ADMINISTRATIVE LAW: TEACHING AND PRACTICE

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[Administrative Law was slow to gain acceptance as a separate body of law. This article examines why it should be taught and its relevance in Australia today. The author examines recent methods of teaching Administrative Law, in both England and Australia, the theories behind these methods, and their problems. Statistics are provided to suggest the most likely grounds for litigation, and what the consequent focus of Adminstrative Law teaching has ignored. The author points to the need for a reformulation in approach, reviews a number of text and case books on the subject, and suggests the study of this area of law should be closely related to its practical operation.]

(1) *Why should Administrative Law be Taught?*

Even the question which commences this article is problematic. What is administrative law? Who should teach it? Where? And to whom?

Dicey, of course, denied that English law knew any body of rules which could be described as administrative law,[1] although he was using the phrase in a very limited sense. However, Dicey's view of what constituted administrative law has since coloured virtually all English-speaking discussion of administrative law, and a lot more besides. This article is written in an Australian context, for Australians. For my purpose it is sufficient to use 'administrative law' to mean that body of rules, practices and institutions which exercise a measure of limitation, direction and control on the operations of the State, to the extent that those rules, practices and institutions can be separated, however artificially, from the rules, practices and institutions which *constitute* the State. There is a close connection between the two.

Administrative law, in this sense, clearly exists in Australia, and in many ways its importance is growing. Anyone who studies the operation of the Australian State must be aware of this importance which, in general, has been more readily recognized by non-lawyers than by lawyers. In the standard Australian text on Public Administration, Spann included a chapter on administrative law,[2] and O'Malley, in the first Australian text on sociology of law[3] gives attention to it.

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[1] Dicey, A. V., *Introduction to the Study of the Law of the Constitution,* (10th ed., 1959).
[2] Spann, R. N., *Public Administration in Australia* (2nd ed., 1973).
[3] O'Malley, P., *Law, Capitalism and Democracy: A Sociology of Australian Legal Order* (1983).

The prevailing theory of public law in Australia into the 1970s was Diceyan. Friedmann, Benjafield and Whitmore pioneered the teaching of courses in administrative law in the 1950s and 1960s, and their perceptions, at least in the early stages, were Diceyan. Despite their efforts it took a long time for the legal academics and practitioners who dominated Australian law schools to recognize the importance of the study of this area. Administrative law is still not a required subject in many law degree courses. It is also taught, with a similarly slow and somewhat grudging acceptance, in courses leading to qualifications in public administration, but even in this setting, the dominant influence is still Diceyan. Neither in law nor in public administration courses has it readily been accepted that administrative law should, indeed must, be taught largely as a course which is not confined by the traditional disciplinary boundaries of law, politics, public administration, sociology or social philosophy. To have any meaning for either the teachers or the students in courses presented in any of these contexts, the course must draw on, or, in a platonic sense, partake of, elements drawn from within each of these traditional academic subcultures if its full effect and meaning are to be appreciated. While what is suggested here may be most directly relevant for law schools, it also applies to courses in administrative law offered in other contexts within tertiary institutions.

Although I have taught public law courses directed primarily at administrators or students of administration, both within the public service itself and within Universities and CAEs, I am now teaching a course in a University law school. My experience outside law schools has given me a broader understanding of administrative law, and also a wider understanding of what law schools should be attempting. The function of the University law school is not solely the production of barristers and solicitors who will engage in private practice, though many law students will do so, and virtually all of them expect their law school education to provide at least this career option. Administrative law forms an important part of the 'professional' or vocational element of a law degree course.

While it may provide professional education, the University also has the overriding function of furthering understanding, and in this context as well there is a justification for the teaching of administrative law. Administative law is important in understanding modern society, because of the perspectives it provides on the modern State, as well as being an important tool with which every practitioner of law (in the broadest possible sense) whether in private practice, or whether, in increasingly large proportion, within the body of 'government lawyers', and every person seeking a position in public administration should be equipped.

The question is whether traditional approaches to the teaching of administrative law are any longer appropriate or adequate, and if not, what should be done. This question arises for me, on my return to the formal teaching of administrative law as a University Law School course, and also because of the appearance of a new English book of teaching materials, (Carol

Harlow and Richard Rawlings, *Law and Administration*[4]) which breaks new ground and raises new questions. I have been forced to ask not *why* I should teach administrative law, though it has been useful to rethink the justification, but more importantly, *how* I should do it.

Australian law schools have always accepted, even without thinking, that the teaching of constitutional law should have a place in the law school curriculum. In some law schools the label has changed: in my own, it is 'Australian Government', at the University of Sydney it is 'Public Law'. Law teachers are increasingly aware of the artificiality of the distinction between 'Public Law' and 'Private Law' and some of them are also questioning the distinction between 'the public' and 'the private'. The distinction between constitutional and administrative law has been very marked in Australia[5], largely because our written constitution has required attention to be focussed on the technical rules of interpretation which the High Court has attached to the text. More fundamental and philosophical questions about the nature of the State and of government have tended to be pushed aside, though there are signs that this trend has ceased, and more attention is now given in law schools to more theoretical and conceptual matters.[6] However, administrative law is still taught and studied as if it were something completely different from constitutional law. This should not be so, and at Macquarie University Law School there has been an attempt to integrate some elements of administrative law into the two Australian Government courses.

