

**NATIONAL LECTURE ON ADMINISTRATIVE LAW
AT THE AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW
CONFERENCE**

**Held at the Hotel Realm, Barton, Canberra ACT, Australia
Thursday 18 July 2013**

*Sian Elias¹

I am greatly honoured by the invitation to deliver the 2013 National Lecture on Administrative Law. It was however foolish of me to be flattered into accepting. On one or two previous occasions when I have ventured to talk about administrative law on this side of the Tasman, I have usually ended up in hot water. Indeed, a much more qualified and eminent senior Australian judge, whom I like to think of as a friend, has told me quite plainly that “You New Zealanders just don’t understand Australian public law”.

The spirited defence in the last two lectures in this series, by Justices Gummow and Keane, indicates that there are stout answers to be made and strong intellectual positions to be held against charges of Australian exceptionalism. Such charges may well be exaggerated. More importantly, the sniping generates too much indignation to be constructive. So while it is not possible to avoid questions of difference, I hope to concentrate as much on what is shared in our linked traditions and I hope to get behind some of the labels that impede shared insights. I want to talk about administrative justice. It is an end we have in common, whether we prefer to position it within a constitutional framework based on separation of powers or under the rule of law – if indeed there is any difference.

Foundations

Any comparative perspective on public law runs into the fact that national constitutions and constitutional traditions set the scene. That is because “behind every theory of administrative law there lies a theory of the state”.² Our theories of the state share common roots and some inherited oddities (and there is nothing as odd as the metaphor of “the Crown” which, as Paul Craig and Adam Tomkins have commented is “as daft, in the modern era, as constitutional law gets”).³ In New Zealand, as in Australia, the superior courts have general supervisory jurisdiction over inferior tribunals and administrative action and have the constitutional responsibility of interpreting primary legislation. In both jurisdictions the

¹ The Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand.

² Carol Harlow and Richard Rawlings *Law and Administration* (3rd ed, Cambridge University Press, Cambridge, 2009) at 1.

³ Paul Craig and Adam Tomkins *The Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford University Press, Oxford, 2006) at 5.

executive is answerable to the courts for the lawfulness of its actions and to Parliament for its policies.

The roots we share and the similarities of our institutions do not detract from the significance of the differences between a federal state established under a constitutional document which distributes the functions of government and a unitary state operating under a constitution substantially unwritten in which the limits of the authority of the different branches of government and their relationship with each other rest, uneasily, on historical accommodations and political and legal theories. But the core constitutional principles we recognise and apply in administrative law in both systems are the separation of powers and the rule of law. They shape public law in both jurisdictions.

Separation of powers

Justice Gummow pointed out in his lecture last year that administrative law in Australia must start with the conferral by the Constitution on the Executive of authority to execute and maintain the Constitution and the laws of the Commonwealth. The authority of the Executive is balanced in the Constitution by the authority conferred on the other two branches of government, although the symmetry is inevitably modified from the purer United States model by the engrafted Westminster model of ministerial responsibility to Parliament.⁴ Although the boundaries of executive and legislative functions may be less sharp, the High Court has been vigilant to secure strict separation of the judicial function. The authority of Chapter III courts under the Constitution to interpret legislation and keep the Executive within the powers conferred upon it is secured both by observance of this separation and by the constitutional writs. This mantle now also protects the functions of the State Supreme Courts from legislative encroachment.⁵

Sir Anthony Mason has expressed the view that the separation of powers “has had a stronger influence on Australian public and administrative law, especially judicial review, than it has on English, Canadian and New Zealand administrative law”.⁶ It is not necessary to disagree with this assessment to suggest that its principal manifestation has been in strong protection for the judicial function. Certainly the separation of legislative and executive functions is less strict, as is perhaps inevitable in a Westminster Parliamentary system. It is an interesting question whether the strong

⁴ Stephen Gageler has noted that this melding of a parliamentary system into a constitution based on the United States model produces a tension: Stephen Gageler “Foundations of Australian Federalism and the Role of Judicial Review (1987) 17 Fed L Rev 162 at 164.

⁵ *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

⁶ Sir Anthony Mason, “The Break with the Privy Council and the Internationalisation of the Common Law” in Peter Cane (ed) *Centenary Essays of the High Court of Australia* (LexisNexis Butterworths, Sydney, 2004) 66 at 77.

protection of judicial function from legislative erosion⁷ comes at the price of more deference to the executive function. This is a matter I will return to.

As Lord Diplock pointed out in *Duport Steel v Sirs*,⁸ separation of powers is the assumption behind the constitution of the United Kingdom (and New Zealand) too. There is, therefore, constitutional justification for judicial review of administrative action in New Zealand and the United Kingdom, as in Australia.⁹

Even so, the source of the distribution of power in a foundational instrument adds strength to the separation, a claim which cannot be made when the distribution is based on doctrine. This has implications for legal method. Ultra vires may seem a more convincing basis for judicial supervision of administrative action in a jurisdiction where separation of powers is derived from a fundamental constitutional instrument than in a system where distribution of governmental power rests on doctrine, statutes, and the residual prerogative powers. Judicial supervision under a Constitution in which the executive has direct authority may perhaps require more circumspection than under the different constitutional arrangements in New Zealand. In New Zealand, even if the executive has no clear independent constitutional source of power beyond statute other than can be found in the dwindling prerogative, the legislature has untrammelled authority to empower the executive and ease any judicially-imposed restrictions. In a system like yours, where the lines of authority seem brighter because captured in a text, it may be understandable to prefer bright lines than in a constitutional system where judicial authority rests on big ideas such as the rule of law or the principle of legality.

