Administrative Law notes

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1. Administrative Law – Theory, History and Context

Introduction to Administrative Law

- A feature of Australian history is that community relied on government to provide public services and communal life from the outset
    - Convict settlers relied on government to provide for everything
- Today, transport, education, income support, allocation of land have been under government control for much of Australia's history
- Australians have dealings with government officials and agencies throughout their lives
    - The power wielded by officials is considerable and has grown over time
- This in turn has led to public scrutiny and accountability

Dichotomies in Administrative Law Theory

Judicial regulation vs legislative / executive autonomy

- Parliament, government agencies and courts and tribunals play a part in government administration
- The boundaries of each actor is always subject to debate, reflecting different views
- These views reflect preferences: judicial scrutiny and control or executive antagonism
- A perfect example the Chief Justiceship of Sir Anthony Mason (1987-95), where he conducted a 'judicial activism' which sought to develop policies that addressed the societal problems
- Another example of pragmatism vs activism is the decision of the HC in ***Minister of State for Immigration and Ethnic Affairs v Teoh*** **HCA 20, (1995) 183 CLR 273**, where the court understood that international treaties created an expectation, even if it had not been implemented in domestic legislation
    - The government criticised it for exceeding the role of the court and legislated to overturn the ruling

Intervention vs restraint: red light / green light

- Also known as 'theoretical taxonomy' of red light / green light
- Red light theorists sought to stop collectivist State from redistributing wealth and interfering with personal liberty and private property, and focused on controlling (restraining State power)
- Green lighters sought to use the law to facilitate the State to regulate, redistribute and provide services
- 'Amber light' conceded the desirability and need for the exercise of public power and reject the view that public law should be seen exclusively in terms of control of such power, although forms of political control need to be buttressed by legal control.

Individualism vs collectivism

- The preferences of the administrative lawyers reflect preference for a individualist or collectivist view of the state
- Collectivist:
    - Decisions made with consideration of the broader social concerns
        - E.g. rational allocation of limited resources
        - E.g. predictability and consistency
    - Distributive and horizontal equity
    - Courts should understand the different functions of the executive

- Individualism:
    - Administrative review is concerned only with ensuring individual justice is achieved

- Conflict can be seen in these positions:

Sir Gerard Brennan 'Foreword' in R Creyke (ed), *Administrative Tribunals: Taking Stock*, CIPL, 1992

• Public confidence in tribunals are better secured by their embracing the judicial model
• Tribunal must be and be seen independent from the executive branch of government
• Tribunal of independence and competence provides great benefits:
  ○ Releases political system from reviewing administration
  ○ Gives assurance of integrity and administrative justice
• A strong independent judiciary and, nowadays, members of administrative tribunals, is what secures freedom

S Skehill, 'The Impact of the AAT on Commonwealth Administration: A View from the Administration' in J McMillan (ed), The AAT – *Twenty Years Forward*, AIAL, 1998
• No constitutional principle of separation of powers that applies to administrative tribunals • Accordingly, they are part of the executive and they need to work with the rest of the elements of the branch • There is much to gain from operating in conjunction, maintaining the tribunal independence, but to enhance policies and decisions of the agencies

Sir Anthony Mason, 'That Twentieth Century Growth Industry, Judicial or Tribunal Review' **(1989) 58 *Canberra Bulletin of Public Administration* 26**
• Judicial review is concerned with the operation and preservation of policy, paying subsidiary attention to the ascertainment of facts and the impact of policy on the interest of individuals • Administrative review places the emphasis on the ascertainment of facts and how the individual is affected by rule and policy • The judge's primary consideration is justice to the individual, in the belief that policy has been framed to operate sensibly • Administrators tend to be more concerned with the possible consequences of the decision than the justice or rightness in light of the facts

Justice Murray Wilcox, 'Judicial Review and Public Policy' (1989) 58 *Canberra Bulletin of Public Administration* 70
• Although it is often spoken about accountability of the persons making the policies, the practical sense of it is limited, whether it that of ministers (only held accountable in very extreme cases) or bureaucrats (no accountable at all) • The criticism of the approach by the courts to review the substance (and not just the procedure) of the policies is the best remedy against tyranny. Court are not subordinate to the Administrators.

L Curtis, 'Crossing the Frontier Between Law and Administration' **(1989) 58 *Canberra Bulletin of Public Administration* 55**
• The relevance of a decision is that it is made in accordance with the law, following the right process and not influenced by the personal or political preference and it is fair. • Policies should be carried out as long as they are not against the law for which policy directions and guidelines play an important part. • Legislation is not the only tool to articulate government policy and sometimes it will be necessary to involve administrators executing them.