RISK

REGULATION AND ADMINISTRATIVE CONSTITUTIONALISM

Elizabeth Fisher

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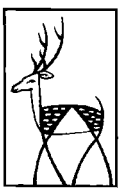

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PREFACE TO THE PAPERBACK EDITION

Legal cultures are constantly evolving and law is not static. The temptation on the reprinting of any work of legal scholarship is thus to update and adjust analysis in light of new legal and scholarly developments. Administrative constitutionalism is no exception to this ongoing process of change—new cases are decided, new regimes created, new statistics published, and new disputes flare up. The temptation to rewrite and to incorporate recent events into the narratives of this book is strong. It is however, a temptation that I have resisted for three reasons.

First, this is very much a paperback edition of the original version rather than a revised or new edition. Besides correcting a few typographical errors, the text remains exactly the same as it was in the original version.

Second, this book was always a collection of 'snapshots' rather than a definitive account of the legal regimes it covered. The purpose of these 'snapshots' was the re-orientation and re-framing of debates about risk regulation by viewing particular legal developments through the lens of administrative constitutionalism. These 'snapshots' not only illustrate the significant role of prescriptive assumptions about the role and nature of public administration, but also the importance of scholars, lawyers, and commentators engaging with legal detail. While continuing each of the narratives in these chapters would have some value (and smugly prove the ongoing relevance of my framework), it would also turn it into a very different work.

Third, and perhaps most importantly, this book was also always meant to be a first step in thinking in terms of administrative constitutionalism. Indeed, when I finished the book three years ago I was concerned that I had simply exchanged one stultifying intellectual construct for another and that I would be locked into a discussion of the rational-instrumental (RI) and deliberative-constitutive (DC) paradigms for the rest of my academic life. To say that is not to undercut the value of those paradigms—they are an incredibly valuable framework for thinking about risk regulation, particularly for breaking free from the futility of the science/democracy dichotomy. It is more that they are very much a starting point and they should not be taken too literally. As I stress in Chapter One, the detail of both paradigms has less to do with my vesting the truth in them and more my wishing to show the co-produced nature of law, risk, and public administration.

I needn't have feared however. Three years on, I am only just beginning to realise the power of the lens of administrative constitutionalism. Looking at risk regulation through it has identified fresh intellectual challenges and raised new questions. It has been a little like observing the night skies through a powerful

telescope—things that I never thought existed have suddenly come into view and require analysis and explanation. In particular, three particular phenomena have struck me as significant. With some humility I note that none of them were identified in the last chapter of this book as next steps for me to take!

First, it has become apparent that the concept of expertise requires even greater analysis than it was given in this book. The distinction between DC and RI expertise is thus only a starting point and expertise becomes an even more multi-dimensional and fractured concept when the range of different forms of expertise that co-exist and interact within administrative and dispute settlement regimes are taken into account. Thus for example, in more recent work I have begun to explore the distinction between the contributory expertise of lawyers and their interactional expertise which allows them to interact with other disciplines.[1] This distinction between contributory and interactional expertise was originally formulated by Collins & Evans and it highlights the way in which a single person or institution may be equipped with a range of different types of specialist knowledge and skills.[2] It is thus not appropriate to think about the role of expertise in public administration and administrative law in monolithic terms. The point is that DC/RI conceptions of expertise, by showing that expertise can operate independently from ideas of technocracy, forces the opening up of the 'black box' of expertise.

Second, administrative constitutionalism has forced me to engage with the detail of legal pluralism in a more careful and nuanced way. In chapter four I show how variations in merits review have a profound impact on the substance of law. That analysis led me to examine more carefully the concept of merits review. Thus for example, comparing the merits review regimes of Australian state environmental courts, variations can be seen concerning scope of review, what are relevant considerations, procedural frameworks, and evidentiary requirements.[3] Indeed, ironically, merits review is a far more legally complex enigma than judicial review. Again, these complexities only became obvious by thinking about how legal culture constitutes, limits and holds public administration to account in particular contexts. The lens of administrative constitutionalism, with its emphasis on 'thick' legal culture, thus forces an engagement with the legal detail of what initially appears 'not legal'.

