BOOK REVIEW*

Administrative Law in a Changing State: Essays in Honour of Mark Aronson
Linda Pearson, Carol Harlow and Michael Taggart (eds)
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Engaging and searching, this *festschrift* is a worthy tribute to its honorand, Emeritus Professor Mark Aronson. It stands in recognition of Aronson's eminence as a scholar and his generosity and inspiration as a teacher and colleague. This reputation has brought together distinguished administrative law scholars from Australia, the United Kingdom, Canada, New Zealand and the United States to produce a lively and stimulating collection of essays reflecting, and reflecting on, Aronson's rich insights over many years into administrative law in a changing state.

The editors – Linda Pearson, Carol Harlow and Michael Taggart – have sought to reflect in its pages both Aronson's substantive scholarship on judicial review of administrative action, as well as the approach he brought to that task, involving a broad appreciation of the range of influences on administrative law. In this endeavour, the editors have succeeded. Although judicial review is a prominent topic, the book does not stand or fall on its coherence around a theme. Its appeal lies in the high quality of the essays individually, and the range of issues and challenges which they collectively traverse. The book's likely readership is wide, not confined to Australian administrative law scholars but extending broadly to those with an interest in public law.

Rather than a theme, there are conversations. These include conversations with Aronson and conversations between scholars across five common law jurisdictions. 'Conversations' is a more apt description than comparative law. As Thomas Poole recognises in the opening chapter, administrative law is 'a subject peculiarly sensitive to, even dependent on, political and administrative context'.[1] Poole reflects on the divergent responses of the English and Australian courts over the past decade to the human rights discourse. Discerning differences and commonalities between jurisdictions is an endeavour common to many of the essays. Jack Beerman reminds us of an apparent divergence, which occurred decades earlier, between the statutory basis of United States administrative law and the common law craft of judges. He softens the dichotomy through his examination of judicial review by United States courts in the context of rule-

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1 Thomas Poole, 'Between the Devil and the Deep Blue Sea', 20.

making and in the context of agency interpretations and policy decisions. Matthew Groves reveals another arena across which the courts, this time in England and Australia, have taken different paths; namely, judicial responses to the mistakes or negligence of the affected person's agent. Like other contributors, the author draws on the constitutional and statutory influences which pull each nation's courts in different directions. In this chapter, domestic influences are used to bring a fresh perspective on differing conceptions of the role of the courts.

The next two essays, in their different ways, lead the reader to reflect on constitutional and statutory approaches to human rights protection and how they may impact on judicial decision making. There is much of interest here for Australian public lawyers thinking through the constitutional constraints and policy dilemmas. Sir Jack Beatson focuses on that genius of the *Human Rights Act 1998* (UK) – the interpretative obligation. The author traces developments that have tilted the court/parliament constitutional balance in the United Kingdom more towards the courts than may have been anticipated. The chapter also points to consequences of the interpretation approach in terms of the opacity and inaccessibility of statute law. David Mullan explores the impact of 'rights-stimulated approaches' on the principles of judicial review of administrative action. He concludes that the *Canadian Charter of Rights and Freedoms* ('the Charter')[2] has not directly driven any significant expansion in the scope of judicial review. While Canadian judicial review has become more rights-oriented, the Canadian Charter is only part of the environment in which that has occurred. A strong common law tradition of human rights protection continues to be part of that environment. Mullan concludes by inviting further detailed study to test his tentative conclusion that the Charter's weak influence on Canadian judicial review has diminished the expectation that the Charter would open a gulf between Australian and Canadian administrative law.

Sanctions for violations of human rights are raised instructively by Carol Harlow in the context of questioning the twin assumptions of tort law; namely, that negligence is the principal vehicle for tortious liability and that tort law's sole concern is compensation. In this engaging essay, Harlow takes the reader back to 'an older and more traditional use of the tort action as a powerful remedy for abuse of public power and vindication of a few powerfully protected common law rights'.[3]

If 'past is prologue', to borrow Beerman's observation,[4] a collection of essays on administrative law in a changing state needs anchors in history, and this is found in several of the chapters. In particular, the anthology is enriched by the Hon J J Spigelman's exploration of the equitable origins of the improper purpose ground of review. The essay uncovers intersections between areas of law, forged by the adaptability of the common law, too readily forgotten by the creation of silos in the study and practice of law. For Peter Cane, history provides

2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11.

