

Charter, make it regrettably clear that the law of neutrality is not visibly more obsolete in the mid-twentieth century than it was under the ill-fated League of Nations".

As was to be expected, this third edition of Alfred Verdross' *Voelkerrecht* will continue to rank with the capital treatises on international law. This code-like text-book, characterised as it is by great economy and precision, must inevitably contain assertions which require qualification, and exclude many points of view necessary for a rounded picture. But its earnestness and integrity well deserve the tribute which Sir Arnold McNair once paid to the late Professor C. C. Hyde.<sup>19</sup> that "In writing he felt that he was on oath."

S. GLICHITCH\*

*Executive Discretion and Judicial Control: An Aspect of the Conseil d'Etat*, by C. J. Hamson, Fellow of Trinity College, Professor of Comparative Law in the University of Cambridge, of Gray's Inn, Barrister-at-Law, *Chevalier de la Legion d'Honneur*. London, Stevens & Sons Ltd. Sydney, Law Book Co. of Australasia Pty. Ltd., 1954. x and 222 pp. (17/9 in Australia).

*The Judicial Control of Public Authorities in England and in Italy*, by Serio Galeotti, D. Phil. (Oxon.), Dr. Jur. (Milan), of Lincoln College, Oxford, Professor "Incaricato" of Comparative Constitutional Law in the Università Cattolica del Sacro Cuore of Milan, Professor of Constitutional Law in the University of Urbino. London, Stevens & Sons Ltd. Sydney, Law Book Company of Australasia Pty. Ltd., 1954. xi and 562 pp. (£1/10/- in Australia).

It is only of comparatively recent years that, for English lawyers, the study of Continental administrative law and institutions has emerged from the shadow cast over it by Dicey in his *Law of the Constitution*.<sup>1</sup> To the steadily growing literature on the subject, Professor Hamson's book, and Professor Galeotti's, are welcome additions.

Professor Hamson's book, which embodies the Hamlyn lectures for 1954, sets out to bring to the English reader, in a short compass, a knowledge of the structure of the French *Conseil d'Etat*, of how it functions and of the rules which it applies in the conduct of its judicial business—the *contentieux administratif*. To one who has not studied the original French materials, the book appears to be admirably successful in carrying out this purpose and it leaves the common lawyer with the wry reflection that, whatever else the common law may be, it certainly is not systematic.

While the book is concerned almost exclusively with the *contentieux administratif*, Professor Hamson makes clear what Dicey failed to make clear<sup>2</sup>—

<sup>19</sup> See (1951) 28 *B.Y.B. Int. L.* 347.

\* *Docteur en Droit* (University of Paris), *Diplômé de l'Institut des Hautes Etudes Internationales* and *Ecole des Sciences Politiques* (Paris). Research Assistant, Department of International Law, University of Sydney.

<sup>1</sup> 1 ed. 1885—9 ed. 1939.

<sup>2</sup> While he concentrated almost exclusively on the *contentieux administratif*, Dicey (see *The Law of the Constitution* (9 ed. 1939), 352 ff.) recognised the intimate relation between the *Conseil d'Etat* and the Executive only as a basis for criticism, and he concluded that the French system would be satisfactory only when the *Conseil* became completely "judicialised", in the sense at least of becoming entirely separated from and independent of the Executive.

that is, that this judicial function is only *one* of the functions of the *Conseil d'Etat*:<sup>3</sup> "indeed possibly its principal business is to *advise* before the event rather than to *judge* after" and, far from being an organ controlling the Executive from without, it is itself an integral part of the administrative structure. In this fact, according to Professor Hamson, lies the strength of the *Conseil*, for "whatever displeasure may internally be caused by a decision of the *Section du Contentieux*<sup>4</sup> externally at least, and especially in relation to the" (relevant) "Minister (which is the capital relation), the administrative *Sections* accept that decision as the authentic voice of the *Conseil d'Etat*, that is to say, as theirs also."<sup>5</sup> It is the setting up of stresses *within* the Executive which has led to the success of the French system, not the imposition of a control operating *ab extra*.<sup>6</sup> Internal self-discipline on the part of the Executive in British Commonwealth countries would go a long way towards solving the problems posed by administrative law under modern conditions and, indeed, there are already signs of development along these lines in England.<sup>7</sup> However, what has happened in England has, so far, been haphazard and without direction and if Professor Hamson's book aids in making clear that systematic control of the administration is feasible it will have served a most useful purpose.

