

## ***The Unity of Public Law?***

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The themes of the conference revolve around familiar questions in public law arising out of the pull of unity and the push of pluralism set up by the diffusion of public power in the modern state. In my remarks I thought I might attempt a judicial perspective on the forces that impact on convergence and divergence across some of the common law jurisdictions represented here. That was of course over-ambitious. The law concerned with public power and its control is a subject of uncertain boundaries and in constant change. And, as the opening session between Chief Justice French and Lord Reed made clear, the differences across jurisdictions are more than label-deep. It does not help, particularly in this scholarly gathering, that I come from a jurisdiction which, although long in scholarly tradition in public law, has a judicial tradition which has generally taken the simple path of optimistic contextualism and is thought to be short in doctrine. So you will have to make some allowances.

In what I say I do not address one of the principal sources of convergence in public law, the role of public international law. Being a small jurisdiction, we have long been used to looking for ideas wherever we can find them and the principles and values obtained from international law are drawn on unselfconsciously and without suspicion in our courts. But today I concentrate on some of the matters we have in common in domestic public law and some where we diverge. I want to reflect a little on public power and the role of judicial review in its control today, before talking about the challenges of law and discretion and the way they are being addressed in constitutional traditions which share common roots but diverge.

In his inaugural lecture at the London School of Economics and Political Science, Professor SA De Smith said that constitutional law and administrative law, the two domestic branches of public law, occupied “distinct provinces, but also a substantial area of common ground”.<sup>1</sup> The latest edition of *De Smith’s Judicial Review* suggests that the distinct provinces have become less clear.<sup>2</sup>

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<sup>1</sup> SA De Smith “The Lawyers and the Constitution: An Inaugural Lecture” (speech at the London School of Economics and Political Science, London, 1960), as cited in M Taggart “The Province of Administrative Law Determined?” in M Taggart (ed) *The Province of Administrative Law* (Hart, Oxford, 1997) 1 at 1.

<sup>2</sup> Lord Woolf and others (eds) *De Smith’s Judicial Review* (7th ed, Sweet and Maxwell, London, 2013) at [1-013]. The shift is attributed to dissatisfaction with ultra vires as the

We have been here before. In 1940, the then Chief Justice of New Zealand, announced that the Council of Legal Education had agreed to include in the curriculum for the law degree what he said the “the law professors are pleased to call ‘Administrative Law’”.<sup>3</sup> It was clearly not a move welcomed by the Chief Justice, even though it had been a long time coming.<sup>4</sup> The Chief Justice followed Dicey in this. He said that the view taken by the judges and the practising profession was that there was “really no such special branch of the law” because administrative law was “properly included in and is part of what is generally called Constitutional law”.<sup>5</sup> A compromise was however reached. The prescription of the constitutional law course was expanded to include the requirement of “a general knowledge of the principles of Administrative Law”, copying the elements used by Professor Frankfurter, indicating the pull of unity exerted by American legal thinking in public law.<sup>6</sup> It was Frankfurter who had dismissed Dicey’s rejection of a separate system of administrative law as “brilliant obfuscation”, saying that it illustrated the truth of the view that “many a theory survives long after its brains are knocked out”.<sup>7</sup>

For much of the past 50 years the development of administrative law has meant that public law has been less court-centred, less-lawyer-led than formerly. During that period the methods of government and its controls, internal as well as external, have been transformed. Better bureaucratic checks, new institutional checks, and the development of specialist systems of administrative adjudication have prompted reassessment of the role played by the general courts.

These reassessments have taken place in all common law jurisdictions but against constitutional backgrounds and traditions which vary. So, although a comparative law perspective comes naturally to those who share the common law tradition, we need to be particularly careful with borrowings in public law. Adding to the complexity of the topic is the contestability of many of the concepts that mark out this area of law from others, if indeed it can properly be separated.

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basis of judicial review and increasing recognition that judicial review protects the rights of the individual against abuse of power.

<sup>3</sup> Michael Myers “The Law and the Administration” (1940) 3 NZ J Publ Admin 38 at 44.

<sup>4</sup> The inclusion of administrative law in the curriculum in the United Kingdom had been urged by academics from the middle of the 19th century. By 1888, as Maitland pointed out, in a speech published in FW Maitland *The Constitutional History of England* (Cambridge University Press, Cambridge, 1908) at 505–506, the law reports were full of cases about administrative law, although they were not indexed as such. Even so, it was a daring move for New Zealand legal education. Only 5 years before, in England, Lord Hewart, writing under the long shadow cast by Albert Venn Dicey, had dismissed the term “administrative law” as “Continental jargon”, when writing in the *News of the World*: as we are told by SA de Smith *Constitutional and Administrative Law* (Penguin, Harmondsworth (UK), 1971) at 509.

<sup>5</sup> Michael Myers “The Law and the Administration” (1940) 3 NZ J Publ Admin 38 at 44.

<sup>6</sup> See Felix Frankfurter “The Task of Administrative Law” (1927) 75 U Pa L Rev 614 at 615.

<sup>7</sup> Citing Huxley in Felix Frankfurter “Foreword” (1938) 47 Yale LJ 515 at 517. The issue had as its topic “Discussion of Current Developments in Administrative Law”.

The problems of power and its abuse are not confined to public law.<sup>8</sup> What we call public law is itself not isolated from the general body of common law from which it developed.<sup>9</sup> Many of the principles of administrative law were developed in tort, contract, company law, labour law, criminal law, and equity.<sup>10</sup> Sir Anthony Mason has written of the extent to which modern administrative law is founded on equitable principles and “has its roots in private law”.<sup>11</sup> Those roots suggest caution in seeing public law as an island.

That is not to say that better development of a theory of public law is not valuable or that it is not important to cultivate a sense of what is public power. Such power is necessarily limited because unfettered government discretion in a constitutional order based on the rule of law is, as Sir William Wade said, a contradiction in terms.<sup>12</sup> Public power must always be “public-regarding”.<sup>13</sup> It cannot be exercised at whim. That means the exercise of public power must be reasonable, as *Associated Picture Houses v Wednesbury* affirmed.<sup>14</sup>

In addition, because government is uniquely powerful governmental power requires special attention.<sup>15</sup> Sir David Williams once said that “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”.<sup>16</sup> The same thinking was expressed by Justice McLachlin in the Supreme Court of Canada in a case in 1994 concerning contracts of procurement by municipal government, when rejecting the argument that the municipality should be treated like any private sector contractor.<sup>17</sup>

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<sup>8</sup> In *Ridge v Baldwin*, for example, Lord Reid drew on private law cases concerned with control of power: *Ridge v Baldwin* [1964] AC 40 (HL).

<sup>9</sup> As scholars such as Dawn Oliver and Peter Cane have been at the forefront in pointing out: see Dawn Oliver *Common Values and the Public-Private Divide* (Butterworths, London, 1999); Peter Cane “Accountability and the Public-Private Divide” in Nicholas Bamforth and Peter Leyfeld (eds) *Public Law in a Multi-Layered Constitution* (Hart Publishing, Oxford, 2003) 247.

<sup>10</sup> A point made in 1987 by DGT Williams “Criminal Law and Administrative Law: Problems of Procedure and Reasonableness” in P Smith (ed) *Criminal Law: Essays in Honour of JC Smith* (Butterworths, London, 1987) 170 at 171.

<sup>11</sup> Anthony Mason “The Place of Equity and Equitable Remedies in the Contemporary Common Law World” (1994) 110 LQR 238 at 238.

<sup>12</sup> HWR Wade and CF Forsyth *Administrative Law* (11th ed, Oxford University Press, Oxford, 2014) at 296.

<sup>13</sup> As Michael Taggart liked to describe it, contrasting it with “the primacy of self-regarding behaviour” which was the starting point of private law: M Taggart “The Province of Administrative Law Determined?” in M Taggart (ed) *The Province of Administrative Law* (Hart, Oxford, 1997) 1 at 5.

<sup>14</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).

<sup>15</sup> Mark Elliott “Judicial Review’s Scope, Foundations and Purposes: Joining the Dots” [2012] NZ L Rev 75 at 79.

<sup>16</sup> DGT Williams “Statute Law and Administrative Law” (1984) 5 Statute L Rev 157 at 168.

