

1. ADMINISTRATIVE LAW

Context of Admin Law

Rule of Law

- **Rule of law:** The principle that every person and organisation, including the government, is subject to the law.
- In Australia, rule of law primarily requires that exercise of official power (legislative, executive or judicial) must be supported by constitutional authority or law made under such authority. Secondly, disputes about limits of legislative and executive power can only be determined in final and binding manner by exercise of judicial power. (French)
- **AV Dicey's Three Concepts:** absolute supremacy of the law (no breach unless established under ordinary legal manner; not administered arbitrarily); equality before the law (including govt. officials); and the rights and freedoms of the citizen being protected by the common law rather than constitutional bill of rights.

Parliamentary Supremacy

- **Parliamentary Sovereignty:** The principle that Parliament may make or unmake any law it wishes. Legislature is sovereign and supreme.
- Parliament is held accountable directly to the people by democratic process of election. However, the Executive (Ministers) are elected by the Party, therefore accountable under administrative law.
- **Statutory interpretation:** Judges power of interpreting statutes is the most frequent and effective means by which parliamentary sovereignty is reconciled with the rule of law.
 - Principle of legality: Presumption that Parliament does not intend to interfere w/ common law rights and freedoms except by clear and unequivocal language for which Parliament may be accountable to the electorate.' *Potter v Minahan* (1908) cited by French. I.e. requires statutes to be construed to avoid or minimise encroachment upon rights and freedoms at common law.
 - Statutory abrogation applies to procedural fairness – *Miah* (2010).
 - Statutory power is confined by subject matter, scope and purpose of the legislation by which it is conferred.

Separation of Powers

- **Executive:** challenges decisions made by the Executive (ie. Ministers / Departments) on legality by the Judiciary.
- **Judiciary:** judicial review of administrative action (JRAA) – only errors of law can be challenged by JR.
- **Legislature:** cannot challenge decisions made by the Legislature under the notion of parliamentary sovereignty which means the Legislature has power to enact laws under which the Judiciary has the power to make decisions on the basis of legality. Citizens give the Legislature power through democratic process of election.

The Australian Constitution

- *Australian Constitution* defines, separates and limits the legislative, executive and judicial powers of the Commonwealth.

Modern Challenges

- **Privatisation / Outsourcing of Decision-Making:** Decisions made by non-governmental bodies cannot be reviewed under s 75(v) as they do not meet the requirement for 'officer of the commonwealth.' Whilst some non-governmental bodies have a sufficiently close connection to the execution of statutory and executive powers to satisfy the requirement, the constitutional text is unlikely allow the HCA to adopt the *Datafin* (UK) public function test.
- ***Plaintiff M61 (2010)*** – there was no specific answer to the questions of whether the HCA's supervisory jurisdiction covered an Independent Merits Review process undertaken by persons not officers of the Department but engaged by a private company contracted by the Department for review of 'offshore' refugee visa applications.
- **Privatisation removes government accountability:** Outsourcing to private providers removed government accountability for public services; no ability to challenge decisions through admin law. Eg, Internet – policy decision to privatise the national broadband network (NBN) to a privacy company NBN Co to install infrastructure to provide a 'public service.'

Administrative Law Values

Themes and Values

R. S. French, 'Administrative Law in Australia: Themes and Values Revisited' in M. Groves (ed.)

- **Narrow approach – Rule of law:** Values that reflect community expectations that representative and responsible government in a democracy will act within the law, honestly, sensibly and fairly in its dealings w/ citizens in operation of the rule of law:
 - Lawfulness: compliance w/ legal requirements for exercise of the power

- Good faith: honest action and fidelity to the purposes and criteria that govern the exercise of statutory power.
- Rationality: decisions must be reached by reasoning which is intelligible and reasonable and directed towards the purposes of the power.
- Fairness: procedural fairness regulates the exercise of power unless excluded by plain words. Includes fair hearing rule and bias rule.
- **Broad approach – Government accountability**: accessibility, openness, participation and accountability. Purpose of admin law to control government power in protection of individual rights; rules designed to ensure administration effectively performs assigned tasks; ensures govt. accountable and fosters participation by interested parties in decision-making process.
- S 7 directly confers upon the HCA original jurisdiction in all matters in which a writ of mandamus, prohibition or injunction is sought against an officer of the Cth

Allsop 'Values in Public Law' (2016) 13 *The Judicial Review* 55

- **Key Values**: fairness, reasonableness and justice in framing the legal rules and exercise of power.
- **Values in public law**: reasonable certainty; honesty and fidelity to the Constitution; rejection of unfairness unreasonableness, arbitrariness; equality; humanity and the dignity and autonomy of the individual (mercy)
- **Mercy**: refers to a need for a capacity of mercy as 'a capacity in special circumstances to avoid the rigidity of inexorable law is the very essence of justice.'
- **Broader application of admin law values**:
 - Bankruptcy Act – impact of bankruptcy on individuals to 'crush lives'; competing considerations between providing (1) fair, equal, orderly system to regulate distribution of assets to creditors (ie. certainty); (2) treating the bankrupt with humanity and dignity by preferring rehabilitation over punishment (ie. protecting the bankrupt from inherent vulnerability from impoverishment).
 - Criminal law – Court emphasised the necessary individuality and humanity in sentencing process, rejecting staged approach to sentencing in preference for individualised justice (*Markarian*); but competing considerations of principle and rule, consistency, fairness and equality. Sentencing requires consistence of principle.

Issues with a value-based theory of administrative law

- The evaluation of administrative law effectiveness depends on how the values of admin law are defined; many of them are also conflicting values between accountability to the law, parliament, individuals and the general public.

Purposes of Admin Law

Two Different Approaches

Legal Approach (Accountability Mechanism)

- **Purpose**: provide complainant with redress for past breaches of administrative law; retrospectively holds decision-makers accountable for breaches; expresses and promotes admin law values of legality, rationality, procedural fairness etc.

Regulatory Approach (Regulatory Tool)

- **Purpose**: influence the way decision-makers exercise their powers in the future; prospective effect on bureaucratic behaviour; promotes process related values (ie. procedural fairness and legality).
- **Three components of a Regulatory System**:
 1. Standards: influence how decision-makers exercise their functions
 2. Compliance mechanism: affected individuals have incentive to monitor compliance through availability of complaint mechanisms for breach of admin law.
 3. Mechanism for promoting future compliance: Courts, tribunals, ombudsmen to enforce admin law by providing qualified complaints with redress and incentive to comply in future.