Book Review. Carr, C.T., Concerning English Administrative Law

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throughout the service by this guide-number, there would be references to the cases abstracted in the digest, the 1941 cases reported in the current reporting service, and the discussions in the reproduced literature, on the subject of unconstitutionality of underlying statute as a ground for injunction against the enforcement of a subpoena issued in the course of administrative adjudication—if there were any such materials. The fact that under this guide-line there are no references is merely illustrative of the fact that the authors have carried their analysis far beyond the legal materials yet developed in an effort to provide an organizational basis which will be indefinitely useful. There is also an alphabetically arranged "word-index" which gives references to guide-numbers, and in the "Agency Table" or "vertical index" the guide-numbers under which materials are extant are tabulated according to the agencies with reference to which the materials came into being.

There is no question that the service will be very widely used, for it is the only publication even pretending to fill a long-felt need, and only in the course of its use can really valid judgments of its utility be formulated. For whatever an individual a priori judgment is worth, I have no hesitancy in saying that I believe it to be one of the most important jobs yet done in the development of administrative law, and to be executed with professional excellence. I tender unqualified praise to the authors and their staff, and I believe the legal profession will be perpetually indebted to them.

That having been said, and without implying any limitations upon it, let me indicate what I believe are very definite limitations upon the use of the "horizontal" approach upon which the service is based. As the authors state in the preface, "In our conception of the scope of Administrative Law the approach is essentially a 'horizontal' one. We are not concerned with the substantive aspects of the various fields of federal regulations, such as labor law or taxation; rather we are concerned with those matters which have application throughout the administrative process: in short, constitutional powers and limitations, administrative procedure and judicial review." This is a specific response to an oft-expressed demand of the profession for a working instrument through which legal materials dealing with similar aspects of administrative processes can be readily correlated regardless of differences in the substantive law to which those processes give expression. But it would be catastrophic if it were now to be assumed that by this approach case law from different fields could be brought together and through its reconciliation and organization universally valid "principles of administrative law" could be discovered. The nature of the subject matter, the purposes for which an administrative agency is established, and the objectives toward which its procedures, regulations and actions are directed are still of paramount importance in determining constitutional powers and limitations, administrative procedure and judicial review. The substantive law applied through administrative processes inevitably exerts a dominant influence. The differences between the legal status of an alien and that of a domestic corporation exert a greater influence upon administrative law than the fact that the former is a human being and the latter is a legal fiction. Even in dealing with the topical classifications employed to give horizontal direction to the analysis, form must not obscure substance. To illustrate, from the first page of the Digest: notwithstanding the unquestionable utility of digesting Field v. Clark, 143 U. S. 649, under the guide-line "Delegation of power to suspend operation of statute", and thus differentiating it from J. W. Hampton, Jr. & Co. v. United States, 276 U. S. 394, which is under the guide-line "Delegation of power to alter terms of statute", the two cases have a much closer relationship to each other (by reason of the fact that both involve tariffs) than the former has to Shields v. Utah Idaho Cent. R. Co., 305 U. S. 177, which is digested under the same guide-line.

The publication of the Administrative Law service expedites not only the finding of cases within the particular field of interest itself but in addition it facilitates the application of a sort of comparative-law technique for the concurrent study of experience in other substantive fields from which persuasive comparisons may be drawn. My caveat is that we remember we are dealing with comparisons rather than with manifestations of verities.

Lester P. Schoene*  


The graceful, informative Carpentier lectures for 1940 at Columbia University, which form the content of this little volume, are typical of the best thought that is at work in modern British government. One wishes the book might be read by a far wider audience of lawyers, officials, and political figures than usually takes note of such university-sponsored contributions to legal and political discussion. In these lectures are reflected the administrative skill, tolerance, and benevolent humanitarianism which, if they could but prevail among Anglo-Americans over acquisitiveness, blind competition, and stodgy traditionalism, might yet redeem their social order from within and preserve it against external foes. Written under the stress of bombings and in the presence of recurring danger to life, these pages maintain an urbanity, self-possession, and delightful humor that bear constant witness to the unquenchable integrity, as well as the high ability, from which they spring. A certain weakness in the underlying governmental phi-

losophy, which the book evidences, is perhaps equally typical of British thought.

