Book review

E. C. S. WADE AND G. GODFREY PHILLIPS ON CONSTITUTIONAL AND ADMINISTRATIVE LAW by A. W. Bradley, Ninth Edition, Longman, London, 1977, xiii + 686 pp. (including index and bibliography). New Zealand price $17.95 (paperback). Reviewed by G. S. Orr.*

This is the first edition of this standard work for which Professor A. W. Bradley is solely responsible. As is to be expected in a developing branch of the law there are a number of changes in emphasis and content. For obvious reasons the chapter on the United Kingdom and the Commonwealth has been substantially reduced. Part II on the Citizen and the State has been enlarged to include a discussion on the protection of human rights. Consequent upon Britain's accession to the Common Market there is a new chapter on the United Kingdom and the E.E.C. There has been substantial re-writing and revision of the earlier text but the Bradley edition follows the general pattern and approach of his predecessors. The eighth edition, reflecting Diceyan influence, contained a chapter under the heading "The Doctrine of the Separation of Powers." Bradley has a useful discussion of this topic in the context of the relationship between the legislature, the executive and the judiciary. Although relatively brief it is appreciably longer and considerably more enlightening than the few pages in which S. A. de Smith discusses the subject in his *Constitutional and Administrative Law*.[1]

While New Zealand's largely unwritten constitution has many affinities with that of the United Kingdom the divergence between the two increases year by year. Significant parts of any English text on constitutional law will necessarily be of marginal relevance only to New Zealand. The differences are such that a reader of an English work is brought to realise the pressing need for a comprehensive and up-to-date New Zealand text. Only one New Zealand case, *Parsons* v. *Burk*[2] concerning the ancient writ of ne exeat regno, receives a mention. Presumably the report of *Fitzgerald* v. *Muldoon*[3] on the Bill of Rights reached the author too late for inclusion.

Probably the most valuable section of the book for a New Zealand reader is Part I on general constitutional law. It is very readable if a little bland (compared

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1 Third ed., Penguin, 1977.
2 [1971] N.Z.L.R. 244.
3 [1976] 2 N.Z.L.R. 612.

say with de Smith's lively approach) and on occasions the author leaves admittedly difficult questions wide open. Early on the author tells us that[4]

> the question will be raised in more than one area of the constitution whether the political and social limits upon government in the United Kingdom do not need to be reinforced by greater legal protection for the citizen than is at present provided by the unwritten constitution.

True to his promise he questions, in his concluding comments on parliamentary supremacy, whether the present system, with its heavy reliance on political controls, gives sufficient protection to individuals or majority groups who might be vulnerable to legislative oppression. Given these reservations about existing constitutional arrangements a reader is lead to expect a sympathetic approach to the question of whether Britain should have a new Bill of Rights. The Canadian experience with its Bill of Rights 1960 is discussed and in the light of *R.* v. *Drybones*[5] and other Canadian cases the author concludes that legislation on the Canadian lines should be as effective in the United Kingdom as in Canada. Nevertheless he shrinks from advocating its adoption largely, it seems, because the conferring on British courts of a jurisdiction to hold an Act of the Westminster Parliament inoperative on the ground of conflict with such broad concepts as equality before the law might be an unwelcome innovation to many judges, as well as to politicians and administrators. In short to the establishment. Surely an unconvincing even paradoxical argument. Underlying this objection is a reluctance to concede that any significant modification of the legislative supremacy of parliament should be entertained and a deep-seated scepticism that the Westminster Parliament can effectively bind its successors. Also evident is a nervousness about having the judiciary in a position not merely to interpret a statute in such a way as not to conflict with a Bill of Rights but actually to hold an offending statute partially or wholly invalid.

The author recognises that the United Kingdom Parliament could adopt a written constitution which imposes judicially enforceable limits upon a future legislature. But short of such a structural or organic change he clearly has difficulty in envisaging any effective partial limitation on the legislative supremacy of parliament by means of entrenched provisions. He is content to distinguish the Judicial Committee's decision in *Attorney-General for New South Wales* v. *Trethowen*[6] on the grounds that it concerned a colonial legislature (an inherently inferior body) and that the decision turned on section 5 of the Colonial Laws Validity Act 1865 (U.K.). But as de Smith asks,[7] does it necessarily follow that because New South Wales had a non-sovereign legislature and was found competent to "bind its own future action", a sovereign legislature like the United Kingdom Parliament is incompetent to do so.

