

BOOK REVIEW

FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD. By Bernard Schwartz. New York: New York University Press, 1954. Pp. xxii, 367. \$7.50.

Professor Schwartz's¹ book does not consider French administrative law in the broadest sense but is limited to a discussion of "judicial"² control over administrative action. The book is, to this reviewer's knowledge, the first modern, comprehensive treatment in English of what is today perhaps the most highly developed system in the entire world of judicial review of administrative action: the French *droit administratif*.

Professor Schwartz gives an excellent survey of the structure of the French system of administrative law, its most important substantive principles and the special problems which arise out of the coexistence of administrative courts and regular courts. There is no better introduction to these aspects of modern French administrative law available to the American lawyer. Professor Schwartz is to be congratulated in having accomplished in such an interesting and clear fashion the always difficult task of explaining a foreign legal system.

In handling questions of French administrative law the book is excellent, recommending itself both by its clarity and its precision. In its comparative treatment of the *droit administratif*, however, the book is weaker. Certain differences between the position, structure and task of the administration in France and in the United States are not fully discussed; nor is the significance of these differences for the judicial control of administrative action assessed in detail. What is missed can perhaps be suggested by a few examples:

The United States has not been faced with the problem of a perennially ineffective and unstable parliamentary government. The legislature and the politically responsible executive have given effective leadership, so that it has not been necessary, as it has in France, to look more and more to the permanent administration for direction and stability. It may follow from this that in France more of the burden of governing falls on the administration than it does in America and that institutional checks operating through the legislature and the politically responsible executive are less effective there than here. If such is the case, the pressures to which judicial

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2. "Judicial" is used here in a broad, nontechnical sense to cover any review of administrative action by an independent and impartial body separate from the regular administration. As Professor Schwartz points out in his introductory chapter (pp. 1-18), the French administrative courts, though historically connected with the regular administration and not today a part of the regular hierarchy of courts, are, in terms of such substantive criteria as their independence and impartiality, true judicial bodies.

control of administrative action are responsive differ rather markedly in France and in the United States. The existence of such different pressures in each system may help to explain certain differences between French and American administrative law and also suggest the necessity of explaining why certain similarities have, in spite of these different pressures, emerged in the two systems. For example, Professor Schwartz explains the "vast extension by the Council of State of the scope of reviewing power" on the ground of the expertise of the French administrative tribunal.³ This is doubtless one element in the picture, but does not the lack in France of a sense of security as to the general government result in an exaltation of security and certainty, and of the institutions through which these values can be secured? It is perhaps suggestive in this connection that the Council of State is the most highly respected and most popular court in France. Moreover, does not the frequent recourse, such as is seen in the practice of the *décret-loi*,⁴ to broad-scale delegations of legislative power to the executive branch of the government continually emphasize and dramatize the need for effective judicial control over administrative action if citizens' rights are to be protected?

Another basic difference in the position, task and structure of the administration in France and in the United States concerns differences in the tasks with which the administration has been charged in these two countries. Perhaps the most important function entrusted to administrative agencies in the United States is regulation. Much of American administrative law has grown up around the work of such agencies as the Federal Trade Commission, the Interstate Commerce Commission, the Securities and Exchange Commission, and the Federal Power Commission. A student of French administrative law soon perceives that the French administration is much less concerned with the regulation of private enterprise.⁵

3. See pp. 321-23.

4. Consider, in this connection, the phenomenon of the *décret-loi*. See pp. 95-101; SIEGHART, *GOVERNMENT BY DECREE* (1950) *passim*. A recent reform of the structure of the French administrative courts, designed to relieve the great pressure of work on the Council of State, gave the Prefecture Councils, under the title of Administrative Courts, most of the original jurisdiction formerly exercised by the Council of State. It is interesting to note that this reform was not accomplished by legislation but by an administrative decree issued pursuant to a broad delegation of legislative authority. As Professor Schwartz points out (pp. 48-49) the government had tried for three years to obtain from the Parliament the passage of a bill, approved by the Council of State, putting this reform into effect.

