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PRACTICE ARTICLE

DEEP LEARNING AND ‘TOPICAL ISSUES’  
IN TEACHING ADMINISTRATIVE LAW

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MICHAEL HEAD\*

I INTRODUCTION

It is perhaps a conceit of law teachers to think that their area of law poses special challenges for educative purposes. In this paper, I suggest that administrative law does present some particular problems for students, although I am sure that the issues are not completely unique to this legal field. In any case, my experiences over some years have led me to explore some educational theory and practice that may be of broader interest to law teachers, and not only those involved with administrative law.

One of the concerns expressed by teachers of administrative law is that too many students have difficulty conceptualising its scope and character. What exactly is administrative law? How does it fit in with other areas of law? Where are the boundary lines? What, if anything, is unique about administrative law? These are just some of the questions that students ask and often have difficulty clarifying to their satisfaction. Auxiliary questions abound. How do administrative law remedies relate to other legal, and non-legal, avenues of redress? Why has administrative law had such a convoluted and problematic history? How do its features—for example, standing rules, procedural fairness and remedies—compare to other areas of law?

Recently, an experienced administrative law academic sent a circular email to other teachers in the field, discussing the insights he obtained from asking his students to keep a journal throughout the course ‘where they reflect upon their learning, teaching, materials, particular articles, issues or simply their reaction (or lack of reaction) to topics etc)’. He reported:

A common problem which I am still tackling after four years of reading is how to make administrative law quickly accessible to all students. Often I will get comments like, ‘Week 5 and I still don’t get this subject’ or ‘I had no idea what administrative law was about and I am still struggling’.

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Some already know (mature age students or students who have had summer jobs in the public service or public service relatives — not always a guaranteed result), some get it from the assigned textbooks but others (about 25–30 per cent) still struggle and it slows their progress in the course.

He asked if any of us had ‘materials (videos, case studies, newspaper clippings) or ideas that you use to help give students an easy entry into the wonderful world of admin law.’

My experiences in teaching administrative law at the University of Western Sydney (UWS) since 1998 (and a semester at Osgoode Hall in Toronto) have revealed similar difficulties. In fact, these problems have greatly influenced my approach to the subject, in two inter-related ways. First, I have endeavoured to constantly place administrative law in its historical, political and socio-economic context, as well as its constitutional, institutional, bureaucratic and policy settings. As I have explained elsewhere,<sup>1</sup> this helps make administrative law intelligible, intellectually-satisfying and even enjoyable. Second, I have established a practice of beginning classes each week with ‘topical issues’. I ask students to come prepared to discuss an item they have seen in the media that they think relates to administrative law. Invariably, there are thought-provoking issues or controversies, from the turning back of asylum seekers, or a denial of welfare benefits, to a freedom of information request or contest over a rejected business application for a permit or license.

This article will briefly review these inter-linked approaches and the lessons that can be derived from them. It will begin by exploring the nature and possible causes of the difficulties that students have, and then refer to a teaching approach, that of deep learning, that has helped guide my efforts to overcome the difficulties.

## II WHY DO STUDENTS HAVE PROBLEMS CONCEPTUALISING ADMINISTRATIVE LAW?

A good starting point is to realise that students can hardly be blamed for finding it hard to come to grips with some areas of law, including public and administrative law. There are many reasons for this.

Through no fault of their own, students may have a limited understanding of the existing political order and its constitutional underpinnings, let alone the vast bureaucratic undergrowth at federal, state and local government levels. This is particularly so with international students and those non-English speaking backgrounds, but is by no means confined to them. As the email cited above indicates, mature-age students and those who have had some employment in the public sector find it easier to grasp the contours

<sup>1</sup> Michael Head, *Administrative Law: Context and Critique* (2005).

and intricacies of administrative law. But many younger students, often coming straight from secondary school, have had little exposure to the official institutional structures and governmental frameworks.