Apart from this general, and most important, purpose, the book examines in some detail the grounds upon which the *Conseil d'Etat* will review administrative action, and it is here that it is open to criticism, not on its statement of the French rules but on the manner in which comparison with the English rules is made. On the whole, Professor Hamson presupposes in the reader a detailed knowledge of the relevant English law and therefore tends to state the French position in some detail while merely referring to the English rule with which comparison is to be made. In many respects, his book is first-rate evidence of the dangers of such a technique, for the common-law process is such that, more often than not, the bald statement of a supposed rule leads to failure to understand both its scope and its basis. In the present instance, this itself produces the further result that comparison with French rules is more unflattering to the common law than the facts warrant.

The misleading and unflattering nature of this method of comparison becomes apparent very early in the book. Thus Professor Hamson says<sup>8</sup> of the Executive: "In England discretionary power has been given to it in such terms (as interpreted by the courts) that the control exercisable by the courts has often, if not normally, become of a formal or merely legalistic sort."

Throughout the consideration of the detailed grounds of judicial review, Professor Hamson continually emphasises this view that judicial review in England is merely "formal" and technical in its nature<sup>9</sup> but, with respect, this ignores the tendency of the common law, apparent in many branches of the law and especially in "public" law, to hide behind a facade of technicality action which is in truth an attempt to satisfy the demands of substantial justice. By failing, in general, to look behind that facade, Professor Hamson understates the depth to which judicial control may be pushed in England and leaves the reader with, it is felt, a false notion of the superiority of the French system.

<sup>3</sup> At 7, 45 ff.

<sup>4</sup> The *Conseil d'Etat* is divided into five "*Sections*", four of which have advisory functions. It is the fifth *Section*, the "*Section du Contentieux*", which conducts the "judicial" business. This *Section* is itself divided into nine "*sous-sections*".

<sup>5</sup> At 65 ff., 68. See also 95 ff.

<sup>6</sup> At 213-215. Approaching the problem entirely from an analysis of British materials, the reviewer has, elsewhere in this journal, suggested that a similar approach is needed in British administrative law—see *supra*, 39 ff.

<sup>7</sup> Notably in the administration of such Acts as the Town and Country Planning Act, 1947, the National Insurance Act, 1946, and the National Insurance (Industrial Injuries) Act, 1946. Elsewhere in this journal, the reviewer has discussed these developments—see *supra*, 23 ff.

<sup>8</sup> At 10.

<sup>9</sup> See, e.g., at 18, 52, 164, 182. Moreover, reference to specific examples in the text of the book does little to convey the general attitude of mind induced by the proposition that the English rules relate merely to "formality" and "technicality".

To take but one example from the many arising out of the book, judicial review in both England and France is ultimately based on the doctrine of *ultra vires*,<sup>10</sup> however far that doctrine may be in fact pushed into unreality. One aspect of that doctrine, which has been employed with great effect by the *Conseil d'Etat*, is *détournement de pouvoir*, which operates, according to Professor Hamson,<sup>11</sup>

by reading into a statute, framed in general terms and apparently giving an unlimited discretion, a special and limited purpose (*but*) and quashing as a *détournement de pouvoir* the use of the power or discretion not clearly directed to the attainment of that purpose so read into the statute by the *Conseil d'Etat*.

While recognising that this approach has in England a counterpart in *Roberts v. Hopwood*,<sup>12</sup> the author feels that that case "is regarded as singular".<sup>13</sup> In truth the position is otherwise; not only has *Roberts v. Hopwood*<sup>14</sup> been followed by the Court of Appeal since Professor Hamson's book was published,<sup>15</sup> but also there is a multiplicity of earlier cases<sup>16</sup> in which the English courts have forbidden executive officers to take into account "extraneous considerations" and have pushed this doctrine so far that they have accomplished precisely the same theoretical result as the *Conseil d'Etat*. Admittedly, the English courts do not seem prepared in this manner to review exercises of administrative discretions in as great detail as the *Conseil d'Etat*, but equally it seems clear that they *could* do so. Self-denial does not necessarily amount to abdication, although Professor Hamson tends to assume that it does.

