THE DECLARATORY JUDGMENT. By I. Zamir, M.Jur. (Jerusalem), Ph.D. (London). [London: Stevens. 1962. xxii + 337 pp. (incl. index). £2 15s. 0d.]

The declaratory judgment is a comparatively new addition to the judicial armoury. It was introduced into English law about a century ago, and its ubiquity has caused it to be extensively employed to-day, both in the field of private and public law. Despite its popularity, the rules governing its operation are shrouded in obscurity, much to its detriment, as may be seen by the fact that the courts still speak in terms of circumspection when faced with applications for a declaration.[1] This is in accordance with the older judicial pronouncements that the declaration is a discretionary remedy and that this discretion should be exercised "sparingly", "jealously" and "with the utmost caution".[2] These judicial pronouncements are reflective of the conservative attitude adopted by the courts towards the declaration in the early days, when as a newcomer, it was viewed with suspicion. However, to-day, the courts have struck a bolder attitude towards the scope of the declaration. Nonetheless, because of the lack of a comprehensive work on this score, reliance is frequently placed on standard works like Halsbury's "Laws of England" which of necessity is silent on the many ramifications of the law relating to the scope of the declaration, and the effect of this is to present a sketchy and conservative picture of the nature of the declaration. In a recent case, the court relying on Halsbury's "Laws of England" stated that:

> "The power to make a declaratory judgment is a discretionary one; the discretion should be exercised with care and caution and judicially with regard to all the circumstances of the case...."[3]

In this context, Dr. Zamir's book on "The Declaratory Judgment", which is the first comprehensive study of the scope of the declaration in English law is highly wel-

1. See *Chop Chuah Seong Joo* v. *Teh Chooi Nai* [1963] M.L.J. 96, 99.

2. See *Austen v. Collins* (1886) 54 L.T. 903, 905; *Faber* v. *Gosforth U.D.C.* (1903) 88 L.T. 549, 550; *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.* [1906] 1 Ch. 324, 329; *Burghes* v. *Attorney-General* [1911] 2 Ch. 139, 156; *Smeeton v. Attorney-General* [1920] 1 Ch. 85, 97; *Russian Commercial & Industrial Bank* v. *British Bank for Foreign Trade Ltd.* [1921] 2 A.C. 438, 445, 461; *Gray* v. *Spyer* [1922] 2 Ch. 22, 27.

3. *Chop Chuah Seong Joo* v. *Teh Chooi Nai* [1963] M.L.J. 96, 99.

corned. It fills in an important lacuna in legal writing.[4] The book traces the background and history of this judicial remedy and then it sets down in precise terms the rules governing the scope of the declaration as culled from the cases on this subject.

One of the rules which emerges from the analysis of the cases is that the courts will not entertain claims for declarations on theoretical issues. Dr. Zamir sought to rationalise this attitude by equating it to the aversion of the courts towards advisory opinions. One of the grounds forwarded is that consultation of the judiciary by the executive tends to sap the independence and impartiality of the judiciary, or at least have such a semblance, and that at any rate this is "properly a function of the law officers" rather than the judiciary.[5] However, this argument does not seem to be borne out by the practice of embodying terms into the constitutions of several newly independent countries empowering the executive to refer matters involving the interpretation of the constitution or matters of public interest for the advisory opinion of the Supreme Court even before they have crystallised into concrete issues.[6]

Secondly, it was suggested that since there is no actual opponent when a ease is referred for the advisory opinion of the court, the opinion may be given on an inadequate presentation of facts and arguments. This danger, however, has not deterred the reference of constitutional issues which have not yet arisen to the courts. Dr. Zamir also pointed out that one of the advantages of the advisory opinion which was to diminish the danger of administrative activities being declared illegal retrospectively is reduced in significance by the introduction of statutory provisions limiting any challenge to administrative schemes to a short period after their publication. This is true enough except that the limitation period does not completely preclude challenge and neither does it really eliminate the risk of administrative schemes from being declared illegal retrospectively.

Dr. Zamir also raised an interesting discussion on the availability of the declaratory judgment in lieu of other non-statutory remedies, e.g. certiorari. He raised a query as to whether a declaration will issue in place of certiorari in all circumstances or only where special circumstances exist, and came to the conclusion that the position is not free from doubt. The subsequent case of *Punton* v. *Ministry of Pensions and National Insurance*[7] leaves this view, whose application for unemployment benefits under the National Insurance Act, 1946, was rejected by the insurance commissioner, sought a declaration by way of originating summons that he fell within the category of persons entitled to such benefits under the Act. The Court of Appeal granted the declaration after requiring the application to be amended. However, Diplock L.J. made it clear that:

> "…. in concurring in the order made, I do not wish it to be thought that, without further careful examination, I necessarily assent to the proposition that a declaration lies as an alternative remedy whenever certiorari would lie. I think it must depend, or may at any rate depend, on the statutory terms in which jurisdiction is conferred upon the inferior tribunal and upon the statutory effect of its decision."[8]

On the other hand, Lord Denning M.R. and Upjohn L.J. indicate that the availability of the declaration as an alternative remedy to certiorari is not limited to those circumstances where certiorary is inefficacious.

Another interesting query was raised by Dr. Zamir in his chapter on the scope of the declaratory judgment. This relates to the question whether a declaration will lie against a decision arrived at in violation of rules of natural justice. The argument against it is that such decisions are merely voidable and not void and that in

4. See however, De Smith, *Judicial Review of Administrative Action,* Chapter Eleven (1959).

5. Zamir, *The Declaratory Judgment* at 47.

6. See Federation of Malaya Constitution (Article 130); Indian Constitution (Article 143); Pakistan Constitution (Article 59).

7. [1963] 1 W.L.R. 186.

8. *Ibid* at 193.

strict logic, a court cannot declare a merely voidable decision to be void.[9] There is a great deal of authority for the proposition that a decision arrived at in breach of the *nemo judex in causa sua* rule is merely voidable, and some authority that one arrived at in violation of the *audi alteram partem* rule is similarly so.[10] It is interesting to note that the House of Lords in the recent case of *Ridge* v. *Baldwin* [11] is evenly divided on whether an impingement of the *audi alteram partem* rule renders a decision void or voidable thus leaving the issue as confused as before. However, as was pointed out,[12] this is not of great practical significance as the courts have in practice brushed aside these logical difficulties and declare such decisions void. Dr. Zamir, however, ingeniously suggested that such decisions can be justified on the basis that the declaration assumes a constitutive as opposed to a declarative character.

The manner in which Dr. Zamir dealt with the two problems as to the precise scope of the declaratory judgment commented above is indicative of his general approach which is one of complete thoroughness in the handling of the materials and one of close analysis of the cases which will appeal to the academic lawyer. On the other hand, his systematic arrangement of the underlying principles of the nature and scope of the declaration, amply illustrated by cases, and a good index, renders the book easy to handle to a busy practitioner.

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9. Zamir, *The Declaratory Judgment* at 156.
10. *Ibid.*
11. [1963] 2 W.L.R. 935.
12. De Smith, *Judicial Review of Administrative Action* at 408, cited by Zamir at 156.