The new chapter on the United Kingdom and the European Communities contains a useful and interesting commentary on the various community institutions including the Court of Justice but a somewhat unsatisfactory discussion on

4 Page 5.
5 [1970] S.C.R. 282.
6 [1932] A.C. 526.
7 *Constitutional and Administrative Law* (3rd ed., Penguin, 1977) 87-88.

parliamentary supremacy and community law. The author takes the view, no doubt correctly, that it remains competent for the United Kingdom Parliament to legislate for the unilateral withdrawal of the United Kingdom from the various communities. But he leaves entirely open the admittedly much more difficult question of whether community law prevails over post-accession United Kingdom statutes which are in conflict with community law. On this question de Smith's more lively and informative discussion is greatly to be preferred. De Smith's conclusion is that for the time being, while the communities are concerned primarily with social and economic matters rather than political, it is quite possible that the British courts will accord primacy to subsequent United Kingdom legislation in direct conflict with community law.

In a short review it is possible to comment on only a limited number of topics covered in this comprehensive work. In discussing the collective responsibility of ministers, the author points out that serious disagreements between departments should remain hidden from public view and be contained within the constitutional framework. Until recently it was thought that New Zealand constitutional convention imposed a similar constraint on government departments. In recent years, however, there have been several occasions when a department appearing before a parliamentary select committee has openly challenged provisions in a Bill sponsored by the minister of another department. Members of the committee might fairly ask which was the voice of government. The practice represents a clear breach of the notion of collective responsibility of ministers for government policy but it seems likely to persist. Those who welcome more open government support this development.

The shifting nature of constitutional principles is illustrated by a comment on the civil service. The author expresses the confident view that it is an important constitutional principle that those concerned with the higher administration of government departments should in fact enjoy security of tenure, so that they may serve successive ministers of different political parties. A reader of R. H. S. Crossman's *The Diaries of a Cabinet Minister*[8] will however, be struck by the manouvering which went on in the Labour Government in the 1960's by ministers to have a permanent head removed to another department and to persuade the Prime Minister to approve a new permanent head more to the liking of the minister. What of the pressure which appears to be gaining momentum in New Zealand for permanent heads to be politically appointed and not necessarily from within the public service? The tendency to give ministers the advice they are thought likely to prefer would undoubtedly escalate.

In commenting on the proper scope of parliamentary criticism of the judiciary Bradley refers to a "strong convention"[9] that members of the executive, whether ministers or civil servants, do not criticise judicial decisions. The government is not expected to state that a court's decision is mistaken or wrong. It is clear that this principle is in jeopardy if Prime Minister Muldoon's criticism[10] of the

8 Hamilton, London, 1975-1977.
9 Page 319.
10 *The Dominion*, Wellington, 14 September, 1976, p. 1.

judgment of the Chief Justice in *Fitzgerald* v. *Muldoon* becomes accepted as a precedent.

In discussing judicial control of police policies the well known Blackburn litigation against the Metropolitan Police Commissioner[11] is examined. The author expresses reservations about the wisdom of looking to the courts to supervise the exercise by the police of their discretion in carrying out their work. Rather surprisingly he suggests that it might be better to re-assess the proper scope for political direction and parliamentary discussion of police policies. While the present position may well not be satisfactory there would surely be much to be said for this supervisory power being vested in an independant prosecuting authority rather than the government of the day. Bradley also points out[12] that in Scotland there is greater scope for independent investigation of complaints against the police by the procurator-fiscal than exists in England (or New Zealand), although the recent appointment of a Police Complaints Board is a welcome English innovation. The police in New Zealand have so far successfully avoided being subjected to the scrutiny of any independent authority. The jurisdiction here of the Ombudsman is seriously curtailed in this respect.

Part II of this book contains a detailed discussion of the law concerning the citizen and the state. There is an illuminating discussion of developments in the law relating to immigration and deportation. But in this, as in other aspects of this topic, New Zealand law has diverged from that of the United Kingdom. So while useful as background reading it is essential that New Zealand writing on various aspects of the subject are consulted for an accurate account of New Zealand law.

Part III, the final part of the book is concerned with administrative law. The growing importance of this topic is recognised by the inclusion for the first time of administrative law in the title of the work. Although over 100 pages are devoted to this subject, the treatment of some aspects is necessarily curtailed. A bare outline only is given for instance of the current law on locus standi. Those seeking a general understanding of administrative law will be well rewarded but for a more detailed account H. W. R. Wade and de Smith should be consulted.

This ninth edition of Wade and Phillips remains a scholarly, sober and balanced account of British constitutional law. If at times it leaves topical questions tantalisingly swinging this is largely because there is no ultimate certainty in a subject which is so susceptible to unpredictable political decisions and events.

11 *R.* v. *Metropolitan Police Commissioner, ex. p. Blackburn* [1968] 2 Q.B. 118.
12 Page 348.