In part, this reveals gaps or weaknesses in the school curricula. From my classroom discussions, it also reflects a certain degree of disaffection with a political and official system that is seen to be indifferent or unresponsive to the lives and aspirations of young people. There is empirical evidence, for example, of a significant level of disenfranchisement from formal electoral processes. The Australian Electoral Commission estimates that only 80 per cent of eligible voters aged between 18 and 25 are on the electoral roll. In 2005, an AEC-commissioned *Youth Electoral Study* found that 50.2 per cent of secondary students said that they would not vote in a federal election if voting became non-compulsory.<sup>2</sup> This situation could worsen following the passage of electoral legislation that may make it more difficult for new voters to enrol before an election.<sup>3</sup>

Secondly, students may have even less knowledge of the historical roots and evolution of the Anglo-Australian polity. It is impossible to comprehend the full significance or implications of vital concepts such as the separation of powers, the classification of powers, parliamentary sovereignty, ministerial accountability, natural justice and *habeas corpus* and other prerogative writs without an acquaintance with the issues at stake in the English civil war and 'Glorious Revolution' of the 17<sup>th</sup> century. Yet, in speaking to students over the years, I have come across only a handful who could even nominate the century in which these convulsive struggles against the absolute monarchy occurred, far less identify the role played by John Locke in elaborating the concepts of life, liberty and property.<sup>4</sup>

Equally, few students are familiar with the economic, social and demographic changes brought about by the industrial revolution and the rise of the working class in the 19<sup>th</sup> century. These, followed by the extension of the franchise, led to the growth of parliamentary and municipal power, together with the re-emergence of central executive control through the cabinet, government departments and statutory authorities.<sup>5</sup>

The confusion is not helped because at the end of the 19<sup>th</sup> century, Professor Dicey, an influential figure in English constitutional law,

<sup>2</sup> Australian Electoral Commission, *Youth Electoral Study* (Lawrence Saha, Murray Print, Kathy Edwards), *Youth Political Engagement and Voting, Research Report No. 2*, 2005 <[http://www.aec.gov.au/About\\_AEC/Publications/youth\\_study\\_2/index.htm](http://www.aec.gov.au/About_AEC/Publications/youth_study_2/index.htm)> at 7 December 2007.

<sup>3</sup> Michael Head, 'Democratic rights on the chopping block — Australia's new electoral laws and the High Court' (2006) 185 *Overland* 40.

<sup>4</sup> See eg, Crawford B Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (1962).

<sup>5</sup> Stan Hotop, *Principles of Australian Administrative Law* (6<sup>th</sup> ed, 1985) 1-.

denied the very existence of a separate branch of administrative law.<sup>6</sup> Dicey claimed that administrators were subject to the same ‘rule of law’ as individuals and were liable for any illegal or arbitrary action in the ordinary courts of law. Therefore there was no need for special courts or tribunals. Dicey argued that there should be no separate system of administrative law, such as existed in France, where the *droit administratif* involved a distinct system of administrative rules and tribunals. As a result, English administrative law developed in an unplanned and often quixotic way, fraught with technicalities.<sup>7</sup>

This legacy lingers, although in the post-World War II period, the rise of extensive government regulation of economic and social life and the emergence of the welfare state made it evident that both a distinct body of law and new mechanisms for addressing grievances were needed. Over the past four decades, administrative law has been profoundly affected by the radicalisation and struggles of the 1960s and early 1970s, which were reflected in the courts, legislatures and corridors of power by way of a greater recognition of individual and collective rights against government power and over welfare and other entitlements. One manifestation of this claim to administrative rights in the American context was Charles Reich’s seminal 1964 article, ‘The New Property’.<sup>8</sup>

However, since the mid-1980s, administrative law has been diminished by the dismantling of entitlements, government funding cuts, deregulation, widespread privatisation and the introduction of concepts such as ‘user pays’ and the contracting out of essential public services. Semi-privatised or corporatised institutions such as Telstra impact heavily on people’s lives, yet are immune from administrative law sanctions.

Another problem that arises for students, apart from the notorious technicalities of administrative law that derive from this tortured history, is that diverse individuals and bodies exercise administrative power, including public servants, Ministers of the Crown, regulatory agencies, commissions, local councils and some non-government organisations such as social or sporting bodies. Non-government organisations exercise public powers such as regulating access to employment or occupation: for example, the various horse racing authorities and the various state Law Societies. In some spheres, particularly procedural fairness (natural justice), principles of administrative law have been extended to private bodies, such as trade unions, perhaps because they exercise certain powers of a semi-public character. Efforts to explain the domain vary.

