Judicial Review Today

The 2008 Maurice Byers Address was delivered by the chief justice of New Zealand, the Rt Hon Dame Sian Elias, in the Bar Association Common Room on Thursday, 24 April 2008

The Profession

It is a great privilege to be asked to give the annual Sir Maurice Byers Lecture. It honours a great lawyer, whose influence has shaped the direction of Australian law and continues to set the tone for the profession.

Sir Owen Dixon as you will know, thought that the barrister's role was more important than the contribution made to justice by the judge.[1] That was not mere politeness. The system we have depends on the ethical discharge by the profession of its responsibilities. There are real strains evident here. Lawyers have been important facilitators in commercial wrongdoing in some of the spectacular corporate collapses. In public law too, there have been serious lapses in standards. The most notorious recent example is the memorandum justifying torture signed by the assistant attorney-general of the United States, JS Bybee.[2] Harold Koh, the dean of Yale Law School said of this memorandum that it was 'perhaps the most clearly erroneous legal opinion I have ever read… a stain upon our law and our national reputation'.[3]

No one is immune from the pressure to give the answer the client wants. That is not the ethic of the Bar. As the torture memorandum signed off by Bybee demonstrates, those advising government are subject to special pressures and have special responsibilities to the legal order. Sir Gerard Brennan refers to the story related by David Bennett that when it was suggested that Sir Maurice might take instructions on some question of policy he replied, 'I don't take instructions – I give them.'[4] It matters very much that a law officer of the Commonwealth has such independence and that Sir Maurice cared so deeply for justice. The New South Wales Bar is rightly celebrated for its standing in the common law world. A member it marks out for the distinction of an annual lecture is the best of the best.

I thought I would attempt this evening a survey of the place of judicial review in modern societies. Power and its control is a topic that exercised Sir Maurice throughout his career. Academic commentators both here in Australia and in New Zealand have referred to the 'exceptionalism' of Australian administrative law.[5] The way in which we address questions of power and its exercise may vary between jurisdictions for good reason (New Zealand law, too is 'exceptional') but the issues we grapple with are the same. Over time, divergence is likely to be more exceptional than the common ground we will have in answering common problems, even if the dress is dissimilar.

I want to address this topic because in my jurisdiction I think we are too ready to jump to the conclusion that the rich Australian case law on judicial review has little to offer us because of the very different constitutional and legislative context. In fact, engagement with the ideas expressed in Australian judgments would be very much to the benefit of our legal method. Conversely, it would be troubling if a self-perception of difference led to isolationism in Australian public law thinking. I should say that I am not at all sure this trend, identified by some, is accurate. I do not try to express a view on its validity – that would take much closer understanding of Australian law than I can pretend. I do think it is a great pity if the existence of statutory and constitutional bills of rights in other jurisdictions is used here to suggest that their case law is not of direct relevance to the problems of good administration under law which your courts have to consider.

In that connection, I was surprised to read some of the articles and letters to the editor in Australian newspapers today which seem to assume that Australian law is without fundamental values and that collecting them in a statement of rights would be revolutionary. It is similar to the misconception in my country that we have no constitutional law because we have no single written constitutional instrument. Courts in our jurisdictions have always had recourse to fundamental values whether found in a written instrument (in which at least they have demonstrable democratic validity) or are immanent in the common law (where judges are more exposed in identifying them). So I do not think that the existence of a written constitution or a statement of rights is properly to be an excuse for ignoring the ideas thrown up for judicial determination in societies as similar as ours. Brennan J described our conception of judicial review as well as yours when he said:[6]

> Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.

I do not attempt anything comprehensive. That would be impossible. I touch on some selected themes.

First, our shared tradition. Chief Justice Gleeson has said that, with allowances for the very different constitutional arrangements, English law and Australian law were relatively consistent until English grounds of review and the standards by which they are measured moved apart with the growing influence of European human rights law.[7] It may be that English law (and New Zealand law for that matter since its adoption of human rights legislation) has drifted apart from Australian law. I think however the trends have been there for much longer.

It is worth remembering how far our shared tradition has moved during the course of Sir Maurice's time in the profession. Indeed, it has been transformed since I studied constitutional and administrative law in 1968.