The sphere reserved for judicial authority is strictly patrolled in Australian constitutional law. Chief Justice Spigelman points out that it is a more strict separation than that developed in the United States jurisprudence, even though Chapter III of the Australian Constitution is based on Art III of the US Constitution.¹⁰ In Australia, only Chapter III courts can exercise judicial power and they can perform non-judicial functions only if incidental to the exercise of judicial authority.¹¹ The High Court will strike down legislation which intrudes upon the judicial power. This strict demarcation of functions prompts vigilance about distinctions between

⁷ For example, by the enactment of privative clauses.

⁸ [1980] 1 WLR 142 at 157.

⁹ See Ivan Hare "The Separation of Powers and Judicial Review for Error of Law" in Christopher Forsyth and Ivan Hare *The Golden Metwand and the Crooked Cord* (Oxford University Press, Oxford, 2005) 113 at 129 for the view that commentators have not sufficiently emphasized the separation of powers in the public law of the United Kingdom. Hare argues that it is possible to find constitutional justification for judicial review of administrative acts in the principle of the separation of powers.

¹⁰ The Hon Justice J Spigelman AC "Public Law and the Executive" (2010) 34 Aust Bar Rev 10.

¹¹ See, for example, *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

law and policy and emphasis upon distinctions between law and the merits of individual decisions.

Separation of powers necessarily sets up inter-institutional respect. There may be room for difference in national traditions about the level of respect required to be shown in the particular context. But care to ensure that institutions do not overreach is found in any jurisdiction. (In the recent exchange between Lord Sumption and Sir Stephen Sedley on judicial overreaching in judicial review, Sedley is surely in the right when he points out that the legitimacy of what they do is a matter of constant anxiety for all judges.)¹²

Observing proper boundaries is constitutional obligation. If however, the separation of powers (whether derived from a constitutional text or from doctrine) is taken to mark out entirely distinct spheres of responsibility, it would be unacceptably tolerant of government power, as Peter Cane has pointed out.¹³

Whether the strict separation of powers in Australia raises this risk is not something upon which I am qualified to comment. Michael Taggart suggested a few years ago that there are signs that the emphasis on the constitutional protection of the judicial authority has come at a cost to administrative law and has expanded the area ceded to the executive.¹⁴ If so, our law may diverge. Whether it does significantly may depend in part on the second constitutional principle we share: the rule of law.

Rule of law

Although it is always a good precept to beware of fashions in legal thinking, there is substantial support for the view that the foundation of modern administrative law is the rule of law.¹⁵ Mark Elliott has suggested that it is now “the driving force behind – and the normative basis of – modern administrative law”.¹⁶ In similar vein, Sir John Laws has written that the rule of law is “a free-standing principle, which is logically prior” to the three heads of review identified by Lord Diplock in the *CCSU* case.

There is some justification in the view that the rule of law is too often invoked as if a talisman to ward off evil. And I certainly do not intend to use it as any conversation-stopper. It is however a principle recognised as an assumption

¹² Jonathan Sumption QC “Judicial and Political Decision-Making: The Uncertain Boundary” (FA Mann Lecture 2011, Lincoln’s Inn, London, 8 November 2011); Stephen Sedley “Judicial Politics” (2012) 34 *Lond Rev Books* 15.

¹³ Peter Cane, “Review of Executive Action” in Cane and Tushnet (eds) *The Oxford Handbook of Legal Studies* (2003) 57 at 59–60.

¹⁴ Michael Taggart “Australian Exceptionalism in Judicial Review” (2008) 36 *Fed L Rev* 1.

¹⁵ Mark Elliot *The Constitutional Foundations of Judicial Review* (Oxford University Press, Oxford, 2001) at 104.

¹⁶ At 104.

of the Australian Constitution¹⁷ and it is part of the New Zealand constitution, as explicit reference in the Supreme Court Act 2003 affirms.¹⁸ Although invoked sometimes for rhetorical flourish, there has to date been little unpacking of the concept attempted in New Zealand case-law at least. It is notable, however, that the White Paper which preceded enactment of the New Zealand Bill of Rights Act explained the omission of any reference to “equality” in the proposed Bill of Rights as unnecessary because it is part of the rule of law.

The principle of the rule of law exerts a powerful pull. It is Dicey’s concept of the rule of law that underlies modern public law. Rights may not be infringed except in accordance with law, determined by the ordinary courts of the land.¹⁹ The rule of law is however also pregnant with common law values, as Lord Bingham’s writings on the topic indicate and as is suggested by the White Paper on the New Zealand Bill of Rights, with its reference to equal treatment being part of the rule of law. The rule of law in this sense is also behind disenchantment in some jurisdictions with the adequacy of ultra vires and imputed legislative intent as explanations for intervention by way of judicial review. A common law conception of the rule of law, like the common law itself, is not static. It has necessarily been affected by the removal of immunities and procedural impediments to legal action against government and officials. The values of the common law adopted in judicial review are also values which are used in interpretation of legislation. Such values develop. In New Zealand they are influenced now by the New Zealand Bill of Rights Act.

Administrative Justice

It is easy to acknowledge that our traditions and legal method may diverge because of constitutional differences. What is not so apparent however is whether the ends of administrative justice and the role of the courts in achieving it should differ.

“Administrative justice”, the term I have used, was looked to by Lord Denning when in 1949 he said that the “task of doing justice as between the subject and the administrative branches of government is just as important as the task of doing justice between man and man”.²⁰ It may have been a startling idea at the time. Indeed, twenty years later when I first studied administrative law, many of the great administrative law cases which established the subject in its modern form were very new. Over the next decade the courts in the United Kingdom redressed the indifference and injustices to “living people” which had shocked Kenneth Culp Davies, the American administrative lawyer on his visit in 1959.

¹⁷ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193 per Dixon J.

