TRACCE ESTRATTE

TRACCIA 2

1) Discrezionalità amministrativa e discrezionalità tecnica.

2) Principi di fiducia e di risultato nel codice dei contratti pubblici.

Informatica: Cosa si intende per sistema di videoscrittura

Inglese: Brano estratto allegato

TRACCIA 3

1) Le modalità per l'esercizio del diritto d'accesso agli atti amministrativi.

2) Amministrazione per accordi e art 11, legge 241/1990.

Informatica: Con quali modalità può essere apposta una firma digitale su un documento informatico

Inglese: Brano estratto allegato

Firma autografa omessa e sostituita a mezzo stampa ai sensi dell'art.3, comma 2 del d.lgs. 39/1993

including procedural irregularities in the process of a structured consultation. The case is easily distinguishable from *Greenpeace*.

There have been important developments in relation to the requirements for impartiality in judicial decision-making. The courts have adopted several tests for establishing whether a decision should be annulled because of a lack of impartiality. Understandably, they have been more flexible about administrative decisions than about judicial ones where the test is "having regard to the relevant circumstances, as ascertained by the court, the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".[68]

8. *Liability*

Ombudsmen's reports have been urged as a resort for ideas for courts when awarding compensation for breaches of human rights legislation. Awards of damages by courts can be very high in England and Wales although there have been concerted efforts to keep awards for damages for breaches of the Human Rights Act at the lower end of the scale where possible. Conversely, the law is very difficult and unpredictable. Attempts to incorporate tests from EU law into domestic law have not to date been successful.[69] Proposals from the Law Commission (a law reform body financed by the public purse) have sought greater discussion of bringing requests for damages with judicial review applications (technically possible but very rarely done) and also introducing liability for unlawful activity per se as in the French system. The recommendations were not widely supported.[70]

9. *Contracting Out Government*

In the UK we have seen more of contracting out of governmental functions to private sector bodies than anywhere else in Europe. In the brave new world of government by contract the Efficiency and Reform Group in the Cabinet Office provides guidance on procurement and contracting by government departments and agencies and a Crown Commercial Service (2013) centralised purchasing for goods and services.[71] As private entities replace government in the pure sense, and as activities assume more of a competitive context for delivery, the question inevitably arises as to whether standards of good administration formulated in the public sector should apply in the private sector. Should there be a right to good administration against private sector deliverers of a service to the public? If so, should they apply with or without qualification so as to acknowledge the different context of the private and market environment. Several points should be recalled: first of all markets are never government neutral: they invariably only exist to the extent that governments allow them to exist. Secondly, if governmental functions are being contracted out, is there not an element of public interest involved in the transfer and delivery of function? The public interest has seen an irrebutable presumption in favour of standards of good administration and transparency. Where private companies are acting as proxies for government there seems no reason why the principles we have witnessed should not be applied to those bodies. There seems no good reason why human rights protection should not apply. A recent report on a UK Bill of Rights recommended extending the concept of the state for human rights purposes.[72]

In the FOIA for instance, private companies may be designated by the Secretary of State as public bodies where they are performing functions of a public nature or which are providing under contract with a public authority any service whose provision is a function of that authority (s. 5 (1) (a) & (b)). The formulation is not intended to cover areas "properly the realm of business, and that should remain confidential and private".[73] Under the Environmental Information Regulations the coverage of private bodies is more immediately broader than under FOIA. Under HRA, private bodies performing public functions are covered by the Convention rights. The difficult question has been what is a public function? Is provision by private bodies of education or residential accommodation for the old a public function because public bodies have duties or powers to provide such functions? The tendency of the courts – but the balance and distinctions have been fine ones – has been to say "No"; more is required than functional similarity. The answers provided by the courts have not been altogether satisfactory and, as Lord Neuberger suggested, the problem is one that requires legislation.[74] Elsewhere, where functions are clearly those of a state nature – decommissioning of nuclear power plants – even though the government may wish to engage in competitive processes for contracting out the function there are detailed provisions in place for allowing

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(68) *Porter v. Magill*, [2002] *AC* 357. This case emerged after an investigation by the Audit Commission.

(69) *Cullen v. Chief Constable of the RUC*, [2004] 2 *All ER* 237 (HL).

(70) Law Commission *Administrative Redress Public Bodies and the Citizen* (LC 322, 2010).

(71) https://www.gov.uk/government/organisations/efficiency-and-reform-group.

(72) Commission on a UK Bill of Rights (2012), http://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf.

(73) HC Standing Committee B, Jan 11, 2000, col 67.

(74) The most recent decision was notably divided and raises more questions than solutions: *YL v. Birmingham City Council and Others*, [2007] *UKHL* 27. The Joint Human Rights Committee of the Houses of Commons and Lords has reported on the *Meaning of Public Authority under the Human Rights Act* and public/private divide: HL 39 (2003-04) and HL 77 (2006-07). See UK Bill of Rights Commission note 72.

