

Law, State, & Citizen

Class 4 - Lecture

Administrative Law

Lecture Outline:

- We will define administrative law, how it relates to the state, what the structure looks like, its relation to the constitution and the state.
 - Administrative and...
 - The state.
 - Structure.
 - The executive.
 - The constitution.
 - Citizenship.
 - We need to spend sometime what the concept of citizenship is and where it comes from.
 - Disaster law.
 - Can be understood as a subfield of administrative law - a characteristic of disaster law is it cuts across multiple fields of law.
 - The Westray case study.

Administrative Law 101:

- Administrative laws pertains to state bodies that exercise:
 - Statutory powers (the vast majority).
 - Prerogative power (war and passports).
 - Narrower branch of state power.
 - Other government power exercised on behalf of state.
 - Administrative law is very broad as you can see.
- Why is it important that state power is statute based?
 - Coercive power state power affects individual rights.
 - One common thing that is common to all visions of the state are citizens. There is no state without citizens/population made up of individuals.
 - Therefore state power should be restrained.
 - State power can effect these individuals. The idea of this is to endure individual rights don't get trampled.
- Administrative law tends to operate at a more specific, day-to-day level than constitutional law.
 - E.g. landlord and tenant rules, disability rights, pensions, energy and resources, E.I., child services, workers rights... a long list!
 - Dealing with law that is closer to peoples day to day lives. Not typically about conditional promises or abstract guarantees of freedom or freedom of mobility. we are talking about specific administrative law.
 - Must still operate within framework of constitutional law.
 - Closely related.
 - Administrative law and conditional law are aspects of public law (the law relating to the state and its relationships with society).

Administrative Law and the State:

- There are many ways of viewing what the state is and what it should be.
 - (viz. Hobbes, Locke, Marx, Weber, Gramsci etc.)
- The state can be defined as the institution that exercise sovereign power and purports to act on behalf of the public.
- The state can be equated, roughly, with government.
 - When we talk about state action being litigated via statues we are talking about government action and the many levels of government.

Efficiency vs. Fairness:

- Administrative law can be seen from two sides:
 - Allowing state efficiency (positive side).
 - Administrative law is designed in order to ensure the state remains efficient.
 - Ensuring the state does its job daily without undue harm (negative or control side).
 - Its about limiting what the state can do in order to ensure that it does it job fairly and does not do undue harm.
 - “The underlying challenge of administrative law is to find the best balance between the two.” Elliot, p.21.
 - Between efficiency and fairness. It is subjective to a degree between the two - everyone will have a different answer.
- What determines how the balance is set and how do we set it?
 - Context.
 - Multiple contexts. (economic, wealth, societies with differing levels of wealth and property are going to answer this fairness vs efficiency differently. How that wealth is spread and distributed in the state will impact that question. Is the state flush or is the state borderline bankrupt - some states have defaulted on their debts. This question of what the state can afford will impinge between this balance of fairness and efficiency.
 - Social needs.
 - Different Staes will have different populations with different needs. What is the age of the majority of the population. Is it largely homogenised or extremely multicultural. These differences play out and present social needs of the state and impinges on this question of efficiency and fairness.
 - Public and institutional discourse.
 - Discourse = conversation. Whats the conversation in the public sphere. What are the newspapers and news saying and focusing on. They contribute to a public discourse. How do questions about the state get presented. Whats possible and what’s appropriate for a balance between state efficiency and protecting states citizens will be impacted by this discourse.
 - Politics.

If state efficiency goes up scrutiny of the state and the probability of ensuring that the state is doing its job fairly goes down.

- Thats why there needs to be a balance.
- States are not free to establish a particular balance in an abstract. The balance they establish is contextual and determined by multiple things. It’s subjective but determined by the discourse of the times, politics and ideologies.
- When you read through the various aspects from the textbook and the readings in this course, thinking of them through a lens of fairness and efficiency is a good way to do it.
 - Ask yourself if you are stuck think about “how does this reading speak to efficient and fairness which is the underlying of all administrative law”.

Administrative Law: Structure:

- Concerned mainly with the executive branch of government.
- The executive initiates and administers policy and law, and administer the assets of the state.
- Contrast with legislative branch, which represents the interests of the electorate, monitors the executive, and formally enacts laws.
- Contrast with judiciary, which resolves disputes according to law, and interprets and develops law.
 - Beware of the different between the three.

The Executive:

- The Executive:
 - Cabinet and the individual ministers of the Crown.
 - Central bodies which coordinate policy, finance, and employment (e.g. the Privy Council Office, Treasury Board).
 - Traditional departments or ministries (e.g. Foreign Affairs).
 - Independent regulatory agencies (National Energy Board, Canadian Public Radio and TV).
 - These are also parts of the executive, parts of the state.
 - Crown Corporations (Via Rail, Canada Post).
 - Municipal Corporations (Ottawa City Council - Controlled by province).