The gloom of administrative law

In an article published in 1961, Kenneth Culp Davis in reviewing SA de Smith's Judicial Review of Administrative Action, first published in 1959, expressed dismay about the future of judge made public law in England.[8] In particular he criticised the failures to grapple with policy and the abdication of responsibility to ensure procedural fairness. He expressed the view that judicial review, properly limited, does not

weaken but strengthens the administrative process. He was 'often shocked by the extent to which English courts refused to enquire whether serious justice has been done in the administrative process'.[9] Davis referred to Lon Fuller's verdict that in the field of commercial law, British courts had 'fallen into a 'law-is-law' formalism that constitutes a kind of belated counter revolution against all that was accomplished by Mansfield.'[10] Davis says the position in respect of public law was much worse:[11]

> Most judge made public law is much more in need of constant re-examination than most commercial law, for the effects of decisions either way on living people are often more drastic, the policy problems are often more difficult, and the needs for predictability are usually less.

I suspect that the condition Davis described in relation to administrative law in the United Kingdom applied equally in Australia at the time. It certainly did in New Zealand. We were just emerging from what has been described as a period of 'slavish imitation' of English law[12] and still under the oversight of the Privy Council, although the recently established Court of Appeal was starting to feel its oats. Administrative law was a very new subject. Professor Wade has written of the 'deep gloom' that had settled upon English administrative law.[13] All that was about to change. Wade says that the English judges, prodded by Lord Denning and then Lord Reid, woke up to 'how much had been lost'.[14] In New Zealand, one of the changes on the horizon was the appointment of judges who had studied administrative law and legal method in the United States and in the United Kingdom. In Robin Cooke we had one of the more influential administrative lawyers of the common law world.

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In Davis's view the test for the soundness or unsoundness of judge made law was 'its effect upon living people':[15]

In the present generation, English judges have been limiting themselves too much to the tasks of the bricklayers and too much neglecting the functions of the architects.

That, he said, was wholly unsatisfactory in building the 'giant structure' of public law that had to be built during the coming century.[16] What he was looking to was a changed culture in law, in better response to the needs of 'living people'.[17]

Change

For those of us who have practised law through most of the years since De Smith's book was published in 1959 it is hard to think back to how things were. The book itself was a pioneering effort. De Smith described the scope of judicial review in terms of vires, jurisdiction, and clear demarcation between law and fact.[18] Natural justice embraced the right to a hearing (which until *Ridge v Baldwin*[19] exposed misapplication of a dictum of Lord Atkin,[20] was thought to arise in limited circumstances[21]) and decision-making free of bias. Discretionary powers had to be exercised within jurisdiction but were otherwise largely immune for correction for error. The exceptions were use of power for bad faith, cases where error of law appeared on the face of the record (a ground recently rediscovered) and those where the decision-maker had acted without evidence or had come to a conclusion no reasonable decision-maker could reach. The great administrative law cases of *Padfield*,[22] *Ridge v Baldwin*, and *Anisminic*[23] had not been decided.

The comfortable assumptions on which judicial supervision of administrative power were based in 1959 have not lasted. So, in most jurisdictions, over time, the courts have pulled back from a strict application of the ultra vires rationale. It has not seemed to fit the needs of 'living people' in modern societies. In the first place, reliance upon open textured legislation with wide discretionary powers has made it difficult to separate legality or statutory interpretation from policy choices. In the second place, the ultra vires theory does not fit easily with the supervisory jurisdiction exercised in relation to non-public bodies, not regulated by statute. In addition, modern insight as to the nature in which power is exercised has prompted more fundamental rule of law justifications for supervision.

More fundamentally, there has been a shift in the way in which law is seen in our societies. Such shift has been described as a culture of justification.[24] In this vein, Chief Justice Gleeson acknowledges:[25]

> The development in the Australian community of a cultural expectation that those in authority are able and willing to justify the exercise of power is one of the most important aspects of modern public life.

I do not think this climate has come about solely or even mainly because of increased suspicion of government. Rather, I think it is attributable to the increasing diversity of modern societies, an increased concern that social ends need to be balanced with individual autonomy and increased openness in government. These influences overlap. They have clearly been affected by the post-war adoption of statements of fundamental rights and the vocabulary and organising principles supplied by such statements dominate thinking. I do not think the transformation of judicial review is attributable to statutory and constitutional recognition of rights.