¹⁸ Supreme Court Act 2003, s 3(2) (in conjunction with “the sovereignty of Parliament”).

¹⁹ AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan & Co Ltd, London, 1961) at 195-196.

²⁰ Sir Alfred Denning *Freedom Under the Law* (Stevens, London, 1949) at 96.

Administrative justice must be adaptable to the changing circumstances of administration and the expectations and needs of modern society. Although there are fields of legal control where certainty through what Felix Frankfurter called “mechanical application of fixed rules” is attainable, he was surely right to say that “there are other fields where law necessarily means the application of standards – a formulated measure of conduct to be applied by a tribunal to the unlimited versatility of circumstance”.²¹ And he identified administrative law as occupying such a field, where fixed rules are less useful and abstractions can work real injustice by attempting to “torture[]” individual circumstances into “universal molds which do not fit the infinite variety of life”.²²

In administrative law we are dealing pre-eminently with law in the making; with fluid tendencies and tentative traditions. Here we must be especially wary against the danger of premature synthesis, of sterile generalisation unnourished by the realities of “law in action”.

If this insight is accurate, as I think it is, it suggests that in administrative law we should be careful not to be locked into tests, formulas and prescriptions. It has implications too for preferences for bright lines and hard edges.

Constitutional underpinning, such as is provided by a doctrine of separation of powers, brings great strength and authority to administrative law. But it may bring temptations which, if taken, can impede responses to ensure administrative justice. It is, I think, a mistake to see administrative law as isolated from the general body of common law. Felix Frankfurter pointed out that “the problem of rule *versus* discretion is far broader than its manifestations in administrative law”.²³ That is demonstrated in the great administrative law case of *Ridge v Baldwin*,²⁴ where Lord Reid drew on private law cases concerned with control of power. Although issues of power present in a more acute form and over a wide range of activities in the administrative state, these are but new aspects of familiar conflicts in private as well as public law between rule and discretion. The overlap of principles and values applied by the common law indicate the concern of the law with the exercise of power over others, wherever it is found.

That is not to say that the concept of the public in administrative law is irrelevant. But if the problems of power and its abuse are not confined to public law, it is less easy to discern the purpose in insistence on drawing rigid boundaries between public and private power. Indeed the exercise was deprecated by Sir William Wade.²⁵ Certainly, a clear distinction is hard to maintain in jurisdictions in which the exercise of judicial function must conform with human rights standards in private law cases as well as public

²¹ Felix Frankfurter “The Task of Administrative Law” (1927) 75 U Pa L Rev 614 at 619.

²² At 619.

²³ At 619.

²⁴ [1964] AC 40.

²⁵ HWR Wade and CF Forsyth *Administrative Law* (10th ed, Oxford University Press, Oxford, 2009) at 570-571.

law cases.²⁶ But well before introduction of such statements, Sir David Williams was urging that the principles of administrative law “inevitably impinge upon or draw from other areas such as tort, contract, company law, labour law, and criminal law”.²⁷ Too close a tie to constitutional law may blunt that sense of connection. It may also obscure the fact that securing administrative justice is a whole of government responsibility, the topic I next address.

The work of administrative justice today

Administrative justice is today the work of many hands. An emphasis on judicial supervision misses the point that modern administration, which is characterised by openness and fair process, is substantially the work of the other branches of government.²⁸ De Smith in his pioneering text famously said of judicial review that it “is inevitably sporadic and peripheral”.²⁹ And, in reality, the courts are not where administrative justice is usually obtained.

Discretion is systemised by policy statements, manuals, and other forms of “soft” law which protect against arbitrariness and provide fair processes. Checks within government provide supervision and may be accessed for review of decisions by those affected. More or less elaborate systems of review of decisions are provided by tribunals or officers who observe principles of natural justice, an obligation now imposed on all who exercise public functions under the New Zealand Bill of Rights Act. Ombudsmen provide additional scrutiny and assistance for those affected by administrative decision-making in my jurisdiction as well as in yours. Effective redress for administrative error for most people does not entail access to a court possessing general supervisory jurisdiction. And, in reality, judicial review is not often the best mechanism for securing administrative justice.³⁰

Access to official information has changed the culture and method of government. It has also changed the administration of justice in the courts. Until the relatively recent legislative reforms the courts themselves had lagged in terms of freedom of information. There was even doubt as to whether courts could compel production of official information relevant to litigation or whether they were obliged to accept the decisions of the

²⁶ See *Hosking v Runting* [2005] 1 NZLR 1 (CA) and *Lange v Atkinson* [2000] 3 NZLR 385 (CA).

²⁷ DGT Williams “Criminal Law and Administrative Law: Problems of Procedure and Reasonableness” in P Smith (ed) *Essays in Honour of JC Smith* (Butterworths, London, 1987) 170 at 170.

²⁸ As scholars such as Carol Harlow and Richard Rawlings have stressed, arguing that a judicial review-centred conception of public law provides a partial picture only.

²⁹ SA de Smith *Judicial Review of Administrative Action* (1st ed, Stevens, London, 1959) at 1. This description was retained in all five editions of the text.

³⁰ See the Hon PA Keane “Democracy, Participation and Administrative Law” (2011) 68 AIAL Forum 1 at 14.

Executive at face value. As a young lawyer I once watched a dramatic exchange in the New Zealand Court of Appeal in 1981 between the Court and the Solicitor General in which the Court insisted on being provided with material relied upon by the Minister in making his decision in a controversial case. It was a close run thing. The Solicitor-General was obliged to keep going back for instructions. The relief of the judges when the Court was eventually advised that the Minister acquiesced was palpable. It was a constitutional moment.