"anyone" on the basis of maps or plans for the local area. There was provision for an appeal against the findings.

We find numerous references to openness, fairness and impartiality (the principles from the Franks report of 1957 on Tribunals and Enquiries[1] following a notorious episode in chicanery by public officials); to fair procedure; transparency; reliance upon proper and adequate evidence and reasonableness in decision-making as requirements from courts and ombudsmen decisions; proportionate decision-making and consistency as a clear requirement in ombudsmen reports; adequate compensation or remedies when wrongs or maladministration have been committed; giving reasons for decisions; providing adequate internal grievance procedures before the ombudsmen or courts are engaged as a requirement of executive guidance, ombudsmen reports, Parliamentary legislation and the Civil Procedure Rules. We witness efficient use of resources as a Parliamentary and auditing requirement through the work of the National Audit Office and the recently abolished Audit Commission; the latter has no replacement but responsibility for audit will be placed on local authorities and health bodies "mirroring" private sector arrangements (Local Audit and Accountability Act 2014.). A code of audit practice will be produced by the National Audit Office.[2] More recently we see proportionality in decision making, protection of equality, use of minority languages and meeting legitimate expectations as requirements introduced through legal and ombudsmen decisions.

An Administrative Justice and Tribunals Council was established under the Tribunals, Courts and Enforcement Act 2007 as a standing expert body on administrative justice in the round and not just in relation to tribunals.[3] Its mandate was to keep under review the "administrative justice system" defined as "the overall system by which decisions of an administrative or executive nature are made in relation to particular persons"[4] ensuring that the relationship between courts, tribunals, ombudsmen and Alternative Dispute Resolution (below) reflects the needs of users.[5] Members were appointed by the minister of Justice and Scottish ministers and Welsh Assembly. Appeals to greater fairness, impartiality and effectiveness were associated with the government reforms but there was no grand charter of rights to turn to. It was seen as a matter of considerable regret that the Council was abolished in

(1) *Report on the Committee on Administrative Tribunals and Inquiries* Cmnd 218 (1957).
(2) http://www.parliament.uk/documents/impact-assessments/IA13-11A.pdf
(3) Not unlike ACUS (USA) which was abolished and the ARC in Australia. Its wide remit was set out in the Tribunals, Courts and Enforcement Act 2007.
(4) TCEA 2007 Sched 7 para. 14.
(5) Exp Memo to the Tribunals, Courts etc Bill para. 29-31.

2013[6] leaving no independent body to oversee administrative justice for the first time since before 1958.

The context of honesty and probity in public service and integrity of appointments is addressed by a variety of devices including a Code (May 2010) for the conduct of ministers.[7] Parliament has its Code of Conduct (2012)[8] which is policed by the Committee of Privileges and the Parliamentary Commissioner on Standards, and the Lords have their own equivalent. The civil service now operates under a statutory framework (Constitutional Reform and Governance Act 2010) and no longer under the prerogative. Provision for Local government in England to uphold standards were altered under the Localism Act 2011.[9] All public servants are duty bound to comply with the Nolan principles of good government – the general principles of conduct identified by the Committee on Standards in Public Life[10] as applying to holders of public office and which can usefully be spelt out: Selflessness; Integrity; Objectivity; Accountability; Openness; Honesty and Leadership. A Commissioner for Public Appointments exists and there is a code on public appointments.[11]

This if you like is the constitutional dimension of good administration. We should note that very little if any of this is the subject of judicial enforcement and shows the typical British predilection for internal administrative enforcement of standards. Whistleblowing is given statutory protection and numerous episodes in health administration have shown the existing provisions working in a feeble manner.[12]

1. Tribunals and Adjudication

The Tribunals and Enquiries Act 1958 (now 1992) and the Tribunals, Courts and Enforcement Act 2007 (TCEA) govern most statutory tribunals. The 1958 Act skimmed the surface of administrative justice in England a viewpoint reinforced by the fact that the events leading to the Franks Inquiry did not itself come within Franks' terms of reference. The first two acts provided for

(6) http://ajtc.justice.gov.uk/docs/AJTC_Response_to_JCR_(07.13)_web.pdf and http://ajtc.justice.gov.uk/.
(7) http://www.cabinetoffice.gov.uk/propriety_and_ethics/ministers/ministerial_code.aspx.
(8) http://www.publications.parliament.uk/pa/cm201012/cmcode/1885/1885.pdf.
(9) See *Local Government: the Standards Regime in England* SN/PC/05707 House of Commons Library (2013). Wales, Scotland and Northern Ireland have their own arrangements.
(10) http://www.public-standards.gov.uk/.
(11) http://publicappointmentscommissioner.independent.gov.uk/wp-content/uploads/2012/02/Code-of-Practice-20121.pdf.
(12) See Public Interest Disclosure Act 1998 as amended and NHS guidance http://www.nhsdirect.nhs.uk/about/freedomofinformation/foipublicationscheme/~/media/Files/FreedomOfInformationDocuments/OurPoliciesAndProcedures/HRAndEmployment/20130801_Whistle_blowing_policy.ashx.
On confidentiality and severance payments see National Audit Office (2013): http://www.nao.org.uk/wp-content/uploads/2013/10/Confidentiality-clauses-supplement.pdf.

