BOOK REVIEWS

Cases on Constitutional and Administrative Law, by Peter Brett, Reader in Law, University of Melbourne, Australia. Butterworth & Company (Australia) Ltd., 1962. ix and 517 pp. (£5/2/6 in Australia).
Principles of Australian Administrative Law, by W. Friedmann, Professor of International Law, Columbia University, and D. G. Benjafield, Professor of Law, University of Sydney, Australia. The Law Book Company of Australasia Pty. Ltd., 1962. xxiii and 263 pp. (£2/18/- in Australia).

The publication of one new book dealing with administrative law in Australia is an occasion; that two should have appeared during one year is almost beyond belief. It is surprising that this vital sector of modern law should have been so neglected, particularly in a country where criticisms of bureaucracy, administrative bungling, abuse of power, political jobbery and the like have filled innumerable columns of the newspapers. But until 1962 the only textbook available was the slim volume produced by Professor Friedmann in 1950.

Even though there has been a dearth of published material it might reasonably have been thought that the ever-growing volume of public law, the obvious need for greater understanding of the process of administration, and practical demands for more effective and appropriate means of review of administrative action would have stimulated a deal of experimentation and research. This has not been the case, and it is to be fervently hoped that these two new books will mark the beginning of a new era in Australian administrative law. It must be particularly galling to many Australian lawyers to know that New Zealand has already started a unique experiment in common law countries by its establishment in October, 1962, of an "Ombudsman" to keep a close watch on administrative action and investigate the complaints of citizens. According to early reports the Ombudsman is already justifying his existence. The contrast with Australian lack of interest in such experiments needs no emphasis.

In his *Cases on Constitutional and Administrative Law*, Dr. Brett makes it quite clear that all he is setting out to do is to provide basic materials for class tuition of students faced for the first time with "the problems arising from relations between the citizen and his government".[1] Having regard to this limitation, the selection of cases and materials is excellent; a judicious blending of English and Australian decisions is leavened with United States, Canadian and New Zealand cases which serve to shed some light on the more difficult problems. A student with a working knowledge of the cases could hardly fail to grasp the basic principles of judicial review.

The traditional and familiar topics in constitutional law—the rule of law, separation of powers, supremacy of Parliament, executive power of the Crown, and the Judiciary—are dealt with in the first four chapters. Of necessity the chapters are fairly brief but the cases and other materials are adequate for

[1] At v.

the modern student. No law teacher who is concerned with imparting some knowledge of the growing volume and complexity of public law can afford the luxury of lengthy and detailed discussion of constitutional theory. As a matter of arrangement it may be open to question whether there is any point in dealing with the liability of the Crown in contract and tort in this part of the book (Chapter 3) and the liability of other public authorities in another. Although the principles controlling liability may not be identical, there is obviously a close affinity which should not be obscured by completely separate treatment.

Two very lengthy final chapters—the major part of the book—come to grips with some of the crucial issues in administrative law; the substantive principles evolved by the courts to control the exercise of statutory authority and the remedies available to give effect to these principles.

In his selection and arrangement of cases dealing with the exercise of statutory authority (Chapter 5) the author has called in aid[2] the words of Dixon, J. (as he then was) in *Yates* v. *Vegetable Seeds Committee*[3] to justify disregard of the "conceptual boundaries" which led to traditional classification of cases under headings such as "control of delegated legislation" and "control of quasi judicial tribunals". Re-classification has been attempted on a "different basis" in order to achieve easier understanding. It is to be doubted whether understanding is materially assisted by the intermingling of cases concerned with review of delegated legislation, of decisions by courts, and of decisions and actions by a mixed bag of other authorities. Even the conceptual boundaries specifically discarded by Dr. Brett seem particularly ill-chosen; in American and English law the basic difference between clear legislative action on the one hand and clear adjudicative action on the other is recognised as vital—both as to procedure and judicial review. In the *Yates Case*, Dixon, J. also pointed out that in English law distinctions are based on the status, composition and purposes of the particular body sought to be reviewed; he approved language of Frankfurter, J. to the effect that "there is no such thing as a common law of judicial review". The complexities and inconsistencies of the extraordinary remedies themselves partially reflect the concern of the courts to adjust the availability and scope of review to what they consider appropriate in the particular context; and the argument for abolition of these remedies is largely based on the view that the courts should be free to work out the appropriate scope of review on policy grounds without resort to labelling which conceals the real basis of decision, and unhampered by the technicalities of a bygone age not related to the merits of review. It is the antithesis of this approach that general principles should be erected and sought to be applied irrespective of the nature of the authority and power under review. The author warns that the new headings are merely labels and do not represent a set of rules to be automatically applied.[4] Nevertheless they are labels, and ones which tend to give an illusion of certainty and uniformity which certainly does not exist.

