

French Administrative Law and the Common-Law World. By Bernard Schwartz. New York: New York University Press, 1954. Pp. xxii, 367. \$7.50.

This book is the last of a trilogy. The first book, which appeared in England, explains American administrative law to English readers; the second explains the same topic to French readers; while now the third explains French administrative law to American readers.

Dean Russell D. Niles, in his Preface, introduces the reader to the method used by Professor Schwartz. He says: "The work itself seeks to explain the fundamentals of the *droit administratif* to an English-speaking audience. The author does so by use of the comparative method, rather than by the more usual type of straight exposition. Approach through the comparative method takes as its point of departure knowledge already possessed by the reader in the American System of law and proceeds thence to point out similarities and differences. In so far as possible, the American lawyer is thus enabled to learn French administrative law in terms of his own law and not as a distinct but unrelated system" (p. vii).

I have no right to raise any question as to whether Schwartz bases his comparison on American problems which are really of outstanding significance. He made a name for himself by publishing a number of excellent law review articles on the subject of American administrative law. And Chief Justice Arthur Vanderbilt, one of America's leading lawyers in the field, in his Introduction (pp. xi-xvii), makes it almost *res judicata* that, from the point of view of American administrative law, the right questions are being raised and answered in an outstanding way. He says: "Professor Schwartz paints his picture with a broad brush, making it possible for us to see the woods and not merely the trees. There is no evasion of difficult problems, no fuzziness of thinking, no vagueness in language as he probes the vital problems of administrative law in our complicated modern industrial era in three different administrative establishments [U.S.A., France and England]."

Therefore, there remains for this reviewer only one way to assess this book—to discuss the principal topic of the book, as defined in the heading of Chapter I ("A Common Lawyer Looks at the *Droit Administratif*"), from the point of view of the receiving end of this "Look." But having decided that this is the proper approach, I feel constrained to add that this Review might have found a much more competent reviewer than a lawyer first educated in the State of Baden, which developed an administrative law parallel to that of France, or even copied from the French example.

At the beginning, let me say that I support Professor Schwartz in the method applied by him. Indeed, comparative law is intelligible only if we use our own law as the basis for the solution of the questions to be examined. In very many cases we will find that other countries, on the basis of other philosophies or techniques, found other devices to reach the same results which we have attained. In other cases, we find differences in the result or a disregard of certain

problems. We must first modestly register our findings of such considerations and then we might decide to learn, positively or negatively, from our comparison. Indeed, it requires a lot of self-discipline to be satisfied with this method. It is much more exciting to use a Tacitus-deTocqueville method to describe to Americans the law of other countries as superb, hoping that they might adopt some of the other system, or to use the opposite method of horrifying the Americans, by showing them the terrible results to which the use of some foreign method may lead them. Just recently I had the occasion to learn that there is no chance for someone who suggests that a little bit of water ought to be put in the Tacitus-deTocqueville wine. When I did just that, I was unanimously voted down, and I left the meeting full of despair, almost convinced that I should forget comparative law.

While Professor Schwartz is not entirely free from overconfidence in his own law (especially in his references to English law), his basic method is good and opens a new gateway for studies in this field. I cannot think of any more important service to be performed in this respect.

Professor Schwartz has made the following basic findings during his eighteen months' visit to France: (1) The entire relationship between the French government and the French individual is governed by the rule of law. (2) The rule of law is being protected by the administrative tribunals, primarily the "*Conseil d'État*" (Council of State) and the "*conseils de préfecture*" (Prefecture Councils), which may either annul almost any decrees of an administrative agency on the ground of incompetence, abuse of power, violation of law in substance or procedure (*contentieux de l'annulation*) or impose an obligation to pay damages on the Government for a "*faute de service*" (a wrongful act committed by an agent of a public service in the exercise of his administrative function). (3) The separation of powers is guaranteed to the last logical result. Whenever any decision of a court of law depends on the interpretation of administrative law or on the validity or invalidity of a decree of an administrative agency the problem has to be submitted to the administrative tribunal for the determination of the point in issue. Whenever a court of law deals with a question which, in the opinion of the Executive, belongs to the jurisdiction of the administrative tribunals, a special "Court of Conflicts" decides the question of jurisdiction (positive conflicts). The same court determines the type of court—law or administrative—to which the case belongs, provided both courts have refused to take the case (negative conflict).