<sup>6</sup> Albert Dicey, *Introduction to the Study of the Law of the Constitution* (10<sup>th</sup> ed, 1959).

<sup>7</sup> Peter Cane observes that the prerogative writs ‘escaped the great procedural reforms of the 19<sup>th</sup> century’. See Peter Cane, ‘The making of Australian administrative law’ (2003) 24 *Australian Bar Review* 114.

<sup>8</sup> Charles Reich, ‘The New Property’ (1964) 73 *Yale Law Journal* 733.

Douglas notes in *Administrative Law*:

Traditionally, administrative law has been largely concerned with government administration. It is generally conceptualised as lying within the purview of 'public law', that is, the law which concerns the relations between the individual and the state. Activities outside the public sector are governed by bodies of private law, such as contract, tort and consumer protection law.<sup>9</sup>

However, Douglas describes the distinction as 'problematic' and says it 'has never been a rigid one'. He cites as examples the expansion of the natural justice doctrine into private law, the nibbling away of estoppel into public law concepts, the occasional issuing of administrative law remedies against non-government bodies, privatisation and the increasing adoption of corporate models for the public sector.

For my own part, I also caution students that administrative law is

wider than ensuring that an administrative body acts within the law. It involves understanding the way governments operate, the nature of the administrative power and process, the function of those who participate in it, and the practices, procedures, manuals, guidelines and other internal policies or rules which may influence the way they behave.<sup>10</sup>

For all these reasons, great care and attention must be given to helping students explore and grasp the sometimes uncertain and always evolving contours of administrative law.

### III 'DEEP LEARNING' VERSUS 'SURFACE LEARNING'

Contemporary educational research suggests that serious problems arise when students are regarded as passive recipients of information, rather than as active participants in the learning process. It is important for teaching practices to focus on what students will internally comprehend differently after the learning experience. Drawing on noted educational theorists, Macduff suggests that learning is bound up with students actively coming to understand topics and ideas in ways that change or re-organise their views.<sup>11</sup> This internalised process has been referred to as 'deep learning' in contrast to 'surface learning' that emphasises the ability to memorise and list information.<sup>12</sup>

<sup>9</sup> Roger Douglas, *Administrative Law* (2<sup>nd</sup> ed, 2004) 3.

<sup>10</sup> Head, above n 1, 18.

<sup>11</sup> Anne Macduff, 'Deep Learning, Critical Thinking and Teaching for Law Reform' (2005) 15 *Legal Education Review* 125, 126.

<sup>12</sup> Ibid, citing Ference Marton and Roger Saljo, 'On qualitative differences in learning: outcomes and processes' (1976) 46 *British Journal of Educational Psychology* 4.

The challenge, therefore, is to frame the learning experience so that it leads to conceptual changes in students' minds. One education researcher identifies flaws with approaches that see students as empty vessels who simply absorb information, or that, alternatively, focus on the responsibility of teachers to provide clarity and diversity in methods of communication.<sup>13</sup> Biggs argues that focusing on 'what the student does' best helps students acquire a deeper and more critical understanding. This can be achieved by providing opportunities for students to question, extrapolate and hypothesise. Macduff argues:

It is not sufficient to have emotive stories, more rigorous arguments or more persuasive communication techniques... Rather, change through critical understanding is something that students will need to construct for themselves through actively engaging with topics of social importance in personally meaningful ways.<sup>14</sup>

Macduff relates her own experience in giving a legal conference presentation designed to encourage legal educators to develop their understanding of teaching approaches and practices. She used a quiz and small group discussions to ask participants to (1) identify their own teaching practice; (2) identify the assumptions underlying their practice; (3) identify discrepancies between their teaching practice and underlying assumptions; (4) question information transmission as the only teaching practice possible; and (5) explore alternative teaching practices, including 'what the student does'.<sup>15</sup>

Among her conclusions were that teachers must be aware of the general understanding each student group starts out with. She also observed that participants recognised that their learning had happened because the session had engaged them through personal critical reflection, rather than seeking to persuade them to change through lecturing. Finally, she noted that the process of learning depends upon making students 'active participants in their own change'.<sup>16</sup>

It thus appears that 'deep learning' is associated with 'active engagement'. The next parts of this note seek to examine, in the light of these considerations, my practice of discussing 'topical issues' at the beginning of each week's administrative law classes, and of striving to place the subject within its historical, economic and social context.