procedures for scheduled tribunals and inquiries, reasons for decisions and appeals to courts of law. The Council on Tribunals – a product of the 1958 Act – produced rules of procedure for tribunals. Since the 2007 reforms tribunal rules of procedure are produced by the Ministry of Justice and approved by Parliament. For inquiries into fact finding exercises, the cause of major accidents or disasters and informing the public of how they were caused and the lessons to be learned, the Inquiries Act 2005 now provides the statutory framework. This allows procedures to be held in private and for non publication of evidence.

The TCEA has recast our system of tribunals into a unified and national system under a president (a senior judge) comprising first tier and upper tier (appeal) tribunals.[13] They are served by a Tribunals Service which is a part of the Courts and Tribunals Service which is an executive agency of the Ministry of Justice (2007). This reform was expected to bring coherence and greater efficiency to our method of delivering administrative justice through tribunals which involve about a million cases a year. The change was outlined in a government paper[14] which looked at public service and effective grievance redress and which urged "proportionate grievance redress" in relation to the "whole end to end" of administrative justice. It advocated more effort in getting decisions right initially so that there was less resort to complaints processes.

2. *Public Inquiries and Examinations*

We have seen the provenance of this procedure. The best known and most widely used procedures for participation have been inquiries concerning local land use where an inquiry is used as an appeal mechanism against a decision affecting adversely a land owner's proposed use of land. In relation to inquiries the governing provisions are in the Town and Country Planning Act 1990 as amended. Procedures for inquiries are set out in regulations and the most general are the TCP (Inquiries Procedure) (England) Rules (SI 2000/1624 as amended).

These typically involve a publication of a plan of some form for an area concerning land use, the opportunity to make objections and a public hearing before an inspector who reports back to the minister. These give a wider range of local interests an opportunity to raise objection. The procedures have been heavily modified and take a variety of forms to suit the decision-making

(13) *R (Cart) v. Upper Tribunal*, [2011] *UKSC* 28 on application of judicial review to Upper Tribunal.

(14) *Transforming Public Services: Complaints, Redress and Tribunals*, July 2004 Cm 6243 http://www.dca.gov.uk/pubs/adminjust/adminjust.htm. See R. CARNWARTH, (2009) *Public Law* 48.

context; from small informal hearings to very large formal hearings with legal representation. The independent Planning Inspectorate provides an inspector to preside over the inquiry. They have power to make a final decision but in important matters a decision may be made by the minister.

The most notorious use of a public local inquiry has been into major proposals for development in which government has a direct interest and which involve national (even international) interests and not just regional or local ones. These inquiries had taken longer and longer to conduct and had, the government argued, delayed decisions on vitally important topics such as energy generation, road building and siting of new airports or runways. Government argued that the complexity of legal procedures and the success of legal tactics in forcing open the examination of policies and merits behind proposals have caused an unacceptable delay in crucial planning decisions.

For major proposals involving energy, transport, water and waste the government introduced the reforms under the Planning Act 2008. The Commission created by the Act to examine and decide upon the proposal was abolished by the Localism Act 2011 but its procedures (below) were transferred to a unit in the Planning Inspectorate and its name survived until 2012. Streamlined development consent has since been extended to commercial decisions of national significance under the Growth and Infrastructure Act 2013. These proposals followed a government white paper which sought to streamline the planning process as a whole.[15] National Policy Statements (NPS) would go through processes of "thorough and effective public consultation and Parliamentary scrutiny".[16] The Localism Act introduced a requirement of Parliamentary approval. Examinations into proposals take place before a panel of the Planning Inspectorate (PI) which is independent of government. PI is accountable to ministers for its overall performance and reports to them. The panel would consider the environmental impact of a proposal, manage any hearings, make recommendations on consent for an application and any conditions to be attached. The details on public notification, consultation on Environmental Impact Assessments requirements, formal processes for registration of interested parties, evidence gathering, pre-meetings, submission of evidence and opportunities for counter evidence are contained in the report together with the examination stage where evidence will be heard and probed according to a detailed timetable.[17] The panel would ask questions rather

(15) *Planning for a Sustainable Future* Cm 7120 (May 2007).

(16) Ditto p. 24.

(17) For procedures, see SI 2010/103 as amended and: http://infrastructure.planningportal.gov.uk/wp-content/uploads/2012/04/Advice-note-8.1v4.pdf For the procedures involved in the decision to build a new nuclear generator at Hinkley Point C see http://infrastructure.planningportal.gov.uk/wp-content/ipc/uploads/projects/EN010001/3.%20Post%20Decision%20Information/Decision/121219_EN010001_%20SoS%20HPC%20Decision%20Letter%20Annex%20A.pdf [Infrastructure Planning