These basic findings of the book—unfortunately nowhere stated together—are correct without doubt. But may the reviewer express his surprise that these elementary facts of French law were new to any American observer of European history and political structure? Professor Schwartz (p. 310) and Chief Justice Vanderbilt (esp. p. xii) assure us that before the research leading to the book reviewed here, "Anglo-Americans" were "convinced that control of administrative action by the ordinary courts of justice was the essential element of the rule

of law." "To an American the rule of law seems to demand that all justiciable controversies be determined by the judges who are our depositories of the law." How could "Anglo-American lawyers" without knowledge of these elementary facts negotiate with France on treaties dealing with the legal status of Americans in France or even more with institutions like the European Coal and Steel Union (Schuman Plan)? How can "Anglo-American" college professors explain Montesquieu and the principle of separation of powers under law, unless they understand that the executive side of the government of France acts subject to the rule of law? This question is justified, since it was in connection with this principle that the legislators of 1790 established the two systems of courts. Nonetheless, one must admit that, apart from the work of Dicey, legal considerations of the French system have only recently been published in the English language. See the masterly book of Marguerite A. Sieghart, *Government by Decree* (1950), especially Part II; C. T. Hamson, "Le Conseil d'État Statuant au Contentieux," 68 *Law Quarterly Review* 60, especially page 61 n. 4 (1952), where one finds a list of earlier English literature; T. W. Elven, "The Administration of Bordeaux," [1953] *International and Comparative Law Quarterly* 238. Under the circumstances, Professor Schwartz has helped indeed to further understanding and research.

Once we overcome prejudices, such as the belief that French (or European) executive side of government is not subject to the rule of law, we have to guard ourselves against oversimplifications and against too far-reaching findings to the effect that our systems are "basically" the same, another trap set for comparative lawyers. I am afraid Schwartz goes too far when he equates the difference between the Anglo-American double court system (law and equity) and the French and European double court system (administrative and law). Law and equity are the historical result of different approaches to the same factual problems developed within different periods, while administrative and private law deal with substantially different relationships. Law and equity resulted in bitter fights because of jurisdictional disputes and the claim of the common-law judges that "Law," whatever its source, has to be under their final control. The separation of the French courts has much deeper reasons. Fundamentally, there is the philosophy of an all-embracing state, beside which there are no other legally admitted bearers of social power. This power-house can only be administered successfully if acting in the three divisions. This is combined with the idea of an Executive free from negative influences of law judges but subject to the limitations set by the legislative power and the general (which, practically speaking, means "normal") principles of law. In the first line, law and general principles are interpreted by the highest authorities in the public hierarchy which can obtain jurisdiction in all cases by the usual complaint procedure (strongly neglected by this book). Only in the second line, judicial tribunals serving the idea of a strong and just Executive take over the task of interpretation.

Professor Schwartz, as understood by Chief Justice Vanderbilt in his Introduction, used his comparative method in opposition to the former American "analytical, historical and sociological approach." He excludes, apart from a few unimportant remarks, the historical basis of the French idea of the two-court system. He does not mention the sociological differences between the set-up of American and French society; nor even the entirely different meaning of "government" in the United States, pluralistic as it is, and "government" in France, centralistic as it is in governmental and even social forms. He mentions legal philosophy only once, in connection with natural law, and there his attitude is completely negative. Perhaps the overdose of sociology, in combination with an ahistorical education and the substitution of a doctrine of expediency for philosophy opens the way to a new American conceptualism. This reviewer, who experienced certain European promenades in jurisprudence, observes here, with great concern, a brilliant American administrative law expert, who looks at the most important problems of French administrative law only from the point of view of legal forms and techniques. While it is true that sociology or history or even legal philosophy alone are dangerous bases for legal research, not less dangerous is legal research without all three aids.