<sup>13</sup> John Biggs, 'What the Student Does' (1999) 18(1) *Higher Education Research and Development* 57.

<sup>14</sup> Macduff, above n 11, 128.

<sup>15</sup> *Ibid* 130.

<sup>16</sup> *Ibid* 132, 133, 135.

#### IV ON USING 'TOPICAL ISSUES'

One means of facilitating 'deep learning' and 'active engagement' is to ask the students to come prepared to at least one class per week with examples of items in the media that they think illustrate, or raise issues about, administrative law. This exercise encourages students to turn their minds to grasping the province of administrative law. The examples they produce not only enliven the discussion, they are often invaluable in clarifying the nature of administrative law and its relationship to other types of public and private law. Most times, the students themselves can correctly explain how their item is relevant to administrative law. Occasionally, they cannot. Either way, there is an opportunity for the entire class to critically engage with the subject matter.

Among the more interesting 'topical issues' during the Spring Semester of 2006 were:

- An unsuccessful application by a UWS law student to the NSW Administrative Decisions Tribunal challenging the university's refusal of a Freedom of Information request for information about the Vice Chancellor's salary package.<sup>17</sup>
- The High Court decision in the WorkChoices legislation case, in which judges expressed concerns about the width of the regulation-making powers given to the Minister to set working conditions.<sup>18</sup>
- A NSW Supreme Court case in which Young CJ held that, given various circumstances, a church was not obliged to tell a church minister the time and date of a disciplinary hearing. While the judge applied the requirements of procedural fairness to the Baptist Union, a private religious body, he commented: 'Justice in this sort of case is not to be meted out in coffee spoons'.<sup>19</sup>

These cases illustrated different things about administrative law: its coverage of universities; how exemption provisions limit the FOI laws; the almost unlimited scope of delegated legislation; the extension of procedural fairness to private bodies such as churches; and the flexibility and chameleon-like character of the common law's procedural fairness doctrine.

Another case that provoked considerable discussion, and ultimately became part of the final examination set for 2006, was *The Australian* newspaper's *Freedom of Information Act* (Cth) (FOI Act) challenge to Treasurer Peter Costello's refusal to release Treasury information relating to personal taxation bracket creep and the number of wealthy people claiming the first home buyer's grant.<sup>20</sup>

<sup>17</sup> *Fomiatti v University of Western Sydney (No 2)* [2006] NSWADT 210.

<sup>18</sup> *New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia* [2006] HCA 52. See eg [395–421] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>19</sup> *Graham v Baptist Union of NSW* [2006] NSWSC 818 [49].

<sup>20</sup> *McKinnon v Secretary, Department of Treasury* [2006] HCA 45.



By a 3–2 margin in *McKinnon*, the High Court dealt a blow to efforts, even by large and well-resourced media companies, to reveal publicly-significant but potentially embarrassing official documents. After a four-year legal battle, estimated to cost Rupert Murdoch’s News Ltd more than AUD\$2 million, the court upheld a decision by the Administrative Appeals Tribunal (AAT), which ruled that *The Australian* newspaper’s freedom of information editor, Michael McKinnon, was not entitled to access the documents. The Australian Press Council, which was a party to the case, said it was dismayed by the decision, and called for urgent FOI Act reform.

For my students, the case illustrated a number of key issues about the FOI Act, including the ministerial use of ‘conclusive certificates’ to claim the exemption for ‘internal working documents’; whether the Act has a presumption in favour of disclosure; and the extent to which the ruling undermined the stated purposes of the FOI Act. Both the majority and minority judges also made interesting comments about the powers of the AAT and how these can be circumscribed by legislation such as the FOI Act; and whether judicial review might have produced a better outcome for the plaintiff. These issues proved fruitful and productive of discussion. In fact, we spent some weeks exploring aspects of the case, which ultimately led to the examination including a question derived from the *McKinnon* scenario.

