords in *Summers v. Salford Corporation,* [1943] A.C. 283, is a notable instance. See also Friedmann, *Statute Law and its Interpretation in the Modern State,* (1948) 26 Can. Bar Rev. 1277, at 1286.
[54] *Seaford Court Estates Ltd. v. Asher,* [1949] 2 K.B. 481, at 499.

Symptomatic of the same general approach to the modern law is the decrease in judicial hostility towards administrative tribunals. It is difficult to imagine any member of the present Bench expressing with the rhetorical extravagance of Lord Hewart any misgivings that he might feel about encroachments upon the preserve of the judiciary. In a lecture delivered in 1949 Denning, L.J., went so far as to say that there was "no need for the ordinary courts to be jealous of the new tribunals . . . the new tribunals on the whole do their work admirably."[55] But he went on to insist (as most other commentators have insisted) that there should always be an appeal on points of law from a tribunal to a superior court. Sir Raymond Evershed, M.R., in another recent lecture, seemed to entertain graver doubts about the wisdom of entrusting so many issues to tribunals that are apt to allow their decisions to be unduly influenced by considerations of policy; and he made the further interesting point that the ordinary courts were in danger of losing touch with the living law by being excluded from jurisdiction over important classes of controversies arising under modern statutes.[56] These and other judicial criticisms of current trends have been distinguished by the most scrupulous regard for constitutional propriety.

The judges have moved with the times; no more subtle explanation of their changing attitudes need be suggested. Certainly there is no reason to suppose that their private political opinions differ radically from those of pre-war judges. In any event, the Labour government has made no attempt to influence the political complexion of the Bench. In 1949 the Attorney-General said that it was a matter of some gratification to the Government that although two-thirds of the High Court and County Court judges had been appointed to their offices during its lifetime, only two could be "suspected of having any leanings, even of the most tenuous character," towards the Labour Party.[57] Political practice has altered since the years before the War, when Professor Laski was able to support by concrete illustrations his assertion that "the most important judicial posts are, in England, largely the appanage of the chief legal advisers of the Cabinet of the day."[58] English lawyers seldom have occasion to-day to ask themselves how far a judge's political views may have influenced one of his decisions. Whether judicial detachment could have been preserved had the Courts had to interpret a written federal constitution is a matter for speculation.[59]

[55] Sir Alfred Denning, *Freedom under the Law,* 81-82; see also Lord Greene, *Law and Progress* (Haldane Memorial Lecture, 1944).

[56] *The Court of Appeal in England* (1950), 30-32.

[57] Sir Hartley Shawcross, *The Times,* 12 November 1949. In July 1950 a Labour M.P. was appointed to the High Court. Two former Conservative Law Officers had earlier been appointed direct to the House of Lords and the Court of Appeal.

[58] *The Technique of Judicial Appointment,* in *Studies in Law and Politics,* 163, at 169.

[59] Cf. Jennings' interesting study of the Privy Council's interpretation of the Canadian Constitution in (1937) 51 Harv. Law Rev. 1.

Despite the restricted scope of judicial review to-day, the role of the ordinary courts in administrative law is by no means insignificant. Some statutes provide for appeals on points of law to go from special tribunals to the High Court[60] or the Court of Appeal.[61] The statutory powers of Ministers are sometimes defined precisely enough for the *ultra vires* doctrine to be applied.[62] The decisions of inferior tribunals will be quashed if the tribunals incorrectly determine facts upon which the jurisdiction depends.[63] In one much-discussed case the illegal exercise of requisitioning powers evoked dicta as forthright as any that have come from the Bench in modern times.[64] Nor has the *audi alteram partem* principle of natural justice been emptied of content,[65] though it would often be unrealistic to apply it to determinations made by Ministers.[66] The Courts continue to hold invalid the exercise of statutory powers where irrevelant considerations have been taken into account in reaching a decision[67] or where a power has been exercised for improper purposes.[68] It is also open to a plaintiff to impugn a Minister's *bona fides*[69]—the English courts do not share the doubts on this matter that have been expressed by some Australian judges—but it is perhaps not surprising that no challenge based exclusively on want of good faith has yet succeeded, especially as Ministers are not in the habit of disclosing full reasons for their decisions.