Few judicial decisions have had the impact of the decision of the Ombudsman in New Zealand, later upheld by the Court of Appeal when challenged by judicial review on behalf of the police, that the Official Information Act required pre-trial disclosure by the police in prosecutions.³¹ This shift was achieved by a Parliamentary Officer with a mandate to promote good government. It is not at all clear that the courts could have forced such reform by themselves without serious political strain. That the Ombudsman did was in large part because of respect for the office and because the climate of open government the office promoted was embraced by our society. It affected popular expectations of good government.

Do the modern safeguards diminish the importance of judicial review in securing administrative justice? I do not think they do. Although Australia was an early pioneer of merits review, the provision of reasons, and access to official information under the reform package of the 1970s, most common law jurisdictions have now followed suit. I am not therefore convinced that Australian preference for jurisdictional error and legality and reluctance to embrace abuse of power as a basis for judicial intervention is explained by the federal law reform package of the 1970s, as Chief Justice Gleeson has suggested.³² To an outsider, there seems much force in Peter Cane's assessment that the system may itself have fragmented administrative law "by giving the distinction between judicial review and merits review a unique and rigidifying significance".³³

There are two main reasons why I think judicial review is critical to administrative justice despite the systems of modern government. In the first place, I think it is necessary to acknowledge how much the architecture of modern administrative justice owes to the realisation that "the judge over the shoulder" would intervene to ensure observance of legality, rationality, and fairness in administrative decision-making. It is not necessary to attribute to judges the credit for the insight, once it was realised how much had been lost during the period of what Sir William Wade described as their "backsliding".³⁴ Wade attributed the new preparedness to correct administrative injustice as

³¹ *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA).

³² Murray Gleeson "Australia's Contribution to the Common Law" (2008) 20 ALJ 1 at 15.

³³ Peter Cane "The Making of Australian Administrative Law" (2003) 24 Australian Bar Review 114 at 133.

³⁴ Wade described the time as one when the judges "declined to apply the principles of natural justice, allowed Ministers unfettered discretion where blank-cheque powers were given by statute, declined to control the patent legal errors of tribunals, permitted the free abuse of Crown privilege, and so forth": HWR Wade *Constitutional Fundamentals* (Stevens, London, 1980) at 78.

a response to the public mood. And, certainly, the legislative and administrative reforms I have already referred to suggest that there was a well-spring of political will to do better. What was cause and effect may not be profitably disentangled but I have elsewhere suggested that the climate of openness in government has had profound consequences for law and judicial method, especially in judicial review, which has itself led other public agencies to reinforce and develop administrative justice.³⁵

In the second place, judicial oversight of administrative decision-making provides independent scrutiny which is beneficial for good administration more generally. Most often, the cases provide independent vindication of official behaviour. There is public virtue in this demonstration and in the exposition of how decisions have been taken, even where correction is not necessary. It is a principal contribution of legal process to the rule of law. Judicial determinations “illuminate” administrative justice as well as holding institutions and officials to account.³⁶ Is it romantic to think that the examination of practices in the deliberative processes of the court itself promotes good administration and helps it to adapt to changing circumstances? And in high stakes cases, those of real public anxiety, there may be real benefit in the dispassionate processes of the supervisory jurisdiction. That certainly was my experience of some highly charged cases when in legal practice.

In supervising the exercise of discretionary judgments, the courts are engaged in the same interpretative exercise as in construing the text of provisions by which powers are conferred. In such exercise, values obtained from the common law, international law, and contemporary legislation are context for both.³⁷ The exposition of such principles and their application in individual cases provide frameworks and standards for administrators and judges alike to use. New Zealand, as a small society, has always looked for help wherever it can get it: from other jurisdictions, particularly this jurisdiction, and from international sources. As is the common law method within which we work, we look for reasons that convince and standards that are explained in application. Good government according to law is the end sought by administrative justice. It must entail reasonableness, fairness, legality, consistency, and equal treatment (the best protection against arbitrariness and a value that underpins the rule of law). But these abstractions need explanation in application to be useful. So, administrative lawyers have to read cases.

In the climate of openness and justification in which administrative law is conducted today, a sharp distinction between merits review and supervision of process seems increasingly difficult to maintain. Under New Zealand’s

³⁵ Dame Sian Elias “Administrative Law for ‘Living People’” (2009) 68 CLJ 47.

³⁶ DGT Williams “Police Accountability” in D Butler, V Bogdanor and R Summers (eds) *The Law, Politics and the Constitution: Essays in Honour of Geoffrey Marshall* (Oxford, Oxford University Press, 1999) 273 at 294.

³⁷ As TRS Allan has been at the forefront in pointing out. See, for example, TRS Allan *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press, Oxford, 1993).

Official Information Act 1982 people are entitled to reasons for administrative decisions. It is an aspect of human dignity that people know why official action is taken which affects them. If people are given the dignity of reasons, they want them to justify the outcome. If they do not, the decision is appropriately characterised as unreasonable and reviewable. And, as Peter Cane has pointed out, it is difficult to understand in what sense a judgment that an administrative decision is unreasonable is not a judgment about the merits of the decision.³⁸

The reach of the supervisory jurisdiction

Much academic writing has been directed at the difficulty of maintaining a boundary between what is public and private. I do not do attempt here to do more than acknowledge this issue as a challenge for the courts in supervising the legal system. I have already referred to the fact that the common law principles applied by the courts in administrative law are derived from private law sources as well as public law sources. I have referred to the opinion of Sir William Wade that a rigid distinction between public and private power is harmful.

The “public function” test applied in *Datafin* for cases where the source of the power under examination is not statutory or prerogative is so far a swallow that has not ushered in a general spring – yet.³⁹ In the corporatised and pluralist modern state, it is however increasingly difficult to draw a confident line between what is public and what is private.⁴⁰ The New Zealand Bill of Rights Act attaches not only to the legislative, executive, and judicial branches of government but also to “acts done ... by any person or body in the performance of any public function, power or duty conferred or imposed on that person or body by or pursuant to law”.⁴¹ We can expect further development of what functions and powers are properly viewed as “public” and less emphasis on the nature of the person or body exercising the function.