As Paul Craig has pointed out, the development of varied intensity judicial review, for example, was under way long before adoption of statutory statements of rights in most jurisdictions.[26] Similarly, JWF Allison agrees that recourse to substantive values and a substantive conception of the rule of law was evident in the decades before the passing of the Human Rights Act.[27] The development has been paralleled by scholarly writing, particularly that influenced by Ronald Dworkin's emphasis on legal principle. In this tradition, Trevor Allan focuses on the fundamental principle of equality in Dicey's rule of law and likens it to Dworkin's ideal of integrity.[28] Allan's principle of equality is a substantive

value.[29] It imposes a fundamental requirement of justification. The implications of rule of law analysis have yet to be fully explored. As Justice Keith Mason in his 2004 Maurice Byers Lecture suggested, the concept of the rule of law leaves 'much room for movement'.[30] The immediate point to be made, however, is that varied intensity review did not follow the enactment of explicit standards in statutory bills of rights. Its well-established use in other contexts was explained by Gleeson CJ and explained in *Plaintiff S157/2002*.[31] It is commonplace that decision-making, whether judicial or administrative, is subjected to different degrees of scrutiny according to context, including most importantly what is at stake and questions of institutional competence. Variable intensity review responds to the insight that in decisions of great importance, judicial indifference to what happens within the four corners of vast discretion does not meet the needs and aspirations of the community.

In pluralistic modern societies, often secular or with diverse beliefs, law is one of the more important sources of the principles by which society operates civilly. The concept of human dignity as developed in the South African Constitutional Court is concerned not only with impact upon the individual but with the interest of the whole community in promoting mutual respect not only for individual difference but for group difference.

William Eskridge, in an article entitled 'Pluralism and Distrust' suggests that our societies have moved on from the one-sided battlefields in which the majority democratically oppresses minorities.[32] They are the conditions which have led to engagement with fundamental rights, protective of the individual. He suggests that societies today are divided also by what he calls 'culture wars',[33] in which values clash. Eskridge is of the opinion that courts perform a valuable role in lowering the stakes in such wars and allowing the political processes to adapt. He allows that if courts raise the stakes they can fracture society.

The stakes can be raised as much by not-doing as doing. Although bold decisions may raise the temperature from time to time (and inevitably provoke charges of judicial activism), those cases are very rare indeed. The virtue of judicial process is to still controversies. That is sometimes done through vindication of claim of legal right, but much more frequently it is done through authoritative vindication of conduct which is substantively compliant with legal obligations, including obligations of fairness and reasonableness. Providing such legitimacy is a principal contribution of legal process to the rule of law. It is not achieved through supervision for procedural exactness but extreme deference in matters of substance.

Nor does extreme deference permit the valuable contribution to the political process of which Sandra Fredman has written.[34] 'Dialogue' is perhaps an overworked word today, but full exposition of the issues that may have been glossed over or overlooked in the political process is a benefit of the deliberative process of litigation which is valuable in itself. Those who litigate are demonstrating expectations about the system. They are working within it. Sometimes in the patient examination of claims dismissed out of hand in less deliberative, less disinterested processes there are important gains irrespective of formal outcome. In New Zealand, I have no doubt that litigation by Maori in the 1980s achieved a substantial shift in social and political values. The decisions in the landmark cases about lands, forests, fisheries and language delivered relatively modest direct results but they demonstrated a just claim, long ignored, and resulted in political will to respond. Similarly, cases formally lost in seeking recognition for same sex marriages in New Zealand and some US jurisdictions led to the enactment of civil union statutes through the political process. The reasoning of the courts in these cases demonstrated the justice to which the political processes responded.

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Thoughtful writers have long realised that a critical role played by law in our societies is as a method of argumentation. (It is a major theme of Neil MacCormick, a significant legal philosopher of our time). The processes of law mediate and explain change in social conditions. A dramatic example is the decision of the *United States Supreme Court in Brown v Board of Education*.[35] As Richard Posner has pointed out about that decision, it was not pondering the text of the Fourteenth Amendment that suddenly switched on a light bulb. It was recognition that American society and international society had changed and that the law needed to shift also.[36]

A shift in expectations of law may also be attributed to the climate of openness that many of us embraced with freedom of information legislation. Such legislation lays bare the material relied upon by administrative decision-makers. In New Zealand, under the Official Information Act, someone affected by an administrative decision can ask to know the reasons for it. Under s23 of the *Official Information Act 1982*, where a department or minister of the Crown or one of a wide range of organisations makes a decision or recommendation in respect of any person, the person is entitled to a written statement, on request, of:

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- the findings on material issues of fact; and
- a reference to the information on which the findings were based; and
- the reasons for the decision or recommendation.