## V PLACING ADMINISTRATIVE LAW IN CONTEXT

A related difficulty that students have in coming to grips with the parameters of administrative law is their tendency to expect the law to be a set of clear, black-and-white propositions that can be simply learned and applied. They are liable to be disillusioned. To find the Australian High Court split over elementary and fundamental questions, as it was in *McKinnon*, can be disconcerting. But the fact that the country’s highest court has been divided in many leading cases can also become instructive for students. It points to the need to gain a feel for administrative law’s historical background, social fabric, political dynamics and judicial schisms. As I explain in my text:

Anyone who studies administrative law soon realises that it has changed dramatically over the past three decades. Indeed, in one well-known case, *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33, Dean J (later Governor-General) referred to a ‘quiet revolution’ in administrative law. The phrase seems to be an oxymoron but contains a kernel of truth. Major shifts (evolutionary rather than revolutionary) have occurred in administrative law. Over the same years, the Australian law has diverged considerably from, or lagged behind, developments in other common law jurisdictions, notably Britain and Canada. These rifts cannot be explained simply as the product of purely legal disputes. This is all the more reason to probe more deeply and critically, not just into

the stated legal doctrines but the historical, political, socio-economic and constitutional background to the law's convoluted development.<sup>21</sup>

From my experience in teaching law, this approach is also the most intellectually-satisfying and therefore firmly-grasped. It not only makes administrative law — a notoriously difficult subject — less intimidating for students, it also enhances active engagement. Students can more easily relate to the often complex, hair-splitting and seemingly dry rules and concepts if they have some idea of their origins and modern-day relevance.

For example, I always review with my students the substantial changes that have occurred over the past three decades, arguably in response to underlying political, economic and social shifts. In discussing the rise of what is sometimes called the new administrative law, I point to at least five major factors: (1) The development and extension of the post-World War II welfare state, encompassing, for example, the provision of social security benefits to single parents and students; (2) A rising demand for greater recognition of social security and other entitlements as basic rights against the government; (3) The perceived loss of parliamentary power to the executive, giving rise to more extensive recourse to litigation to challenge government decisions; (4) The demand for access to more readily available public information, and to cheaper and less formal avenues of redress, as well as uniformity, flexibility and certainty in decision-making; and (5) The greater relevance of international law via United Nations Covenants on various human rights, which have been given limited recognition in administrative law.<sup>22</sup>

Moreover, I emphasise that since the mid-1980s, these developments have been counteracted by the processes mentioned earlier — dismantling of entitlements, funding cuts, deregulation, privatisation, contracting out and 'user pays'. I also suggest that the highly-charged political atmosphere created in the wake of 11 September, 2001 terrorist attacks in New York and Washington has led to problematic extensions of executive power in the name of national security and combatting terrorism.<sup>23</sup>

## VI STUDENT REACTIONS

While no scientific study has yet been devised or conducted to gauge and assess student responses to the use of topical issues, the results of UWS Student Feedback on Teaching questionnaires provide some empirical evidence. Unfortunately, no specific tailored questions address the issue. These annual, anonymous surveys are conducted in a standard form for all units at UWS. But in the open-

<sup>21</sup> Head, above n 1, 2.

<sup>22</sup> Ibid 11.

<sup>23</sup> Ibid 10.

ended comments that students are invited to make, students have often expressed appreciation for the approach taken by my text and for the exploration of topical issues. Last year, the comments included:

- ‘Provided interesting views and information on current events in administrative law that were very interesting and stimulating.’
- ‘Topical topics — showed current relevance.’
- ‘Relates subject to everyday issues.’
- ‘It is great/interesting that Michael relates administrative law to the current political and judicial climate.’

With the advent of new inter-active technology (‘Campus Edition’) at UWS, I intend to explore student reactions to my approach more fully by asking them to write online learning journals.

## VII CONCLUSION

This article has suggested that the teaching and learning of administrative law can be significantly enhanced by students discussing ‘topical issues’ in classes, particularly when accompanied by a teaching approach that places the ever-changing legal picture in its historic, political and socio-economic contexts. Similar approaches may be worth pursuing in other fields of law. Further research, and a properly-designed study, may be necessary, however, to fully assess student reactions to, and appreciation of, these educative methods.<sup>24</sup>

<sup>24</sup> I would appreciate any feedback, comments or suggestions from law teachers: [m.head@uws.edu.au](mailto:m.head@uws.edu.au)