Lord Diplock made it clear that it is the responsibility of the courts to adapt their processes “to preserve the integrity of the rule of law despite changes in the social structure, *methods of government* and the extent to which the activities of private citizens are controlled by government authorities”.⁴² And, as he explained on another occasion, the jurisdiction of the High Court to supervise for legality extends to new bodies possessing the “essential

³⁸ Peter Cane “Merits Review and Judicial Review – The AAT as Trojan Horse” (2000) 28 Fed L Rev 213 at 221.

³⁹ *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815 (CA).

⁴⁰ Dawn Oliver *Common Values and the Public-Private Divide* (Butterworths, London, 1999).

⁴¹ New Zealand Bill of Rights Act 1990, s 3.

⁴² *Inland Revenue Commissioners v National Federation of Self-employed and Small Businesses Ltd* [1982] AC 617 (HL) at 639-640. [Emphasis added.]

characteristics” upon which the supervisory jurisdiction of the High Court has been based.⁴³

In all jurisdictions, the courts have been cautious.⁴⁴ Perhaps in Australia however the approach has been even more careful. Certainly, to our eyes, cases like *Tang*⁴⁵ and *NEAT Domestic*⁴⁶ are surprising. It may be that in those cases there were other remedies. What would surely be unacceptable however is if cases of potential injustice fall into some black hole because of the classifications of power as public or private.

I am not entirely convinced that a public function approach is in any event sufficient. I wonder whether the supervisory jurisdiction of the courts which protects the legal order is properly confined to the area of law we call “administrative”. Administrative law is simply the field in which power is most often encountered in modern states. But power abused or rights infringed should always be the concern of the courts. I have mentioned Sir David Williams’s view that administrative justice is not an island but is connected to the mainland of the common law. More attention should, I think, be paid to consistency between the principles we apply in supervising administrative action and the principles applied in torts, contract, company law, labour law, and criminal law.⁴⁷

The characteristics of judicial review

Chief Justice Gleeson identified the characteristics of judicial review in Australia as “[a] search for jurisdictional error and an insistence on distinguishing between excess of power and factual or discretionary error”.⁴⁸ Chief Justice Spigelman has similarly expressed the view that Australia’s “constitutional jurisprudence has now installed jurisdictional error as an overriding, unifying concept”.⁴⁹ The classic statement of the distinction between excess of power and merits review is that of Brennan J in *Attorney-General (NSW) v Quin*:⁵⁰

The duty and jurisdiction of the Court to review administrative action do not go beyond the declaration and enforcing of the law which

⁴³ *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864 (CA) at 884.

⁴⁴ In *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC), the Privy Council corrected the New Zealand Court of Appeal and held that the decision of a State enterprise to enter into a contract could be the subject of judicial review on a limited basis (for fraud, corruption and bad faith).

⁴⁵ *Griffith University v Tang* [2005] HCA 7, (2005) 221 CLR 99.

⁴⁶ *NEAT Domestic Trading Pty Ltd v AWB Ltd* [2003] HCA 35, (2003) 216 CLR 277.

⁴⁷ In jurisdictions like mine where providing remedies for breaches of the New Zealand Bill of Rights Act is a responsibility of the courts, there is the need to reconcile tortious and Bill of Rights Act remedies.

⁴⁸ The Hon Murray Gleeson “Australia’s Contribution to the Common Law” (Singapore Academy of Law, Singapore, 20 September 2007).

⁴⁹ The Hon JJ Spigelman AC “Public Law and the Executive” (Garran Oration, Institute of Public Administration Australia National Conference, Adelaide, 22 October 2010).

⁵⁰ (1990) 170 CLR 1 at 35-36.

determines the limits and governs the exercise of the repository's power ... the Court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

The rather unattractive indication in this much quoted statement that the courts must be indifferent to "administrative injustice" must be read with the important qualification Sir Gerard makes that it is only where "merits" *can* be distinguished from "legality" that the courts cannot intervene. As a fair reading of *Craig v South Australia*⁵¹ demonstrates and as is now emphasised in *Kirk v Industrial Relations Commission (NSW)*,⁵² the grounds for vitiating error which justify judicial review are comparable to those in other common law jurisdictions and are themselves capable of movement. In *Kirk*, the High Court has affirmed that classifications of when error is jurisdictional are only examples. There is no "rigid taxonomy".

Such contextual assessment of when it is appropriate for courts to exercise the power of judicial review is a feature of all common law jurisdictions. In New Zealand and the United Kingdom we prefer to avoid the language of jurisdictional and non-jurisdictional error. In Canada, as in Australia, the Supreme Court finds it useful to label the cases where the courts must intervene by judicial review as ones of jurisdictional error. In both Canada and Australia, what constitutes jurisdictional error is however an intensely contextual assessment, in which usually the most important context is provided by any statute which confers the power being exercised. Behind the terms there is common acceptance that the supervisory jurisdiction requires vitiating error (a matter of degree not susceptible to rule or test) and is not warranted where the decision maker reasonably has a choice in the assessment made.

I do not mean to suggest that there are not real differences in legal culture or dress. Often these differences in tradition and culture do lead to different results in different jurisdictions. There are some decisions of your courts which seem decidedly strange to us. No doubt there are some decisions of our courts that seem unacceptably adventurous or loose to you. That is to be expected. Indeed, within jurisdictions judicial attitudes and public expectations can be expected to fluctuate over time. As Frankfurter said, administrative law is concerned with "fluid tendencies and tentative traditions".⁵³ But the differences should not be exaggerated. In all common law jurisdictions, judicial review polices minimum standards of administration, below which the decision lacks legitimacy in law. When that happens, it the function of the courts to say so.