<sup>17</sup> *Shell Canada Products Limited v Vancouver City* [1994] 1 SCR 231 at 240–241, a case concerning City Council resolutions not to buy Shell products while it continued to do business with South Africa and Shell challenged the decision on public law principles. McLachlin J said that the Council members, undertaking commercial and contractual

In the modern state, finding where public power resides is not always easy. In all jurisdictions there have been huge changes in how government is delivered and corresponding movement in the scope of judicial review to extend to bodies private in form which operate through contract.<sup>18</sup> The “contracting state” may throw up special challenges, but it is the responsibility of the courts, as Lord Diplock said, to adapt “to preserve the integrity of the rule of law” despite changes in “methods of government”<sup>19</sup> and to supervise for legality new bodies possessing the “essential characteristics” upon which the supervisory jurisdiction of the High Court has been based.<sup>20</sup> The scope of judicial review has been extended by procedural reforms which have described amenability to judicial review in expansive terms.<sup>21</sup> And in many jurisdictions, judicial review now operates with wide definitions of public function and public power adopted in statements of rights.<sup>22</sup>

### Judicial review today

Judicial review is supervisory jurisdiction. It checks the boundaries of power conferred on others. It is not original decision-making. And it is therefore inevitably deferential to the primary decision-maker, to a greater or lesser

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activities with public funds and with wider consequences than for the parties to the contract, and under statutory powers which were limited, could not act in pursuit of their own private interests, but must exercise their contractual power in the public interest.

<sup>18</sup> See *Mercury Energy Ltd v Energy Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC) (where the scope for judicial review was suggested to be limited). In New Zealand however see *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62. In Canada in *Alberta v Elder Advocates of Alberta Society* 2011 SCC 24, [2011] 2 SCR 261 at [83]–[91] the Supreme Court accepted that liability may attach to public actors in equity even if in limited and special circumstances which did not undermine their public law responsibilities.

<sup>19</sup> *Inland Revenue Commissioners v National Federation of Self-employed and Small Businesses Ltd* [1982] AC 617 (HL) at 639–640.

<sup>20</sup> *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864 (CA) at 884. *R v Panel on Take-overs and Mergers, Ex parte Datafin plc* [1987] QB 815 (CA) was an early harbinger of movement in the scope of judicial review to extend to private bodies which operate through contract. *Finnigan v New Zealand Rugby Football Union* [1985] 2 NZLR 159 (CA) (a private law case in which principles of public law were applied) remains an outlier. *Datafin* and *R v Panel on Take-overs and Mergers, ex p Guinness plc* [1990] 1 QB 146 (EWCA) have prevailed in New Zealand: see, for example *Electoral Commission v Cameron* [1997] 2 NZLR 421 (CA) at 429; *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA) at 11–12; followed by the Court of Appeal in *Wilson v White* [2005] 1 NZLR 189 (CA) at [21]; itself adopted by the Supreme Court in *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [89].

<sup>21</sup> Such as New Zealand’s Judicature Amendment Act 1972, as discussed in *Electoral Commission v Cameron* [1997] 2 NZLR 421 (CA) at 429.

<sup>22</sup> Such as s 3 of the New Zealand Bill of Rights Act 1990; and s 6(1) of the Human Rights Act 1998 (UK), discussed in *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95, where the compelling dissenting judgments by Lord Bingham and Baroness Hale seem likely to point in the direction most of us will follow.

extent. Space for proper choice, what we call discretion, is at the heart of judicial review.

The direct impact of judicial review in administrative justice is slight. If it was “inevitably sporadic and peripheral” when the first edition of *De Smith* was published in 1959,<sup>23</sup> it is even more so today. Discretion is now 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 adjudicators or officials who observe principles of natural justice, an obligation now imposed on all who exercise public functions which affect rights. Ombudsmen provide independent scrutiny and assistance for those affected by administrative decision-making. Improved access to official information and reasons for decisions<sup>24</sup> have not only changed the culture and method of government but have revolutionised administrative law by laying bare the justification for actions taken. Effective redress for administrative error for most people does not entail access to a court possessing general supervisory jurisdiction.<sup>25</sup> This climate has implications for judicial review’s scope and methods.

Local conditions have also prompted reconsideration of adjudicative correction in a number of jurisdictions which also impact on judicial review and on public law more generally. Under the Tribunals, Courts and Enforcement Act 2007, the adjudicative appellate administrative tribunals in the United Kingdom are positioned in the judicial branch. The reform seems to represent a unified rather than a pluralistic aspiration for public law. It was prompted by the need in the United Kingdom to take the strain off the courts in judicial review. In Australia, by contrast, the Commonwealth Administrative Appeal Tribunal (AAT), although presided over by a senior judge, has been held by the High Court to be part of the Executive.<sup>26</sup> The different locations of adjudicative administrative power (in the judiciary or in the administration) may have implications for the scope and method of judicial review by the courts.

There are some suggestions that greater deference may be accorded to decisions of inferior courts or administrative appeal tribunals comprising members of the judiciary. That does not seem to me a sound distinction. First the difference between the functions being fulfilled by and the methods and expertise of an appellate administrative panel and a court of limited jurisdiction may be largely indistinguishable. Whether appeal is to a tribunal within the courts system or within the administration is a matter of

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<sup>23</sup> SA De Smith *Judicial Review of Administrative Action* (1st ed, Stevens, London, 1959) at 1.

<sup>24</sup> In New Zealand s 23 of the Official Information Act 1982 requires reasons to be provided on request by those whose interests are affected.

<sup>25</sup> See PA Keane “Democracy, Participation and Administrative Law” (2011) 68 AIAL Forum 1 at 14.

<sup>26</sup> *Bushell v Repatriation Commission* (1992) 175 CLR 408 at 425.

institutional design which is as likely to turn on considerations such as volume of work or questions of cost as on any real difference in function.

Secondly, I doubt whether judicial review of courts of limited jurisdiction is appropriately more tolerant of error than judicial review of specialist administrative bodies. The reasoning and interpretative functions being fulfilled by a court or a judicialised tribunal may often be of wider application in the legal order because such a body will usually deal in legal principles of general application, will observe judicial methodology, and its decisions may have the sort of consequences (as precedents or in application of *stare decisis*) which might be thought to prompt close judicial supervision.

Development of more elaborate review or adjudication as part of a system of administrative justice may not seem justified in every jurisdiction. And it is possible that any increased judicialisation of administrative review processes could come at the expense of desirable plurality in administration (as some administrative lawyers have feared<sup>27</sup>).

The development of administrative adjudication may also affect the unity of law maintained through the courts of general jurisdiction. It is at first sight startling to those brought up in a tradition influenced by Dicey to see in recent decisions of the UK Supreme Court<sup>28</sup> the protection of decisions of the Upper Tribunal from judicial review unless they would qualify for second tier appeal (and with the indication of at least one senior Judge that intervention might be further restricted once there is more experience of “how the new tribunal system is working in practice”<sup>29</sup>). And it is even more startling to see this deference provided for reasons of proportionality in dispute resolution.<sup>30</sup>

As Sir John Laws pointed out in an article about reasonableness in public law some years ago, it is one thing to say that reasonableness means different things in context.<sup>31</sup> It is quite another to say that there are circumstances in which unreasonable exercise of power is not amenable to judicial review at all. It is more appealing for some of us to think that the basis of review remains constant for all bodies amenable to judicial review.

I am not sure that it is a complete answer that *Cart* preserved the formal power of judicial review of the Upper Tribunal, so that refusal to intervene did not entail relinquishment of jurisdiction. It is true that on this approach the Supreme Court can intervene if the Upper Tribunal seems to be developing “local law” in a way that injures the coherence of the legal order. But if the Supreme Court is prepared to allow that a statutory tribunal with many of the

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<sup>27</sup> HW Arthurs “Rethinking Administrative law: A Slightly Dicey Business” (1979) 17 Osgoode Hall LJ 1.

<sup>28</sup> *R (Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663; and *Eba v Advocate General for Scotland* [2011] UKSC 29, [2012] 1 AC 710.

<sup>29</sup> *R (Cart) v Upper Tribunal* at [92] per Lord Phillips.

<sup>30</sup> See criticisms made by Mark Eliot and Robert Thomas in “Tribunal Justice and Proportionate Dispute Resolution” (2012) 71 CLJ 297.

<sup>31</sup> John Laws “*Wednesbury*” in Christopher Forsyth and Ivan Hare (eds) *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Clarendon Press, Oxford, 1998) 185 at 196.

attributes of a superior court will be judicially reviewed for error only if the effort is proportionate measured against the resources available to the legal system, why should the legislature not act to restrict judicial review where it finds it too expensive or inconvenient?