The failure to evaluate the legal differences, excellently observed, in terms of the structure of French society, history, and philosophy as contrasted to American society, history, and philosophy, has caused other deficiencies. We can only come to a proper definition of "administration" in its substantive meaning (executive side of government) if we contrast the function of administration with the functions of the judiciary and of the legislature, as these functions developed historically and logically. Only a clear description and definition of this concept gives us a clear basis for jurisdiction of the administrative tribunals.

In just this regard, Professor Schwartz, who apparently is not interested in problems of trade regulation—which certainly is not intended as a criticism—might have availed himself of an opportunity to show the greatness of the *Conseil d'État*. During World War II committees of merchants, industrialists, and the like were established in France for the purpose of aiding the Government in the distribution of commodities and raw materials. The question arose as to whether the activities of these committees constituted "administration" and were, therefore, subject to review by the *Conseil d'État*. The *Conseil* responded in the affirmative. In the middle of cartel-ridden France the *Conseil* also took under its review admission to such trades as accountancy, dentistry, and pharmacy, although decisive determinations are not made in such cases by administrative agencies but by "private" organizations. The *Conseil* has defined "administration" as including practically all regulatory functions from above which limit the individual.

While this broad definition of "administration" enlarged the field of judicial review in the economic sphere, another development narrowed the field of jurisdiction. The *Conseil* has shown the greatest possible reluctance in looking

at cases of price control [C.E. 8-12-1950, Confédération générale des petites et moyennes entreprises, Recueil Sirey 3, 30 f.; C.E. 27-2-1948, Syndicat de la Raffinerie de soufre française, Recueil Dalloz 661 (1951)].

A very able young German observer has suggested that the *Conseil* has worked out another requirement for judicial review: Is there a public interest in a review? Does the case call for special protection?

Schwartz might have covered another point in his book: the supervision of municipal councils and their right to call on administrative tribunals for review, a procedure designed to protect not only individuals but also municipalities. Can a municipality compel the supervising governmental agencies to permit the establishment of municipal enterprises (e.g., gas, electricity)?

A stricter definition or description of "administration," in contrast to the function of the legislature and judiciary, would have shown the exclusion of any consideration of the constitutionality of statutes or treaties. The entirely unsatisfactory solution to this problem contained in the 1946 Constitution, which provides for examination of such issues by a committee of the legislature, shows how deeply rooted is the refusal of examination of constitutionality of legislative acts by *administration* (including administrative tribunals) or the judiciary in France.

Judicial review, with the aim of annulling an administrative decree, can only be asked for in France, as is the case in the United States, by persons who have a personal interest in the case. Under French law any economic and social interest is enough to justify a "standing in court." This includes taxpayer suits against municipalities. Professor Schwartz has been most impressed by the recognition of the consumer interest as the basis for a petition for judicial review (p. 184 et seq.). He refers to the case *de Roche du Teilloy*, Dec. 4, 1936, in which street-car riders of Nancy complained about an increase in the fare. The *Conseil d'État* considered the interest of these petitioners sufficient to give them "standing in court." But why does not the book refer to the case *Fédération des Sociétés d'Assurances* (1951 *Revue du droit public*, 488 et seq.), in which the *Conseil d'État* took the opposite view? It is difficult to state what the present trend is.

At this juncture a little deviation may be permitted the reviewer. Without taking any position at this time, I would like to raise some questions:

To what extent, if at all, are decisions of French administrative tribunals "precedents" as that term is understood in our case law? Is the book sufficiently developed as to this point?

On the problem of "standing in court," is France on the way to an *actio popularis*, which Professor Schwartz defines as an action "with no restrictions on the standing of those who seek to bring it"? (P. 190.) Schwartz believes that Roman law knew such an *actio*. There he seems to go a little bit too far. The *actio popularis* was nothing more than a civil action by virtue of which a person damaged as a result of a minor criminal act could bring a suit for a "fine," to be paid to

him, provided the praetor licensed the bringing of the action. All in all, I believe that Professor Schwartz is too optimistic in regard to the development of "standing" before French administrative tribunals.