Thirdly, the type of analysis in these chapters also establishes the importance of looking in more detail at the role of information in public administration. Just as expertise and merits review are no longer 'black boxes' the same is true with information. Thus for example, my recent work has concerned the role of models in risk regulation decision-making. In particular, models provide the rationale and basis

[1] E. Fisher, B Lange, E Scotford and C Carlarne, 'Maturity and Methodology: Reflecting on How to Do Environmental Law Scholarship' (2009) 21 *Journal of Environmental Law* 213 and E. Fisher, 'The Capacity of Courts to Handle Complex Cases: Lessons from Technological Risk Regulation' (Oxford, FJLS Policy Brief, 2009).

[2] H. Collins and R. Evans, R, *Rethinking Expertise* (Chicago, University of Chicago Press, 2007).

[3] E. Fisher, 'Administrative Law, Pluralism, and the Legal Construction of Merits Review in Australian Environmental Courts and Tribunals' in C. Harlow & L. Pearson (eds) *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart, Oxford, 2009)

for much risk evaluation but in engaging with them administrative decision-makers and lawyers must face a series of technical, institutional, interdisciplinary and evaluative complexities.[4] The detail of those complexities only became obvious to me through viewing risk regulation through the lens of administrative constitutionalism.

On each of these topics there is still more work to be done. Moreover, they do not represent the total sum of intellectual challenges that have come into sharp relief by viewing risk regulation through the lens of administrative constitutionalism. There is much still to be said in regards to the next steps outlined in the final chapter.

All of the above might read as a refutation or at least a 'moving on' of what is in this book. But I do not see it that way and I have no doubt about the inherent worth of my argument and of each of the case studies. It is just that the intellectual value of this book is not only in the account it provides but the new intellectual challenges it raises.

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7 February 2010

[4] E. Fisher, W Wagner & P Pascual, 'Thinking Critically About Models in Environmental Regulation: An Agenda for Lawyers and Policy Makers' *Journal of Environmental Law* (forthcoming).

ACKNOWLEDGEMENTS

This book has had a very long gestation period. Its origins lie in my taking two undergraduate courses in the third year of my Arts/Law degree in 1990 at the University of New South Wales—a course on administrative law as part of my Law Degree and a course on the sociology of risk in the School of Science and Technology Studies. The former was a straightforward doctrinal course on Australian administrative law and the latter a very theoretical and interdisciplinary course concerned with technological risk decision-making. Despite these differences, I not only found myself having to think about the role and nature of public administration in both, but scholars and decision-makers seemed to be struggling with the exact same issues. Yet with that said, there was very little dialogue between these two disciplines. To me this seemed a pity because the scholars in each discipline seemed to be holding different pieces of a larger jigsaw puzzle. Over the past decade and a half I have dedicated myself to putting together that jigsaw puzzle. While I have been publishing on these issues for several years, this book is my first attempt to provide a more comprehensive overview of these issues. I say first, because the purpose of this book is to reframe debate in this area rather than be a last word on the issue. Indeed, as will become clear this book raises more questions than it answers, but the questions it raises are important ones and cannot be ignored.

Since 1990 there are many people who have helped, inspired and deliberated with me and whom I would like to thank. I would like to thank Mark Aronson, Ronnie Harding and Gavan McDonell who were at the University of New South Wales while I was there. While working in very different disciplines, they each motivated me to pursue these issues and this book lies very much at the intersection of their interests. I would also like to thank Paul Craig, the supervisor of my DPhil while I was a graduate student at St John's College, Oxford. Some of that doctoral work can be seen in Chapter Three of this book but Paul's contribution to this book extends beyond that chapter. In particular, Paul taught me the importance of writing about what I wanted to write about rather than what I thought others wanted me to write about.

