LEGAL EDUCATION

Challenges in teaching administrative law

The decision of the Consultative Committee of State and Territorial Law Admitting Authorities (the Priestly Committee) to make administrative law a compulsory element of all professional law curricula from 1996 onward, opens up new opportunities and responsibilities for teachers of administrative law. It heightens the need to reassess the content and audience of administrative law teaching.

What administrative law should address

Since constitutional and administrative law is the law that regulates the machinery of government, administrative law should ideally address both the nature of the state itself, and ongoing political issues. To offer discussion of the modern state is to give administrative law an appropriate context. To try to grapple with ongoing political issues is to enhance administrative law's relevance and usefulness. After all, the traditional business of government is wracked by institutional failings. Recent national controversies have included the mismanagement of the Civil Aviation Authority, and inadequate decision-making with respect to woodchipping licences. There has been recurrent Parliamentary scrutiny of, among other things, the activities of a number of Commonwealth departments, the regulation of pay television, and the print media. There are various ongoing inquiries into State government corruption and financial mismanagement. All these events involve the (non)practice of administrative law principles.

Administrative law teaching needs to keep in mind that administrative law is part of public law. Such a recognition refocuses attention on the state itself, and how it actually functions as it precariously balances the disparate interests present in it and society. These competing interests, of course, are not solely constituted by administrative lawyers representing private clients. An administrative law course that attempts to grapple with the complexities of state action, and responses to it, results in a far stronger public law than a course cast solely in terms of doctrine for the benefit of private litigants.

Administrative law theory?

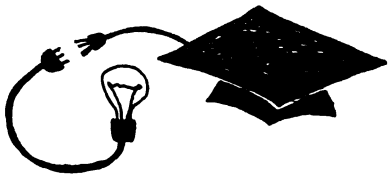
The Priestly Committee specifically nominates administrative law 'theory' in its list of designated topics, but gives no clues as to what it might be or how it might be included. Presently, there is little (Australian) scholarship on administrative law available that combines doctrinal and theoretical issues. This creates difficulties for course presenters who want to import theory because they are forced to present theoretical issues and doctrinal issues as separate — rather than theory as informing doctrine.

Presently, some law schools teach administrative law in the same unit(s) as constitutional law, as an aid to coherence. Teaching the two together can give coherence not only because both concern the business of government, but perhaps more importantly, constitutional law is necessarily more clearly informed by discussion of the nature and purpose of our system of government.

Administrative law is capable of being organised theoretically without having to be taught with constitutional law doctrine. Administrative law can be theorised and contextualised using its history, and analysis of the changes that are taking place in administration and governance.

The history of administrative law tells us that it has been shaped by its role in the disputes between executive authority and individual rights and freedoms. Once, the struggle was between the king and the free men of the parliamentary classes. Later, with the Crown 'drawn into' Parliament, the struggle has come to be between the individualised claims of private litigants, and aggregated interests administered by executive agencies of the state. The past gives us insights for understanding the strains placed on modern administrative law.

On the other side, analysis of the changing nature of state activity enables us to understand the significance of structural changes that impact on legal developments (such as the increased availability of review on the merits), and there can be little argument that the sweeping changes to the public sector over recent years deserve much examination. Consider, among other issues, the possible impact of ongoing programs of corporatisation, privativisation, and economic rationalism on administrative practices and administrative law.



Teaching administrative law

Those having a good knowledge of administrative law, most particularly public servants and lawyers, can and could play a hugely constructive role in political events such as those mentioned above — as long as administrative law teaching is sufficiently contextual. The lively political context within which administrative law operates suggests two things that place an onus on those who teach it. The first is that administrative law is too important to be taught only to lawyers, as tends presently to be the case. The people who exercise executive power in their work should be a primary target of public law education. A doctrinal approach will be insufficient for them because it is too late, for good decision making, to confine attention to what happens when lawyers and courts come along after the event. Unfortunately, despite the attention given in the public service to teaching 'management', little is given to law as such, let alone administrative law. Further, sometimes administrative law is seen as a tool of the 'enemy', a hindrance to decision making.

The second suggestion, linked to that unfavourable perception of administrative law and lawyers, is that administrative law should be taught in a way that explains why administrators make decisions as they do, and actively assists them in their task — and

not just point out 'where they went wrong'. Administrative law teaching can explore the differences between executive and judicial decision making, the conflicts that will arise between the modes (as each privileges differing considerations), and criteria for criticising both the judicial and executive approaches. Administrative law teaching can explore, for example, the courts' concern with individualised rights-based justice, as against public officials' concern with delivery of an overall program to the entire population.