The requirement of reasons is also an applauded feature of the package of administrative reforms introduced in Australia in the early 1970s (even if the common law still lags in this[37]). These requirements for information and reasons respond to a widely held need.

People want to know the reasons why official action is taken which affects them. It is an aspect of human dignity. It facilitates participation and prevents human beings being regarded as objects. Similar underlying themes are responsible for legislation which enables individuals to obtain information held about them by public agencies and employers.

I realise that references to 'human dignity' set some people's teeth on edge. They fear its malleability in the hands of judges bent on vindicating personal preferences. It is however a standard which underpins the United Nations Declaration and the international covenants based on it, as the South African Constitutional Court has emphasised.[38] South Africa may have acute reasons for some such social glue, but that hardly means we have no need for some ourselves.

Lorraine Weinrib makes it clear that the state cannot satisfy the modern expectation of substantive justification by 'merely asserting plenary political authority, promotion of the public good, fidelity to traditional moral values or social roles, or financial constraints.'[39] This, she says, is not a 'balancing exercise':[40]

> Justification requires connection to the core constitutional principles through a sequence of analytical steps that maintain the primacy of the constitutional principles even when a particular crystallisation of these principles must cede. The compendius name for this methodology is proportionality analysis.

Maintaining a strict division between merits review and legality, always difficult, is sometimes strained to breaking point in the new climate of openness that our societies have come to expect. Again, this cannot be set down simply to the adoption of statutory bills of rights in some jurisdictions. They certainly provide measures against which exercise of authority must be justified, in protection of values which have been democratically identified, and which cannot be divorced from some merits consideration, but they are an aspect of a wider phenomenon: the view that the possession of power is not sufficient to justify its use.

It may have been inevitable that, with the ubiquity of reasons and open access to official and personal information, judicial review could not maintain the line that it is not concerned with outcomes except where the decision-maker can be said to have taken leave of his senses. Aronson, Dyer and Groves in their excellent book Judicial Review of Administrative Action[41] say that Professor William Wade thought that the availability of certiorari to correct non-jurisdictional error of law on the face of the record (a ground of review famously 'rediscovered' in *R v Northumberland Compensation Appeal Tribunal (Ex parte) Shaw)*[42] was exceptional, arising only because the urge to intervene was 'more than judicial flesh and blood could resist'.[43] It seems to me that it is wrong to suggest that the reaction is a judicial reflex. Decisions which are wrong on their face are deeply offensive to anyone affected by them. With the spread of justificatory processes in administrative decision-making, it seems to me that expansion of the scope of judicial review rightly responds to that sense of human outrage. As Sir Robin Cooke pointed out in 1986 Lord Sumner's metaphor of the Sphinx in speaking of error of law on the face of the record[44] served a 'rather vicious purpose in suggesting that by leaving reasons unspoken an authority can emancipate itself from scrutiny.' [45] Cooke said:[46]

> It was always obvious to persons interested in administrative law that this could prove a blind alley or side road.

One of the interesting features of the working of Official Information Acts has been its demystification of administrative decision-making. The workings of the legislation have revealed what has been intuitively thought by many, that the courts are wrong to defer unduly to administrative expertise. As Justice Roger Traynor pointed out in 1968, very often a technical evaluation 'may have expertly skimmed the surface of a problem and never touched its depths'.[47] It may overlook altogether legal aspects. It may trench upon legitimate rights and interests without justification. Supervision through judicial review promotes better administrative decision-making and good government. This seems to me a good thing, provided the limits to judicial review are respected.

It is important not to throw the baby out with the bathwater. Review does not permit the court to substitute its discretion for that of the decision-maker. There is room for divergence in approach here, depending on the domestic solutions to supervision of administrative discretion. This is the area perhaps of Australian 'exceptionalism', which I want to touch upon before attempting to finish with what I think may be some of the challenges ahead.

Australian solutions

In a September 2007 lecture, Chief Justice Gleeson explained the differences between Australian solutions in judicial review and those of comparable jurisdictions as arising out of Australia's constitutional and statute law: [48]

> A search for jurisdictional error, and an insistence on distinguishing between excess of power and factual or discretionary error, remain characteristic of our approach to judicial review.

That difference arises out of the constitution and in particular the strict separation of powers it provides. A further cause of difference is the extensive system of merits review provided by federal legislation. As a result:[49]

> Australian administrative law has not taken up the North American jurisprudence of judicial deference, nor has it embraced the wide English concept of abuse of power as a basis for judicial intervention in administrative decisions.

