ADMINISTRATIVE LAW OF MALAYSIA AND SINGAPORE. By M.P. Jain. 1980. Malayan Law Journal (Pvt.) Ltd., Singapore. Pp. xxxviii+473. Price $ 45.

I

THERE HAS been an age old conflict between government and individual liberty. In order to protect an individual from the abuse of governmental authority various checks and controls have been devised from time to time. In the common law world individuals have always looked upon courts as impartial arbiters of conflicts which arise between government and individuals. Administrative law of Malaysia or India, by virtue of the common law tradition, primarily concerns itself with powers of administration and judicial remedies available to aggrieved individuals whose rights have been infringed. Jain's description of the scope, content and ambit of administrative law, though comprehensive and unexceptional is in fact only a theoretical formulation. According to him :

> Administrative Law deals with the structure, powers and functions of the organs of administration; the limits of their powers; the methods and procedures followed by them in exercising their power and functions; the methods by which their powers are controlled including the legal remedies available to a person against them when his rights are infringed by their operation. . . .[1]

The first limb of the definition concerning structure, powers and functions of the organs of administration of Malaysia or Singapore has not been discussed by the author. The only reason for the omission is that this is not usually done in the textbooks of administrative law. This branch of law presupposes a thorough knowledge of the principles of constitutional law and in that sense, it still keeps the tradition of being an appendix or addendum to constitutional law.

Be that as it may, the quest of a lawyer trained in the common law tradition to subject administration to judicial controls has relegated to the background, consideration of checks and controls other than judicial controls in the study of administrative law. Modern administration has stubbornly resisted judicial interference on several plausible and convincing grounds. First, "while state activism has meant increased work for all...organs...yet, it is mainly at the level of executive-cum-administrative organ that by far the largest extension in depth and range of functions and powers has taken place".[2] Modern administration is saddled with

1. M.P. Jain, *Administrative Law of Malaysia and Singapore* 13 (1980).
2. *Id.* at 4.

responsibilities of regulating private enterprise, providing services of various kinds, and responding to emergent situations at short notice. It has no time for prolonged procedures which are concomitants of judicial process or patience for its refinements or subtle distinctions. In a result-oriented and time-bound dispensation, regard for rights of individuals receives a low priority. Second, social justice has been proclaimed to be the ultimate aim of and justification for the modern omnipotent state. It has been asserted that it could be ushered in by giving "fundamental importance to the rights of the members of the community as against the rights of the few individuals".[3] If granting fundamental importance means giving precedence in priority, social justice could well be achieved without regard to individual liberties. Whether injustices could be removed by suppression or denial of individual freedoms or by nourishing or supporting them is a highly debatable issue. Administrative convenience, however, has largely tilted in favour of exclusion of challenges of administrative action through individuals in the courts. Third, there has been a realization of the limitations of judicial process. Judges do not have access to materials which enable administration to weigh competing social and individual interests. Judicial decorum demands that judges remain aloof and unconcerned with policy controversies. The procedures of adjudicatory system are long drawn, time consuming, expensive and highly technical. These may be ideally suited to protect property rights, but are inept for contesting claims arising out of modern social legislation. Last, but not the least, an important ground for exclusion of judicial scrutiny, has been development of alternative and more efficacious means of control of administrative action. The institution of *ombudsman* in the Scandinavian countries has found favour in a number of common law countries, although it is not understood why controls through an agency like *Conseil d'Etat* has not been tried out to supplement judicial controls.

In any case, the onslaught of administration on the traditional preserve of judiciary has not been without results. There has been a silent transformation in the judicial approach in this area of public law. The emerging legal issues arising out of the attempt to strike a balance between individual liberty and public or social interest have not been finally resolved. However, the realization of the contestants in the struggle that all is not well raises the hope that in the not too distant future ways and means will be found to achieve the desired and consistent with democratic traditions. The work of Jain on *Administrative Law of Malaysia and Singapore* gives a graphic exposition of these emerging legal issues.