Much has been written about the desirability of enlarging the scope of judicial review and of informing administrative tribunals with a judicial spirit. Only by parliamentary action can major reforms be effected; and Parliament has up to now shown singularly little interest in these questions. With respect to the improvement of judicial review, Parliament could modify its practice of conferring absolute discretions on public authorities; it could empower the High Court to review the decisions of inferior tribunals on their merits; it could provide more often for appeals to lie from administrative tribunals to the ordinary courts on points of law. As has already

[60] E.g., Pensions Appeal Tribunals Act 1943 (6 & 7 Geo. 6, c. 39).
[61] E.g., Lands Tribunal Act 1949 (12 & 13 Geo. 6, c. 42).
[62] *Harlow v. Ministry of Transport,* [1950] 1 All E.R. 898.
[63] *R. v. Fulham Rent Tribunal, ex parte Philippe,* [1950] 2 All E.R. 211.
[64] *Blackpool Corporation v. Locker,* [1948] 1 K.B. 349 (discussed in 11 Mod. Law Rev. 338). See further S. A. de Smith, *Subdelegation and Circulars,* (1949) 12 Mod. Law Rev. 37; A. E. Currie, *Delegated Legislation,* (1948-49) 22 A.L.J. 110.
[65] *R. v. Paddington & St. Marylebone Rent Tribunal, ex parte Bell London & Provincial Properties Ltd.,* [1949] 1 K.B. 666 (criticised in 12 Mod. Law Rev. 363); *R. v. Kingston-upon-Hull Rent Tribunal, ex parte Black,* (1949) 65 T.L.R. 209.
[66] de Smith, *loc. cit.,* note 51 *supra.*
[67] *Pilling v. Abergele Urban District Council,* [1950] 1 K.B. 636.
[68] *R. v. Paddington etc. Rent Tribunal,* note 65 *supra.*
[69] *Underhill v. Ministry of Food,* [1950] 1 All E.R. 591. Want of good faith cannot be investigated on affidavit evidence alone.

been indicated,[70] it is now not uncommon for statutes establishing tribunals to provide for appeals on points of law to the superior courts, and probably most lawyers consider that such a right of appeal should be universal. The other suggestions are more controversial. Whilst it is important for Parliament to be circumspect in giving discretionary powers to public authorities, past experience of judicial review has made the Executive very chary in agreeing to risk the possibility of important matters of policy being in effect determined by the Courts. And it is doubtful whether the Courts themselves would wish to pass upon the reasonableness of executive acts or of the decisions of most administrative tribunals. Mindful perhaps of the experience of the United States Supreme Court under President Roosevelt, the judges have in recent years shown reluctance to interfere with matters of policy, particularly where the action in question has been taken by an authority that is amenable to popular control.[71] If all administrative tribunals could be required to state cases on points of law, the High Court would no doubt follow the principle adopted in hearing cases stated from Courts of Petty Sessions and Quarter Sessions and would quash a perverse decision, one which no reasonable tribunal could possibly come to on the evidence.[72] But the power to review findings of fact that is inherent in the idea of a palpably absurd decision being contrary to law[73] falls far short of the power of review exercised by Australian Courts by means of statutory prohibition[74] or (in practice) by American courts in virtue of the substantial evidence rule.[75]

The problem of the reform of administrative tribunals is too large to be adequately discussed here.[76] Few will deny that much needs to be done by way of improving the quality of their personnel

[70] See statutes cited in notes 60 and 61, *supra*.

[71] See cases cited in note 46, *supra*; and *B. Johnson & Co. (Builders) Ltd. v. Ministry of Health*, [1947] 2 All E.R. 395; *Franklin v. Minister of Town and Country Planning*, [1948] A.C. 87; *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. 223; *In re Decision of Walker*, [1944] K.B. 644.

[72] *Bracegirdle v. Oxley*, [1947] K.B. 394; *Afford v. Pettitt*, (1949) 113 J.P. 433.

[73] Sometimes called the "no-evidence rule." See cases cited in note 47, *supra*; and *Bean v. Doncaster Amalgamated Collieries Ltd.*, [1944] 2 All E.R. 279; *Minister of National Revenue v. Wrights' Canadian Ropes Ltd.*, [1947] A.C. 109; and A Farnsworth, *'Fact' or 'Law' in cases stated under the Income Tax Acts*, (1946) 62 L.Q.R. 248.