Rather, the focus is on jurisdiction and legality.

A New Zealand academic, Michael Taggart, has suggested that the strong insistence of the High Court of Australia on the separation of judicial power has been at a cost to administrative law.[50] The strength on the constitutional side is mirrored by 'considerable restraint' in administrative law. A sharp division is drawn between law on the one side and 'policy and the merits' on the other.[51]

Peter Cane in his centenary essay for the High Court of Australia said that the establishment of the AAT 'fragmented administrative law by giving the distinction between judicial review and merits review a unique and rigidifying significance'.[52] A second factor he identifies as 'contributing' to 'Australian exceptionalism' is that the judicial review jurisdiction of the High Court is remedially focused and contained in a document which is, by its very nature, tradition bound.[53] This he says makes it harder for the courts to re-fashion the common law than it has been for English courts. The third factor he identifies is a lack of an Australian Bill of Rights.[54] Finally, the new constitutional administrative law is 'informed by a strong commitment to conceptualism and historicism on the part of intellectual influential members of the Gleeson court'.[55] Cane accepts that if the merits review system had not been established in the 1970s 'judicial review would probably have developed to cover all or most of the grounds now occupied by merits review.'[56]

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It may be that the combination of merits review and constitutional and common law review covers the field. I am conscious of the fact that some of the decisions of the High Court that look odd in result to New Zealand eyes, cases such as *Tang*[57] and *Neat Domestic*,[58] may well have been inevitable given the form of the proceedings and the relief sought and the division of responsibilities within the Australian legal system. I certainly do not want to suggest that judicial review is always preferable to merits review of the type set up under the AAT legislation. It clearly is not, but it does seem that with respect to grounds of substantive review and standard of review, we are now in a phase where Australian law is picking its own path. To an outsider, there are two pressing challenges. The first is the ability to draw a distinction between policy and fact on the one hand, and legality on the other, on which a focus on legality and jurisdiction depends. The second is the ability to engage with developing standards for substantive review.

The line between law and fact or policy is notoriously unstable. Carol Harlow considers that Dicey made a malignant contribution to English public law by making 'scientific rationalism an essential component of British constitutional theory, an error of law to which it was arguably least appropriate'.[59] This, she says, left a 'disabling legacy for English constitutional law' by obscuring the close relationship between law and politics 'which he himself had always recognised'.[60] Much scholarship in recent years, some of the best of it Australian, has been devoted to the porous nature of fact, law and policy. That thinking may be influencing the shift in the United Kingdom to rule of law justifications for judicial review, which, with their importation of fundamental principles of equality, make substantive assessment inevitable, as Trevor Allan has pointed out.[61] The view may be developing that in supervising administrative decision-making the courts are engaged in the same interpretative exercise both in deciding what limits are set by the words conferring discretionary powers and by the context in which they are exercised. That is why Taggart considers that the principle of legality and the presumptions of conformity with international law attach to discretionary decisions.[62] What is then important is the standard of review.

That is I think the second challenge. Lord Cooke long expressed the view that the grounds of judicial review can be summed up on the basis that a decision-maker must act in accordance with law and fairly and reasonably.[63] Although review for unreasonableness was pitched by Lord Greene at a level that shaded into bad faith,[64] Lord Cooke contended that there is no need for any amplification of the standard of reasonableness, and that what is required of it takes its shape from context.[65] The important considerations in setting such context are the nature of the interests affected and the relative competence of the courts to judge what is reasonable. Although some of our case law has moved around, this approach is widely supported in my jurisdiction and fits with the principle of legality applied by the House of Lords.[66] On this view substantive unreasonableness has moved from the Wednesbury formulation maintained in the Australian legislation. How constraining that will be of the development of common law review here remains to be seen.

In the United Kingdom, Canada, and New Zealand, unreasonableness as a standard of review is giving way to proportionality analysis. On the Cooke approach to reasonableness, proportionality analysis is simply an application of varied reasonableness in context, but that is not how it is being generally treated.

Mine is the more modest point that where the content of human rights in context turns on what Sunstein has referred to as the 'qualitative actual experience and self-understanding within a society', the promotion of human rights may be better served in a particular case by accepting that the courts may not always consider they are best placed to make the assessment.

As is well known, proportionality analysis entails four sequential mandatory tests:

1. Is the objective of sufficiently high importance to warrant the infringement of right?
2. Does the law or action logically forward this objective?
3. Does it impinge on the right more than is necessary?
4. Does the benefit exceed the detriment?