⁵¹ (1995) 184 CLR 163.

⁵² (2010) 239 CLR 531.

⁵³ Frankfurter, above n 21, at 619.

In 1999, the New Zealand Court of Appeal summarised the grounds upon which judicial review is available in New Zealand and compared the New Zealand position with “the different approach taken in Australia” in *Craig v South Australia*:⁵⁴

The grounds upon which judicial review is available are well established. Judicial review is in general available where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abuses its powers, to quote Lord Templeman in *Re Preston* ...

Error of law is a ground of review in an of itself: it is not necessary to show that the error was one that caused the tribunal or Court to go beyond its jurisdiction. The effect of the House of Lords’ decision in *Anisminic v Foreign Compensation Commission* ...as interpreted in *O’Reilly v Mackman* ... and *Ex parte Page*, is in general to render redundant any distinction between jurisdictional and non-jurisdictional error of law.

The availability of error of law as a ground for review of the exercise of public power is also now well established in New Zealand as appears from the decisions of this Court in *Bulk Gas Users Group v Attorney-General* ...This may be compared with the different approach taken in Australia: *Craig v State of South Australia* ...

As I have already indicated, I doubt whether the claim that New Zealand and Australia diverge in respect of the basis on which judicial review is exercised is much more than label-deep. English abandonment of the ultra vires theory of administrative law in favour of a common-law based system of judicial review is sometimes suggested to have increased the scope for intrusion by the courts. But the same reach has come about in Australia with expansion in the grounds which now count as jurisdictional error. No longer is judicial review confined to matters the decision-maker could not embark upon. Jurisdictional error arises also where the decision-maker acts for improper purpose or unreasonably or errs in law on a point critical to the outcome or which, if uncorrected, would undermine the integrity of an integrated legal system. As Aronson and Groves have observed, “jurisdictional error expresses a conclusion that judicial intervention is appropriate”.⁵⁵ That is “a conclusion based not just on principles generalised from the vast mass of judicial review decisions, but also on the particular statute at hand and the administrative demands of effectiveness and efficiency”. It is a contextual assessment in which the relative gravity of the error is critical.

Intensity of review

⁵⁴ *Peters v Davison* [1999] 2 NZLR 164 (CA) at 180-181.

⁵⁵ Mark Aronson and Matthew Groves *Judicial Review of Administrative Action* (5th ed, Thomson Reuters, Sydney, 2013) at [1.140].

Because context *is* everything and is everywhere, jurisdictional differences in the intensity of supervision are to be expected even if the functions performed are, behind the labels, the same. Constitutional traditions, social expectations, intellectual preferences all mean there is reason to take different paths. This can I think be seen in relation to attitudes to the interpretation of and source of discretionary powers, to variable standards of review, and to preparedness to apply proportionality analysis. I want to touch briefly on these areas as the final matter I address. I group them all under the heading “intensity of review” because I think interpretation of the source and scope of powers and substantive evaluation of justification for their exercise both admit variable standards.

First, interpretation. The view that only the courts can declare the meaning of an enactment exerts a powerful pull on judges in our tradition. We do not feel very deferential when it comes to interpretation. But if, as Sir Stephen Sedley has recently argued, the meaning of words cannot be ascertained “except in relation to known or supposed facts”⁵⁶ (such as “speech” in relation to “flag-burning”), then meaning is always evaluative. Where the evaluation may properly be influenced by expertise possessed by an independent decision-maker then there is room for the courts to accept the interpretation preferred by him, as long as it is a reasonable one. The scope for this leeway is limited.

Generally, the courts cannot defer to the views of the Executive in matters of interpretation because to do so would be to abdicate their responsibility when adjudicating between the state and the private individual. Lord Denning, who was firmly of this view, thought that if the executive was not happy with an interpretation, it should go to Parliament to have the law amended.⁵⁷ I tend to the Lord Denning end of the spectrum, but acknowledge there are here a range of responses which will inevitably be affected by jurisdictional habits and preferences and by the particular circumstances. In Canada, more respect is paid to the expertise of the primary decision-maker, including legal expertise. The *Chevron* doctrine has an appeal in North America that Australia and New Zealand have resisted to date, except perhaps in Australia in relation to errors of inferior courts. It seems unlikely in our traditions, where authoritative interpretation of law is highly valued, that the courts will cede the responsibility to say what the law is, except in very limited circumstances. Perhaps in highly technical areas, such as price-setting, where interpretation of standards set by legislation is a matter of evaluative judgment, there is room for greater respect shown to the primary decision-maker, at least where it is independent. In such cases, the proper characterisation of the exercise being undertaken may in fact be to ascertain whether the conduct in issue fits the rule, as the High Court has recently held.⁵⁸

⁵⁶ Stephen Sedley “Construct or Construe” [2012] 34 (16) *Lond Rev Books* 19 at 19.

⁵⁷ *Royal College of Nursing v Department of Health and Social Security* [1981] AC 800 (HL) at 806-807.