Can the study of what, in an English-speaking context, has been described as 'public law', have much meaning if it is divorced from the study of the notion of power and the specific ways, within the legal order, in which power is exercised? If not, it would be foolish to accept that the formalistic study of rules and institutions suffices to give anything like a full understanding of the rules and institutions which govern the exercise of power within the modern State. The State is not the exclusive channel through which the exercises of power flow, but it is important.[7] A traditional, formalist study of constitutional law would introduce the formal basis of legislation and the courts as the sources of rules, the rules governing the institutional structures through which legislation is made, and the role of the courts, exercising powers of 'judicial review' within that formal structure. It could examine the formal sources of the power of the executive branch of government: *e.g.* the prerogative, delegation of legislative power, *etc.* These are essential in understanding the structures within which power is exercised in modern society,

[4] London, Weidenfeld & Nicolson, 1984.

[5] 'Public Law and Accountability of Government' (1985) 15 *Federal Law Review* 10.

[6] Detmold, M., *The Australian Commonwealth: A Fundamental Analysis of its Constitution* (1985) adopts a logical and philosophical approach to the study of the Australian State, legal order and Constitution. A different, but similarly 'fundamental' approach can be discerned in the materials produced by P B Kavanagh for the course LAW 300 Australian Government I, especially in 1984 and 1985.

[7] Nadel, Mark, 'The Hidden Dimension of Public Policy: Private Governments and the Policy-Making Process' (1975) 37 *Journal of Politics* 2.

and of some of the controls which may inhibit such power. Such an examination would not give a complete picture, and, it is suggested, such an incomplete picture would distort the full understanding which, in the western tradition, it is the objective of a university education to provide. For example, it ignores the legitimating function of law.

It follows that a study of what is called administrative law in this paper must also take account of theories of the State and of power; the effects and consequences of 'administrative law' can be understood only in the context of what the objects and functions of the State may be. Though 'grand theory' is today enjoying something of a revival, I am sceptical. Phillippe Nonet has indicated, in the context of administrative law, what some of the failings of grand theory may be.[8] Grand theory may provide some tools for understanding, but will seldom, if ever, provide a complete answer. Attention needs also to be paid to specific instances of the operation of administrative law, and this requires some forays into the disciplines of public administration, politics, psychology, sociology and organizational theory, at least, if the understanding is not to be 'one-dimensional'. A study of administrative law should take such matters into account, for they will assist the development of our understanding of the modern State and of its operations and effect on interpersonal relations.

The nature of the modern State provides a further justification for the teaching of administrative law. In an advanced welfare-capitalist society such as Australia, the State is all-pervasive. It is the provider of benefits and bounties, and the regulator of conduct deemed, by those in power, to be anti-social. According to the prevailing Diceyan theories, the activities of the State are founded on some basis of legal authority, and legal rules and institutions influence whether this authority is to be expanded or confined. A person credentialed as having a qualification in law may be called upon to advise and represent persons who desire to resist, or call in aid, State power, in every area in which the activities of the State can be found. The advice and representation may be in the traditional form of representation before courts and tribunals. Increasingly it may be in the area of policy and planning, within the State itself, but also within corporate and voluntary associations of many kinds which have arisen within society, for many reasons, not least of which may be to balance the power of other organizations and of the State itself. That part of the studies offered by law schools which is not general education, but which is specifically professional, requires understanding not just of the specific rules, but also of the contexts within which the rules, practices and institutions of administrative law operate. A knowledge of corporate law, of trade union law, of planning and environmental law, of welfare law or of taxation law is incomplete unless it can be plugged into a substructure of administrative law.

[8] Nonet, Phillippe, 'The Legitimation of Purposive Decisions' (1980) 68 *California L Rev* 263.

While, in one sense, administrative law is context-dependent (as are all areas of law), it might be suggested that the way in which it is to be studied will depend on the motivation of the students and the general nature of the course which they are studying. Similar arguments are consistently made in relation to the study of 'commercial law' subjects in commerce courses. I do not accept these, or similar arguments made in respect of administrative law, for they assume that administrative law is different depending upon whether the practitioner is operating as a bureaucrat, an advocate for government, or as a barrister. That assumption is false and may be misleading. Whatever the perspective of the practitioner, she/he will use the same forensic and analytical tools and techniques, and will require a knowledge of the same rules, practices and institutions in the same or similar contexts.

It is true that government departments and agencies employ an increasing proportion of law graduates, who work in policy, administrative and advocacy roles. There are indications[9] that much of this work is shared by law graduates and administrators with other academic and professional backgrounds, all of whom see themselves in an administrative, rather than a 'lawyer' role; when such administrators appear in an advocate's or representative's role, they will have lawyers as their opponents. All take part in the same game, played according to the same rules. The administrator needs the knowledge of 'legal' skills and rules; the lawyer needs to understand the administrative context in which a subject-matter has arisen. All this points to a similar type of study which the two can pursue in common.

(2) *How has Administrative Law been Taught?*

Ten years ago, in a seminar in Canada, Terence Ison delivered what, for me, was a seminal paper,[10] in which he criticizes the pervasive influence of private law models on both the teaching and practice of administrative law. Included in the 'private law' model are the adversary process, rules relating to standing, the preoccupation with 'rights' (since taken up, in slightly different contexts, by others)[11] and the fact that the overwhelming bulk of the work of the courts, solicitors and barristers has been concerned with matters of property (including trusts and succession), contracts and, over the past century, torts. In England, at least, the absence of a written constitution has precluded constitutional litigation. Until the last century, the small size of the British bureaucracy and indeed, of the operations of the State, has meant that there have been few occasions on which a citizen with sufficient resources would want to challenge administrative decisions: there simply was very little

[9] Goldring, John and Hawker, Geoffrey 'Lawyers in a Government Department: A Report and Suggestions for Further Research' (1985) XLIV *Australian Journal of Public Administration,* 287.

[10] Ison, T. G., 'The Intrusion of Private Law in Public Administration' (1976) 17 Les Cahiers du Droit 798.