One of the most interesting grounds of *ultra vires* or *exces de pouvoir* is termed "*violation de la loi*"<sup>17</sup> and under it the *Conseil d'Etat*, in applying what it calls the *principes généraux du droit*, "imposes upon the administration conformity to a standard of conduct not enacted as obligatory by any legislative authority."<sup>18</sup> In determining those standards, the *Conseil* will "look to any source which it considers relevant"<sup>19</sup> and under this heading it has, for example, imposed upon tribunals the obligation to adopt a *procédure contradictoire*<sup>20</sup> and a duty to state their reasons,<sup>21</sup> which must be "honest and lawful".<sup>22</sup> Even where the *Conseil* holds that an administrative body which is not a tribunal need not *state* its reasons, it will still enter upon an independent investigation of the reasons which in fact prompted the taking of action and will annul a decision if it is in *violation de la loi* in the present sense.<sup>23</sup>

Without doubt, this is a ground upon which administrative action may be subjected to penetrating review, but is it fair to assume, as Professor Hamson seems to assume,<sup>24</sup> that similar review is *not possible* in England? Here again, the English case law opens up at least the *possibility* of a judicial review as detailed as that which exists in France—"bad faith", "unreasonableness", consideration of "extraneous circumstances", and so on, have constantly been seized upon as indications that administrative action is *ultra vires* and, though the courts often appear reluctant to push review too far, this is merely self-denial and not legal impossibility. As pointed out by Professor Hamson, the application of the doctrine of *ultra vires* in this extended form is basically a matter of interpretation, of implying limitations in statutes which contain no express limitations. This being so, in England as in France the extent of review in any particular instance will depend on the attitude adopted by the reviewing body to the particular statute. In this matter, there would appear to be no criterion for differentiating between the *power* of the courts in England and

<sup>10</sup> See, e.g., B. Schwartz, *French Administrative Law and the Common-Law World* (1954), 200.

<sup>11</sup> At 167.

<sup>12</sup> (1925) A.C. 578.

<sup>13</sup> At 166.

<sup>14</sup> (1925) A.C. 578.

<sup>15</sup> *Prescott v. Birmingham Corporation* (1954) 3 W.L.R. 990.

<sup>16</sup> The present writer has discussed these cases elsewhere in this journal—see *supra*, 2 ff.

<sup>17</sup> At 164 ff.

<sup>18</sup> At 170.

<sup>19</sup> *Ibid.*

<sup>20</sup> At 176.

<sup>21</sup> At 180. This would more properly be called a *vice de forme*.

<sup>22</sup> At 181.

<sup>23</sup> At 180.

<sup>24</sup> See esp. at 182.

the *power* of the *Conseil d'Etat*, though purely as a matter of fact it would appear clear that, of the two institutions, the *Conseil d'Etat* is the more *willing*.

It is this *willingness* of the *Conseil d'Etat* which is made abundantly clear by Professor Hamson's book. The English law is more tentative in its approach, more hesitant in its statement of principles, more inclined to appear to look at form when a decision really turns on substance. This typical common-law approach, coupled with the diversity of the procedures for challenging administrative acts, leads inevitably to difficulty in systematic exposition and development. By contrast, the French system is a system, with the consequence that the central reviewing body feels itself under a duty to produce systematic rules. It has fulfilled this duty with notable success and it is interesting to see that it has done so through the development of a system of "case law" closely similar to, though perhaps not so rigid as, the English doctrine of precedent, and derives little assistance, if any, from the Code, which was promulgated before the modern problems of administrative law had arisen.<sup>25</sup> Furthermore, the proposition that Professor Hamson's approach does not indicate the full extent of judicial control possible in the common law is not intended to deny the existence in France of methods and grounds of judicial review which could profitably be imitated or adapted for British purposes.