⁵⁸ See, for example, *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25, (2009) 238 CLR 304, in relation to misleading or deceptive conduct in trade. See Christopher

Secondly, the *source* of executive authority may lead to differences between jurisdictions in intensity of review. This is to revert to the different constitutional contexts within which administration is carried on. The area of direct executive authority under the Constitution has greatly exercised the High Court in the last few years. While the extent of the powers is contestable, there is no doubt that there is substantial direct discretionary power, which is referable to and limited only by the functions assigned to all branches. The position in New Zealand is different. In New Zealand, as in the United Kingdom, there have been some academic efforts to develop what Stephen Sedley has described as a “meta-doctrine of executive supremacy that marginalises both the legislature and the courts”.⁵⁹ But the orthodox view is that, lacking any other source of original power, the executive must have statutory or prerogative authority for the exercise of power, apart from the purely ancillary powers necessarily incidental to its lawful functions.⁶⁰ And, as Diplock LJ said of the prerogative powers, “it is 350 years and a civil war too late for the Queen’s courts to broaden the prerogative”.⁶¹ The different authority of the executive under our constitutional arrangements has implications for the intensity of review of its actions.

Finally I deal briefly with reasonableness, proportionality, and deference.

The apparent reluctance of Australian courts to adopt variable intensity review or proportionality analysis may be modified by recent emphasis in the High Court on contextualism. In New Zealand, as in the United Kingdom, we have been more prepared to acknowledge frankly that in some contexts the supervisory jurisdiction requires something on the continuum closer to a standard of correctness. This development was underway long before adoption of statutory statements of rights.⁶² What is at stake and questions of institutional competence have always affected the intensity of judicial supervision. That is a matter of rationality. In addition, in decisions of great importance, judicial indifference to what happens within wide discretion is not I think the response the community expects.

Walshaw “Interpretation is Understanding and Application: The Case for Concurrent Legal Interpretation” (2012) 34 Statute Law Review 101.

⁵⁹ Sedley, “Construct or Construe”, above n 56.

⁶⁰ Dicey defined the prerogative power as “the residue of discretionary power left at any moment in the hands of the Crown”: above n 19, at 424. Sir David Williams says that “[t]he advantage of Dicey’s words is that the executive is obliged to identify a statutory or prerogative basis for what it does. Where big government moves there is no such thing as ‘ordinary powers,’ for those powers are exercised in a context of financial dominance and control of information and access to political channels to which no natural person could aspire”: DGT Williams “Statute Law and Administrative Law” (1984) 5 Statute L Rev 157 at 168.

⁶¹ *BBC v Johns* [1965] Ch 32 at 79.

⁶² Paul Craig *Administrative Law* (7th ed, Sweet and Maxwell, London, 2012) at 536-537.

So far, Lord Diplock's prediction that proportionality would emerge as a general ground of review⁶³ has not come about outside the application of proportionality analysis to limitations of human rights. Although it was argued by Jowell and Lester many years ago that proportionality is immanent in the common law, that may be true only in the sense that disproportionate results (using a sledge hammer to crack a nut) inevitably bear on reasonableness.

Proportionality analysis is a more precise methodology for identifying when it is justified to interfere with rights. Rights may not be interfered with unless the interference is justified. Proportionality requires evaluation. It requires pursuit of a legitimate aim. The limitation on the right must be a proportionate means of achieving that legitimate aim. The rights of the individual then have to be balanced with the interests of the community, a balance on which European law permits a margin of appreciation to member states.

While proportionality is increasingly resorted to in human rights cases and there are advocates for its wholesale adoption in replacement of review for reasonableness,⁶⁴ there is some truth in the charge that it dazzles with a show of objective rationality.⁶⁵ Even in the context of human rights, it is preferable methodology only in those cases where it is necessary to decide whether a limitation is justifiable in a free and democratic society. In very many human rights cases there is no question of such justification and the outcome turns simply on whether the right is infringed, a question of statutory interpretation or assessment in which recourse to proportionality analysis may balance rights away. There is room for concern if judicial methodology jumps too readily to justification without considering the nature of the right and whether it is infringed. A recent controversial case in New Zealand concerning discrimination may provide some illustration.⁶⁶

There is nothing wrong with unreasonableness as a standard of review. It is flexible enough to accord proper respect for the primary decision-maker and separation of powers where a range of reasonable options are available. Even in Canada, with its more developed concepts of deference to a primary decision-maker, the extent of deference is highly contextual. In some cases, the courts insist on correctness. In others they are concerned only with decisions that fail a reasonableness standard, leaving choice to the administrative decision-maker.

It is the term of art "Wednesbury" unreasonableness which proved unhelpful, because it was anachronistically shackled to a level of unreasonableness that was pitched close to bad faith. What is reasonable must be contextually

⁶³ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) at 410.

⁶⁴ See, for example, Paul Craig "Proportionality, Rationality and Review" [2010] NZ Law Rev 265.

⁶⁵ Mark Aronson and Matthew Groves *Judicial Review of Administrative Action* (5th ed, Thomson Reuters, Sydney, 2013) at [6.520].

⁶⁶ *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.

assessed. But Lord Cooke was surely right to suggest in *Daly* that “it may well be that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd”.⁶⁷ Administrative justice requires more than that. It seems to be a standard no longer adhered to by the High Court.⁶⁸

Where human rights are engaged, there has been considerable debate in the courts and among academics about whether the role of the courts is to supervise for unreasonableness in the decision of the primary decision-maker or to vindicate the right, by making its own assessment. The topic has unsurprisingly attracted a great deal of academic comment. TRS Allan has argued that a doctrine of judicial deference in relation to rights is “either empty or pernicious”.⁶⁹ If prompted by separation of powers concerns it is “empty” because “that separation is independently secured by the proper application of legal principles defining the scope of individual rights or the limits of public powers”.⁷⁰ A doctrine of deference is “pernicious” if it:⁷¹

permits the abdication of judicial responsibility in favour of reliance on the good faith or good sense or special expertise of public officials, whose judgments about the implications of rights in specific cases may well be wrong. In its latter manifestation, judicial deference amounts to the abandonment of impartiality between citizen and state ... leaving the claimant without any independent means of redress for an arguable violation of rights.