[74] W. N. Harrison, *Statutory Prohibition*, (1936-37) 10 A.L.J. 300; R. Else Mitchell, *Concurrent Proceedings to Review Decisions of Justices*, (1943-44) 17 A.L.J. 286.

[75] *Consolidated Edison Co. v. National Labor Relations Board*, (1938) 305 U.S. 197, at 229; 83 Law. Ed. 126, at 140.

[76] See especially W. A. Robson, *Justice and Administrative Law* (2nd edn., 1947); R.S.W. Pollard (ed.), *Administrative Tribunals at Work* (1950), Introduction.

and providing for greater publicity and for the publication of reasoned decisions.[77] Some measure of uniformity of procedure is also desirable; but nobody who has given any thought to the problem would propose that the procedure that is best for conscientious objectors' tribunals is equally appropriate for town planning appeals. English administrative law has a deplorably untidy appearance, but when it is fitted with new clothes they must not include a strait-jacket.

The most radical proposal for the reform of administrative justice is that a new administrative court of appeal should be created. Such a reform has long been advocated by Professor W. A. Robson[78] and (in a somewhat different guise) by Sir Ivor Jennings.[79] Until recently it was strongly opposed by Dr. C. K. Allen;[80] but now, "in view of the great and increasing pressure of administrative problems," he would be prepared to accept such a tribunal as a *pis aller,* "provided always that in conception and function the tribunal remained essentially judicial and not executive . . . , i.e., that it decided the issue before it as a matter of pure adjudication, without regard to the convenience or inconvenience of the result."[81] Most academic writers on public law to-day give tentative support to the idea of establishing an appellate body with affinities to the French *Conseil d'Etat.* On the other hand, few feel confident that they are fully conversant with the way in which the *regime administratif* operates in practice, and few serious attempts have yet been made to work out the detailed implications of such a reform.[82] It cannot be doubted that if and when concrete proposals come to be considered by a new Committee on Ministers' Powers they will meet with strenuous resistance. An administrative court of appeal would deprive the ordinary courts of their supervisory jurisdiction over public authorities and administrative tribunals, and would probably need to have jurisdiction over claims for damages against public authorities; and it would be difficult to set up a central tribunal without conferring extensive new powers upon a reconstituted system of lower administrative courts. Neither the majority of common lawyers

[77] The practice of giving and publishing reasoned decisions is gradually increasing. Decisions of the Commissioners under the National Insurance Act 1946 and the National Insurance (Industrial Injuries) Act 1946, and of the Minister in appeals under the Town and Country Planning Act 1947, are published by the Ministries concerned. A law publishing firm has just brought out the Planning and Compensation Reports, which include decisions of the Lands Tribunal and appellate decisions of the Minister of Town and Country Planning.

[78] See now *Justice and Administrative Law* (2nd edn., 1947), 505. His general proposals were flatly rejected by the Committee on Ministers' Powers: *Report* (Cmd. 4060/1932), 110.

[79] *The Report on Ministers' Powers,* (1932) 10 Public Administration 333.

[80] *Law and Orders,* 170 et seq.

[81] Foreword to M. A. Sieghart, *Government by Decree* (1950), xiii.

[82] Mrs. M. A. Sieghart, *op. cit.,* gives a useful general outline of the French system. Mr. Richard Fitzgerald has made some interesting suggestions for the constitution of a body similar to the *Conseil d'Etat* in (1950) 28 Can. Bar Rev. 583 at 556 et seq.

nor those elder statesmen who have been reared in the Diceyan tradition would be expected to receive such proposals with enthusiasm. Nevertheless, the body of opinion that favours a radical approach to the problem of administrative justice is steadily increasing in strength.

Finally, I would enter a plea for more information to be made available about Australian administrative law. Several admirable articles have been published in Australian law journals, but these are to be found in very few English libraries outside the Institute of Advanced Legal Studies in London and are therefore unknown to many students. It is understood that fuller studies are in preparation.[83] They, and their successors, will be received with great interest in England. Notwithstanding the important differences in the constitutional laws of the two countries, their problems of administrative law are too similar for England to remain largely ignorant of experience and thought in Australia.

S. A. DE SMITH.

[83] Since this article was written, Melbourne University Press has published *Principles of Australian Administrative Law* by Professor W. Friedmann. —EDITORIAL NOTE.