BOOK REVIEW

JUDICIAL REVIEW *REDUX*

Ian Holloway[*]

M Aronson and B Dyer, *Judicial Review of Administrative Action* Sydney, LBC Information Services, 1996; ciii, 990 pp.

de Smith, Woolf & Jowell, *Judicial Review of Administrative Action* (5th ed) London, Sweet and Maxwell, 1995; clxxxvi, 1020 pp (distributed by LBC Information Services).

One of the most difficult issues to face a writer is what could be called "the paradox of the ground-breaking work". In a subsequent edition, what is the author of a successful, forward-looking work to do? To update the law goes without saying. But ought the task to stop there? The temptation to leave well enough alone in such a case must be a strong one, for, as the *cliché* has it, one does not lightly mess with success.

Or ought the author to try to better his past efforts; to *improve* on his success? And if this is to be the course, in what manner ought he to go about it? On the one hand, an author might be tempted to employ the same sort of bold and creative strokes that earned the work *kudos* in the first place. But on the other, the initial edition's internal logic was presumably one of the determinative factors in its success. And not to be forgotten is human nature — the tendency in us all to rest on our laurels. To use another *cliché* (was it Trotsky who said it?), yesterday's revolutionary tends to be today's conservative.

This dilemma is magnified when there has been a change in authorship in succeeding editions. For understandable reasons, every new author wants to lend a distinctive, personalised stamp to the project. But at the same time, a degree of selflessness is generally called for when a new person takes over a pre-existing work — especially when that work has already achieved some prominence. Simply put, the new author of a previous edition must remember just that, namely, that he is working on a new edition of somebody else's work. For very good reason, the dead hand of the past ought to remain a living force when it comes to new editions.

Both of these books show the art of the subsequent edition at its finest. Each differs in significant respects from its predecessors, yet the changes have been carried out in

[*] BSc, LLB (Dalhousie), LLM (Calif, Berkeley). Lecturer in Law, Australian National University.

such a way that the flavour of previous work is retained. In short, both of these are very new books, but at the same time one can still recognise in them that which made the original authors' first efforts so commendable.

de Smith, Woolf & Jowell, *Judicial Review of Administrative Action* (5th ed)

Simply because it has been around longer, *de Smith* will probably be the better known of the two works. Appearing first in 1959, the last edition written by Professor de Smith himself was the third, published in 1973. The fourth edition, which was published in 1980, was by Professor John Evans of the Ogoode Hall Law School. As Professor Evans said,[1] with one notable exception (dealing with the 1978 revision to Order 53), his edition represented a simple up-dating of the law as set out in the third edition. This edition, however, marks a substantial departure from de Smith's writing.

To begin, all of the authors are new. In place of Evans's sit three names on the frontispiece: Lord Woolf, Professor Jeffrey Jowell QC and A P Le Sueur. Woolf's and Jowell's names will of course be familiar to everyone working in the public law field. Le Sueur, who is given the title "Assistant Editor", is noted in the preface as having played a special role with respect to Part V of the book, dealing with remedies. In addition, in Part VI of the book, entitled "Judicial Review in Context", the editors have employed the services of some of Great Britain's leading academics and practitioners to produce a series of chapters dealing with specialised administrative law topics. Together, these new faces give *de Smith* a complete facelift.

One of the main keys to *de Smith's* initial success was its timing. To use the crude expression, it was the first cab off the rank. More than that, though, in his writing, Professor de Smith captured well the "feel" for administrative law that infused his generation. In his classic work, *Villeinage in England*, Sir Paul Vinogradoff wrote that "schools and leading scholars displace one another more under the influence of general currents of [contemporary] thought than of individual talents."[2] It would be wrong to lump Professor de Smith in with others of the cocky and arrogant "Dicey-bashing brigade", but it is clear that his view of administrative law was heavily coloured by the anti-Dicey academic writing that was so prevalent in England during the period between the First World War and the late 1950s. Interestingly, at the time that the first edition was published, de Smith was a Reader in Law at the London School of Economics (LSE) — the very place which had given birth to so much of the anti Dicey/anti-judicial review scholarship.