First and foremost, the *Conseil d'Etat* constitutes the apex of a centralised system of control of the administration and at the same time is itself part of that administration. Therefore, not only does it, through this position, secure coherence and consistency in the rules governing the conduct of administrative officers, but also, being a mixed body of men who are aware of *all* the problems of administration and government, it lays down those rules only after informed discussion and the reconciliation of possibly divergent views. Moreover, the process by which it investigates matters brought before it shows marked superiority over English litigation. The *Conseil* is not restricted to a consideration of matters put before it by litigants, but may and does take the initiative in instituting and carrying out inquiries—the process called "*l'instruction*"<sup>26</sup> is, as Professor Hamson points out, truly "inquisitorial" in its nature, and the *Conseil* does not rest until it feels that it is *fully* informed about any particular matter before it. This inquisitorial procedure is particularly forceful when combined with the French citizen's "unparalleled ability to call in question the official decision"<sup>27</sup> for, in sharp contrast with the common-law system, the French citizen is under no necessity to put the official action against which he seeks *recours* into a particular legal category in order to claim that a particular remedy is available. The *Conseil* is competent to review *all* administrative action, whether it be classified as "judicial", "quasi-judicial" or purely "administrative".<sup>28</sup>

These seem to be the main advantages which the French *system* has over the common-law "system"<sup>29</sup> and, on the whole, they seem to add up to the proposition that in France there is in truth a *system* for the review of administrative decisions, while in England there is not.

The same comment may be made in relation to the Italian system of review of administrative action, though that system, while *outwardly* similar, differs fundamentally from the French structure. Professor Galeotti, in his *The Judicial*

<sup>25</sup> At 54, 128; see also Schwartz, *op. cit.*, 2 ff.

<sup>26</sup> See 31 ff.

<sup>27</sup> At 73.

<sup>28</sup> At 151-2; 175-6. But note that these distinctions have their relevance in determining the extent of the duties as to conduct of their business which the *Conseil's* law imposes on administrative officers—see at 176 ff.

<sup>29</sup> There are, of course, other specific matters in which it may be considered that French law has advantages over English law—e.g., in relation to the rules requiring the giving of reasons for administrative decisions (179 ff.) and the ability to require the Executive to produce documents and to draw unfavourable inferences if production is withheld (e.g., 31, 36-8). However, though these matters are of great importance, it is felt that they are subsidiary to the main advantages stated above.

*Control of Public Authorities in England and Italy*, gives us a clear account<sup>30</sup> of a Continental system which approaches the relations between subject and government in a way which has no counterpart in either France or England. The book is valuable in many ways, and especially in the fact that it provides, for this reason, an account in the English language of a system which has found it possible to approach problems of administrative law on a new basis.

So far as concerns the organs of judicial control, Italy has a counterpart for each body in the French system—the *Consiglio di Stato* is the supreme administrative body and, as with the *Conseil d'Etat*, it has both administrative and judicial functions; there are also, as in France, the civil courts as a separate organisation. The vital difference in Italy lies in the manner of dividing business between the administrative courts on the one hand and the civil courts on the other. This division is accomplished by drawing a novel distinction between “rights” (*diritti*) and “legitimate interests” (*interessi legittimi*) not amounting to “rights”. Any action which affects the “rights” of a subject is cognisable by the civil courts, whether or not it is the action of an administrative officer; on the other hand, any action which affects merely a “legitimate interest” is the province of the administrative court. As in France, any doubt as to jurisdiction is settled by a conflicts tribunal, but while in France a separate body exists for this purpose (the *Tribunal des Conflits*), in Italy the doubt is referred to the highest civil court (the *Corte di Cassazione*) in full session.