The classifications used cannot perhaps be regarded as completely satisfactory. Is there any real connection between the grant of an easement over property acquired by a railway company and the delegation of disciplinary power by a Dock Labour Board? Both are grouped under the heading: "The Rule Against Divesting". Is the heading "To Act Reasonably" even a useful label? In practice, of course, judicial language relating to categories such as reasonableness, improper purposes, and relevant and irrelevant considerations is so imprecise and conflicting that no simple classification could possibly be devised that would satisfy everyone. The classification of the rules of natural justice as merely an aspect of the *ultra vires* principle under the heading "To

[2] At vi.
[3] (1945) 72 C.L.R. 37.
[4] At 183.

Observe Proper Procedures" has the unfortunate effect of concealing their importance as "the very kernel of the problem of administrative justice".[5]

Many students of administrative law, though by no means all, would agree with the well known assessment of the extraordinary remedies by Professor K. C. Davis which is included in the selected materials.[6] In his view "an imaginary system cunningly planned for the evil purpose of thwarting justice and maximising fruitless litigation would copy the main features of the extraordinary remedies. . . . For no practical reason the remedies are plural. A cardinal principle, now and then erratically ignored, denies one method of review when another is adequate. The lines are moved about through discussions of such concepts as judicial, nonjudicial, discretionary and ministerial. These concepts are acutely unfortunate not only because they deny definition but because of the complete folly of using any concepts whatever to divide one remedy from another. . . . The most serious consequence of the system is the myriad of cases which fail to reach the merits". Professor Davis' more recent comment is that the extraordinary remedies should be consigned to the bottom of the River Thames.[7] Whatever strange creatures may be found on the river bed the prerogative writs are not yet amongst them, nor are they likely to be in the foreseeable future. Since the pre-eminence of the prerogative writs as administrative law remedies in Australia seems assured for the time being at least, it could be argued that more space should have been allotted to exposition of problems inherent in their use. The almost complete separation of materials on the remedial law (Chapter 6) from those dealing with the principles of review is likely to confuse students when they are faced with practical problems. It might have been helpful to have indicated throughout Chapter 5 the remedies available under particular headings where difficulties arise. There is certainly English authority for the firm distinction drawn by the author between "lack of jurisdiction" and "excess of jurisdiction" as grounds for certiorari and prohibition;[8] but to the writer maintenance of such a distinction appears only to serve the purpose of further entrenching unnecessary technicality—a purpose opposed to the general tenor of the book. The treating of breach of the rules of natural justice as jurisdictional error also seems unnecessarily obscure and perhaps misleading. The judicial trend in England to encourage the use of the declaratory judgment as a complete alternative to the prerogative orders might have been nurtured in Australia by inclusion of material indicating the full scope of the remedy.

Criticism of a book of more than 500 pages on the basis of material omitted may seem rather purposeless. But the omissions here are vital. They deny the very title of the book. This is a book on judicial review, not administrative law. There are no materials dealing with parliamentary and administrative review of delegated legislation and other forms of administrative action. Despite the scepticism of the Americans, parliamentary review can and must be made effective; it is by far the most appropriate means of controlling legislative power. There is no indication of the importance or functions of administrative tribunals in Australia; no consideration of their procedures or effectiveness in providing review of official action. There is no examination of the administrative structure itself or the process of decision making.

On the other hand, it must be emphasised that there is in Dr. Brett's work a refreshingly new approach to many aspects of judicial review, and a recognition of the practical problems confronting the judges of the reviewing courts.

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[5] H. W. R. Wade, *Administrative Law* (1961) at 127.

[6] At 497ff.

[7] K. C. Davis, "The Future of Judge Made Public Law in England: A Problem of Practical Jurisprudence" (1961) 61 *Columbia L.R.* 201 at 204.