[11] Especially McAuslan, Patrick, 'Administrative Law, Collective Consumption and Judicial Policy' (1983) 46 *Modern Law Review* 1. See also Prosser, Tony, 'Towards a Critical Public Law' (1982) 9 *Journal of Law and Society* 1.

'administration' in the modern sense. Any 'public administration' was largely confined to local boroughs and corporations and to justices of the peace who combined their relatively minor administrative functions with judicial functions. The traditional administrative law remedies (largely the prerogative writs) were often issued indiscriminately to the justices and local government bodies, without regard to the strict characterization of their functions as 'administrative' or 'judicial'.

For courts and lawyers who saw even the prerogative writs (notwithstanding the constitutional significance afforded them by Dicey) simply as a minor by-product of the general business of the courts, the prevailing attitude could only be expected to be that this was just another part of a single body of 'law'. It was therefore hardly surprising that Dicey's contention, that there was no separate system of administrative law in England, was accepted without demur. The State, and those who exercised such powers as the State then had, were indeed subject to the same body of rules, administered in the same institutions, as were other individuals. Dicey, of course, was seeking to provide a convenient model which could answer (mainly) United States critics' suggestions that the United Kingdom had no constitution; he isolated a body of legal rules and practices which he systematized into a body of 'constitutional law'. Thinking critics[12] make allowance for this. The growth of the modern State and need for a system of administrative law has largely occurred since Dicey prepared his Oxford lectures. Those changes have required a 're-thinking' both of the nature and function of administrative law which may well not have been as necessary then, and of the relation of administrative law to constitutional law.

Yet it is Dicey's legacy that such administrative law as was taught in Australia up to the 1960s was seen simply as an offshoot of traditional studies of constitutional law (whose agenda, except for those parts which deal specifically with written constitutions, was also set by Dicey). Dicey alone cannot be blamed for the prevailing formalism and 'mechanistic jurisprudence' which pervaded the teaching of all law in Australian and English law schools until recently. That, fortunately, is also now beginning to change, as professional law teachers realize that formalism alone cannot provide all the answers. The prevailing formalism has certainly meant that 'public law' has been taught as public law, public administration as public administration, and politics as politics, with minor and grudging concessions that each may have some influence on how the others are to be understood or practised. For an academic discipline which has prided itself on its practicality, law should be ashamed that in its approach to administrative law, it has concentrated on a single practical perspective and largely ignored other practical perspectives which

[12] *eg* Jennings, W. I., *The Law and the Constitution,* (5th ed., 1959); McAuslan, Patrick, *op. cit.* n. 11, and 'Administrative Law and Administrative Theory — the Dismal Performance of Administrative Lawyers' (1978) 9 *Cambrian Law Review* 110; Arthurs, H. W., 'Rethinking Administrative Law: A Slightly Dicey Business' (1979) 17 *Osgoode Hall Law Journal* 1; and Arthurs, H. W., 'Jonah and the Whale: The Appearance, Disappearance and Reappearance of Administrative Law' (1980) 30 *Univ of Toronto Law Journal* 225.

may be equally, or more important, both for teaching and for practice. It has also largely ignored the theoretical perspectives on the subject. I intend to return to these other perspectives shortly.

It is perhaps a consequence of the formalist approach that when administrative law has been taught in England and in Australia, it has concentrated on the rights of the individual citizen as against the State, rather than on what Patrick McAuslan has called interests of 'collective consumption',[13] which include collective and communal interests, and the distributions of wealth and power. This aspect has strengthened the connections between what is perceived as a legal liberalism (characterized by a preoccupation with individual, especially property, rights) and the bourgeois-capitalist state. Some criticisms have been made on the ground that while the State has passed from bourgeois capitalism into welfare capitalism, the legal system and its institutions, as ever, lag some decades behind. Perhaps there may be some connection between the current growth of neo-conservatism and the rediscovery of the value of individual rights and autonomy which characterize some elements of the 'critical legal studies' movement and some who have been influenced by it. Frug,[14] the most noticeable 'critical' commentator on American administrative law, does not seem to move very far beyond the analysis of the 'realist', Richard Stewart[15] and though they are writing about a substantially different subject-matter, there are many parallels between Stewart and McAuslan. Neither seeks to degrade individual values, but simply to assert that there may be other interests which deserve representation in processes with which administrative law, in the sense in which the term is used here, should be concerned. This rather more abstract debate about what administrative law is and does has certainly influenced ideas about how administrative law should be taught in the future, to which we shall return.

(3) *The Operation of Administrative Law*

Harlow and Rawlings[16] group those who have tended to theorize about administrative law into 'red light' and 'green light' theorists, though they concede the existence of 'amber light' theory. This characterization can be seen as a device to assist in understanding the effect of various approaches to administrative law. Dicey is a 'red light' theorist, in that he sees administrative law as placing restraints on what officialdom may do. To the extent that a theorist sees administrative law as establishing a system of limits on the exercise of governmental power, she/he is a 'red light' theorist. A 'green light' theorist, by contrast, perceives the law as an instrument by which policy can be implemented. McAuslan, in this taxonomy, is probably a 'green light'

[13] McAuslan, *op. cit.* n. 12.
[14] Frug, Gerald E., 'The Ideology of Bureaucracy in American Law' (1984) 97 *Harvard Law Review* 1277.
[15] Stewart, Richard B., 'The Reformation of American Administrative Law' (1975) 88 *Harvard Law Review* 1669.
[16] *op. cit.* n. 4, Chapter 1.

theorist. Others would be harder to classify. Kenneth Culp Davis,[17] probably the most influential recent American writer on administrative law, concedes the need for broad discretionary powers to be conferred on officials, in the interest of the implementation of government policy, but calls for the imposition of restraints on this discretionary power. How is he to be classified?