5. Schwartz recognizes this (see p. 102) and explicitly states the difference between the French and American approach: "In France the type of administrative adjudicatory regulation of the economic system that is so familiar to the American student has not been of great importance. In the field of public utilities the dominant theme in the French system has been, not regulation, but operation. Since the State itself operates most public utilities, there is no place for the Interstate Commerce Commission kind of regulation, which is of such significance in the American system. And as for the Federal Trade Commission type of regulation of abusive economic practices, the French system has tended to adopt a hands-off policy. It is this tendency that has made the growth of large cartels a matter of such consequence in a country like France, where their abusive practices have been almost wholly free from administrative regulation." He does not, however, consider the implications of this fact for judicial review of administrative action in these two countries. For a suggestive discussion see Pekelis, *Administrative Discretion and the Rule of Law*. 10 *SOCIAL RESEARCH* 22, 30-37 (1943).

There are no French counterparts to the American commissions listed above. The activities which are subject to administrative regulation in the United States are in France typically left to private initiative unless taken over entirely by the government through nationalization. It is probable that these differences in the tasks typically entrusted to administration in these two countries result in important differences in the types of problems which the administrative law of each country must handle. In particular, administrative decisions involving important questions of economic policy will less frequently be open to challenge and judicial review in France than in the United States because in France such decisions, when they are an administrative responsibility, are not made in a regulatory context but in connection with the direct management of a sector of the economy which has been nationalized. Consequently, in France it will often happen that no one will have the interest⁶ required, or a ground on which, to challenge such a decision. In the United States, on the other hand, the regulated industries will be directly affected and will also possess the economic resources and political power to ensure a full hearing of all grievances.⁷

A final important difference to be noted here in the structure and setting of administrative law in France and the United States arises from the federal structure of our government. The problems and tasks handled by state and local administrations in the United States are, in many respects, basically different from the problems and tasks which concern our national administration. Likewise, in certain fields at least, there are significant differences between the federal rule and the typical state rule on important questions of law relative to the extent of judicial control over administrative action. For example, the typical state rule relative to standing may well be broader than the present federal rule.⁸ In France, because of the highly centralized character of its government, there is one administrative law which deals with the full range, national and local, of administrative action. Consequently, the *droit administratif* has been shaped to a far greater extent than has our federal administrative law by the problems involved in judicial review of such typically local administrative activity as that involved in exercises of the police power. The federal nature of our administrative structure may explain, at least in part, certain differences between the rules of our national administrative law and the rules of the *droit administratif*. As has already been noted, our typical state rule rela-

6. It may be that the somewhat broader concept of standing found in French administrative law as compared with American administrative law (see pp. 170-91) is due not only to the absence in French law of a constitutional requirement of "case or controversy" but also to the greater reliance in France upon nationalization.

7. The greater recourse in France to nationalization may also be a partial explanation for the earlier, and more complete, overthrow there than in the United States of the doctrine of sovereign immunity. See pp. 250-305. Schwartz suggests at least one other partial explanation: the greater immunity from suit traditionally enjoyed in France, as compared with England and the United States, of the public officer. See pp. 250-66, 268-69. Of course, there are doubtless many other elements to be considered in any full explanation.

8. See note 12 *infra*.

tive to standing is broader than the present federal rule. Also, as Professor Schwartz points out, the Council of State holds that a municipal taxpayer, *qua* taxpayer, has standing to bring an action to review the legality of an act of local government which might involve the illegal expenditure of municipal funds but that a national taxpayer lacks standing to bring a taxpayer's suit to challenge an act of the central administration.⁹ Does this not at least suggest a partial explanation of the differences between the rules of our federal administrative law and that of France? In all events, the federal character of our national administrative law makes it imperative in any comparative discussion to distinguish sharply between principles of state administrative law and principles of national administrative law, at least where the tasks of the national administration differ from those of the state. This Professor Schwartz has not always done.¹⁰ It can also be suggested that, in terms of the type of administrative action which it typically reviews, the work of the Council of State is more comparable with the work of one of our state courts than with the work of the federal courts. If this is so, it probably follows that the body of administrative law in the United States most nearly comparable to the *droit administratif* is not the federal administrative law, upon which Professor Schwartz concentrates his attention, but rather state administrative law.