In retrospect, it is hard to believe that barely 20 years had passed between Lord Hewart's final salvo against the prospect of administrative lawlessness[3] and the first edition of *de Smith*. To put that in perspective, that is less than the time that elapsed between the report of the Kerr Committee and the decision of the High Court in *Craig v South Australia*.[4] Yet in some ways, the law had in its basic tenor remained static during that time. There had been some important and (as time would show) far-reaching decisions, to be sure — notably *Wednesbury*[5] and *Northumberland Compensation Appea*

1 *de Smith's Judicial Review of Administrative Action* (4th ed) at v.
2 (1892) at 38.
3 See, *Not Without Prejudice* (1935) at 96.
4 (1995) 184 CLR 163.
5 *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

Tribunal[6] — but the accepted doctrine remained such that Lord Hewart could have just as happily railed against the state of the law in 1959 as he had in 1935. It was for that reason that de Smith felt that he could confidently assert, as he did in the first edition, that "[j]udicial self-restraint has won a decisive victory over judicial activism in a field where the contest might well have been an even one".[7]

Consider, though, what was to come within the next few years. Here in Australia, Sir Own Dixon — the steadfast proponent of "strict legalism" — was to retire. In his place as Chief Justice was appointed Sir Garfield Barwick — a conservative, but (to use his own title[8]) a *radical* conservative; an unrepentant judicial activist. Similarly, in England, Lord Denning was to be appointed Master of the Rolls in 1962. In the House of Lords, the old guard — characterised by Lord Devlin — was passing. In Devlin's stead as the *de facto* chair of the Appellate Committee came Lord Reid, a Scottish judge without the same deferential instinct towards precedent as an English judge. Consider, too, the line of decisions that was to follow: *Ridge v Baldwin*,[9] *Padfield v Minister of Agriculture*,[10] *Anisminic*,[11] and *Conway v Rimmer*[12] were all decided within a few years of one another, and all within a decade of the first edition of *de Smith*.

In his succeeding editions, de Smith duly (and faithfully) reported all of these developments. Yet he seemed increasingly uncomfortable with them as time went on. After the first edition, he was forced to temper his claim that judicial self-restraint had won a "decisive victory" over judicial activism, but in the second and third editions, he sought, with perhaps a little too much stridency to be completely convincing, to offer examples of judicial deference in action. This theme was carried on by Professor Evans in the fourth edition. Without meaning to appear unkind, de Smith really did not seem to appreciate the magnitude of the social, political and legal upheavals going on around him. When read in context, his confident assertion in 1959 about the decisive victory of judicial deference seems as hollow, and as ill-timed, as Dicey's claim in the late nineteenth century that such a thing as administrative law did not exist in England. In his effort to distance himself from Dicey, de Smith in an odd way came to resemble him.

It is only with this edition that one gets the impression that *de Smith* has come not just to accept, but to *embrace* the new administrative law. Rather than holding on to the old and cherished (at least by some) Harold Laski/Ivor Jennings/LSE view of the general inappropriateness of judicial review, the new authors accept that a "sea-change"[13] has occurred in the English mindset towards administrative law. In this attitudinal respect, the book does not resemble its predecessors much at all. As the authors themselves admit, de Smith's views have been "frankly rearranged".[14]

---

6 *R v Northumberland Compensation Appeal Tribunal, ex parte Shaw* [1952] 1 KB 338.
7 1st ed at 18.
8 Sir Garfield's autobiography was entitled *A Radical Tory: Garfield Barwick's Reflections and Recollections* (1995).
9 [1964] AC 40.
10 [1968] AC 997.
11 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.
12 [1968] AC 910.
13 5th ed at 8.
14 Ibid at vii.