The Reach of Canadian Administrative Law:

- Canada context is complex in terms of the structure of administrative law that's because there are 14 separate executives!
 - 14 separate executives: one at the federal level, 10 at provincial level, and for each of the three territories.
 - Can extend beyond the executive branch, to the operation of legislation and policies outside of government and organizations that carry out public responsibilities (e.g. universities and hospitals)
 - We have institutions that carry out public responsibilities but do not operate like private corporations. It's not always obvious how public an organisation is. Its grey area - public to a degree but acts like a private body in many respects - it becomes tricky to figure out the extent which the organization is beholden to administrative law.
 - If it is unclear how "public" the organization is, then it will likely be unclear to what administrative law is applicable.

Constitutional Principles 101:

- Four key constitutional principles in administrative law:
 - 1) Government action must be authorized by state.
 - 2) Government action must comply with the formal part of Canadian constitution.
 - 3) The statutory, prerogative and constitutional law that authorises or limits government action is subject to interpretation by the judiciary.
 - In their interpretation, the courts may impose additional implied restrictions from common law.
 - 4) Government workers retain capacity and restrictions of private individuals.
 - So, if they act outside their statutory authorization, they may be subject to private law actions in tort on the same basis as other private individuals.

Page 23 of the text expand on these 4 constitutional basics.

Administrative Law and Citizenship:

- What is citizenship and how does it pertain to administrative law.
 - "To be a citizen meant to have the right to participate, on an equal level with all other citizens, in the basic decisions of the state. To be a citizen meant that there were no persons with statuses higher than that of citizen (such as aristocrats). To be a citizen meant that everyone was being accepted as a rational person, capable of political decision. The logical consequence of the concept of citizen was universal suffrage."
 - I. Wallerstein, World-Systems Analysis: An Introduction (Duke UP, 2004): 51
 - This definition takes the French Revolution as its foundational moment.
 - Its worth remembering when he talks about status, he is talking about categories of person. He's saying there is an equal level for which all citizens have a right to participate.

What is a Citizen?

- Etienne Balibar identifies four conceptions of citizenship:
 1. Citizenship as Power:
 - Aristotle: power as “the indefinite office” of citizens.
 - As a citizen, you have the indefinite office of citizenship. You are a citizen and it cannot be taken from you. There is power attached to this status.
 - Autonomous position but with (reciprocal) obligations as well as your rights.
 - Obligations - paying tax, obey the law, compulsory military service.
 - Some of these duties might be onerous but some might minor.
 - The point is rights and duties are flip sides of the same coin. The coin is citizenship.
 - Governance.
 2. National Citizenship:
 - (Wallerstein’s starting point: the “bourgeois revolutions”)
 - The question: How is the universal to be realized within the form (and limits) of a community that is organized by the state?
 3. Social Citizenship:
 - E.g. as under the European social / welfare state.
 - Emphasis on claims / social rights of citizens.
 - Arguably an extreme form of this - example - is models of citizens incomes. Is it practical for the state to give all citizens a flat rate income.
 4. Neoliberal Citizenship:
 - To what extent does neoliberalism / capitalism pose a truly mortal threat to citizenship?
 - To such a degree that citizenship is no longer achieves what it set out to achieve.
 - Ref. “The Westray Story” (textbook, pp. 38–43)
 - Comes back to question of balancing in a capitalistic society efficiency and fairness.

Source: Étienne Balibar, Citizenship (Polity, 2015).

Rights and Citizenship:

- Rights and citizenship have always been intimately connected.
- Three fundamental axes of citizenship:
 - (I) Extent, (ii) Content, (iii) Depth
- Legal status under authority of a state, but more:
 - The extent to which one enjoys Political and social recognition.
- Three theories of citizenship:
 - (I) Liberal (emphasis a Individual)
 - (ii) Communitarian (emphasises a community)
 - (iii) Republican (accommodates both individual and group right; emphasises conflict and contestation).

Rights and Citizenship:

- Rights and Duties:
 - Reciprocity, contractual (Rousseau).
 - There is a social contract going on here. Rousseaus social contract. As a citizen you are contracting tight the state, and the state is going to give you some rights, and you are going to have some duties.
- Three strands of modern citizenship rights:
 - Civil (e.g. free speech, movement, the rule of law).
 - Political (e.g. voting, seeking electoral office).
 - Right to participate in political process.
 - Social (e.g. welfare, health care, social security).
- Duties/Obligations:
 - Minimally invasive (taxes, jury service).
 - More invasive (military duty).

Citizenship and T.H. Marshall:

- T.H. Marshall, *Class, Citizenship and Social Development* (1965)
Citizenship connected to rights:

Civil rights



Political Rights



Socio-economic rights

- But: this model has been subject to rigorous critique:
 - Rights as socially constructed, historically specific, contingent.

The extent to which the model is right or wrong in Canadian context. The critique is rights are always historical socially constructed.

Use for reading to ask yourself questions, is there a blind spot in these categories of rights, and how do courts interest these rights, are some more important than others.

These rights give you a way to analyze and critique various cases we will be reading.