II

M.P. Jain is a well known scholar of administrative law. His earlier work on *Principles of Administrative Law* in collaboration with S.N. Jain

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3. Bhagwati J. in *Minerva Mills Ltd.* v. *Union of India,* A.I.R. 1980 S.C. 1853.

has been well received by the academic world. The present work though primarily meant to "bring together the court pronouncements in these countries in the area of administrative law and extract relevant principles therefrom"[4] contains several features which are of special relevance to students of this branch of law. Having articulated the aim of administrative law as "to ensure that government acts according to law on proper legal principles and according to rules of reason and justice, and that adequate control mechanism exists to check administrative abuses without at the same time unduly hampering the administration in efficient discharge of its functions"[5], Jain proceeds to give an exposition of the subject in an analytical manner. He has marshalled evidence from the case law of England, Australia and India to demonstrate that there is taking place a transformation in the judicial attitude in interpreting the fundamental norms of the subject. The discussion is lucid and coverage of topics comprehensive. A student of comparative administrative law must profit very much by its study. He will not only enrich his knowledge, but also gain new insights of the subject.

Administrative law whether of common law or continental countries has been influenced greatly by the doctrine of separation of powers. In the common law world an administrative lawyer does not look upon with favour the exercise of legislative or judicial authority by the administrators; in any event, taking into account the inevitability of the exercise of such authority by them, the task of administrative law has been to devise controls—predominantly judicial ones—with a view to giving priority to civil liberty as against administrative convenience. The constraints imposed upon the judiciary in the common law system make it to a great extent an ineffective instrument to control the discretionary powers of the administration. The French *droit administratif*, however, does not suffer from limitations of this kind, as is evident from the following ;

> On the one hand it maintains and supports administrative powers; on the other, it has developed a mechanism for protecting individual rights and civil liberties against possible attacks by public authorities. The *Conseil d'Etat* has been characterised as the 'bulwark of civil liberties' and also as the 'guardian of administrative morality.'[6]

That the French *droit administratif* affords protection to individual liberty without unduly hampering public interests does not mean that the system of controls devised in the common law countries could not be improved upon to promote administrative legality and justice. The

4. *Supra* note 1 at *v*.
5. *Id.* at 7.
6. *Id.* at 30.

modern trends perceived by Jain in this direction are of cardinal importance.

In the arena of subordinate legislation—delegated or subsidiary—the system of safeguards devised by common law countries with a tradition of rule of law has been succinctly discussed. There are differences of substance among the various systems. However, the author rightly comments :

> The power of delegated legislation may be so wide in range and scope as to be subject to no meaningful restriction . . . .[7]

To protect individual liberty, therefore, legislative controls over the delegate by requiring it to follow certain procedural norms and in certain cases to get the subordinate legislation brought to its notice or approved by the legislature assume importance. In a modern social welfare state judicial control can only supplement, but not supplant parliamentary control. Whether in Malaysia or India greater vigilance on the part of the legislature through its various instrumentalities such as the Committtee on Subordinate Legislation or other committees would be needed to ensure that the delegate remains within the bounds of authority entrusted to it for public good.

Of vital importance is the subject of administrative adjudication. Among lawyers trained in the common law tradition, an adversary atmosphere is a *sine quo non* for the protection of individual rights. It has been well remarked that safeguards of an adversary system are contained in the interstices of procedure developed in actual litigation in the last few centuries. Among the procedural safeguards are the rights to an impartial tribunal, to a hearing, of cross-examination, to have a counsel of one's choice and to a reasoned decision. There is no uniformity in the constitution or procedures of modern administrative tribunals. As a result of this, these tribunals are suspect. While the traditional adversary procedure was devised to safeguard individual liberty, the procedure of modern administrative tribunals is geared to ensure that public interest is not hampered by technicalities and delays. In the name of public interest ingenious devices have been devised to shut out the jurisdiction of the courts. Many statutory clauses specifically exclude judicial review or give a finality to administrative determinitions. For a long time courts hesitated to check administrative illegality on such flimsy grounds as lack of standing, nature of function of interest of the aggrieved (right or privilege), nature of function of the administrative authority (quasi-judicial or administrative), privilege of non-disclosure available to the