The problems arising out of the distinction between “rights” and “interests” make it difficult to compare the Italian and the common law approaches for it is a distinction which is basic to Italian administrative law<sup>31</sup> and yet has no direct counterpart in England. If one may venture a criticism of a system which is largely *terra incognita* to the writer, the distinction, as a test of jurisdiction, would appear to be circuitous, for in the long run a “right” in this sense appears to be a relationship which Italian law says is to be protected in civil courts, while a mere “legitimate interest” appears to be what Italian law says inheres in the “public” rather than the individual citizen and is therefore to be protected by the administrative courts. This seems to be the result of Professor Galeotti’s summary of the matter:<sup>32</sup>

In the words of Professor Zanobini, the *right* (*diritto*) can be defined as “an interest, recognised by law as pertaining exclusively to the holder and as such protected in a direct and immediate manner,” whereas the *legitimate interest* (*interesse legittimo*) is defined as “an individual interest closely connected with a public interest and protected by law only through the legal protection of the latter.”

To say, however, that the test is circuitous does not do justice to the Italian system, for the policy behind the distinction between *diritti* and *interessi legittimi* is simply the policy, derived from the “separation of powers”, that “No authority” (*scil. civil authority*) “must meddle in the acts which public authorities, within their powers, issue in order to promote and protect public private welfare . . .”<sup>33</sup> The Italian system, therefore, employs the distinction between *diritti* and *interessi legittimi* to permit review by a special tribunal of administrative acts which are admitted to be within power. In contrast, the common law, since it traditionally rejects the notion of intervention on the merits of administrative actions, has been able to review such actions only by holding them to be *ultra vires*. If, then, the Italian system has divided jurisdiction between civil and administrative tribunals by adopting an artificial distinction, the common law has adopted an equally artificial extension of the doctrine of *ultra vires* to augment the jurisdiction of the ordinary courts.

<sup>30</sup> An excellent outline is given at 4 ff., and this is amplified at the relevant points throughout the book.

<sup>31</sup> See, e.g., at 13.

<sup>32</sup> At 16.

<sup>33</sup> The Report on the Bill from the Parliamentary Committee of the Chamber of Deputies, quoted by Professor Galeotti at 14.

Whatever may be the true position as to the Italian distinction, it clearly has no direct counterpart in English law, so that the method of dividing jurisdiction in Italy has no direct relevance as a guide to what might be done in common-law countries. This does not mean, however, that the Italian structure is of no interest to the English lawyer, for Professor Galeotti gives us a clear and concise picture of the successful working of a system in which a separate administrative tribunal has been set up alongside the ordinary civil courts, with the ultimate decision in matters of jurisdiction left to the supreme civil court. The setting up of such a court or tribunal in England has been much discussed as at least a partial remedy for the problems of English administrative law, so that the functioning of the Italian *Consiglio di Stato* cannot fail to be of great interest to the English lawyer.

It is in the detailed examination of the rules formulated by the *Consiglio di Stato* that Professor Galeotti's book is of particular interest. In this task, Professor Galeotti's approach is very different from that of Professor Hamson. While both books are "comparative", Professor Galeotti does not fall into the trap of assuming a knowledge of either the English or the Italian rules—both are set out in considerable detail, so that comparisons may be made step by step. Indeed, Professor Galeotti is conspicuously successful in his analysis of the English rules—Professor F. H. Lawson, in his introduction to the book,<sup>34</sup> did not overstate the case when he said: "Dr. Galeotti knows his English Law and his exposition of it not only is correct in detail but also shows a profound sense of the way in which it works."

This is especially true of Professor Galeotti's treatment of the availability of declaratory judgments and the prerogative writs<sup>35</sup> and his acute analysis of the applicability of the so-called "rules of natural justice".<sup>36</sup> On these, and on allied matters, Professor Galeotti's book will be a valuable addition to the literature on English administrative law, quite apart from its worth as a comparative study. Furthermore, the care and detail with which Italian materials are compared with English materials will be of great interest both to the comparative lawyer and to those who seek to propose reforms in English law. This detailed comparison, it may be added, does not place the common law in so unfavourable a light as would Professor Hamson's comparison with French law and it is, perhaps, not presumptuous to assume that, had Professor Hamson's comparison been more detailed, it would be seen that, *vis a vis* French law, the common law is not really in such bad case as Professor Hamson might lead us to believe. Indeed, this may as Professor Galeotti puts it,<sup>37</sup> "be quoted as a good illustration of the statement, so familiar to comparative lawyers, that the different systems, in spite of their external diversities, are, in their bones, all very much alike."