On the other hand, the new systems of administrative adjudication may well be better placed to promote the interests of good administration as well as the reasonableness, fairness and observance of law which are the concerns of judicial review and which are the constitutional responsibility of the superior courts. I am not entirely convinced that it is a function of judicial review to secure good governance, although some thoughtful commentators think it is.<sup>32</sup> Good governance may well however be a central purpose of a mature system of administrative justice, such as I think we can see developing in some common law jurisdictions, shaking off the legacy of Dicey. But I question whether it is the function of the supervisory system of judicial review through the ordinary courts. It seems to me that the function of judicial review is securing the rule of law in relation to public power.

### **The nature of administrative law**

Frankfurter said of administrative law that it is an area of law where standards, and not rules, have to be applied to “the unlimited versatility of circumstance”.<sup>33</sup> Administrative law is concerned, he thought, “pre-eminently with law in the making; with fluid tendencies and tentative traditions” and in which it is necessary to be wary of “premature synthesis” and fixed rules.<sup>34</sup> A similar warning was repeated by Lord Hailsham half a century later in 1979 about the use of “rigid legal classifications” in exercising the supervisory jurisdiction in the field of administrative law.<sup>35</sup> The jurisdiction is, he said “inherently discretionary, and the court is frequently in the presence of differences of degree which merge almost imperceptibly into differences of kind”.

Is this a lesson we are fated never to learn? And to the dangers of “premature synthesis” highlighted by Frankfurter perhaps we should add “premature antithesis” of the kind that seems particularly appealing in administrative law (law and merits, private and public, jurisdictional error and non-jurisdictional error, interpretation and discretion, judicial and non-judicial, policy and fact, and so on) and big theories such as ultra vires and the rule of law.

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<sup>32</sup> Christopher Forsyth, Mark Elliott and Swati Jhaveri (eds) *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford University Press, Oxford, 2010).

<sup>33</sup> Felix Frankfurter “The Task of Administrative Law” (1926) 75 U Pa L Rev 614 at 619.

<sup>34</sup> See also DGT Williams “Justiciability and the Control of Discretionary Power” in M Taggart (ed) *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, Auckland, 1986) 103 at 122.

<sup>35</sup> *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182 (HL) at 190.

I do not suggest that these ideas are not valuable. Indeed, they are inescapable. But they are not themselves tests or standards for judicial review.

Questions of vires and jurisdiction account for a great part of judicial review of administrative action because a principal function of the supervisory jurisdiction is to ensure that decision-makers have the power they purport to exercise and keep within any limits imposed on it. Especially in a jurisdiction where the constitutional balances are fragile, there may be good sense in structuring intervention in terms of vires and Parliamentary intent wherever it provides an answer.<sup>36</sup>

Such tactical considerations should not obscure the fact that ultra vires has to be stretched to fit the scope of judicial review as it has been developed to meet the needs of our societies in securing administrative justice. It requires emphasis on a constructed and artificial legislative intent for decisions not concerned with the exercise of statutory powers. It obscures the overlap between legality and reasonableness by suggesting judicial review can be reduced to an exercise in statutory construction alone.<sup>37</sup>

The acceptance that the distinction between jurisdictional and non-jurisdictional error of law is not a useful test for the effect of ouster clauses was reached in the United Kingdom following *Anisminic*<sup>38</sup> although it is probably fair to say that the implications of that Delphic decision were appreciated earlier and more enthusiastically in New Zealand, under the influence of Sir Robin Cooke in *Bulk Gas Users Group v Attorney-General*.<sup>39</sup> Nevertheless, as Cooke J pointed out, the shift was not out of a blue sky and represented a decision in favour of one of two bodies of existing doctrine.<sup>40</sup>

Justice Scalia described the label “jurisdictional” as “an empty distraction because every new application of a broad statutory term can be reframed as a questionable extension of the agency’s jurisdiction”.<sup>41</sup> This is the same sort of thinking used by Lord Diplock in *O’Reilly v Mackman*, to explain that, if a tribunal of limited jurisdiction mistook the law applicable, “it must have

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<sup>36</sup> Although, as Paul Craig points out, a search for legitimacy in this way is not the way in which the common law has developed across the law. The ultra vires doctrine is, he thinks “predicated on highly contestable assumptions about the correct normative relationship between common law and statutory power in a constitutional democracy”: Paul Craig “The Nature of Reasonableness Review” (2013) 66(1) CLP 131 at 159.

<sup>37</sup> Compare the reasoning in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL).

<sup>38</sup> *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

<sup>39</sup> *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA).

<sup>40</sup> The triumph of *Anisminic* was completed in the United Kingdom in *O’Reilly v Mackman* [1983] 2 AC 237 (HL); *R v Hull University Visitor (ex parte Page)* [1993] AC 682 (HL); and *Boddington v British Transport Police* [1999] 2 AC 143 (HL) at 154. In *O’Reilly v Mackman* at 278, Lord Diplock spoke of the liberation of English public law from court-imposed fetters based on “esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within their jurisdiction”.

<sup>41</sup> *City of Arlington, Texas v Federal Communications Commission* 133 S Ct 1863 (2013) at 1870.



asked itself the wrong question, ie, one into which it was not empowered to inquire and so had no jurisdiction to determine”.<sup>42</sup> Justice Scalia thought “judges should not waste their time” on such “mental acrobatics”.<sup>43</sup>

And yet, the pull of “jurisdiction” as a touchstone remains.<sup>44</sup> That is for the very good reason that, although not a test, it is an idea that underlies much of the supervisory jurisdiction. As Mark Aronson has observed it “expresses a conclusion that judicial intervention is appropriate”.<sup>45</sup> If so, “jurisdiction” is perhaps best seen as a “mediating” concept for judicial review, as Harry Arthurs described it many years ago.<sup>46</sup> Even in Australia (where a search for jurisdictional error is still required in order to preserve the decencies of strict division between merits review and judicial review), post *Kirk*<sup>47</sup> and post the relaxation of *Wednesbury* unreasonableness by the majority in *Li*,<sup>48</sup> the different basis for intervention for error of law (jurisdictional or not) may not yield very different in results in the end.

## Law and discretion

What then of supervision of discretion? In the same year that Lord Hailsham was expressing concern about “rigid legal classifications”,<sup>49</sup> Harry Arthurs suggested “Rethinking Administrative Law”.<sup>50</sup> He argued for recognition that law and discretion are not distinct and that generalist judges are not best-placed to interpret public law legislation knowledgeably. We have been worrying away at this bone ever since.

Arthurs did not support the development of an entirely distinct system of public law under “unifying principles of public law”.<sup>51</sup> He thought such repositioning would depend too much on lawyers, including as decision-makers. He questioned whether common approaches to procedural fairness were really useful. He asked whether any higher-order principles which might be adopted to provide coherence would be at such general level of

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<sup>42</sup> *O’Reilly v Mackman* [1983] 2 AC 237 (HL) at 278.

<sup>43</sup> *City of Arlington, Texas v Federal Communications Commission* 133 S Ct 1863 (2013) at 1870.

<sup>44</sup> As can be seen in the Court of Appeal decision in *Regina (Cart) v Upper Tribunal* [2010] EWCA Civ 859, [2011] QB 120.

<sup>45</sup> Mark Aronson, Bruce Dyer and Matthew Goves *Judicial Review of Administrative Action* (5th ed, Thomson Reuters, Sydney, 2013) at [1.140].

<sup>46</sup> HW Arthurs “Without the Law”: Administrative Justice and Legal Pluralism in Nineteenth Century England” (1985) at 208–209, as cited in Michael Taggart “The Contribution of Lord Cooke to Scope of Review Doctrine in Administrative Law: A Comparative Common Law Perspective” in Paul Rishworth (ed) *The struggle for simplicity in the law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 189 at 212–213.

<sup>47</sup> *Kirk v Industrial Court of NSW* [2010] HCA 1, (2010) 239 CLR 531.

<sup>48</sup> *Minister for Immigration and Citizenship v Li* [2013] HCA 18, (2013) 249 CLR 332 at [68].

<sup>49</sup> *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182 (HL) at 190.

<sup>50</sup> HW Arthurs “Rethinking Administrative law: A Slightly Dicey Business” (1979) 17 Osgoode Hall LJ 1.