The author, now Parliamentary Counsel to the Treasury and therefore England's chief legislative draftsman, is that country's outstanding authority on legislation and on administrative rule-making,* which are here discussed. In this book he includes also a discussion of administrative adjudicative tribunals and of bureaucracy—as he is willing to call it—in general. The first lecture is an outline of the history of bureaucracy in England from the eighteen-thirties to the present time—not so much its causes or its details as its spirit and the ebb and flow of public opinion and parliamentary action with respect to it. The story of modern beginnings is told in terms of a sketch of Chadwick, disciple of Bentham and arch-embodiment of bureaucratic zeal, whose "sanitary reforms" during the second quarter of the century achieved so much and aroused such intense opposition.† Here occur a number of the author's most delightful passages—some at the expense of the humorless Chadwick, others induced by the stridency of opponents of his reforms. As a mere visitor Sir Cecil does not know when, if at all, a parallel period of centralization may have occurred in the United States, but he leaves this question to "the scholars of that university which bred up Alexander Hamilton" (p. 8).

The author's emphasis, here and throughout the book, however, is upon the regulation of persons and individual property rather than upon the more strictly economic phases of governmental activity which Hamilton fostered.

The first lecture concludes with an account of the significance of the establishment and the report of the Committee on Ministers' Powers. It is interesting to have set out in an appendix the infinitesimal specific consequences of the Committee's work. Yet the author believes that work to have been worth while, for it drew back the "islanders'" attention in a "reverent spirit" to the "Dicey tradition", based upon the ancient landmarks of liberty. Even if reformers who thought the report inadequate are right, they should be content, we are told, with "their task of educating the land from the eighteen-thirties to the present time—not so much its causes or its details as its spirit and the ebb and flow of public opinion and parliamentary action with respect to it. The story of modern beginnings is told in terms of a sketch of Chadwick, disciple of Bentham and arch-embodiment of bureaucratic zeal, whose "sanitary reforms" during the second quarter of the century achieved so much and aroused such intense opposition.† Here occur a number of the author's most delightful passages—some at the expense of the humorless Chadwick, others induced by the stridency of opponents of his reforms. As a mere visitor Sir Cecil does not know when, if at all, a parallel period of centralization may have occurred in the United States, but he leaves this question to "the scholars of that university which bred up Alexander Hamilton" (p. 8). The author's emphasis, here and throughout the book, however, is upon the regulation of persons and individual property rather than upon the more strictly economic phases of governmental activity which Hamilton fostered.

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In the second lecture, dealing with delegated legislation, Sir Cecil summarizes in revealing fashion the knowledge of which he is master. The reasons for delegation, the more significant types of regulations, and possible safeguards attending the rule-making process are here passed in review. Realistic and clear are these observations upon a vital aspect of modern government. An informative lecture on Crisis Legislation follows, showing the English courts to be still more effective during emergencies in protecting property than in protecting personal freedom from ultra vires acts (pp. 82-5). The author has little faith in the ability of crisis administration to safeguard the individual through its own processes. Rather must its abuses be corrected after the crisis ends (pp. 80-81).

In his lecture on administrative tribunals Mr. Carr appears particularly discriminating. Many different types of tribunals are necessary in a workaday world (p. 94); "belief that judges are the sole repositories of incorruptibility" seems to be a modern growth (p. 97); the legislature itself, rather than executive officers, departs from laissez faire, and "it is not at all certain that administrative tribunals are unpopular in England" (p. 100); a tribunal should be fashioned to the task it is asked to perform (p. 101); agencies dealing with a single problem must be administratively coordinated (pp. 101, 103); judicial functions cannot be identified (pp. 105-110); "where two or three lawyers are gathered together, they will introduce their accustomed procedure" (p. 110), although often other skills need to be brought into play (pp. 110-120); opinions accompanying administrative decisions may sometimes be a hampering ritual (p. 123).

Space forbids review of the excellent chapter on the written laws, which points out the uses of technicalities in statutory drafting and the opportunities for popular wording which administrative rule-making affords. In the final lecture such vital topics as training for the public service, bureaucratic rigidity as against possible flexibility, and the spirit of government personnel come in for treatment. A leading ground for confidence, we are told, lies in the fact that "the work is greater than the official; it masters him and gives him a sense of responsibility" (p. 167), as the case of Samuel Pepys illustrates. Have we not seen the same phenomenon in many an American politician?

In his preface Sir Cecil expresses in a sentence the only well-articulated philosophy of government that appears in his pages, attributing it with deference to the United States as well as Great Britain: "To both countries government, tolerated as an unfortunate necessity, is but the means to the end; to both countries the end is liberty." Further along in the book one senses more than tolerant acceptance by the author of slum clearance and other forms of administratively-effected social improvement; but his approval is nowhere forthrightly expressed. In him as in so many of the best Anglo-Americans humanitarianism competes with laissez faire; benevolence and realism lead to piece-meal acceptance of social reforms and of the means of achieving them; but no inclusive philosophy arises to justify them as against traditional negative generalizations. In the author, in addition, the self-abnegation of the legislative draftsman, who serves subordinateiy to all shades of political opinion, doubtless operates to forestall any save the most cautious utterances of political views.