What such a course might look like

I offer three general themes around which developments in administrative law could be organised. I am not suggesting that no administrative law course currently does any of the things I discuss above. Among the better courses, material is offered that introduces students to the executive decision-making process, and its problematic relation to the body of administrative law principles. What follows here are brief suggestions on how such insights and problematics might be contextualised.

The first is work on the nature of the liberal and post-liberal state under conditions of capitalism. Theorists such as Jurgen Habermas and Claus Offe (and those who have adopted their concepts, such as Michael Pusey in his well-known book *Economic Rationalism in Canberra)*[1] offer one set of descriptions of the structural logic of the modern state. Offe and Habermas developed a 'systems' model to describe the state in capitalist societies; their model helps us understand the pressures and limitations on the state's capacity to act on and respond to the social and economic factors lying outside of itself. (See, especially, Habermas' discussion of their systems model in *Legitimation Crisis*[2] at pp 2-8, and problems of the shift from liberal to advanced capitalism at pp. 30-36.) In this way the functional role of various administrative law doctrines in system maintenance can be explored, together with the significance of doctrinal shifts that are continuing to occur as the state continues to move from a liberal to more welfarist/corporatist form.

Second, the continued utility of the concept 'state' itself can be put under scrutiny. Are we conceiving of the state too positivistically? Michel Foucault has remarked: 'We need to cut off the King's head: in political theory that has still to be done'.[3] This work of Foucault and the school known as 'governmentality' can be used to help examine the difficulty judges and administrators have in conceptualising what is going on in *public* administration, and what distinguishes it from other exercises of political or private power.[4]

Third, Offe's work can help us examine why courts and executive decision makers so often seem to be at cross-purposes, and how administrators themselves can be so readily bound up in competing considerations. In his essay 'The Divergent Rationalities of Administrative Action',[5] Offe describes how there is not just one rationality by which the system of executive government operates; there are several competing rationalities, representing different conceptions of the role to be performed by bureaucratic agencies. He describes how departments proceed either on the basis of faithfully carrying out policy directions (a Weberian model), or on the basis of the program results they are supposed to achieve, or on the basis of a corporatist model, whereby a number of differing (perhaps irreconcilable) interests are accommodated. Conversely, judicial review remains overwhelmingly tied to a Weberian conception of administrative rationality.

Mark Vincent

Mark Vincent teaches law at Macquarie University.

References

1. Cambridge University Press, Melbourne, 1991.
2. Beacon, Boston, 1975.
3. In Morris, M. and Patten P. (eds), *Michel Foucault: Power, Truth, Strategy*, Feral Publications, Sydney, 1979, p.38.
4. See Burchell, G., Gordon, C. and Miller, P. (eds), *The Foucault Effect: Studies in Governmentality*, Harvester/Wheatsheaf, London, 1991.
5. Chapter 10 of *Disorganised Capitalism*, Polity, London, 1984.

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active voluntary euthanasia *(Voluntary Euthanasia Bill 1995)*.

This recent flurry of legislative activity reflects a general perception that the time has come for legislative reform in this area. In the light of the recent success of a citizen-initiated referendum in the State of Oregon in the United States for the legalisation of doctor-assisted suicide in certain circumstances,[5] it is not inconceivable that these legislative initiatives in Australia may also be successful. If that were to be the case, Australia would be the first country in the world to enact legislation for the legalisation of active voluntary euthanasia.

Margaret Otlowski

Margaret Otlowski teaches law at the University of Tasmania.

References

1. 'We Can Achieve VE This Year!', Voluntary Euthanasia Society of New South Wales *Newsletter* No. 72, 1995, p.1.
2. Note also cl.13 which is to the effect that, notwithstanding s.26(3) of the Northern Territory *Criminal Code*, an action taken in accordance with the legislation by a medical practitioner does not constitute an offence under Part VI of the Code.
3. See also the immunity provisions in cl.17(2) and (4) of the Bill which reinforce the right of a doctor to refuse to participate in assisting a patient to die.
4. According to recent surveys conducted in a number of Australian jurisdictions, over a quarter of doctors who had been asked bya patient to hasten his or her death had complied with the patient's request. See Kuhse Helga and Singer, Peter,'Doctors' Practices and Attitudes Regarding Voluntary Euthanasia', (1988) 148 *Med J Aust* 263 dealing with Victoria (29%); and Baume, P. And O'Malley, E., 'Euthanasia: Attitudes and Practices of Medical practitioners'. (1994) 161 *Med J Aust* 137, commenting on a virtually identical survey conducted in New South Wales and the ACT (28%).
5. The introduction of this legislation *(Death with Dignity Act)* has, however, been delayed due to a constitutional challenge which has been brought against it by opponents of the legislation. See Kuhse, Helga, 'Oregon — Medically Assisted Suicide Becomes Law', (1995) 14 *Monash Bioethics Review* 1.