<sup>51</sup> At 30.

abstraction as to be “hardly legal rules”. Arthurs suggested that useful rules for administrative justice were likely to emerge “only in the specific and varied contexts of administrative activity”.<sup>52</sup>

The approach Harry Arthurs argued for in 1979 was a “functionalist” one. Under it, there would be a move away from the “slippery slope” of supervision by way of judicial review under terms such as “reasonable”, “fair” and “*bona fide*”.<sup>53</sup> A more rigorously “functionalist” approach, would be shaped by inquiring into whether there are elements of the decision relative to which generalist judges might have special competence. If so, judicial review would be appropriate. Such element might be found in the need to have authoritative resolution of constitutional questions or the interpretation of statutes of general application. “Presumptive deference” available to an administrative body acting within its area of specialist expertise might be displaced by its failure to provide a credible explanation for adoption of a particular procedure. Arthurs suggested it was “functional” to defer to those possessing specialist knowledge where they have in fact considered the matter.

This thinking has been highly influential in the jurisprudence of the Supreme Court of Canada and its development of deferential standards of judicial review. Despite the efforts in development of doctrine over the past three decades, it is, however, sobering to read the views of Chief Justice McLachlin of Canada in a recent paper that “administrative law arguably is beset by more difficulty than any other branch of the law”.<sup>54</sup> She says it is a “barbed and occluded thicket”. In support of that verdict, the Chief Justice traced the twists and turns of Supreme Court doctrine review of discretion. From this experience, she makes the suggestion that we should give away what she calls “linguistic games” such as qualifiers or spectrums of reasonableness. Courts, she says should recognise that “most questions don’t admit to a single right answer and ask, in all humility, whether interference is necessary in the interests of fairness and preservation of the rule of law”.<sup>55</sup>

Disagreements and expressions of doubt have been expressed in a number of recent judgments of final courts concerning administrative law. In the United Kingdom, Trevor Allan has suggested that the different approaches adopted by members of the United Kingdom Supreme Court in *Evans v Attorney-General*<sup>56</sup> indicate deep disagreements about the nature and function of law.<sup>57</sup> Similar differences in approach can be seen in the decision

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<sup>52</sup> At 31.

<sup>53</sup> At 32–33.

<sup>54</sup> Beverley McLachlin “Administrative Law is Not for Sissies: Finding a Path Through the Thicket” (paper delivered to the CLEBC Administrative Law Conference, 16 November 2015 in Vancouver, British Columbia) (2016) 29 CJALP 127 at 127.

<sup>55</sup> At 133–134.

<sup>56</sup> *Evans v Attorney-General* [2015] UKSC 21, [2015] 2 WLR 813.

<sup>57</sup> TRS Allan “Law, Democracy, and Constitutionalism: Reflections on *Evans v Attorney General*” (2016) 75 CLJ 38 at 39. Among other comments, Allan points to difficulties in the distinction drawn by members of the Supreme Court that the Attorney General was bound by the view expressed by the Upper Tribunal of the law but not by its

in *Bank Mellat v HM Treasury (No 2)* where Lord Neuberger and Lord Dyson, although agreeing with the analysis of Lord Reed, expressly declined to join him in endorsing the views earlier expressed in *Huang*<sup>58</sup> and *Denbigh High School*<sup>59</sup> that compliance with rights was to be objectively determined by the court.<sup>60</sup> In Canada the recent decision of the Supreme Court of Canada, *Wilson v Atomic Energy of Canada*, indicates divisions over deference. Three Judges in that case disagreed with the presumption of deferential review of a home statute observed by the majority, citing rule of law concerns and indicating the view that the decision of the majority “would abandon rule of law values in favour of indiscriminate deference to the administrative state”.<sup>61</sup>

These disagreements indicate the extent to which judicial review engages with constitutional values and other values fundamental to the particular legal order. The connection between administrative law and constitutional law explains why jurisdictions with much in common may diverge in the manner of controlling administrative discretion.

### **Constitutional traditions**

If “behind every theory of administrative law there lies a theory of the state”, as Carol Harlow and Richard Rawlings say,<sup>62</sup> close attention to constitutional law and traditions is necessary in administrative law. Constitutional traditions provide coherence within a legal order but may limit convergence across jurisdictions.

In the United States, the development of modern administrative state was characterised by dispersal of executive power under wide discretion both as to rule-making and in application of power, conferred in broad terms, to particular cases. While this dispersal of power and the discretion which was an indispensable part of it responded to the needs of modern government, it is also explained by the constitutional tradition of the United States. As Peter Cane has explained, in the United States the three institutions of government are co-ordinate and share power, including in relation to policy development.<sup>63</sup> That is a tradition in which development of institutional deference is congruent with the constitutional values of the state. It is

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assessment of the public interest in disclosure (at least where he had confronted the reasons of the Tribunal, as the majority considered to be necessary).

<sup>58</sup> *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167.

<sup>59</sup> *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100.

<sup>60</sup> *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 at [123]–[124] per Lord Reed, at [175] per Lord Neuberger and at [197] per Lord Dyson.

<sup>61</sup> *Wilson v Atomic Energy of Canada* 2016 SCC 29 at [79] per Moldaver, Côté and Brown JJ.

<sup>62</sup> Carol Harlow and Richard Rawlings *Law and Administration* (3rd ed, Cambridge University Press, 2009) at 1.

<sup>63</sup> Peter Cane “Judicial control of administrative interpretation in Australia and the United States” in Hanna Wilberg and Mark Elliot (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart, Oxford, 2015) 215 at 227–228.

understood that, as Justice Scalia put it, “Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion”.<sup>64</sup>

The deference extended to to an administrator in interpretation of its home statute extends to the provisions conferring jurisdiction as well as to other provisions. It applies to rule-making. Adjudicatory decisions under the Administrative Procedure Act of 1946<sup>65</sup> are subject to *Skidmore* deference by which the court decides on matters of interpretation but takes account of the agency’s view and looks to whether it is preferable.<sup>66</sup> Interpretation of regulations that the agency itself has made are deferred to unless plainly erroneous.

The constitutional conditions which led to development of the *Chevron* doctrine are not encountered in other common law jurisdictions. In Australia, Canada, the United Kingdom, and New Zealand the Parliamentary tradition and what Bagehot called the “efficient secret” of Cabinet government means that the Executive is much less controlled by institutional balances and divided power.<sup>67</sup> In such contexts, judicial review is a principal constitutional check. It is one the courts cannot avoid without affecting the constitutional balance.

In Australia, the separation of powers provided by the Constitution has been used by the High Court to protect its constitutional responsibility to say what the law is.<sup>68</sup> That has had implications for the development of Australian administrative law. It has been taken to emphasise a distinction between legality and merits which in other jurisdictions is less sharp. In Australia, the strict line observed between legality and merits means it is difficult to develop standards for judicial intervention from values obtained from the common law, or international conventions, or the statutory Bills of Rights found in

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<sup>64</sup> *City of Arlington, Texas v Federal Communications Commission* 133 S Ct 1863 (2013) at 1868, referring to the *Chevron* doctrine: *Chevron USA Inc v Natural Resources Defense Council Inc* 467 US 837 (1984). *Chevron* applies to cases in which an agency interprets its own constitutive statute or a statute it administers. If the intent of the legislature is clear, that prevails. Cane says that the standard reading of *Chevron* is that deciding whether more than one meaning is available is a question of law. If it is, the second step involves exercising discretion: Peter Cane “Judicial control of administrative interpretation in Australia and the United States” in Hanna Wilberg and Mark Elliot (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart’s Rainbow* (Hart, Oxford, 2015) 215 at 221.

<sup>65</sup> Administrative Procedure Act of 1946 Pub L No 79–404, 60 Stat 237.

<sup>66</sup> *Skidmore v Swift and Co* 323 US 134 (1944).

<sup>67</sup> Although the Australian constitution is modelled on that of the United States in large measure, its adoption of a parliamentary system produces a tension, as Stephen Gageler explained: “Foundations of Australian Federalism and the Role of Judicial Review” (1987) 17 Fed L Rev 162 at 164.

<sup>68</sup> In Australia, judicial review by the High Court of the exercise of power by officers of the Commonwealth is entrenched in s 75(v) of the Constitution. The High Court has held that Chapter III of the Constitution protects by implication the supervisory jurisdiction of the State Supreme Courts: *Kable v DPP for New South Wales* [1996] HCA 24, (1996) 189 CLR 51; and *Kirk v Industrial Court of NSW* [2010] HCA 1, (2010) 239 CLR 531.