Weinrib maintains that it is only in the last step (does the benefit exceed the detriment?) that there is any room for balancing.[67] I am not sure that the decisions in New Zealand and England are bearing this view out and indeed there is some concern that judicial 'balancing' in review in protection of human rights is diminishing those rights.

Weinrib is right, however, to say that proportionality methodology must be expounded in application.[68] It cannot be reduced to a text, but then, no more can reasonableness.

What is not clear yet in New Zealand and elsewhere is whether proportionality analysis will be reserved for human rights cases or whether it will be applied as the standard of substantive review, supplanting Wednesbury. If the varied intensity review that Cooke thought required when determining unreasonableness is used, it may not matter, although Paul Craig makes the case for proportionality as better methodology quite compellingly.[69]

Challenges ahead

Substantive fairness has featured in New Zealand decisions at least since 1979,[70] but has never been authoritatively established. Whether that position will be maintained in the face of gathering authority in favour of substantive fairness as a ground of review in the United Kingdom will no doubt arise for consideration before too long.

Linked to fairness in outcome is the question of rule-making and the extent to which a rule of law justification for judicial review may require processes to ensure equality of treatment. The balance between maintaining discretion to deal with individual cases and making sure benefits and detriments are not arbitrary has not been greatly explored but is the subject of increasing attention. There is no reference to 'equality before the law' in the New Zealand Bill of Rights Act. The White Paper which preceded it indicated that such expression was unnecessary because equality is part of the rule of law.[71] Formal equality in application of law is a general principle of justice and even application of law is a central plank in the culture of law-mindedness on which the rule of law depends. Justice Jackson in *Railway Express Agency Inc v New York*[72] struck a chord that resonates with most when he said:

> Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

That presents challenges for judicial review of discretionary decision-making. As Justice Douglas said in his concurring opinion in *Furman v Georgia*, discretionary powers are 'pregnant with discrimination' and therefore potentially damaging to the idea of equal protection of law.[73] This is an area in which the courts in the United Kingdom have been busy in the last few years. It is too soon to know how it will turn out.

In administrative law it is necessary to re-think what leeway can be left to the decisionmaker to whom parliament has delegated responsibility. What level of scrutiny ought the courts to undertake? Where are the standards applied to be obtained? In the Denbigh High School case the decision of the school to exclude a pupil for wearing a jilbab which did not meet the school's uniform code, was subjected in the English Court of Appeal to close scrutiny for procedure.[74] The Court of Appeal thought the process deficient and would have sent the case back for reconsideration. On appeal the House of Lords agreed with academic criticism that the Court of Appeal had failed to address the substantive outcome of the decision.[75] Indeed, Thomas Poole memorably suggested that the elaborate and costly process suggested by the Court of Appeal would have put the judge into the decision-maker's head rather than over its shoulder.[76] The House of Lords considered rather whether the actual decision violated rights. The conclusion is one arrived at on the facts, without development of any legal test for future cases and the facts stressed were broadly contextual. The assessment was not simply a value neutral supervision as to whether the board had addressed the right question and come to an answer open to it on the material available to it.

In cases concerning what Eskridge describes as 'culture wars',[77] there may be good sense in not imposing the value judgment of the court. These themes of relative institutional competence in the context of decisions about incommensurable values are explored by Sunstein,[78] Alder,[79] Alexy[80] and others. This deep water I do not enter. Mine is the more modest point that where the content of human rights in context turns on what Sunstein has referred to as the 'qualitative actual experience and self-understanding within a society',[81] the promotion

of human rights may be better served in a particular case by accepting that the courts may not always consider they are best placed to make the assessment.

Where as in a case like *R (Limbuela) v Secretary of State for the Home Department*[82] a fundamental human need is in issue and no judgment about incommensurable balancing values is called for, strict review for compliance with human rights is appropriately directly undertaken by the courts. In other cases the option of accepting well-justified conclusions of the agencies primarily responsible is properly available. The reasons they give will be key to the courts having confidence in a particular case to respect the decision under review. If they do not give convincing reasons, the courts will have to undertake close scrutiny. At the other end of the spectrum, the nature of the decision under review will raise issues of institutional competence which may require patent error in law or reasoning to justify intervention.