Much of the work in this book has been given as seminar papers in a variety of different academic forums in Europe, the United States, and Australia. Several of the chapters in this book have also been published elsewhere in earlier, and shorter, versions. The list of those that have discussed these issues with me and given feedback on those papers and publications is a very long one. I cannot even attempt to name them all here but in particular I would like to thank Nick Barber, Peter Cane, Michelle Everson, David Faulkner, Adam Finkel, Mark Freedland,

Dan Kelemen, Sheila Jasanoff, Judith Jones, Christian Joerges, Pasky Pascual, Mahla Pearlman, Paul Stein, Andrew Stirling, Rene von Schomberg, Paddy van Zwanderberg, Ellen Vos, Wendy Wagner, Vern Walker, Nick Wikeley, David Wirth, Brian Wynne, and Lucia Zedner for taking the time to discuss these issues with me. While they may not agree with everything in this book I do believe that their critical and honest comments have made it a better piece of work. I would also like to thank Richard Hart who has been the most patient, encouraging and understanding of editors.

In researching this book I also received support from a number of other quarters. I thank everyone at Corpus and the Law Faculty for making Oxford such a wonderful and vibrant place to work. I am also grateful to the Oxford University Faculty of Law for providing financial support for travel and research assistance. Jaswinder Kaur, Eloise Scotford, Sameer Singh and Sandeep Sreekumar were all brilliant and highly professional research assistants. Research for Chapter Three was part of my doctoral studies for which I had a Commonwealth Scholarship for. Research for Chapter Four was done while a Visiting Fellow at the Law Program at the Research School of Social Sciences at the Australian National University and the Faculty of Law, University of New South Wales in 2005.

In conclusion I would like to thank Roderick's and my family. Jill, Jo, Andrew [who sadly died in December 2008], Victoria and Ian have always been encouraging and supportive of my work. My two wonderful sons Corin and Arthur, in their own boisterous and lovely way, remind me daily that the concept of reasonable action is contextual. My final and most important thank you is to Roderick Bagshaw who has been an endless source of loving support, academic rigour, intellectual inspiration, and humour.

Oxford

1 January 2007

TABLE OF ABBREVIATIONS

AAT	Administrative Appeals Tribunal
AB	Appellate Body
ACGIH	American Conference of Governmental Industrial Hygienists
ACT	Australian Capital Territory
AFMA	Australian Fisheries Management Authority
AG	Advocate General
ALARP	as low as reasonably practicable
APA	Administrative Procedure Act 1946
BSE	bovine spongiform encephalopathy
CFI	Court of First Instance
CJD	Creutzfeldt-Jakob disease
CMO	Chief Medical Officer
Codex	Codex Alimentarius Commission
Communication	Communication from the Commission on the Precautionary Principle
CPSC	Consumer Product Safety Commission
CVO	Chief Veterinary Officer
CVL	Central Veterinary Laboratory
DC	deliberative-constitutive
DH	Department of Health
EC	European Communities
ECJ	European Court of Justice
EFTA	European Free Trade Association
EIA	environmental impact assessment
EIS	environmental impact statement
EPA	Environmental Protection Agency
ERDC	Environmental Resources and Development Court
ESD	ecologically sustainable development
EU	European Union
FIS	fauna impact statement
GATT	General Agreement on Tariffs and Trade
GMO	genetically modified organism
ICC	Interstate Commerce Commission
IGAE	Intergovernmental Agreement on the Environment
LEC	Land and Environment Court
MAFF	Ministry of Fisheries and Food
NHSTA	National Highways and Safety Transport Administration

NIOSH	National Institute of Occupational Safety and Health
NRC	National Research Council
NSW	New South Wales
OIE	Office international des épizooties
OMB	Office of Management and Budget
OSHA	Occupational Safety and Health Administration
OSH Act	Occupational Safety and Health Act 1970
PEC	Planning and Environment Court
PEL	permissible exposure limit
ppm	parts per million
Qld	Queensland
RI	rational-instrumental
SA	South Australia
SEAC	Spongiform Encephalopathy Advisory Committee
SIS	species impact statement
SPS Agreement	Sanitary and Phytosanitary
SVS	State Veterinary Service
Tas	Tasmania
TEC	Treaty establishing the European Community
TBT Agreement	Technical Barriers to Trade Agreement
TSE	transmissible spongiform encephalopathy
UK	United Kingdom
US	United States
Vic	Victoria
v-CJD	variant Creutzfeldt-Jakob disease
WA	Western Australia
WTO	World Trade Organisation

TABLE OF CASES

Australia

Germany

United Kingdom

United States

European Free Trade Authority

European Union