Victoria and the Australian Capital Territory.<sup>69</sup> Reference to such values is seen to give rise to “merits review”, a line the courts will not pass.<sup>70</sup>

Chief Justice Gleeson in a 2008 lecture identified both the constitutional balances and the federal administrative law reforms of the 1970s as an explanation why Australian law had not taken up the North American jurisprudence of judicial deference nor the English attraction for abuse of power as a touchstone.<sup>71</sup> Rather, he said, in Australia the focus has been on jurisdiction and legality.

In the United Kingdom and New Zealand, where executive dominance of Parliament and Parliamentary sovereignty is untrammelled by a constitutional text which distributes powers, judicial review is less secure. That institutional insecurity has I think shaped judicial development of administrative law. It may, as I have suggested, account for the attraction of ultra vires as the underpinning justification for judicial review, because it is seen to have constitutional validity. But in both the United Kingdom and New Zealand there are signs of constitutional repositioning around values derived from the common law, ancient statutes and charters, and modern enacted statements of human rights.<sup>72</sup>

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<sup>69</sup> As illustrated by the Court’s decision in *R v Momcilovic* [2011] HCA 34, (2011) 245 CLR 1.

<sup>70</sup> In *Craig v South Australia* (1995) 184 CLR 163 and *Corporation of the City of Enfield v Development Assessment Commission* (1999) 199 CLR 135 the High Court has made it clear that judicial review is concerned with legality, not merits. Cane notes that while in the US that is reason to give weight to administrative decisions, in the High Court it is a reason not to review them on grounds of reasonableness or for error of fact or mixed fact and law. Constitutional rights protective of freedom of speech were recognised in *Australian Capital Television Pty v The Commonwealth* (1992) 177 CLR 106 and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 to be implicit in the Constitution and have been confirmed in *Unions NSW v New South Wales* [2013] HCA 58, (2013) 252 CLR 530. There seems to be resistance to extending such rights beyond protection of political participation, as can be seen in the cases in which the High Court has declined to infer a freedom of association: *Mulholland v Australian Electoral Commission* [2004] HCA 41, (2004) 220 CLR 181 at [148] per Gummow and Hayne JJ and at [364] per Heydon J; *Wainohu v New South Wales* [2011] HCA 24, (2011) 243 CLR 181 at [72] per French CJ and Kiefel J, at [112] per Gummow, Hayne, Crennan and Bell JJ and at [186] per Heydon J; cited by Hayne J in *Tajjour v New South Wales* [2014] HCA 35, (2014) 254 CLR 508 at [95].

<sup>71</sup> Murray Gleeson “The Role of a Judge in a Representative Democracy” (speech to the Judiciary of the Commonwealth of the Bahamas, 4 January 2008).

<sup>72</sup> Most notably in the decision of the UK Supreme Court in *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868 where members of the Court went out of their way to emphasise fundamental values of the common law. See also *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, [2014] All ER 109 at [207] where Lord Neuberger and Lord Mance referred to fundamental common law principles in addition to constitutional instruments like Magna Carta and the Petition of Right 1628. The New Zealand Supreme Court recently invoked the “principle of equality” (the need to treat like cases alike): *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [94]–[95], citing acceptance of such a principle as “a general axiom of rational behaviour” by the Privy Council in *Matadeen v Pointu* [1999] 1 AC 98 (PC) at 109 per Lord Hoffmann, referring in turn to Professor Jowell’s article “Is Equality a Constitutional Principle?” (1994) CLP 1 at 12-14. The Supreme Court in *Ririnui* pointed to the explanation for the omission of a statement of equality in the New Zealand Bill of Rights Act given in the White Paper that preceded it, that such a

In Australia, if the High Court continues to move away from the common law constitutional foundation earlier recognised by Sir Owen Dixon,<sup>73</sup> public law may develop more distinctly from other branches of law. It may achieve greater unity within itself. The elaboration of the original executive power under the Constitution touched on in recent decisions of the High Court may also provide a point of further difference.<sup>74</sup> Peter Cane considers that the power of conclusive statutory interpretation developed by the High Court is here to stay in part because of the concentration of power in the executive under the Australian constitution.<sup>75</sup> The High Court is not likely to do anything to undermine its work in protecting the judicial power of the Commonwealth and, under it, a single common law of Australia.<sup>76</sup> So the constitutional pull to unity is strong. But the marked version of the separation of powers under which the judicial power is protected, also marks out a separate sphere for the executive power towards which traditionally there has been much deference to administrative choice. If the line between legality and merits cannot be maintained (and cases like *Li* will make it difficult to maintain), I do not think movement towards greater tolerance of administrative choice in interpretation and in application could be ruled out. This is of course highly speculative. But it is not inconsistent with the strong sense of separation of powers in Australia and with the positioning of the administrative adjudication system within the executive.

In New Zealand and the United Kingdom, administrative law remains grounded in common law doctrine under the supervisory jurisdiction. Deference in matters of interpretation has not been the general tradition, although it is not unknown. Lord Denning thought that tribunals dealing with statutes like the Supplementary Benefits Act 1966 should be given latitude to interpret the legislation in a “broad reasonable way, according to the spirit and not to the letter”.<sup>77</sup> Such latitude has been expanded for decisions of the

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statement was unnecessary because the principle of equal treatment is part of the rule of law.

<sup>73</sup> Owen Dixon “The Common Law as an Ultimate Constitutional Foundation” (speech to the 10th Convention of the Law Council of Australia, Melbourne, 16 July 1957), printed in Owen Dixon *Jesting Pilate and Other Papers and Addresses* (Law Book Company, Sydney, 1965) at 203–213.

<sup>74</sup> See *Pape v Commissioner of Taxation of the Commonwealth of Australia* [2009] HCA 23, (2009) 238 CLR 1 and *Williams v The Commonwealth of Australia* [2012] HCA 23, (2012) 248 CLR 155.

<sup>75</sup> Peter Cane “Judicial control of administrative interpretation in Australia and the United States” in Hanna Wilberg and Mark Elliot (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart’s Rainbow* (Hart, Oxford, 2015) 215 at 224–233.

<sup>76</sup> The High Court is said by Cane to be “gradually re-writing history by, for instance, renaming the prerogative writs as ‘constitutional writs’”: Peter Cane “Judicial control of administrative interpretation in Australia and the United States” in Hanna Wilberg and Mark Elliot (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart’s Rainbow* (Hart, Oxford, 2015) 215 at 234; referring to *Re Refugee Tribunal; Ex Parte Aala* [2000] HCA 57, (2004) 204 CLR 82 at [21] per Gaudron and Gummow JJ and at [138]–[139] per Kirby J.

<sup>77</sup> *In Regina v Preston Supplementary Benefits Appeal Tribunal; Ex Parte Moore* [1975] 1 WLR 624 (CA) at 631. See also *Cooke v Secretary of State Social Security* [2001] EWCA Civ 734, [2002] 3 All ER 279 at [15]–[17], adopted in *R (Wiles) v Social Security Commissioners* [2010] EWCA Civ 258 at [53]–[55].

tribunals organised under the Tribunals, Courts and Enforcement Act 2007.<sup>78</sup> Any errors otherwise reviewable will be reviewed only if they fall within the criteria for second tier appeal. The legislation and its interpretation in this way is a point of divergence between UK and New Zealand law.

Writing in 2009, the first chair of the Upper Tribunal, Lord Justice Carnwath, now a member of the Supreme Court, looked to the establishment of the new UK Supreme Court as an opportunity to “develop the relationship” between administrative justice and general law.<sup>79</sup> He took the view that the over-riding concern of the court in any case not involving fundamental human rights is not to become involved in policy choices but to confine itself to ensuring that the decision complies with fairly undemanding standards of irrationality. The recent decisions of the UK Supreme Court move in that direction.<sup>80</sup> Whether in the long run however the development of a mature distinct system of administrative law is helped or hindered by being positioned in the judicial branch remains to be seen.<sup>81</sup> It is not the vision Harry Arthurs urged for administration law.

In Canada, my impression is that there is less anxiety about constitutional fundamentals. If so, that may go some way to explain the preparedness of the Supreme Court of Canada to countenance a marked degree of deference to administrative decision-makers, even in cases affecting Charter rights.<sup>82</sup> The other reason for the Canadian approach may be the example across the border. It would, however, be unwise to think that positions may not move around on this question of deference according to the subject-matter and even the personnel on the Court, as some of the recent divisions in the Supreme Court may indicate.