It is fully understandable that Professor Schwartz was most surprised to find the French administrative tribunals having jurisdiction in suits for damages against the Government as well as against the responsible official (p. 250 et seq.). The official is liable for "faute personnelle" whenever he acts "willfully or maliciously, with gross negligence, or outside the scope of his official functions" (pp. 251, 283). The Government is liable for "service-connected fault" (p. 276) and for risks endangering an individual by public activities (p. 288 et seq.). It is not always possible to distinguish entirely between facts leading to personal liability of the officer and the liability of the Government. Both liabilities often exist side by side (p. 285). It is, as Professor Schwartz well realizes, an especially fine legal accomplishment of French jurisprudence to have developed the liability of the Government for imposing particular risks on certain individuals. Under German administrative law, a house-owner whose house suffered from an explosion which took place 10 miles away in connection with the construction of a canal could only bring a suit for damages before the civil courts if he could prove negligence. What of the case where the rock formation where the explosion occurred is part of the formation on which the house is built? In such event the damage would be the unavoidable result of the explosion. French law goes so far as to recognize that the house-owner has a claim for damages, while German law only relatively recently grants a very modest compensation for "sacrifice to the public good."

The principal problem of government liability arises in determining whether damage done to individuals is the result of "service-acts." What is "service"? The *Conseil d'État* has been very liberal in extending government liabilities. The two most impressive liabilities are the one for legislative acts (p. 298 et seq.) and the one for parliamentary acts.

Professor Schwartz in dealing with the first instance rightly refers to the decision in the famous *Flevretti* case, rendered in 1938. That case arose out of a newly enacted law that forbade the manufacture and sale of cream substitutes that looked and tasted like cream but were not made from milk. Such substitutes were in no way injurious to the public health. The sole purpose of the law was to protect the French dairy industry. The plaintiff company, which had made a cream substitute prohibited by this law, brought an action against the State for damages caused to it by the law. The *Conseil d'État* allowed recovery although there was no provision in the statute for the compensation of those injured by it. In its decision the *Conseil* stated that "it cannot be thought that the legislature intended to impose upon plaintiff a burden that does not normally fall upon him; and this burden, imposed in the general interest, must be borne by the community as a whole."

The reviewer cannot overlook certain technical deficiencies in this book.

French cases are only referred to by the name of the case and the date. How can the interested reader find them? The general reference on page 341 to the various collections of cases is not adequate. The reader who becomes most interested in the topic of this excellent book would also prefer to have a more detailed bibliography than offered.

These minor matters have to be mentioned by the reviewer. They do not affect in the least his admiration for the book and the author, as well as for the Institute of Comparative Law of New York University under whose guidance the book has been prepared.

Professor Schwartz and I approach comparative law with similar questions. Our different philosophies lead us to rather different answers. That is only to the good. It is my hope this spirit may help to protect American comparative law against the conformism fostered by many of our organizers of legal research and to bring out books of similar value.

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The Doctrine of the Separation of Powers and Its Present-Day Significance.

By Arthur T. Vanderbilt. Lincoln: University of Nebraska Press, 1953. Pp. 144. \$2.50.

This provocative book of lectures, delivered in the Roscoe Pound Lectureship Series at the University of Nebraska, by Arthur T. Vanderbilt, Chief Justice of the New Jersey Supreme Court, stirs up memories of a feud that has been ended, and at the same time points up defects in the treaty of peace. There will be some who will question his description of the causes of that conflict, and there will be some who will question his description of the vices that have survived the peace treaty. On both counts his book is significant and should be read with interest and care by lawyers, judges, and students of public affairs.

During the first two terms of the administration of Franklin D. Roosevelt there was a bitter feud over administrative procedure between Liberty League lawyers, the American Bar Association, and the Republican party, on one side, and the New Dealers, on the other. Dean Roscoe Pound and Arthur T. Vanderbilt (who was president of the American Bar Association in 1937-38) led the attack on the administrative agencies. Some of us who defended the administrative process felt that the lawyers who were attacking that process were really aiming at the New Deal, which created a multitude of alphabet agencies as the chief means of implementing its reform program. Dean Pound unjustly labeled us "administrative absolutists." It may be that one or two were "administrative absolutists," but I am sure that most were only typical American reformers, disciples of Emerson and William James and Louis Brandeis. Because we rejected the constitutional philosophy of Justice McReynolds, it did not