If the word were freedom instead of liberty, its meaning might be enlarged, as haltingly we are enlarging

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* His acute pamphlet on delegated legislation, published in 1921, was a pioneering work upon that subject. Sir Cecil was at that time editor of the Statutory Rules and Orders.

freedom in practice, to include freedom from exploitation, aggression, and want as well as freedom from arbitrary governmental action; but liberty calls up no such modern connotations. In these anxious days for the democratic system and for the law which is its core, we need a new philosophy, proudly asserting the affirmative purposes of government, as well as the patience, tolerance, and administrative skill which this work so beautifully reflects.

Ralph F. Fuchs*


Albert C. Barnes, in addition to providing a suitable place for Dr. Russell at his Foundation in Pennsylvania, has sponsored the preparation of this very useful book. Since its subject is the legal case which arose out of the attempt to appoint this philosopher to a teaching position, it is appropriate that the book should be written by educators, philosophers and lawyers. Perhaps a lawyer may be pardoned for suggesting that the legal aspects of the case might have been more fully dealt with though surely not with greater skill than they were treated by Walton Hamilton and Morris R. Cohen. Cohen does, however, stress the evil which can result when political considerations prevent educational authorities from seeking review in the higher courts of the decision of a single judge, an evil for which Mayor LaGuardia must accept the major share of the blame.

A full factual account of the case is presented by Horace Kallen with particular emphasis on the ecclesiastical background. Dr. Kallen has turned the tables on the churchman with much zest:

"Now in scientific terms it is just as false that the opinions of Bertrand Russell on sexual behavior make for immorality as that the dogmas of the Catholic and Anglican churches make for morality." And he cites statistics on the latter phase of his question.

John Dewey, in addition to contributing an introduction, deals at length with Professor Russell's views and shows how unrepresentative of them were the few quotations picked out of their context by his attackers. He criticizes Judge McGeehan's opinion not only for its intemperateness and unfairness, but also, and primarily, because the consequences of a decision such as his must be the perpetuation of taboos and the discouraging of sane discussion of the need for change in moral standards. Professor McKeon reviews the case in the light of the history of persecution from Greek times into the Middle Ages. He challenges the notion that teachers in the field of higher education should be expected to conform to current mores and insists that, to encourage independence of thought, only the competence, not the doctrines or the conduct of such teachers, should be considered.

In addition, a churchman, a public school superintendent and a member of the philosophy department at C.C.N.Y. each contributes a brief paper and indicates that not all constituted authority accepts the implications of the Manning-McGeelhan approach.

In conclusion, Sidney Hook raises the fundamental question whether freedom of ideas can be preserved within the framework of the present social and economic order. He refers to many pressure groups active in opposing educational independence—the businessman, the churches, the chauvinists, and includes within such groups those who, like the Communists, claim to possess a special method for reaching the truth.

The opinion of Justice McGeehan and a contemporaneous statement by the Committee on Cultural Freedom are reprinted in appendices. There might well have been added to these Justice McGeehan's two latter opinions, the one denying Dr. Russell's application for leave to intervene, the other denying the request of the Board to appear by counsel of its own choosing.

Osmond K. Fraenkel*


One of the most interesting developments in American legal philosophy has been the rapid rise of the School of Legal Realism. Distinctly American in its roots and personnel, deriving out of the pragmatism of Dewey and James, realism has just reached its jural majority. Garlan's book serves several useful purposes.

First of all, it contains the most complete bibliography on legal realism available and lists seventeen pages of articles, pro and con—concrete evidence that realism has attracted the attention of defenders and critics. Professor Garlan's treatise is one of several recent contributions which undertake to discuss the performance of the new jurisprudence to date. [See Llewellyn, on Reading and Using the New Jurisprudence (1940), 40 Col. L. Rev. 581; Yntema, Jurisprudence on Parade (1941), 39 Mich. L. Rev. 1154.] The author shows that the new approach of realism with its emphasis upon facts, functions and institutions has made errors and mistakes which are now being gradually eliminated. Psychological leanings in the direction of Freudian complexes and Watsonian behaviorism are being deleted (p. 12). Even natural law, believe it or not, is now accorded a place in the realist's pursuit of down-to-earth facts (p. 120).

Garlan's treatise discloses a conciliatory and sympathetic attitude toward moral values, ethical principles, and the common good, and a recognition of their importance in the development of law (pp. 59-63, 118-###*Professor of Law, Washington University School of Law; Member of the Attorney General's Committee on Administrative Procedure.

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