

LAWS1160 - ADMINISTRATIVE LAW

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CONCEPTS OF ADMINISTRATIVE LAW

'Historical and Constitutional Contexts' Chapter 2

Federation –

- 1900: England had a unitary legal system - queen-in-parliament was the highest legal authority
 - According to the doctrine of the supremacy of parliament the superior court's status as law-makers was subordinate to that of the Queen's
- Colonial govs in Aus did not have the inferior legal status of local gov in England
- Federation created a new legal system and complex set of relationships between the Cth and the 6 existing colonial legal systems
- Division of powers – foundation for system of responsible government developed in the context of a unitary system giving Aus admin law a complex and hybrid nature

Aus's judicial system has 2 layers:

1. Federal courts - federal law
2. State courts - state law

Layers connected in 3 ways:

1. Jurisdiction over matters of federal law could be conferred on state courts
 2. HC had jurisdiction to hear appeals from decisions of state courts on matters of state law as well as federal law
 3. The privy Council retained jurisdiction to hear appeals from both state Supreme Courts and the HC thus binding all Australian courts to decision of a single tribunal
- On matters in which state and federal law overlapped, the courts could create a single Aus common law that applied uniformly at both levels
 - HC the only federal court of general jurisdiction - autochthonous expedient - giving state courts jurisdiction over matters of federal law

2-layered legislative and executive system

1. Fed parliament - legislative powers in ss 51 & 52 of Constitution
2. State legislatures - retained residual power under their existing constitutions
 - State laws subordinated to federal law - s 109 in the event of any inconsistencies
 - Ss 106-108 expressly preserved the pre-existing constitutional position of the states subject to the operation of the constitution
3. Local gov retained its pre-fed character as a creation of the state legislatures

Other effects of federation:

- Dicey - 'federalism...means legalism - the predominance of the judiciary in the constitution- the prevalence of a spirit of the legality among the people'
 - Because of division of powers - a constitutional court with a high degree of independence from the political process is needed to police that division
 - Fed necessarily 'legalises' issues about the allocation of power that would not arise in a unitary system

Responsible government –

- Aspect of British heritage
- 1867 Walter Bagehot - system in which the executive government (the cabinet) relied for its initial and continuing existence on the support of an elected legislature - House of Commons
 - Presidential system of government - USA - both legislature and executive are elected by popular vote. Separation of executive and legislature.
 - Parliamentary system - UK - executive elected by the legislature which itself is elected by the voters to perform this function. Integration of legislative and executive branches of government (power of legislature > executive).
- Principle of 'collective ministerial responsibility' (CMR) - individual members of the government would stand or fall as a group depending on whether they retained or lost the confidence of the Commons
 - Nowadays CMR depends the loyalty of members of gov to its policies and dictates confidentiality of cabinet deliberations and inner workings of the gov
- Principle of 'individual ministerial responsibility' (IMR) - requires members of the gov to provide the legislature with information and explanations for their conduct and that of their public servants; to take remedial steps and to resign when needed
 - Key integration mechanism - Allows the legislature to exercise a measure of control over the executive without threatening its existence
- Underlying theme of admin law - distinction between legal and political responsibility or accountability
 - Role of legal institutions is to enforce accountability in the name of law
 - Distinction between law and policy - used to set limits on judicial control of the executive and other public decision-makers
- bicameral legislature: appointed upper house/Legislative Council and an elected lower house/Legislative Assembly
- Alternative view - because of party discipline, IMR is a weak accountability mechanism -> establishment of merits review tribunals, the ombudsmen and increasing use of formalised 'internal' review and complaint-handling procedure
- *NSW Constitution Act 1855* (Imp) - introduced responsible gov
 - S 37 - differentiated between 2 categories of public officials: 1) those 'liable to retire from office on political grounds' and 2) those not in the first class
 - Power to appoint officials in the 2nd category given to the Governor acting on the advice of the Executive Council (the political executive) while power to appoint officials in the 1st category (members of the exec council) given to the Governor alone
 - S 18 - exempted political officials from the rule disqualifying members of the Legislative Assembly from public office
- Principle that the non-political head of state normally acts on the advice of the gov
- Opponents argued that RG was inconsistent with federalism because it implied that a gov could continue in office so long as it enjoyed the confidence of the lower (popularly elected) house and that the Senate would lack the power to force a gov to resign

- Operation of party system has robbed senate any meaningful role in protecting states' rights
- However the Senate in Aus is more powerful than in UK – have the power to block legislation and supply and the fact that minor parties and independents may hold the balance of power in the upper house is an element of CMR in the federal system
- Sustained by a combination of constitutional law, constitutional conventions and political practices
- Courts play a role in developing and policing the system
- *Egan v Willis* (1998) raised issues about the extent to which the courts should interfere with the internal workings of parliament
 - Effect - established as a matter of judicially enforceable common law as opposed to unenforceable constitutional convention that the Legislative council had the power to suspend a minister who refuses to produce a document that is not subject to privilege
 - Selway argued that such legislation of the political process is undesirable because it 'entrenches' a system of gov that he considered to be highly unsatisfactory
 - Gave legal force to what had previously been unenforceable constitutional conventions that were neither expressed nor implied in NSW Constitution
- *Lange v Australian Broadcasting Commission* (1997) - HC view that in giving legal effect to ideas of responsible gov in the federal context, it should stick closely to the words of the aus constitution itself (in contrast to *Egan*)
- Ideas about Rg provided the background for institutions designed to strengthen accountability in public affairs - merits review tribunals, ombudsmen, human rights and privacy commissions, anti-corruption bodies, parliamentary committees and 'internal' review and complaint mechanisms
 - ^products of a social and political climate in which those who exercise public power and authority are expected to be more directly responsive to the subjects of that authority and power