One ought not, however, to think that the new authors have thrown the baby out with the bathwater. Another of the keys to *de Smith's* enduring popularity has been its comprehensiveness at covering the existing case law, both British and Commonwealth. Indeed, in the preface to the first edition, de Smith noted that he had cited nearly 1,800 cases![15] In the second, he noted that the number of cases cited had "passed the 2,000 mark".[16] It was because of this thoroughness that *de Smith* came to be so useful to bench and bar, in addition to the academy. Happily for all of its users, the new authors have remained faithful to Professor de Smith's avowed goal of comprehensiveness, and his faithfulness in the reporting of cases.[17] They have also done well to maintain the elegance of style and witty turn of phrase that was always so much a hallmark of de Smith's writing.

What the new authors *have* done is adapt de Smith's literary and analytical methods to the changed social and legal environment. Accordingly, much of the discussion of what we in Australia would refer to as the "grounds of review" is now grouped around the characterisation of judicial review given by Lord Diplock in the *GCHQ* case.[18] Similarly, the law of standing is given expanded coverage, and is featured early on in the book,[19] rather than towards the end, and as part of a chapter on prerogative remedies as was the case in previous editions. Another significant expansion in the fifth edition is in the coverage of unreasonableness. In the previous editions, *Wednesbury* and its progeny were considered in a chapter dealing more broadly with the review of discretionary decisions. In this edition, the idea of "unreasonableness" as forming a basis for judicial intervention in the business of the executive, including the currently trendy idea of proportionality, is also given its own chapter.[20] This is, of course, in keeping with the "sea change" in the way in which we think about judicial review.

As is necessary in any English book on administrative law today, there is also a part — Part V — on European Community Law. This is all new, and reflects the fundamental changes that are taking place in English public law as a result of the surrender of legislative sovereignty by Westminster to Brussels. Another completely new part is Part VI which, as has been mentioned, contains a series of "field-specific" chapters. As the new authors describe their aim in this respect:

> Although there are general principles of judicial review applicable to the performance of all public functions, it was felt that the general principles are sharpened, highlighted and better understood when viewed in the context of particular areas of public administration.[21]

The new chapters include ones on planning law, revenue law, prison discipline, migration law, housing law, social security law and one which, following the decision of the High Court in *Teoh*,[22] will be of special interest to Australian readers, treaties.

---

15 1st ed at vi.

16 2nd ed at v.

17 They have been assisted in this edition by a series of "foreign correspondents" (as the authors describe them) from the Commonwealth, Ireland, the United States and Europe The Australian correspondent was Professor Cheryl Saunders.

18 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

19 Chapter 2.

20 Chapter 13.

21 At xi.

22 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 69 ALJR 423.

M Aronson and B Dyer, *Judicial Review of Administrative Action*

Strictly speaking, *Aronson and Dyer* is not a subsequent edition. Nevertheless — and doubtless to the irritation of the authors — it will be viewed by most either as a second edition,[23] or a third.[24] In point of fact, however, almost the whole book is either new, or a complete re-write of what came before. Unlike *de Smith*, though, whose ambit is now much broader than before, this book covers rather less. *Aronson and Franklin* had a chapter on Freedom of Information, but *Aronson and Dyer* is a book about judicial review *stricto sensu*. But what it does cover is covered in much more detail.

At first glance, *Aronson and Dyer* has something of an "old-fashioned" look about it. Now that is not necessarily a bad thing, but such an assessment of the work is far too superficial to be accurate. For one thing, the book begins where any Australian analysis ought to begin, but not nearly enough do — namely with the federal question. Unlike their counterparts in unitary jurisdictions like England or New Zealand, Australian or Canadian judges must first answer a question about their own *vires*, long before getting to any question of the jurisdiction of the impugned administrative decision-maker. And in *Aronson and Dyer*, the story begins, appropriately enough, with the State courts and their inherent jurisdiction. There is a tendency today to ignore administrative law at the State level. This book will serve as a useful reminder of the nature of the division of powers in the Australian constitutional structure.