Full discussion of such aspects as these of the total setting within which judicial review of administrative action operates in each of these systems would be necessary in order to make Professor Schwartz's excellent survey of the structure and principles of French *droit administratif* fully relevant for problems of American administrative law. The suggestions with regard to possible changes in American administrative law which Professor Schwartz makes on the basis of his study of *droit administratif*¹¹ do not, of course, necessarily lose their validity because of the incompleteness of his comparative treatment of the subject. A fuller comparative treatment might, however, have cast a different light in at least some of his suggestions. For example, is it proper to conclude from a study of the French law on standing that ". . . American courts have been excessively narrow in their views regarding the availability of review"?¹² The statement may be perfectly valid, but does it not follow from the great recourse to nationalization in France that, if the administrative action is to be subject to any review at all, broader concepts of standing are required than those necessary where regulatory commissions are involved. Furthermore, does

9. See p. 183. Departmental taxpayers and taxpayers of overseas territories are also held to have the requisite standing. *Ibid.*

10. Consider, for example, his discussion of standing. See pp. 179-91, 327.

11. See pp. 329-32.

12. P. 327. Professor Schwartz is here, as elsewhere, perhaps rather sketchy in his treatment of American administrative law. There is a marked, recent development in the federal courts in the direction of relaxing the requirements for standing. Moreover, as Schwartz indicates (pp. 181, 184-88) without giving a full discussion, many of the state rules relative to standing go farther than the traditional federal rule in allowing both taxpayer's and consumer's suits.

the French experience really give a firm basis, in view of the refusal of the Council of State to accord standing to a national taxpayer to bring a taxpayer's suit, for the conclusion that our national administrative law, as distinguished from state administrative law, should make review more widely available? Similar questions arise with respect to Professor Schwartz's remarks on the refusal of Anglo-American courts to inquire, as is done by the French administrative courts,¹³ into the motives that induced a challenged administrative act and to accord full review over law and facts, as the French Council of State is now tending to do.¹⁴ Is not the course of development of the *droit administratif* in these respects influenced by the relative ineffectiveness and instability of the control exercised through the legislature and the politically responsible executive and the related tendency to exalt security and certainty in an area where it can be achieved? Is it not perhaps true, moreover, that the complexity of the problems which come up for judicial review is inherently less, and hence a fuller judicial review is more feasible, in a system which typically does not accord wide regulatory functions to the administration but has instead taken recourse to nationalization?

It will be observed that the above remarks concern only the comparative treatment of the *droit administratif* in *French Administrative Law and the Common-Law World*. Professor Schwartz's main emphasis is upon French administrative law itself. He has done an admirable job in describing, for American lawyers, the hierarchy and composition of the French administrative courts and their relation to the ordinary law courts; the structure and general powers of the French administration; the proceedings through which, and the rules under which, administrative action can be reviewed; the availability and scope of the review accorded and the liability in French law of the state and of public officers. In attempting to draw upon his knowledge of the *droit administratif* while considering certain problems of American administrative law Professor Schwartz has only experienced the almost unsurmountable difficulty which is the bane, as this reviewer can testify, of every comparative lawyer's existence: the immense problem of assessing the full range of conditioning elements in a given situation so as to make a valid and meaningful comparison possible. Professor Schwartz has contributed greatly to comparative work in the field of administrative law by providing a much needed study of French administrative law. *French Administrative Law and the Common-Law World* is a welcome contribution to the slowly growing literature in English on foreign and comparative law.

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13. See p. 327.

14. See p. 328.

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