Separation of powers -

- American heritage but because Aus constitution opted for system of RG, textual separation of legislative and executive power would be read as being compatible with the integration of legislature and executive that characterises RG
- Dicey - rule of law and separation of powers were in opposition to each other and the whole point of the independence of the judiciary was to enable the judiciary to protect the rights of the individual citizen from unlawful encroachment by the gov
- legislature (s 1 - legislative power in federal parliament), executive (s 61 exec power in the Queen) and judiciary (s 71 judicial power in the HC and other federal courts as Parliament creates)
 - Text also held to be consistent with the statutory conferral of delegated legislative powers on the executive
- Separation of judicial power in Ch III - 2 separate strands of reasoning:
 1. Judicial power may be conferred on adjudicators that are not Article III courts provided the exercise of that power is subject to a suitable measure of judicial review by an Article III court
 2. Judicial power is may be conferred on adjudicators that are not Article III courts provided the conferral of such power in the particular case does not unduly undermine the purposes of separation of judicial power
- HC's approach - 1909 Griffith CJ - principle that parliament has no power to invest the judicial power of the cth in any hands other than those of a Chapter III court
- Widely accepted view was that efficient conduct of the complex business of gov in the welfare and regulatory state required the creation of non-judicial adjudicative bodies
- HC's created such bodies by distinguishing between adjudicative functions that are the sole preserve of the judicial branch (exclusively or inherently judicial functions) and adjudicative functions that may be performed by either the judicial or the executive branch according to convenience (innominate or hybrid functions)
- 1956 Griffith CJ's principle supplemented by the converse proposition that a non-judicial function may not be exercised by a Chapter III court unless it is incidental to judicial functions - exclusively non-judicial functions - adjudicative functions that are not incidental to the exercise of the judicial power of the cth
 - HC recognised 3 exceptions to the principle - military tribunals and courts martial, public service disciplinary tribunals and the houses of parliament exercising their privilege to punish

contempt's of parliament may exercise judicial power even though they are not Chapter III courts

- Sharp distinction between merits review and judicial review + the strict separation of judicial power = most distinctive aspects of Aus admin law

Supremacy of parliament

- AV Dicey - 4 major implications of the supremacy of parliament:
 1. Statute law would prevail over common law in the event of conflict
 2. Parliament was free to enact whatever laws it chose
 3. No Act of Parliament could be challenged in the courts on the grounds of invalidity or unconstitutionality
 4. No parliament could bind its successors
 - i.e. any and every statute could be repealed by express repeal (parliament following its ordinary procedures) or by implied repeal (in any conflict between an earlier and later act, the later would prevail and earlier be repealed)
- Legislative powers of cth parliament are limited by the constitution and are enforceable by courts
- Colonial legislatures given wide power to legislate for the 'peace, order and good government' of their territories
- => State legislatures must comply with any applicable procedural (manner and form requirements in making laws, including requirements imposed by the legislature itself (s 6 *Australia Acts 1986*))
- No Australian legislature has enacted a bill of rights (except ACT and VIC but no court has the power to strike down legislation for incompatibility with a protected right) - in support of Dicey's idea of freedom
 - Although HC has recognised certain fundamental rights implied in the Constitution
 - Lack of rights reflect a view that the role of the judiciary in controlling the other branches should be quite limited (effect of a bill would be to increase the power of the judiciary)

Rule of Law

- Dicey on the British Constitution:
 1. The exercise of power by gov over citizens was constrained by clear rules of law
 - raises theme of the appropriate balance between rules and discretion
 - Discretion implies choice; rules imply enforceable restriction of choice
 2. Those laws were applied and enforced by 'ordinary' courts rather than by special tribunals
 - ordinary courts have 2 relevant distinguishing characteristics:
 - i. They are protected from external influence and control by a strong principle of judicial independence
 - ii. They have jurisdiction to hear a wide range of disputes between private citizens as well as between citizen and government
 3. The rules that constrained the exercise of gov powers were the same rules as regulated the conduct of citizens
 4. The rights of citizens were protected by the ordinary law rather than by a 'higher law' or 'constitutional' bill of rights
- Dicey did not oppose discretion but the unconstrained ('arbitrary') discretion
- To reconcile his views on parliamentary supremacy with his account of the rule of law - argued that the power of parliament was subject to political and social constraints that made legal limitations unnecessary
 - Argument labelled inconsistent and 'dangerously complacent'
- Issue of 'ordinary' vs 'administrative' courts underlay a debate about whether tribunals should be identified with the judicial or the executive branch of government
- Dicey's aversion to a Bill of rights - view that the most important protection for the individual against government was to be found in remedies (e.g. habeas corpus and damages in tort) and not in statements of rights
 - Remedial orientation of classic English administrative law
- Early days of British of occupation led to the balance between law and discretion leaving ample room for official freedom and governor prerogative