The reasons given by the primary decision-maker for violation of rights will always be important context. But, as cases in the United Kingdom and in the Canadian Supreme Court and the Constitutional Court of South Africa make clear, it is one thing for the courts to find the reasoning of the primary decision-maker convincing, and it is quite another thing to defer to that agency unless its conclusion is irrational.

Legal purists may take the view that the courts, which are themselves bound to observe human rights,⁷² cannot avoid concluding objectively whether rights have been infringed. I am not unattracted to that view, but I do not

⁶⁷ At para 32.

⁶⁸ See *Minister for Immigration and Citizenship v Li* [2013] HCA 18, where Gageler J was the only Judge to endorse the capricious or absurd standard of review: at [108]. The majority (Hayne, Kiefel and Bell JJ) concluded that the standard of unreasonableness is not limited to “an irrational, if not bizarre, decision – which is to say one that is so unreasonable that no reasonable person could have arrived at it”. The majority Judges speculated that Lord Greene MR in *Wednesbury* had not meant to endorse such a stringent standard of review and that he had, instead, simply meant to suggest that “an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified”: at [68].

⁶⁹ TRS Allan “Human Rights and Judicial Review: A Critique of Due Deference” (2006) 65 CLJ 671 at 675.

⁷⁰ At 675.

⁷¹ At 675-676.

⁷² In New Zealand, this is made explicit by s 3 of the New Zealand Bill of Rights Act.

think it prevents the court giving the weight it thinks appropriate in the circumstances to well-justified conclusions of the agencies primarily responsible. The reasons they give will be key to the courts having confidence in their conclusions. If they do not give convincing reasons why the human right should yield, the courts will have to undertake close scrutiny and make the determination unless there are reasons why the decision-making body should have to reconsider the matter.⁷³

What lies ahead?

In concluding, I offer a few general thoughts. I am conscious that contextual judicial review is time-consuming and at times politically fraught. There are also risks for judicial review in the new culture of justification in which administration is now conducted. Lord Sumner's metaphor of the Sphinx⁷⁴ was, as Lord Cooke once said, a rather vicious one because it suggested that justification is best avoided by administrators because it risks exposing error in reasoning.⁷⁵ That is no longer an option in the climate of openness our societies expect. The emphasis on justification makes reviewable error easy to spot and hard to ignore. There is potential for overloading of the courts and delays in administration. Such strains are emerging in the United Kingdom, where the Prime Minister has complained that judicial review is "far too slow in getting stuff done".

In most jurisdictions, but not in New Zealand, there are filters for judicial review. In the United Kingdom senior judges have made statements in judgments and extra-judicially suggesting that proportionality in use of judicial resources requires further restraint in recourse to judicial review and individual justice. We need to be careful. There are real risks here to rule of law values and to access to justice. Such approach could lead to retreat into a renewed search for tests and doctrine, which flies in the face of the experience that led Mark Aronson and Matthew Groves to say (drawing on TRS Allan but also echoing Felix Frankfurter) that "the scope and grounds of judicial review have a degree of indeterminacy whose resolution in individual cases cannot be achieved by reference to doctrine alone".⁷⁶

The risks of overuse of judicial review are not ones that have arisen to date in New Zealand. Despite long-standing relaxation of standing and greatly simplified approaches to the supervisory jurisdiction in the last 20 years, the number of judicial review cases in New Zealand is low. That may be

⁷³ Such as where it is necessary to ascertain and assess facts before concluding that a limitation on rights is justifiable.

⁷⁴ *R v Natbell Liquors Ltd* [1922] 2 AC 128 (PC) at 159.

⁷⁵ The Rt Hon Sir Robin Cooke "The Struggle for Simplicity in Administrative Law" in Taggart (ed) *Judicial Review of Administrative Action in the 1980s* (Oxford University Press, Auckland, 1986) 1 at 6-7.

⁷⁶ Mark Aronson and Matthew Groves *Judicial Review of Administrative Action* (5th ed, Thomson Reuters, Sydney, 2013) at 7.

because the wider machinery of administrative justice, administrative review of merits, checks, and better primary systems of administration, have kept judicial review in its proper supervisory place. If so, it suggests that keeping the wider system of administrative justice in good shape is highly desirable. Whether that will be possible in times of stringency in government is an open question.

In New Zealand, too, we have been spared the highly difficult cases concerning terrorism and immigration which have put the judiciary in tension with the executive in the United Kingdom. In the preface to the current edition of *De Smith* the authors refer to the “heavy cloud looming overhead at the start of 2013”, with “frequently ill-informed, unsubstantiated and sometimes intemperate ministerial attacks on the courts”.⁷⁷ In the United Kingdom, the balancing of the needs of procedural fairness with the interests of national security has presented the courts with real challenges, especially in the use of closed material.

These may be especially difficult issues. But all of us can point to times when judicial review has raised the tensions between the executive and the courts. In jurisdictions without a formal constitutional distribution of powers, such as mine, the role of the courts is vulnerable. That is why close attention to judicial method and effort in explaining fully the reasons for judicial review in each case are best policy. It is also why fitting the decision within a comparative law and international law framework matters. It helps in terms of legitimacy.

So I value very much the things we have in common in administrative justice. I prefer to dwell on the connections rather than the exceptions. It is comfort to be able to draw on the rich vein of jurisprudence developed in the High Court, a great court which conscientiously confronts big issues. As importantly, it is of the greatest benefit to my jurisdiction to be able to draw on the superb Australian academic tradition in administrative law. Attention to difference is important in understanding why we may take different paths, but New Zealand law draws great strength from the connections with Australian administrative justice.

⁷⁷ The Rt Hon Lord Woolf and others *De Smith's Judicial Review* (7th ed, Sweet & Maxwell, London, 2013) at vii.