The Westray Story: A Predictable Path to Disaster:

- May 9, 1992: Coal mine explosion in Plymouth, Nova Scotia.
- All 26 miners killed instantly.
- Justice K. Peter Richard led an inquiry into the causes of the disaster:
 - “the Westray tragedy was predictable and, therefore, preventable.”
 - “a stark example of an operation where production demands resulted in the violation of the basic and fundamental tenets of safe mining practice.”
- CBC “The National” 10-min documentary on the disaster:
 - <https://www.youtube.com/watch?v=Q-Mn9NrWzC4>

This is a case study that speaks to the nuts and bolts of administrative law. It's a short sighted vision of efficiency trumping protections and fairness. The balance that was struck between efficiency and productivity and health and safety was not sufficiency to prevent this tragedy despite it being predictable.

Disasters and Law: What is a Disaster?:

- There are another of bodies that are subject to administrative law: department of labour, department of natural resources, ministers of the crown, varies politicians, multiple actors involved in this tragedy.
- How disasters have been seen in law:
 - IFRC definition:
 - “A disaster is a sudden, calamitous event that seriously disrupts the functioning of a community or society and causes human, material, and economic or environmental losses that exceed the community's or society's ability to cope using its own resources. Though often caused by nature, disasters can have human origins.

$(\text{VULNERABILITY} + \text{HAZARD}) / \text{CAPACITY} = \text{DISASTER}$

- A disaster occurs when a hazard impacts on vulnerable people.

- The combination of hazards, vulnerability and inability to reduce the potential negative consequences of risk results in disaster.”
 - When these things happen, a population is impacted unevenly. Disasters impact vulnerable people more than less vulnerable people.
- [http://www.ifrc.org/en/what-we-do/disaster-management/about-disasters/what-is-a-](http://www.ifrc.org/en/what-we-do/disaster-management/about-disasters/what-is-a-disaster/)

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How Should the Law Respond to Disasters?:

- “Legal, political, and humanitarian responses [to disaster] are premised on the deep-rooted assumption that we can at least decipher the meanings of disaster, at best correct its causes and prevent future occurrences.”
 - Austin Sarat & Javier Lezaun, *Catastrophe: Law, Politics, and the Humanitarian Impulse* (U Massachusetts Press, 2009), 1.
- Not as straight forward as it seems, correcting the causes fo a disaster or preventing future occurrences might involve fundamental reform of society, the economy in ways that wont work.
- “It is maddeningly difficult to get a fix on the word disaster because its connotations have changed so much over time and across space.”
 - Ken Rozario, *The Culture of Calamity* (U Chicago Press, 2007), 11.

“Disaster”, “Catastrophe”, or “Emergency”?

- Disaster:
 - from the Latin compound of dis- or away, without, and astro which means star or planet. Literally means “without a star” –astrologically generated trouble.
 - Something which is so far beyond the way things should be that it is astrologically generated.
- Catastrophe:
 - from the Greek kata (down) and streiphen (turning over): it means an upset of what is expected; originally used to mean a plot twist.
 - Turning something upside down.
- Emergency:
 - from emerge, to rise out of, the opposite of merge, which comes from mergere (to be within or under a liquid). Thus, emergency = a separation from the familiar, a sudden emergence into a new atmosphere
 - (Taken from Rebecca Solnit, *A Paradise Built in Hell*, 2009, p.10)

“Disaster Law” or “Disaster and Law”?

- Disasters have constituted a discrete field of law, but also cut across futile fields of law:
 1. ‘Disaster Law’: UN ILC on Disasters, International Committee of the Red Cross (‘soft law’), regional, domestic, informal, and local
 - (See: Andre de Guttry, “Surveying the Law,” in Andrea de Guttry et al. (eds.), *International Disaster Response Law*, The Hague, The Netherlands: Springer, 2012)
 2. ‘Disasters and Law’: “Disasters and their applicable legal regimes are addressed within diverse areas of legal study and practice, most notably tort, contract, environmental, and constitutional law. Issues such as liability and liability-sharing, breach of contract [...] all bear upon disaster response and management. Disaster issues span insurance law, land use law, and administrative law, which are normally considered very different fields. [...] these disparate issues interconnect in the distinctive context of disasters.” (Dan Farber, “Navigating the Intersection of Environmental Law and Disaster Law,” 2011 *BYU L. Rev.* P. 1788).

Disaster and Legal Failure:

- “Law consistently fails in compensating suffering after disaster despite the profound sympathy victims of disaster draw and the commitment in liberal states to caring for people. Sociolegal scholars can explain how that can happen and provide an explanation beyond the disappointment that meets every failure.”

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- She argues that one of the striking things of law relationship to disaster is it consistently fails.
- “Explaining how law works within disaster could disassemble the belief that law protects people, and that the problem with disaster is just that there needs to be more laws.”
 - Something more fundamental than law needs to change if we are to prevent disasters such as Westray.
 - Susan Sterett, “Disaster and Sociolegal Studies,” *Oñati Socio-Legal Series* (Vol. 3, No. 2, 2013), 174.