If one may attempt to draw a general conclusion from the two books, English administrative lawyers have much to learn from the study of the systematisation in France and Italy of the review of administrative actions but, apart from lack of system, the citizen in England is perhaps not in a situation so very different from that of the French or Italian citizen. The common law is, perhaps, more flexible and adaptable than is realised even by most common lawyers and, in its present state of rapid development, may well have much need of studies such as those at present under review.

In conclusion, one warning note should be sounded, and it arises out of a particularly acute observation of Professor Galeotti's. He notes<sup>38</sup> that the principle *audi alteram partem* is

something with which the English administrative process is imbued and

---

<sup>34</sup> At x.

<sup>35</sup> At 63 ff.

<sup>36</sup> At 163 ff.

<sup>37</sup> At 181.

<sup>38</sup> At 183.

together with the widely applied practice of "public enquiries" it shows a peculiar approach of English law towards the exercise of public functions. The principle is a method of making a decision: by calling the relevant sides which might be interested before the public authority, the English system shows its favour for an exercise of power which is not remote, not kept apart from the subjects affected; it is the spirit of self-government which pervades most parts of administrative law.

In contrast with this, Professor Galeotti says<sup>39</sup> that the Italian approach betrays the autocratic origin of its Executive. . . . If it may be conceded that judicial control has in Italy reached a more systematic and riper organisation . . . one must acknowledge on the other hand that the administrative process takes place in Italy in a more secret and bureaucratic atmosphere. . . . If it is true that the Italian citizen, as opposed to the English, is afforded wider opportunities of attacking an administrative decision after it has been taken, it is equally true that he has almost no chance of influence in the process of its making.

In the reforms which, it is hoped, will take place in English administrative law, it would be tragic if this spirit in administration were lost.

D. G. BENJAFIELD\*

*Cases on Torts*, selected and edited by W. L. Morison, D. Phil., B.A., LL.B., Barrister-at-Law, Associate Professor of Law in the University of Sydney. Sydney, Law Book Co. of Australasia Pty. Ltd. 1955. xviii and 811 pp. (£4/15/- in Australia.)

*Cases on the Law of Torts* by Cecil A. Wright, Q.C., Dean of the School of Law, University of Toronto. Butterworth & Co. (Canada) Ltd., 1954. xix and 905 pp. (£3/8/6 in Australia.)

These two casebooks, despite similarity of title, format and size, are very different kettles of fish. Both are produced by tort teachers of considerable experience and outstanding merit in their field; the former is published at the request of the Australian Universities Law Schools Association, while the latter represents in permanent form previously mimeographed material which for some time past has been widely used in Canadian law schools with notable success.

Apart from these superficial links, however, there is remarkably little ground between them; and the justification for bracketing them together in this context is primarily to focus attention on the divergence of teaching techniques between the North American casebook method and the traditional pattern of instruction followed in most British and Australian law schools. This wider perspective be-

<sup>39</sup> At 184.

\* D. Phil. (Oxon.), LL.B. (Syd.), Associate Professor of Constitutional Law, University of Sydney.

<sup>1</sup> The fostering of the production of casebooks in Australia has been the policy of the Australian Law Schools Association since its inaugural meeting in 1946, when Professor Sawyer was invited to prepare his *Cases on Constitutional Law*. In 1950 a resolution was passed that steps should be taken to assist Mr. Justice Kriewaldt in the preparation of a book of materials on Real Property, which had been hampered by lack of time, a project later taken over by Professor Harrison at the Association's request. In 1951 a resolution was passed that Dr. Morison should prepare the book reviewed above, and at the same meeting it was resolved that "this meeting stresses the urgency of the task of preparing casebooks on the principal law subjects." The same resolution laid down procedure whereby general agreement among the Law Schools on the contents of casebooks published might be ensured before publication. Conference discussions have stressed the dual value of teaching instruments which provide much-needed materials in handy form for the use of students in traditional courses, while at the same time offering opportunities for initial experimentation in the direction of adaptation of American case-method teaching to local conditions.