The pull of legality is strong for courts. That can be seen even in the United States where from time to time the Supreme Court has been obliged to rein in appellate court preferences for interpretation being a judicial responsibility, especially when the jurisdiction of the decision-maker is in issue.<sup>83</sup> Most of us do not feel very deferential when it comes to interpretation.<sup>84</sup> The

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<sup>78</sup> The Upper Tribunal is the superior court of record presided over by the senior president, first of all Carnwath LJ. Members of the Court of Appeal are *ex officio* members who sit where request has made by the President and High Court judges are *ex officio* members. The Upper Tribunal has powers of judicial review in cases transferred (either by category or case by case) from the High Court.

<sup>79</sup> Lord Carnwath “Tribunal Justice – A new start” [2009] PL 48 at 68.

<sup>80</sup> *Regina (Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663; and *Regina (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19, [2013] 2 AC 48.

<sup>81</sup> Although in general there seems to have been more deference accorded to judicial adjudication, I wonder whether that will prevail in the long run, for reasons I touch on at 6. I wonder whether it is by judicial adjudicators that we can expect a developed system of administrative law to develop which has space for values of administration or decision-making which are different from those used by the courts.

<sup>82</sup> Discussed below at 18–19.

<sup>83</sup> See, for example, *Commodity Futures Trading Commission v Schor* 478 US 833 (1986) at 844–845.

<sup>84</sup> 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

*Chevron* doctrine has an appeal in North America that Australia and New Zealand have largely resisted to date, although in Australia some more latitude seems to be accorded to inferior courts (at least on the basis that errors made by inferior courts will not normally constitute jurisdictional error).<sup>85</sup>

One of the problems with questions of interpretation is that they are judicial meat and drink. Although Justice Abella of Canada has said that she thinks very few questions of interpretation have only one right answer,<sup>86</sup> I am not sure many judges would agree. Once the exercise is completed and conviction is reached, anyone who has worked through to a conclusion is unlikely to believe there is a range of reasonable interpretations, even if – or perhaps especially if – their judicial colleagues take a different view.

I would have said until recently that it seems unlikely that in common law traditions, where authoritative interpretation of law is highly valued, the courts will cede the responsibility to say what the law is, except in very limited circumstances. But I am less certain today.

It has become clear the line between interpretation and application is not so much blurred as impossible in much administrative decision-making. There are questions of meaning which can be decided very narrowly by reference to language and the context in which it is used. But the dispersal of executive power under statutes which employ broad concepts means that much application of discretionary power entails interpretation. The effect of words very often cannot be ascertained except in relation to known or supposed facts (Stephen Sedley instances “speech” in relation to “flag-burning”).<sup>87</sup> In such circumstances meaning is always evaluative. And evaluation entails choice and therefore discretion.

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 the decision-maker, as long as it is a reasonable one.

### **Basis of review for reasonableness (of interpretation and application)**

Once it is accepted that interpretation and application are not able to be separated and that each entails evaluation, then it is difficult to maintain a strict separation between review for legality and merits. A conclusion that a decision is unreasonable is a conclusion about its merits. It is inevitably concerned with matters of weight and balancing, often of values that are not directly comparable.

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of this view, thought that if the Executive was not happy with an interpretation, it should go to Parliament to have the law amended: *Royal College of Nursing v Department of Health and Social Security* [1981] AC 800 (HL) at 806–807.

<sup>85</sup> *Craig v South Australia* (1995) 184 CLR 163.

<sup>86</sup> *Wilson v Atomic Energy of Canada Ltd* 2016 SCC 29 at [35].

<sup>87</sup> Stephen Sedley “Construct or Construe” (2012) 34(16) *Lond Rev Books* 19 at 19.



The concept of reasonableness takes its colour from context. Supervisory jurisdiction accords respect to the primary decision-maker and observes any separation of powers between the judiciary and the Executive where a range of options is reasonably available. Where there are no such options, the courts insist on the correct outcome, as was acknowledged in *Dunsmuir v New Brunswick* in Canada.<sup>88</sup> In others, where there is a range of reasonable options, the choice is left to the administrative decision-maker. But Lord Cooke was surely right to say 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”.<sup>89</sup> That seems to me to be where the majority of the High Court of Australia have ended up in *Minister for Immigration and Citizenship v Li*.<sup>90</sup>

What is unreasonable or erroneous has to be explained by the supervising court. Since that cannot be done by assertion, the supervisory jurisdiction necessarily entails close attention to the decision and to the principles of law against which it is assessed (including values recognised by the legal order). Where rights or fundamental values of the legal system are affected, proportionality methodology is preferable because it provides a structured approach which confronts the need to avoid unnecessary infringement of rights (a duty imposed on the courts under the Human Rights Act 1998 and the New Zealand Bill of Rights Act 1990) and unnecessary infringement of important values of the common law (equality of treatment, avoidance of arbitrariness in use of public power, presumptions of freedom among them). Proportionality is superior methodology for supervising for reasonableness in cases where fundamental values are affected, rather than a standalone basis for judicial review applicable in human rights cases.

Because the jurisdiction is supervisory, it is necessarily deferential, to an extent inevitably determined by the context. That insight has been used in Canada to set standards for intervention by way of judicial review. Since adoption of an openly deferential approach<sup>91</sup> instead of the former categories justifying review for the merits according to a “pragmatic and functional” test,<sup>92</sup> recalibration has been necessary on two occasions.

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<sup>88</sup> *Dunsmuir v New Brunswick* 2008 SCC 9, [2008] 1 SCR 190 at [58]–[61]; see *Wilson v Atomic Energy of Canada* 2016 SCC 29 at [23] per Abella J.

<sup>89</sup> *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26, [2001] 2 AC 532 at [32].

<sup>90</sup> *Minister for Immigration and Citizenship v Li* [2013] HCA 18, (2013) 249 CLR 332. Hayne, Kiefel and Bell JJ concluded at [68] 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”; French CJ at [30] preferred to stay with “rationality”, to avoid any connotation of merits review or opening for proportionality; Gageler J was at the more stringent end of the spectrum (“so unreasonable that no reasonable repository of the power could have so exercised [it]”) but considered (at [108]–[110]) that the standard for intervention was comparable to the standard before appellate correction of a discretionary decision.

<sup>91</sup> In *Dunsmuir v New Brunswick* 2008 SCC 9, [2008] 1 SCR 190.

<sup>92</sup> Adopted in *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817.

A recent decision of the Canadian Supreme Court indicates that, while there is not yet a majority for further change, further adjustment may be down the track. It was the shifts in standard of review that Chief Justice McLachlin used to illustrate her view that administrative law is “a barbed and occluded thicket”.<sup>93</sup> The shifts and turns have been well described by others<sup>94</sup> and do not need to be repeated by me at any length.

In 1979 the Supreme Court had allowed deference to a tribunal’s interpretation of its home statute as long as there was no single correct interpretation and the interpretation adopted was not “patently unreasonable”.<sup>95</sup> In *Baker* the Supreme Court endorsed a “pragmatic and functional” approach to determine the standard of review, recognising three standards of review: patent unreasonableness, reasonableness *simpliciter*, and correctness.<sup>96</sup> In *Dunsmuir*, Justice Binnie criticised the former “pragmatic and functional” analysis used to identify whether administrative action fell within one of the categories of review.<sup>97</sup> The majority in that case considered the phrase may have been misleading and preferred to describe the inquiry as “standard of review analysis”.<sup>98</sup> Standard of review followed the level of deference accorded. The three standards were contracted to two: “reasonableness” and “correctness”.<sup>99</sup> It was envisaged that it would be unnecessary to consider standard of review first in cases where it was established by previous case-law for the decision-making in issue.

In *Dunsmuir* the Court explained its concept of deference as moving from a “court centric conception of the rule of law” by acknowledging that “courts do not have a monopoly on deciding all questions of law”.<sup>100</sup> The purpose of judicial review was said to be to ensure that decision-makers do not exercise authority they do not have. That required “correctness” to be applied to “true questions of jurisdiction or *vires*”, questions of general law outside the adjudicator’s specialised area of expertise and of “central importance to the legal system as a whole”, constitutional questions concerning division of powers, and questions concerning the respective jurisdiction of two or more tribunals.<sup>101</sup>

In *Doré v Barreau du Québec*<sup>102</sup> the Court applied *Dunsmuir* and held reasonableness to be the correct standard of review even though the case

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<sup>93</sup> See above at 10.