These theories centre around the theorists' perceptions of how the rules, practices and institutions operate. A major failing of many lawyers in the common law tradition is that they perceive administrative law solely from the standpoint of the private lawyer whose task it is to vindicate the right of the individual, or to protect the collective interest against those who, for reasons based on their interest of property, profit or ideology, seek to assert an individual right against it. Neither McAuslan, nor Harlow and Rawlings, fall into this trap: they are respectively aware that the interest which is asserted by the State is not necessarily a collective interest but may just as easily be the interest of a private person or group on whose behalf the State has intervened. Therefore they do not see administrative law in terms solely of rights or interests but rather of a system in which various forces have some influence. While cases (and, to a lesser extent, statutes) which seek to enforce or protect rights are an important part of administrative law, they are not the only part. They are merely the part that is emphasized by the private law orientation of our legal culture, whose characteristics were described by Ison.

Since administrative law deals with what might, in broad terms, be called 'the administration' (including, but not limited to, the State), it is important that lawyers realize that in addition to the legal culture with which they are most familiar there is also an 'administrative culture' which, in terms of forming 'administrative law' in the sense in which it is used here, is probably more important. Lawyers often tend to see rules, practices and institutions in the light of results in individual cases. Administrators are more likely to see them in terms of either policy implementation or mass decision-making, which may amount to the same thing. Two recent studies serve to illustrate this.

Until the arrival of the 'new administrative law', discussed below, the High Court of Australia decided relatively few cases on administrative law, despite the specific provisions in s.75 of the Constitution which confer original jurisdiction on the High Court in matters where prohibition, mandamus, habeas corpus, injunction or declaratory relief is sought against the Commonwealth or an officer of the Commonwealth. A study which Ian Ramsay and I carried out in 1982 produced some interesting information. The study was originally undertaken to provide a basis for comparison as part of a planned project to assess the impact of the 'new administrative law' (a project subsequently abandoned because of a number of difficulties. The Administrative Review Council has subsequently undertaken such studies, but it, too, has encountered difficulties). It was designed to identify types of

[17] Davis, Kenneth Culp, *Discretionary Justice, A Preliminary Enquiry.* (1969).

administrative activity which had been particularly subject to challenge in the courts. The method was relatively crude and superficial. All reported decisions of the High Court in the period 1904-1975 were examined if they appeared to challenge an administrative act on grounds which a lawyer would normally identify as 'administrative law' grounds rather than those which, for example, involved questions of constitutional validity or of tortious liability. Not every action was considered where some administrative action may have been challenged collaterally, *e.g.* in an action for damages or by way of defence to a criminal charge. For each case, we looked at the nature of the administrative act under challenge, the nature and status of the organ or officer of the government whose action was challenged, the nature of the ground of the challenge (*e.g.* denial of natural justice, error of law, jurisdictional error or lack of power), and finally whether the action was found to be valid. Activities of the Commonwealth related to taxation or to conciliation and arbitration were excluded because the difficulty of separating (if, indeed, that would have been possible), the 'administrative law' aspects of the decisions from other aspects.

Over the period 66 reported decisions involving Commonwealth officers or agencies were located which we determined to be 'administrative law' cases. The proportion of cases reported is always a very small proportion of the cases which are actually finalized. Those cases themselves represent probably less than 5% of actions commenced as we must assume that the overwhelming majority of cases in this, as in other areas, are settled without a hearing. We were dealing only with the High Court. On the other hand, reported cases in the High Court are generally important because they establish principles of law, and as we were concerned with the impact of judicial review on administrators, we consider that reporting of the cases was a significant factor. The relatively small number of reported cases in this area was surprising, but we may have found more had we looked at decisions of State courts in actions involving the Commonwealth. Of the 66 cases isolated, 23 concerned challenges to war-time legislation, which were not treated as relevant, as many of the actions of the Commonwealth which were challenged were taken under special legislation which represented incursions by the Commonwealth into new areas, often under hastily drafted legislation.

Of the remaining cases, five concerned immigration and naturalization, five concerned customs decisions, four concerned decisions relating to the Public Service, four concerned primary produce marketing or stabilization schemes, four related to patents or trade marks, and three concerned decisions of the Postmaster-General (two relating to licensing of broadcasting or television stations). It may be concluded that this does not show any meaningful pattern of challenges which would indicate that the decisions of particular classes of government officers are more susceptible than others to challenge. Decisions relating to both veteran and civilian pensions were virtually non-existent. All that can be said is that an administrative action was more likely to be challenged if it affected the status (*e.g.* immigration or employment in the

public service) or economic interests (*e.g.* customs, industrial property) of the challenger. It is clear that the cost and unfamiliarity of the court system is likely to have inhibited challenges to decisions affecting individuals, especially those on low incomes.

We also made an arbitrary classification of the grounds of challenge. These were:

- power (including *ultra vires* and lack or excess of jurisdiction);
- matters considered (including relevant and irrelevant considerations, bias and improper purpose);
- uncertainty or vagueness;
- error of law;
- denial of natural justice;
- failure to observe specified procedures or procedural *ultra vires;* and
- failure to perform a duty.

In some cases there was more than one ground of challenge, so that the number of grounds exceeds the number of decisions examined. Those grounds were:

power	43
matters considered	10
uncertainty or vagueness	7
error of law	5
denial of natural justice	8
procedural *ultra vires*	7
failure to perform duty	1

This indicates that questions of the extent of power, largely a matter of statutory interpretation, were the most likely grounds for challenge. Several of the cases in which error of law provided a ground related also to questions of interpretation of provisions conferring power of jurisdiction, and there was also some overlap between this category and the category of procedural *ultra vires.* The contrast between the decisions studied and more recent trends where, for example, natural justice has been a major concern of the courts, is quite noticeable.