3 Carol Harlow, 'A Punitive Role for Tort Law?', 269.

4 Jack M Beermann, 'Common Law and Statute Law in US Federal Administrative Law', 69.

the grounding for a contemporary account of administrative adjudication and its relationship with the courts. In a towering essay, Cane explores three explanations for the continuing existence and proliferation of administrative tribunals performing the function of settling disputes between citizen and government. The light that the chapter shines takes a broad sweep over the Australian, English and US landscapes.

The public/private law divide, so prominent amongst the issues thrown up by changing patterns in governance, is approached from a variety of perspectives by Michael Taggart, Alfred C Aman, Jr, Richard Rawlings and, as previously mentioned, Carol Harlow. Michael Taggart continues his lively dialogue with Aronson about the role of the courts in resolving disputes involving State-Owned Enterprises – using, in this chapter, a line of cases in which New Zealand courts were prepared to resolve pricing disputes by way of quantum meruit. Aman puts power and politics into an understanding of the public/private distinction, conceptualising it in terms of multiple political processes and substantive goals rather than as a binary construct. He argues that administrative law can help democratise 'privatised power' by making private providers subject to a continuing political process. In Rawlings' delightfully titled and crafted chapter 'Poetic Justice: Public Contracting and the Case of the London Tube', the author traces the deployment of contract technique – 'pushed to extraordinary lengths'[5] – in the current modernisation of the London Tube, illustrating 'the functional limitations of contractual ordering and the importance of vindicating public law values like transparency and accountability'.[6]

As foreshadowed by this review's earlier reference to Peter Cane's chapter on administrative adjudication, the book contains substantial chapters on administrative tribunals. Cane's essay is followed by a chapter on fact-finding in tribunals by Linda Pearson – how tribunals go about it and the extent to which courts do and should scrutinise it. Elizabeth Fisher takes administrative law scholars to task for seeing in merits review only the functional and not the legal, and for ignoring specialist merits review tribunals. While one may take issue with her starting point (not least because much scholarship and case law on judicial review is concerned with the legal issues attending merits review and the pluralism that characterises the resolution of disputes with government), her chapter provides interesting insights on Australian environmental courts and tribunals.

Few would take issue with the observation that the Ombudsman's contribution to securing 'good' decision making has attracted less attention than it deserves. Anita Stuhmcke, in her essay 'Ombudsman and Integrity Review', urges reconsideration of the role of the ombudsman, particularly in the ability of the institution to be proactive in improving standards of administrative decision making. After an instructive overview of the recent performance of Australian ombudsmen, Stuhmcke develops 'integrity review' as a conceptual framework and performance indicator for the expanding proactive role of the ombudsman.

5 Richard Rawlings, 'Poetic Justice: Public Contracting and the Case of the London Tube', 225.
6 Ibid 246.

Stuhmcke sees the ombudsman – with its whole-of-government approach, its nimble and responsive techniques and its 'soft law focus'[7] – as particularly well-placed to work within the changing state. She identifies in particular, a role for the ombudsman in a regime where 'soft law' is increasingly used to set standards and drive behaviour. In the final chapter of the book, Robin Creyke and John McMillan explore the nature and emergence of 'soft law', its prevalence in Australia, and the legal and practical implications of its unstoppable expansion.

Two chapters have so far been omitted from this catalogue. The first is a challenging essay by Janet McLean arguing that public law contains its own political theory rather than being an extension of political discourse, skillfully using to this end an exchange between Martin Loughlin and the late Sir William Wade arising out of a rare judicial exploration of the nature of the Crown's legal personality.[8]

The second is the very substantial introductory chapter by The Hon Michael Kirby – at the time of writing, Justice of the High Court of Australia. Not content to introduce the book, Michael Kirby interrogates its chapters and, in his indefatigable way, signposts the work ahead for administrative law scholars. Indeed, he urges Aronson not to rest in the warmth and congratulations of his colleagues, but to continue his scholarly voyage of exploration, suggesting areas of research calling for Aronson's exceptional talents and insights.

The approach of this book review has been far more modest than that of the inimitable Michael Kirby. It has been to take the reader through the book's chapters in an effort to reveal its breadth and to encourage the reader to discover its undoubted depths in thinking about administrative law in a changing state. The book is exceptionally rich in coverage and ideas. It is eminently readable, from cover to cover or selectively as a resource for teaching and research. It is a substantial contribution to public law scholarship, as befits its honorand.

7 Anita Stuhmcke, 'Ombudsman and Integrity Review', 374.

8 *M v Home Office* [1992] QB 270; *M v Home Office* [1994] 1 AC 377.