<sup>94</sup> See Lorne Sossin “The Complexity of Coherence: Justice LeBel’s Administrative Law” (2015) 70 SCLR (2d) 145.

<sup>95</sup> *CUPE Local 963 v New Brunswick Liquor Corporation* [1979] 2 SCR 227 at 237.

<sup>96</sup> *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 at [55].

<sup>97</sup> *Dunsmuir v New Brunswick* 2008 SCC 9, [2008] 1 SCR 190.

<sup>98</sup> At [63].

<sup>99</sup> At [34].

<sup>100</sup> At [30].

<sup>101</sup> At [58]–[61]. See Paul Daly “Dunsmuir’s flaws Exposed” (2012) 58 McGill Law Journal 483. It led to further refinements and some outcomes which may well have gone different ways: see *Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association* 2011 SCC 61, [2011] 3 SCR 654 at [34]–[39].

<sup>102</sup> *Doré v Barreau du Québec* 2012 SCC 12, [2013] 1 SCR 395.

concerned adjudication affecting human rights.<sup>103</sup> Such reasonableness inquiry would, in cases of human rights, entail consideration of whether the primary decision-maker had appropriately weighed the human rights by application of proportionality analysis. It may be noted that this approach departs from the direct human rights analysis applied the courts in the United Kingdom where human rights are in issue.<sup>104</sup>

In Canada, there is now a presumption of deference which attaches both to application and interpretation, at least when tribunals are interpreting their own or related statutes. The extent of the Court's preparedness to defer in matters of interpretation is illustrated by the approach in *McLean v British Columbia (Securities Commission)*, where a standard of reasonableness was applied to interpretation of a time limit instead of the standard of correctness usually applied to questions of jurisdiction.<sup>105</sup>

On the other hand, there may be more ambivalence about Charter rights in application. In *Loyola High School v Quebec*,<sup>106</sup> a case concerning freedom of religion, three of the Judges did not join Justice Abella and the other Judges in the majority in applying *Doré's* administrative review approach (although with expectation that the primary decision-maker would adopt a "robust proportionality" assessment of reasonableness appropriate for rights)<sup>107</sup> but applied a standard of correctness as on constitutional review,<sup>108</sup> perhaps because the case, unlike *Doré*, was not concerned with an adjudicative determination.<sup>109</sup>

In *Doré*, a case concerning a disciplinary professional body, the Court's supervision was directed at ensuring that the adjudicative body had given appropriate consideration to the rights in issue, applying proportionality analysis. The conclusion reached however was one that the Court treated

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<sup>103</sup> In *Multani v Commission Scolaire Marguerite-Bourgeoys* 2006 SCC 6, [2006] 1 SCR 256 the Supreme Court by majority had itself applied *Oakes* proportionality analysis to a decision concerning *Charter* rights on the basis that the application of administrative law standards of review would diminish the fundamental rights and freedoms recognised by the *Charter*. In a concurrence, Abella and Deschamps JJ took the view that the case was one for application of administrative law principles on reasonableness review rather than the justificatory review of proportionality analysis. The minority view prevailed in the later case of *Doré*.

<sup>104</sup> As discussed below at 20.

<sup>105</sup> *McLean v British Columbia (Securities Commission)* 2013 SCC 67, [2013] 3 SCR 895. David Mullan has commented of this case that the scope for jurisdictional error in any practical sense seems effectively eliminated: David J Mullan *Unresolved Issues on Standard of Review – An Update* (Canadian Institute for the Administration of Justice, 19 May 2014) at 1–2.

<sup>106</sup> *Loyola High School v Quebec (Attorney General)* 2015 SCC 12, [2015] 1 SCR 613.

<sup>107</sup> At [3].

<sup>108</sup> At [88].

<sup>109</sup> Walters sees the minority judgment as the Judges having "retreated back across the frontier into the field of constitutional law in cases dealing with administrative discretion and fundamental rights, for reasons that they have, so far, kept to themselves": Mark Walters "Respecting Deference as Respect: Rights, Reasonableness and Proportionality in Canadian Administrative Law" in Hanna Wilberg and Mark Elliot (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart, Oxford, 2015) 395 at 422.

as for the tribunal if within the range of what was reasonable. That can be contrasted with the approach taken in the United Kingdom in *Denbigh High School*<sup>110</sup> and *Miss Behavin*<sup>111</sup> where it held that it was for the reviewing Court to assess whether there had been breach of rights.<sup>112</sup>

If a balance affecting rights must be struck in application to individual circumstances by the decision-maker, it is hard not to feel a little uneasy about limitation of rights according to standards that have not been prescribed by law and by specialist bodies which may not have a sense of the whole. In such cases the prescription is in the application. The supervising court, itself bound to observe the rights and freedoms in what it does, may not properly avoid making its own determination of whether the objective is a proper one and the limitation is rationally connected with it and no more than is necessary to achieve the objective. It is not sufficient that the balance is within a range that could be said to be reasonable. The courts will consider the reasons given for the decision. Supervising the reasoning process is however insufficient description of the function the courts fulfil in supervising for objective compliance with rights.<sup>113</sup> This is to express agreement with the approach taken by Lord Reed in *Bank Mellat* rather than that suggested by Lord Neuberger and Lord Dyson and the approach adopted by the Canadian Supreme Court in *Doré*.

*Doré* involved adjudication, the decision of a disciplinary tribunal reviewing the conduct of a lawyer; *Loyola* considered a Minister's exercise of discretion. It is not clear whether the Judges who preferred to make the *Charter* assessment directly in *Loyola* were drawing a distinction between adjudication and administrative discretion.

Where authority is conferred in broad terms, the court is more likely to take the view that there is a range of reasonable interpretative options and in identifying the factors to take into account in making a broadly evaluative decision.<sup>114</sup> The matter is then treated in Canada less as one of interpretation and more as one of discretion. *Katz Group Canada Inc v Ontario (Health and Long-Term Care)* concerned whether regulations were within the scope of the empowering legislation.<sup>115</sup> Justice Abella held that if the regulations were consistent with the purposes of the legislation, it was

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<sup>110</sup> *R (Begum) v Denbigh High School Governors* [2006] UKHL 15, [2007] 1 AC 100.

<sup>111</sup> *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420.

<sup>112</sup> But see *Regina (Lord Carlile of Berriew and others) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945. Although the Supreme Court continued to take the view that in cases where human rights are affected a court must undertake a proportionality assessment, it was careful to point out that an administrator's decision which is neither irrational nor display errors of fact or principle must be given due weight. See at [49] per Lord Sumption, at [67]–[68] and [80] per Lord Neuberger, and at [98] per Baroness Hale; and compare with the reasons of Lord Clarke at [115] and Lord Kerr at [158].

<sup>113</sup> See Paul Craig "The Nature of Reasonableness Review" (2013) 66(1) CLP 131.

<sup>114</sup> In *Agraira v Canada (Public Safety and Emergency Preparedness)* 2013 SCC 36, [2013] 2 SCR 559 it was held that the Minister had considerable latitude in interpreting a statutory provision requiring decisions to be made in the "national interest".

<sup>115</sup> *Katz Group Canada Inc v Ontario (Health and Long-Term Care)* 2013 SCC 64, [2013] 3 SCR 810.

not for the Court to consider whether it would meet the objectives or whether they were over or under-inclusive or “necessary, wise or effective in practice”.<sup>116</sup> Only where objectives were “irrelevant” or “completely unrelated” to the statutory purpose would judicial review lie for wrongful purpose.<sup>117</sup>

In the latest twist, *Wilson v Atomic Energy of Canada*,<sup>118</sup> Justice Abella, who wrote the decisive opinion in *Doré*,<sup>119</sup> indicated that further change was necessary. She took the opportunity, in obiter, to spell out her vision of judicial review of administrative determinations, including interpretation. Four Judges who concurred in the result that judicial review was not warranted on the accepted standard of reasonableness preferred not to express agreement with the suggestions made by Justice Abella for further change “at this time”.<sup>120</sup> The fourth concurring Judge, Justice Cromwell said that there was no occasion for “yet another overhaul” of the standard of judicial review and that while *Dunsmuir* might continue to be further refined, the “basic *Dunsmuir* framework” was sound.<sup>121</sup> On the other hand, while accepting the reasonableness “takes its colour from context,” Justice Cromwell expressed concern about the approach taken by the Federal Court of Appeal in developing “new and apparently unlimited numbers of gradations of reasonableness review”. That, he thought was not “an appropriate development of the standard of review jurisprudence”.<sup>122</sup>

The Judges in the minority, Moldaver, Côté, and Brown JJ, would have applied a correctness review to what they thought to be a “narrow and distilled legal issue”.<sup>123</sup> In their opinion, the case exposed the risks for the rule of law in “presumptively deferential review of a decision-maker’s interpretation of its home statute”.<sup>124</sup> They pointed out that the lower Courts had taken opposite views of reasonableness. “Rule of law values” should not, they thought, be abandoned “in favour of indiscriminate deference to the administrative state”. They were concerned too at the possibility of different

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<sup>116</sup> At [27]–[28].