In 31 of the cases examined, the administrative action was found to be wholly or partially valid. In 30 the action was found to be invalid or illegal. In the other five cases, the result turned on questions of standing or the discretionary nature of the relief sought. It is clear that the processes of negotiation and consultation which are part of the process of litigation is likely to have filtered out cases whose probable outcome was relatively clear. Only where cases of liberty of the person is involved, as in the case of immigration or deportation, are litigants likely to run a high degree of risk, especially because of the costs involved in High Court action.

No conclusive results can be drawn from this study. The fact that it was confined to reported High Court decisions in an arbitrarily limited field made the sample of less worth than it might otherwise have been. However, it is possible to say that a challenge in court to administrative action, though a possibility, was very unlikely. It could not be said that every member of the Commonwealth public service should have felt apprehensive that any decision which she/he took was likely to end up in the courts. In 1974, W. H. Angus,

a Canadian,[18] suggested that judicial review might not be necessary, or that its justification might be limited. The fact that neither the Administrative Appeals Tribunal, nor the Federal Court exercising jurisdiction under the Administrative Decisions (Judicial Review) Act 1977 has been short of business, leads to the conclusion that there is a definite demand for external review mechanisms. Yet it would not seem to be a supportable argument that, before the introduction of the New Administrative Law, there was relatively widespread unlawful activity on the part of the administration of the Commonwealth.

Some other reason should be sought for the general acceptance by administrators of an obligation to act in accordance with legal rules. If this is the case, then it could be argued that because very few cases of judicial review of administrative actions reached the High Court, there is a body of administrative law which includes but extends well beyond the cases decided by the courts. If that is the case, why has the attention of students and teachers of administrative law been focussed so exclusively on cases of judicial review of administrative action? The *direct* effect of litigation on the operations of the State must be relatively insignificant. Why, then, do administrators observe the dictates established by legal rules? This is a generally important question, but in the area of administrative law it may have a special importance.

Until the advent of the New Administrative Law, it was often difficult for persons affected by decisions even to find out that the decisions had been made. Even if they did have this information, there were substantial barriers to legal challenge. These included cost, procedural difficulties (especially in the case of the prerogative writs), the rule that courts were concerned only with limits of power and procedures rather than with the merits of decisions, standing rules, and finally, the rule that in virtually all procedures available for judicial review of administrative action the court retained the ultimate discretion whether or not to grant any remedy. An administrator who could work out probabilities could probably establish that the likelihood of a court challenge to a decision was probably very small. However, administrators assumed that they were required to obey the law, and lawyers assumed that administrative law really only was *judicial* review of administrative action. Nevertheless, most administrators, most of the time, obeyed the law and attempted to fulfil other community expectations. If this is so, can judicial review cases really constitute the main body of administrative law?

To my knowledge, there has, to date, been only one publicly available detailed study of the operation of review mechanisms within a department

[18] Angus, W. H., 'The Individual and the Bureaucracy: Judicial Review — Do We Need It?' (1974) 20 *McGill L J* 177.

of government in Australia.[19] In this study Grbich examined the files of a particular department to assess how decisions were made and what effect the availability of external review had on the decision-making process of the department. The study confirmed a widely held view that the existence of rules which both confer power and limit the way in which power can be exercised are *internalized* by administrators, in much the same way as ordinary citizens internalize legal rules. There is little need for the machinery of the State to intervene to ensure that drivers of vehicles keep to the left side of the road, or that people do not generally assault those they encounter in shopping centres. Just as legitimate prescription of norms operates within the general community, so the binding nature of these norms permeates the administrative culture. Weber[20] was conscious of the parallels between the legal and bureaucratic orders, and this may be one area where the ideal type is close to the reality. Common sense establishes that a public servant is less likely than a lawyer to look at the law as Holmes' bad man[21] would look at it in order to find loopholes. The bureaucrat, if anything, tends to 'go by the book' and is, in fact, likely to be a good deal more legalistic than a lawyer.[22]

Why then, does the academic lawyer's idea, and possibly the practitioner's idea, of administrative law centre around the notion of *judicial review* of administrative action? Judicial, indeed, external, review is the exception which proves the rule. What do students know of administrative law who only know judicial review? Fortunately, the tide is turning. In England, Craig[23] and Harlow and Rawlings have certainly seen that students need to know a lot more. In Australia, there are undoubtedly many practising and academic lawyers who share this appreciation. Harry Whitmore's first year lectures at the Sydney University Law School in 1964 (which I attended) emphasized that the first thing one did on learning of an adverse administrative decision was NOT to rush off for a writ of certiorari. However, most contemporary Australian writing in this area does not provide much evidence that there is more to administrative law than judicial review. One hopes that the teaching has emphasized this wider dimension and will increasingly continue to do so.

[19] Grbich, Judith E., *The Administrative Appeals Tribunal : The Effects of Review upon Management of Deportation Decisions,* LL.M. Thesis, Monash University 1984.
The Administrative Review Council has carried out a number of detailed studies of systems of and potential for review in a number of major departments, and specific reports by the Council have been presented to the Parliament on Social Security Appeals (1981 and 1984); Import Control and Customs By-law Decisions (1982); Customs and Excise Decisions — Stage II (1985); Taxation Review (1983); Veterans' Appeals (1985); Citizenship Review and Appeals (1982) and Review under the Migration Act (1983). Each of these reports concentrated on the system of review of decisions, rather than the decision-making process itself. The Council, in 1982, also decided to undertake a series of 'impact studies' which would assess the impact of the new legislation on the decision-making process, but abandoned this study in 1985, because the task proved impossible within the resources available to the council.

[20] Weber, Max, *Economy and Society* (ed. Roth and Wittich, 1968) 225ff: see also Kronman, Anthony T., Weber, Max (1982), 65 ff.