[8] At 403ff.

The use of American materials to indicate possible solutions to current problems of British and Australian law is much to be applauded. It is quite tantalising to speculate on application of the distinctions drawn by Professor Davis between adjudicative and legislative facts[9] to Australian difficulties with the right to a hearing prior to administrative action.

The new edition of *Principles of Australian Administrative Law* by Professors Friedmann and Benjafield is essentially a textbook on the familiar English model. As with Dr. Brett's work, it is oriented towards the student and its introductory chapters prepare the ground for a study of administrative law by a discussion of basic constitutional issues—the sovereignty of Parliament, constitutional conventions, the rule of law and separation of powers. At this point the resemblance ends. There is, firstly, a different coverage resulting from the nature of the book. Secondly, there is a fundamentally different approach; this book does not attempt to establish universal principles but rather to show the extent of review of administrative action within the framework of the remedial law. Finally, a much wider field is opened by the authors of the *Principles* by their accepted definition of administrative law: that it comprises "the whole body of law which determines the organisation powers and duties of administrative authorities".[10]

An element of futility is inherent in argument as to the relative merits of case books and textbooks in any field of law. Each must have its place. There can be little doubt that in administrative law the textbook has certain advantages, which derive from the subject matter. While the case book is probably a more effective teaching aid, its very nature leads to over-emphasis on judicial review by the superior courts—the smaller part of administrative law. The textbook, on the other hand, lends itself to detailed discussion of the whole fabric of the administrative process. It is unfortunately true that such discussion is rare in British publications and probably Professors Friedmann and Benjafield would be the first to admit that recent strictures of Professor Davis on the approach of English lawyers and academics to the problems of administrative law[11] apply in fair measure to their own work. They point to the "imperfectly realised" impact of recent social developments upon both public and private law; to the need to "balance the vast increase of economic and social functions of the government—by a corresponding adjustment in their legal responsibilities"; to the creation of numbers of special administrative tribunals and the need to reconcile "the growth of administrative jurisdiction with the rule of law"; to the "growth of administrative power—and the vast expansion of legislative machinery, which compel a reconsideration of parliamentary control"; and to the creation of a very great number of discretionary powers operating in areas "to which judicial control does not in fact penetrate".[12] It is one thing to state these problems in general terms. It is another to place them in a practical context and suggest reform. The authors admit that the necessary research work has not been done, though certainly they do make some valuable suggestions and strongly urge official and organised research programmes.[13]

Treatment of the remedial law is fairly comprehensive having regard to space limitations in a book of limited size, and the extensive footnoting will no doubt be of value to the practitioner as well as to the student. There is some appearance of imbalance in that three chapters are devoted primarily to problems arising from the liability of the Crown and other public authorities in contract and tort—an area covered at least partially by standard works on

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[9] At 302.
[10] At 48.
[11] K. C. Davis, "English Administrative Law—An American View" (1962) *Public Law* 139.
[12] At 46ff.
[13] At 250ff.

those subjects—and only one each to judicial review by the prerogative writs and equitable remedies. The result is a very complete account of the somewhat less abstruse fields of contract and tort liability at the cost of some inadequate treatment of complex problems relating to the prerogative writs. There is a notable omission to deal at all with problems arising from direct review of administrative action by the courts and administrative tribunals, although statutory provision for such review is probably more common in Australia than in the United Kingdom.

Little further need be said of the discussion of Crown and public authority liability. The three chapter cover is good and the writer welcomes the introduction of material relating to imposed government contracts and the realistic appraisal of *East Suffolk Catchment Board* v. *Kent*.[14] The six page account of the legal position of Crown servants seems unnecessarily long having regard to special statutory provisions protecting Crown servants in Australia; and indeed a brief survey of these statutory provisions might have been of more value for practical purposes.