<sup>117</sup> As David Mullan notes, effectively regulations have a presumption of validity: David J Mullan *Unresolved Issues on Standard of Review – An Update* (Canadian Institute for the Administration of Justice, 19 May 2014) at 4.

<sup>118</sup> *Wilson v Atomic Energy of Canada* 2016 SCC 29. In *Wilson*, a labour adjudicator interpreted the Labour Code as preventing dismissal of an employee without cause, even though generous severance pay was provided. The adjudicator upheld the complaint that the dismissal was without cause and thereby was unjust. On appeal, the Judge found the decision to be unreasonable because he interpreted the Code as providing no impediment to dismissal without cause. The Federal Court of Appeal dismissed an appeal, but on the basis that the interpretation was wrong, applying a correctness standard to the question of interpretation, rather than assessing the interpretation adopted by the adjudicator for reasonableness.

<sup>119</sup> And had earlier joined the view in *Multani v Commission scolaire Marguerite-Bourgeoys* 2006 SCC 6, [2006] 1 SCR 256 that administrative law principles rather than constitutional review should be used.

<sup>120</sup> McLachlin CJ, Karakatsanis, Wagner and Gascon JJ: *Wilson v Atomic Energy of Canada* 2016 SCC 29 at [70].

<sup>121</sup> *Wilson v Atomic Energy of Canada* 2016 SCC 29 at [72]–[73].

<sup>122</sup> At [73].

<sup>123</sup> At [76].

<sup>124</sup> At [79]–[91].

interpretations in the law which “go to the heart of the federal employment law regime”.

It would be rash to think that this latest word is the last word. The ideas that Justice Abella floated, to start a “conversation”,<sup>125</sup> revert to some of the basics about administrative law raised in the piece by Arthurs.<sup>126</sup> Justice Abella thought that cases where only one reasonable outcome was available were likely to be “rare” and largely confined to the categories identified in *Dunsmuir* as attracting correctness standard.<sup>127</sup> She considered the standard of review adopted in *Dunsmuir* should be further refined by accepting that unreasonableness review is a single standard which, in context, may admit only one correct answer.

Justice Abella thought that the extent to which lower courts were grappling with standard of review was “insupportable” and that she hoped for simplicity of the *Dunsmuir* two standards (collapsing “patent unreasonableness” with “reasonableness simpliciter”) had “not proven to be the runway to simplicity”.<sup>128</sup> It was incumbent on the Court to consider “whether this obstacle course is necessary or whether there is a principled way to simplify the path to reviewing the merits”. She suggested that much of the confusion had arisen over “what to call the category of review in a particular case” and questioned whether it was necessary to engage in such “rhetorical debates about what to call our conclusions at the end of the review”:<sup>129</sup>

Are we not saying essentially the same thing when we conclude that there is only a single “reasonable” answer available and when we say it is “correct”? And this leads to whether we need two different names for our approaches to judicial review, or whether both approaches can live comfortably under a more broadly conceived understanding of reasonableness.

It is possible to see in Canada a more pluralist approach which steers by the “functionalist” view of the competence of the reviewing court. It is now shorn of a “categorical” testing to establish the degree of deference to be accorded. And it is simplified into two standards of review, although with a presumption of deference. The presumption is displaced where deference is not appropriate because the case involves fundamental values of the legal order or principles of general application throughout the legal system or where there is only one correct answer. Such assessment is inevitably highly contextual.

There may be something in the criticism that the New Zealand courts have tended to be light on doctrine and that our administrative law jurisprudence is

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<sup>125</sup> At [19].

<sup>126</sup> HW Arthurs “Rethinking Administrative law: A Slightly Dicey Business” (1979) 17 Osgoode Hall LJ 1.

<sup>127</sup> *Wilson v Atomic Energy of Canada* 2016 SCC 29 at [35]–[36].

<sup>128</sup> At [20]–[24].

<sup>129</sup> At [24].

underdeveloped.<sup>130</sup> But I wonder whether the inescapably contextual assessment of when to intervene by way of judicial review is greatly assisted by attempting to articulate standards of review. Reasonableness may be “a single standard”, as the Supreme Court of Canada now says, but if it “takes its colour from context” as the Court also accepts<sup>131</sup> how useful is it to strain to identify standards of review?

## Conclusion

Ambivalence about the relationship between constitutional law and administrative law, shown by Sir Michael Myers in New Zealand in 1940, has never been entirely shaken off by judges and legal practitioners. Although a number of thoughtful administrative lawyers resist the pull to “constitutionalisation” of administrative law,<sup>132</sup> judicial review strikes me as inevitably located in that space. It is concerned with the rule of law values which underpin the constitution in any law-state and which provide coherence to the legal order which it is for the superior courts to supervise, whether they operate under a constitutional instrument which shares power or under an unmodified Westminster system. Where rule of law concerns end, the supervisory jurisdiction ends too. That may well not satisfy good government values which are a proper end of administrative justice. Their promotion is best served by institutions with freedom to act without further court supervision than the requirements that they act lawfully, reasonably and fairly.

Perhaps we have loaded too much into the supervisory jurisdiction which could be better addressed in a distinct (but supervised) administrative justice system. The challenge for administrative law remains to develop within the scope left for it by constitutional law. In a developed system of administrative law perhaps more respect for administrative choices in interpretation and application of enacted rules is better policy for supervising courts. But we have to be careful not to throw the baby out with the bathwater. It is surely time to move on from always beating up courts about their constitutional obligation to ensure that constitutional balances and values, including rights, are observed and not sacrificed to expediency.

We have had enough experience to know that we can expect successive waves in which growth of discretion gives rise to anxiety about the rule of

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<sup>130</sup> Claudia Geiringer “Process and Outcome in Judicial Review of Public Authority Compatibility with Human Rights: A Comparative Perspective” in Hanna Wilberg and Mark Elliot (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart’s Rainbow* (Hart, Oxford, 2015) 329 at 357–358.

<sup>131</sup> *Canada (Citizenship and Immigration) v Khosa* 2009 SCC 12, [2009] 1 SCR 339 at [59]; *Catalyst Paper Corp v North Cowichan (District)* 2012 SCC 2, [2012] 1 SCR 5 at [18]; as cited by Abella J at [22] and Cromwell J at [73] in *Wilson v Atomic Energy of Canada* 2016 SCC 29.

<sup>132</sup> See Ivan Hare “The Separation of Powers and Judicial Review for Error of Law” in Christopher Forsyth and Ivan Hare (eds) *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Clarendon Press, Oxford, 1998) 113.

law. So we cannot expect this area of law to stand still. And although I acknowledge with gratitude the illumination provided by good scholarship in this area, of which there is much, is the search for better doctrine is ultimately doomed? I don't suggest that the effort is not worthwhile. It keeps everyone up to the mark. But I wonder how much can be expected of overarching theories. Public law has unity and disparity and much of it is untidy and tentative.

The last time I spoke in this lecture theatre, I ended with some views expressed by Sir David Williams. They seem in point today also. Sir David said that the principles of administrative law "can sensibly be considered only with proper regard for the statutory, institutional and broader social or policy context of a particular case".<sup>133</sup> And he thought that in the long term the courts "would help in the development of a more ordered legal system if they insisted on clear authority where clear authority is needed ... and if they intervened where intervention is constitutionally desirable".<sup>134</sup>

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<sup>133</sup> DGT Williams "Criminal Law and Administrative Law: Problems of Procedure and Reasonableness" in P Smith (ed) *Criminal Law: Essays in Honour of JC Smith* (Butterworths, London, 1987) 170 at 171.

<sup>134</sup> At 168.