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7. *Id.* at 62.

government, state immunity in torts, *etc.* In recent years, however, there has been a significant change in the judicial outlook, and many fruitful areas of judicial intervention have been recognised. Jain has with great skill traced these developments in his chapters dealing with Natural Justice[7a] and Judicial Review of Administrative Action.[7b]

Ridge v. *Baldwin* has, no doubt, been a significant landmark in English admininstrative law. The principles laid down in this case have found a fertile soil in countries with a common law tradition. This decision has now been invoked to cover situations where natural justice was not called for some time earlier. The Federal Court of Malaysia too has observed :

> [T]he rule of natural justice . . . should apply to every case where an individual is adversely affected by an administrative action, no matter whether it is labelled 'judicial', 'quasi-judicial', or 'administrative' or whether or not the enabling statute makes provision for the hearing . . . .[8]

The Supreme Court has been expanding the concept of "quasi-judicial so as to bring in a miscellany of functions discharged by the administration within its compass" though the emerging trend is to insist "that authorities act fairly irrespective of the function being characterised as quasi-judicial".[9]

Likewise, it would not now be correct to assume that discretionary powers are completely outside the ambit of judicial review. In a recent case ths Supreme Court has in unequivocal terms held that there are limitations on the discretionary powers of the government imposed upon it by the law. It observed :

> Unlike a private individual, the state cannot act as it pleases in the matter of giving largess and it cannot choose to deal with any person it pleases in its absolute and unfettered discretion.[10]

All these developments reinforce the conclusions drawn by Jain regarding trends in the case law.

III

All said and done in favour of the recent trends which operate to expand the ambit of judicial review, taming the administration continues

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7a. *Id.*, chs. IX, X.

7b. *Id.*, ch. XIII.

8. *Ketua Pengarah Kastam* v. *Ho Kwan Seng*, (1977) 2 M.L.J. 152, quoted in Jain, *id.* at 198.

9. *Id.* at 194.

10. *Kasturi Lal & Lakshmi Reddy* v. *State of J. & K.*, A.I.R. 1980 S.C. 1992.

to be one of the knotty problems of administrative law today. The reasons for this are not far to seek. Judicial review of administrative action is confined mainly to errors of jurisdiction or mistakes apparent on face of the record. So long as an authority acts within its jurisdiction and broadly follows the procedure, the courts do not go into the merits of the decision. More importantly, "while the administration expands and gathers new powers and evolves new techniques to regulate individual feeedom, the tools at the disposal of the courts are still antiquated."[11] Unlike America, the courts in Malaysia and India have not made an extensive and liberal use of declaration and injunction to grant relief to aggrieved indivduals. Consequently, there has been a search for new methods of redress. One of these has been the Scandinavian *Ombudsman*. Jain has briefly dealt with this institution as it operates in New Zealand, England and Australia.[12] The Public Complaints Bureau of Malaysia can hardly cope with problems of adjustment of grievances of individuals against the state. The search for efficacious informal methods must continue. As observed by the Supreme Court :

> Even state is goal-oriented and claims to strive for securing the welfare of its people.... The distinction between different forms of government consists in that a real democracy will endevour to achieve its objectives through the discipline of fundamental rights . . . .[13]

Administrative law must, therefore, aim at devising institutions and procedures which strike a balance between fundamental freedoms and efficient discharge of governmental authority.

Jain's critical analysis of the administrative law of Malaysia and Singapore reveals that much has yet to be done to develop the law to the needs of the time in the common law world. The remedies of common law are still rudimentary and must be supplemented by remedies and control mechanisms developed in other systems "to check administrative abuses without at the same time unduly hampering the administration in efficient discharge of its functions".[14]

*D.N. Saraf**

11. *Supra* note 1 at 341.
12. See ch. XV.
13. *Minerva Mills, supra* note 3.
14. *Supra* note 1 at 7.

*LL. M. (Del.), M C.L., J. S.D. (Columbia), Professor and Head of the Deptt. of Law, University of Jammu, Jammu (Tawi).