[21] Holmes Jnr, O. W., 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, at 459.

[22] Bardach, Eugene and Kagan, Robert A., *Going By the Book: The Problem of Regulatory Unreasonableness* (1982)

[23] Craig, P. P., *Administrative Law* (1983).

(4) *The Need for a Reformulation of 'Administrative Law'*

Australian law teachers have been forced to recast their courses on administrative law because of legislative action. Since 1975 four major Commonwealth Acts[24] have completely restructured legal means of gaining access to information about the activities of the Commonwealth government and its agencies and to a review of those activities. Only one State (Victoria) has enacted similar packages of legislation, though all States now have Ombudsmen. This legislation has also made Commonwealth administrators (other than those trained as lawyers) far more conscious of the existence of both review mechanisms and the possibility of review. It has also encouraged a movement, already apparent before 1975, for the establishment of more extensive review mechanisms within departments and agencies as part of the normal structure and operation of those departments and agencies. Judicial review remains, and remains important, but it does not dominate the whole field of administrative law as once it was supposed to do. In fact, because the substantive principles of the common law remain virtually unchanged by the Administrative Decisions (Judicial Review) Act, the task of the teacher becomes more difficult, because materials on the 'New Administrative Law' and the wider perspectives of administrative law, must be included as well as the more traditional common law materials.

Wolfgang Friedmann produced the first Australian book on administrative law in 1950.[25] It was a relatively short book. In the preface, he referred to the difficulties he had experienced in gaining acceptance for the idea of the book, and for the idea of the study of administrative law in Australia, and the material he covered was not voluminous. Stan Hotop has just produced the sixth edition of the book,[26] which is a substantial volume. Much of it deals with matters other than the common law of judicial review of administrative action. At the beginning of 1983, Hotop produced the second edition of his casebook[27] containing 1200 pages, of which about a quarter concerns non-common law review. There are other books on Australian Administrative Law.[28] They are intended to be the basis of academic courses

[24] Administrative Appeals Tribunal Act 1975; Ombudsman Act 1976; Administrative Decisions (Judicial Review) Act 1977; and Freedom of Information Act 1982.

[25] *Principles of Australian Administrative Law* (1950).

[26] Sydney, Law Book Co, 1985.

[27] *Cases and Materials on Review of Administrative Action* (2nd ed., 1983).

[28] *e.g.* Doogan, C. M., *Commonwealth Administrative Law: An Administrator's Guide* (1984); Whitmore, H. and Aronson, M., *Review of Administrative Action* (1977); Sykes, E. I., Lanham, D. J. and Tracey, R. R. S., *General Principles of Administrative Law* (2nd ed., 1984); Enright, C. S., *Judical Review of Administrative Action* (1986); specialist books include Flick, G. A., *Natural Justice* (2nd ed., 1984), Bayne, P. J., *Freedom of Information* (1984), and Enright, C. S., *Administrative Appeals Tribunals* (Sydney forthcoming).

on administrative law, as well as aids to practitioners of various types. In Abel's terms, they would probably be 'law books' rather than 'books about law'.[29]

Abel's article on 'Law Books and Books about Law' makes some important points which should not be lost on those who choose to work in traditions of legal study, including the positivist and realist traditions, other than that of the 'Critical Legal Studies' Movement, with which Abel is associated. The article sets out to be a review of a book dealing with the family and the law. Abel emphasises that a book may not only set out and analyse the law within its own conceptual framework, but that it also may seek to place the whole complex of tradition, discourse, norms, behaviour and institutional structures within a broader social framework and analyse the effect of that complex in terms of standards established beyond the traditional discourse of lawyers. The former may be described as 'law books', the latter as 'books about law'. Abel suggests that human understanding, at least on one level, may gain more from books about law than from the more descriptive 'law books'.

Harlow and Rawlings have produced a book which, in Abel's sense is both a 'law book' and 'a book about law', which is the sort of book that provides the foundation for a course in administrative law which fulfils the objectives mentioned above. Because it appears to be the first English book dealing with administrative law produced as a teaching book, which attempts to combine law and context (which is appropriate for a book in the series 'Law in Context') it is the sort of foundation which, with suitable changes to deal with differences of politics and substantive law, provides an appropriate form of a course in administrative law for contemporary Australian law students. It contains brief (probably too brief) extracts from the leading cases which establish the boundaries of judicial review of administrative action. But it also contains extracts from more theoretical articles, parliamentary debates, select committee reports *etc.* which provide just as much, if not more, of the real stuff of administrative law than do the cases. In this it follows the precedent established by Geoffrey Wilson's book of cases and materials on more general aspects of public law[30] but goes even further. It is thus very stimulating for an Australian teacher of administrative law faced with the need to develop a course which satisfies a need based on both the 'professional' and 'general education' objectives of a university law course. The division of the materials in the book is also instructive. The first half of the book (roughly) introduces theoretical frameworks which can be useful in understanding the nature and functions of administrative law, and general principles which govern the structure of legal institutions, the nature and content of legal procedures and practices and the composition of, and attitudes that can be expected from, the legal institutions which deal with administrative law. The second half of the book is a series of four case studies; they deal with compensation,

[29] Abel, Richard C., 'Law Books and Books About Law' (1973) 26 *Stanford Law Review* 175.
[30] Wilson, Geoffrey, *Cases and Materials on Constitutional and Administrative Law* (2nd ed., 1976).

planning, immigration, and social assistance, and are designed to give the student an appreciation of the operation of administrative law in modern Britain. Again, the extracts are brief, and the text is peppered with provocative questions designed to interest the students in issues of various types. It is clear that the behaviour of the various actors on the stage of administrative law depends very largely on the specific scenario. There is not a single, monolithic body which is 'administrative law'. Rather, there are a series of principles and practices, some abstract, some specific, which combine and interact depending on the particular circumstances in which they are brought into play. A student who read and absorbed even half of the material in this book would be equipped with a fairly sound understanding of law, administrative practice, politics and history, so that faced with a question of the relation of law and administration she/he would be able to start fomulating an answer which would be both practical and related to the wider theoretical and social context.