In Chapter 10 explanation as to the tribunals to which certiorari and prohibition will lie is exhaustive, but there is insufficient treatment of the grounds—particularly when the authors have elected to deal with the scope of review in conjunction with the remedies. A comment that application of jurisdictional review to control of statutory discretions raises "acute difficulties",[15] is not likely to be of much assistance to the student. A discussion of "error of law" which contains no explanation as to what is an error of law is also singularly unhelpful. The placement of a section on privative enactments immediately after sections on prohibition and certiorari and before those dealing with mandamus and the equitable remedies is likely to be misleading. There is also perhaps too much credence given to the oft-repeated dicta that the High Court will give effect to privative clauses where there is a "bona fide" attempt to exercise authority.[16] The authors' very thorough and critical account of the availability and scope of review by mandamus should do much to resuscitate this comparatively moribund remedy. It is certain that too many practitioners do not know the "considerable lengths" to which review by mandamus (and sometimes other remedies) may be pressed. A comment that the "courts have created a situation in which it is possible to extend the scope of judicial review indefinitely"[17] is far from being an over-statement. Equitable remedies receive comparatively short treatment in Chapter 11. Perhaps, because of the special position in New South Wales, more space is allocated to the injunction than to the declaratory judgment—but it is the latter which is hailed as the all-purpose remedy in administrative law and considerably more discussion of its scope and potentiality would seem to be warranted.

Because of the authors' acceptance of a wide definition of administrative law, the book includes an analysis of the problems of delegated legislation and a survey of parliamentary, administrative and judicial review. So, too, in the final chapter the major recommendations of the British Committee on Administrative Tribunals and Inquiries (The Franks Committee) are set out and criticised. Although the Franks Committee recommendations are by no means fully accepted there is also an all too brief examination of Australian tribunals in the light of those recommendations. Many readers will no doubt be jolted out of some predispositions by the conclusion that: "the majority of Australian administrative tribunals satisfy most, if not all, of the recommendations of the Franks Committee".[18]

[14] (1941) A.C. 74.
[15] At 155.
[16] At 166.
[17] At 177.
[18] At 231.

The reviewer can wholeheartedly agree with the assessment that "the vital problem of the present day is a thoroughgoing investigation and analysis of the multitudes of discretions which are vested in administrative authorities with a view to determining how they may be regularised and systematised and what types of control, both in the ordinary courts and in the departments of government themselves ought to be instituted for the protection of the citizen".[19] Although neither of the books reviewed even attempts such analysis there is in both of them a recognition that a new and constructive approach is needed.

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Law and Minimum World Public Order: The Legal Regulation of International Coercion, by Myres S. McDougal and F. P. Feliciano. New Haven, Yale U.P., 1961. xxvi and 872 pp. ($12.50 in U.S.).
Studies in World Public Order, by Myres S. McDougal and Associates. New Haven, Yale U.P., 1960. xx and 1058 pp. ($15.00 in U.S.).

A reviewer of these two books approaches his task with awe, for not only are they intimidating in size, but they are highly polemical in character, and rather unrelated in subject matter. Among the topics discussed are aggression, self-defence, neutrality, and the law of war and belligerent occupation. It is obvious that Professor McDougal does not see eye to eye with Professor Stone in many of these matters, and the reader will obviously be drawn to make comparisons between the works of the two authors. Whilst Professor McDougal accuses Professor Stone of escaping into "verbal illusion", Professor Stone might well reply that Professor McDougal, despite all his social science language, and his dedication to relativism, is in fact excessively legalistic and of a fundamentally conservative turn of mind.

These two works are the product of a co-operative undertaking within the Yale Law School. The presiding genius of the enterprise is Professor Lasswell, and this explains the strong jurisprudential undertones of the work. While Professor McDougal obviously has done most of the writing, he has been backed by a large research organization with a number of associates. The articles are the result of a great deal of thrashing out of problems in Yale seminars. One important outcome of this community effort is that Professor McDougal's associates are now to be found as junior professors in a number of American Universities, and as a result, several institutions of international law look to Yale as the fountainhead of authority.

It is impossible in a review to do more than notice the thin thread of doctrine which holds all these disjunctive articles together. The theme is the necessity for public order on the international level. Education and a hard hearted appraisal of politics are two of the preconditions of the achievements of this order. The law of war, which occupies three-quarters of the two volumes, is seen as a strategy for the achievement of minimum order, in which is involved the outlaw of aggression, the preservation of self-defence and the humanising of war situations when they occur.

The field of international law today is so extensive that real scientific research work is only possible by team effort. Furthermore, when the topic of research lies on the border of law and international relations the team must include both lawyers and political scientists if the problems raised are to be examined completely in context. These two books represent such an under-

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[19] At 215-216.
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