The book contains chapters with familiar titles like "Error of Law" (Chapter 4), "Error of Fact" (Chapter 5) and "Standing to Sue" (Chapter 12), but it also contains two whose titles will ring unfamiliar: "The Irrationality Grounds of Review" (Chapter 6) and "Illegal Outcomes and Acting Without Power" (Chapter 7). It is interesting that in the former, which basically deals with the grounds of review set out under s 5(2) of the Administrative Decisions (Judicial Review) Act 1977 (Cth) (AD(JR) Act), Aronson and Dyer have chosen to use Lord Diplock's description of the basis of reviewability, rather than the more common "improper exercise of power" that is referred to in s 5(2). But perhaps that was part of their scheme — to reinforce the notion that this is not a book about the AD(JR) Act.

Like the authors of *de Smith*, Aronson and Dyer commend themselves to the practising lawyer and sitting judge through their comprehensiveness of coverage. But they also have great appeal to the academic theoretician and the law student. Chapter 1, for instance, must rank as one of the very best brief essays ever written on the nature of administrative law in Australia. So, too, Chapters 8–10, dealing with natural justice, display a thoughtfulness in analysis which one wishes was more common in academic writing. One other feature of the book that I particularly liked is its coverage of remedies. There are five chapters on judicial remedies (Chapters 13–17), and the authors have given all the prerogative writs and equitable remedies a thorough — and modern — coverage. In a similar vein, *locus standi* (Chapter 12) is covered in a principled, yet contextual way.

Aronson and Dyer also does a very good job at discussing the wrinkle that was thrown into Australian administrative law last year by the High Court in *Craig v South Australia*.[25] This decision remains one of the most perplexing of the High Court's recent holdings in the public law field. As the authors note, the High Court seems to be at the

23 To M Aronson and N Franklin, *Review of Administrative Action* (1987).
24 To H Whitmore and M Aronson, *Review of Administrative Action* (1978).
25 (1995) 184 CLR 163.

point of abolishing the concept of non-jurisdictional errors of law by tribunals, while affirming the continuance of a distinction between jurisdictional and non-jurisdictional errors of law by inferior courts. The problem is that we are not told exactly on what basis the distinction between tribunals and inferior courts is drawn.[26] One is left with the impression that the High Court has drawn a distinction without a difference.

One thing worthy of special mention about *Aronson and Dyer* is the quality of its writing. In a review of *Aronson and Franklin*, Greg Craven said that one of its best features was that it was lucidly written.[27] This statement is as true now as it was then. Like Professor de Smith and his successors, one of the strongest traits of Professor Aronson and his collaborators has been facility with the English language.

Aronson and Dyer have a way of explaining things which is at once funny and profound. In the course of their discussion of the implied limitation that administrative law places on all executive power, the authors write: "Parliament might appear to have granted an unfettered power to an official, but the very thought of it will induce a rash in a traditional administrative lawyer".[28] And in discussing the law of standing, they say: "For a topic which has generated so much critical attention from the commentators and law reform agencies, it is remarkable how rarely it presents the court with problems".[29] In short, everyone with an even basic familiarity with the principles of Australian public law will find *Aronson and Dyer* accessible.

The study of administrative law in Australia has come a very long way in a comparatively short time. The first Australian book on the subject[30] was published less than 50 years ago. It was written by a continentally-trained, German-Jewish refugee, who not long afterwards left the country, and it ran to just 103 pages in length. Now, we have a wealth of fine, Australian-written scholarly treatises, of which *Aronson and Dyer* — at just under a thousand pages! — is the most recent contribution. At the same time, we who study in the field can still draw upon work from the rest of the common law world — which now includes an up-to-date edition of that modern classic, *de Smith*. A lucky country, indeed.

26 Ibid at 176-77.
27 (1987) 16 *MULR* 695.
28 At 92.
29 At 660.
30 W Friedmann, *Principles of Australian Administrative Law* (1950).