Of course the book is not perfect. No book could be. Many of the extracts from cases are too brief to give the student a real feel for the nature of the judicial process, in which there is often neither black nor white, but monochrome of varying intensity. The case studies are possibly too detailed for most general administrative law courses though the more general and abstract concepts in any area of law can only properly be understood if they are studied in their application to particular circumstances. These shortcomings would not stop me from using the book if I were teaching an administrative law course in the United Kingdom, though, no doubt in the light of experience, I would add and subtract. The point is that it does reformulate the pedagogical approach to teaching administrative law in a way which is much closer to what I think is required of a university law course in modern Australia than anything else which is publicly available.

It will be obvious from earlier remarks in this paper that, while the general thrust of much of Abel's criticism of 'law books' is valuable, I have difficulty in accepting his clear dichotomy between 'law books' and 'books about law'. As stated, I am sceptical about grand theory in general, and particularly sceptical of those who would seek to impose on law schools a curriculum consisting entirely of the study of grand theory, even if particularized as study of specific forms of 'legal domination'.[31] We should be trying to combine, in our approach to teaching law, an appreciation of the operation of specific rules, practices and institutions, with the development by students of a conceptual framework which relates that appreciation to perspectives which a study of the rules alone cannot provide. In other words, we should be trying, in our study of administrative law, to include a study of the *practices,* rather than, as in the past, emphasizing the rules and institutions and taking administrative practice for granted.

[31] 'Babies and Bathwater : Keeping What is Valuable in Legal Scholarship and Legal Education' (Paper delivered at 2nd Law and Society Conference, Macquarie University, December 1984).

Harlow and Rawlings make an attempt of this type. The perspective they adopt may not be too close to the legalist model which tends to devalue collectivist or administrative-culture perspectives, but it is far better than anything else currently available. Unfortunately, the United Kingdom is not Australia, and we are long past the time when an Australian law teacher can responsibly prescribe an English text as the basis for his/her course (which was probably the normal practice when I was a law student twenty years ago). The next question is, what should be done in Australia?

(5) *How should Administrative Law be Taught in Australia?*

While the New Administrative Law is itself the prime catalyst for reformulation of administrative law courses in Australia, it has also provided a useful pedagogic device. When I was a student, and when I first taught administrative law, in 1973, the course took me round in a large circle, and not until I returned to the starting point was I completely sure of the nature of the ground I had circumscribed. When I started to teach, it seemed that students would get the clearest understanding of the material if the course began with a study of the remedies, and then moved on to substantive grounds. Some colleagues disagreed strongly. I do not think that it mattered. That problem is no longer with us. The New Administrative Law has provided a structure for an administrative law course which provides a logical development of ideas, allows the incorporation of interdisciplinary and contextual material, and gives the added benefit of requiring students to undertake what is, in effect, a rigorous revision course in statutory interpretation. This is also the approach of my colleague Christopher Enright, who has shared the responsibility for teaching administrative law at Macquarie, and is apparent in his book on the subject.[32]

One reason why the teaching of administrative law in Australia may present different problems from the teaching of the same course in Britain is that the subject-matter has developed differently in each of the two countries. The policy of the Franks Committee,[33] expressed in the Tribunals and Enquiries Act 1971 (UK), is that review mechanisms should differ, according to the subject-matter of the decisions they are established to review. In Australia, recent developments flow from the work of the Kerr Committee,[34] which was comprised exclusively of lawyers, and which sought to establish broad general principles which could be applied in all areas of administrative review, though in the Tribunal which the Committee recommended, now the Administrative Appeals Tribunal, there was to be some scope for the appointment of specialist members to deal with particular classes of appeals on the merits. Apart from

[32] Enright, *op. cit.* n. 28.

[33] Committee on Administrative Tribunals and Inquiries, (Chairman, Franks, Sir Oliver), *Report* Cmnd 218 (HMSO, London, 1957).

[34] Australia, Commonwealth Administrative Review Committee, (Chairman, Kerr, Hon. J. R.) *Report* (Canberra, Government Printer, 1971) (Parl. paper 144/1971).

this relatively minor concession both the substantive principles governing review of administrative action and the institutions which were to undertake such review were to be the same. The assumption that there would be 'One Big Administrative Law' has meant that the differences between administrative action and review in such areas as immigration control, planning control and social assistance, as demonstrated by Harlow and Rawlings' case studies, are far greater in Britain than would be the case in Australia. The 'jurisprudence' of administrative law which is now emerging from the AAT and the Federal Court tends to confirm this. It could be argued that in Australia, the type of case study which might form part of a course in administrative law would need to be rather different from those chosen by Harlow and Rawlings.

It might be suggested that a book, or a course, on administrative law, needs to be built around a theory of administrative law. Harlow and Rawlings do not agree, but they have a theory. The following quotation from the preface of their book suggests what it is:

> In the case of student texts, the argument runs that students must learn the law before they can criticise it. We believe the reverse to be true. Questions about the proper ambit of judicial review, its legitimacy, or the relationship of law to political and economic theory, are not incidental matters to be swept to one side but crucial to the understanding of our subject. Administrative law theory is thus our natural starting point. We do not attempt in our first two chapters to propound our own theory of administrative law, but allow theorists to advance a variety of views in their own words. We have tried not to take sides in a debate which, as you will see, is often acrimonious . . . Here we ask *how law actually operates in a political and administrative framework. We examine the uses to which it is put and identify those who participate in administrative decision-taking or play the administrative law game* . . . We have tried throughout to allow administrators and politicians to speak with their own voices . . . [emphasis supplied]

The theory they advance is not a theory of administrative law, but rather an educational theory and one which, in my view, is quite appropriate to the task of teaching administrative law and perfectly acceptable. It should be for each teacher and student to work out his/her own theory of administrative law on the basis of their own thought and study. What is perhaps more important is that they do not start with a narrow view of what 'administrative law' is, but leave this to be worked out through a study of practices and opinions extending well beyond traditional lawyers' conceptions of administrative law. Because a criticism based on theory alone, without regard to practice, is too abstract to be useful, I have some reservations about the opening sentences of the passage quoted, but if the two opening sentences were omitted I would endorse the approach. It is certainly one which I adopt and which, I hope, will commend itself to other teachers of administrative law.

The Macquarie course in administrative law starts with the assumption that students are not coming fresh to the idea of review of administrative action. At Macquarie, the Australian Government courses, which are required third-year courses, introduce the students to the idea of government and the State, and the legal structures underlying them. As part of the study of the executive branch of government, students come to appreciate the relationship of that branch to the legislative and judicial branches, especially with respect to the concepts of ministerial responsibility, judicial review, and delegated legislation.

They are also aware that the executive itself is both a source and an instrument of power.

The course starts with an examination of the concept of administration, and its relationship to the State, power within the State, and to policy. The next segment deals with access to government information, including freedom of information legislation, reasons for decisions and exemptions from general principles, including Crown privilege. The study then looks at means of challenging administrative action: informal challenges, internal review mechanisms, parliamentary scrutiny, Ombudsmen and formal non-judicial review (*e.g.* the AAT). This takes up approximately half the course. The remainder of the course is devoted to a study of judicial review, using the AD (JR) Act as a structure for the discussion of the common law. At all stages attempts are made by the use of discussion questions and comments to direct students' attention to the differences between the Commonwealth and State positions, and to the relevance of 'contextual' and interdisciplinary material. There are parallels between what this course attempts to do and what Harlow and Rawlings attempt in the first twelve chapters of their book.

Time does not permit us to undertake case-studies, at least on the same scale as Harlow and Rawlings. A more advanced course could take students through similar case studies, and at Macquarie, in other courses such as Environmental Law and Social Welfare Law, this is just what is done.

It has been difficult to assemble material on the basis of this course which I consider to be really appropriate. On judicial review, some of the existing textbooks[35] are adequate, though they lack breadth of perspective. I believe that students do need to immerse themselves, to some degree, in cases and material. To a large extent this can be done using Hotop's casebook, which also contains relevant statutes, but largely ignores the effect of judicial review on administrative practice.[36] I have provided students with a good deal of material (which I have prepared) on the broader issues and the New Administrative Law.

This represents a reasonable start, but a lot more remains to be done.

(6) *The Relationship of Teaching and Practice*

Administrative law should not be taught simply in a way that ensures that law students will know something of administrative law after they graduate. It is almost inevitable that they will need to do so. Nor is it a sufficient justification for the teaching of administrative law that such a study is necessary to enable theories of the State to be evaluated and tested, though that is also true. Whatever is taught under the rubric of 'administrative law' should be related, in the broad sense, to the practice of administrative law. That practice is not, in this area, defined or even determined by what courts,

[35] Whitmore & Aronson, *op. cit.* n. 28.
[36] Hotop, *op. cit.* n. 26.

judges or practitioners actually do, though that is undoubtedly a part of the practice. It is, however, the part of the practice that has determined the perceptions of academic and practising lawyers. Because lawyers have generally determined the agenda for what is taught as administrative law in courses which are not formally part of professional law or legal studies courses, it has also determined the way in which a large and influential body of non-lawyers also perceive administrative law. To this extent, the curriculum design of the law schools (and public administration courses) has an element of the self-fulfilling prophecy about it. A one-dimensional, legalistic view of what is the proper subject of administrative law blinkers the perceptions of all involved. It is important that all scholars and students of administrative law, whatever their particular interest or motivation for the study may be, do not simply concentrate on judicial review, on the study of cases and statutes and forensic and judicial techniques which are employed when a question of review of administrative action comes before a court or a court-like tribunal. It is also necessary to focus on the way legal concepts and, indeed, the whole of what, in this paper, I have called 'legal culture' affects the operations of government administration. That can not be done without injecting into any course on administrative law substantial doses of material drawn from other disciplines: public administration, political theory, organizational studies, sociology and psychology, to name a few. Ideally, the techniques of the lawyer, which comprise a good deal of what most legal academics can bring to the subject, is not enough. Those techniques are necessary for a full understanding of administrative law, but are by no means sufficient. Traditionally the lawyer has always been called upon to assimilate and synthesize a large body of material, and to fit it into a framework which she/he takes to be dictated by legal preconceptions. Within an administrative law course in a contemporary Australian law degree program that skill will, and should, be necessary. The quality of the course will, however, be greatly enhanced if the work of those with skill in other disciplines is also used, and even more so if the material presented in the course will enable both student and teacher to question the strength and value of those legal preconceptions, or at least to evaluate their worth in seeking understanding of an area of social activity which certainly is not totally defined by the activity of courts exercising their functions of judicial review of administrative action. Those functions, it may turn out, may form a relatively small part of that part of administrative activity which is strongly influenced by law, in some form or other.

Harlow and Rawlings have set up a standard which should provide a challenge to Australian administrative lawyers. It remains to be seen whether Australian administrative lawyers can meet that challenge.