Endnotes

1. *Jesting Pilate* (2nd ed, 1996), pp 245-6.
2. US Department of Justice Office of Legal Counsel, 'Memorandum for Alberto R. Gonzales Counsel to the President' (Aug 1, 2002).
3. As he told the Senate Judiciary Committee.
4. 'The Inaugural Sir Maurice Byers Lecture, Strength and Perils: the Bar at the turn of the century' (Summer 2000/2001) *Bar News* 32, p 33.
5. See, for example, Taggart, 'Australian exceptionalism in judicial review (Tenth Annual Geoffrey Sawyer Lecture, Australian National University, 9 November 2007).
6. *Church of Scientology v Woodward* (1982) 154 CLR 25 at p 70 (HCA).
7. 'Singapore Academy of Law Annual Lecture 2007: Australia's Contribution to the Common Law', 20 *Singapore Academy of Law Journal* 1, p 25.
8. 'The Future of Judge Made Public Law in England' (1961) 61 *Columbia Law Review* 201.
9. ibid., p 207.
10. ibid., p 213. Fuller expresses this view in his article 'Positivism and Fidelity to Law – A Reply to Professor Hart' 71 *Harvard Law Review* 630, pp 637-8.
11. Above fn 8, p 213.
12. Characterised by Jim Cameron as 'legal cringe' in 'Legal Change over 50 Years' (1987) 3 *Canterbury Law Review* 198, p 198.
13. In Wade and Forsyth, *Administrative Law* (9th ed, 1994), p 16.
14. ibid, p 17.
15. Above fn 8, p 201.
16. ibid, p 220.
17. ibid, p 219.
18. See Chapter Three, p 55 onwards.
19. [1964] 1 AC 40 (HL).
20. In *Rex v Electricity Commissioners, ex parte London Electricity Joint Committee Co.* 1 Str 557 at p 567.
21. See Lord Reid in *Ridge v Baldwin* at pp 71-72.
22. *Padfield v Minister of Agriculture, Fisheries and Food* [1968] 1 AC 997 (HL).
23. *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL).
24. See Gleeson CJ, 'Outcome, Process and the Rule of Law [2006] 65 *Australian Journal of Public Administration* 5, p 12.
25. ibid.
26. *Administrative Law* (5th ed, 2003), p 562.
27. *The English Historical Constitution* (2007), p 191.
28. *Constitutional Justice: The Legal Foundations of British Constitutionalism* (2001), pp 17-20, 40-41. See also Law, Liberty and Justice, *The Legal Foundations of British Constitutionalism* (1993), pp 21, 44ff, 163ff.
29. See Allison, above fn 27, p 194.
30. 'What is wrong with top-down legal reasoning?' (Winter 2004) *Bar News* 10, p 13.
31. (2003) 211 CLR 476 (HCA).
32. 'Pluralism and distrust: How Courts Can support Democracy by Lowering the Stakes of Politics' (2000) 114 *Yale Law Journal* 1279, p 1298. This title echoes John Hart Ely's *Democracy and Distrust* (1980).
33. ibid.
34. See, for instance, 'From Deference to Democracy: the Role of Equality Under the Human Rights Act 1998' (2006) 122 *The Law Quarterly Review* 53.
35. (1954) 347 US 483.
36. *The Problem of Jurisprudence* (1990), p 307.
37. This is a result of the High Court's decision in *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656. Compare this to Canada where the Supreme Court in *Baker v Canada* [1999] 2 SCR 817 recognised a common law duty on administrative decision-makers to give reasons.
38. *Harkson v Lane* [1988] 1 SA 1 (CC).
39. 'Postwar Paradigm and American Exceptionalism' in Choudhry (ed), *The Migration of Constitutional Ideas* (2006) 84, p 96.
40. ibid.
41. (4th ed, 2004), p 104.
42. [1952] 1 KB 339. Wade's embarrassment based on the 'voidability' of such decisions was removed when the House of Lords in *R v Hull University Visitor (Ex parte Page)* [1993] 1 AC 682 treated all errors of law as presumptively going to jurisdiction.
43. In Wade and Forsyth, above fn 13, p 306. This passage was dropped from the current edition.
44. *R v Natbell Liquors Limited* [1922] 2 AC 128, 159 (HL).
45. 'The Struggle for Simplicity in Administrative Law' in Taggart (ed), *Judicial Review of Administrative Action* in the 1980s (1986) 1, pp 6-7.

46. ibid, p 7.
47. 'Better Days in Court', *The Traynor Reader* (1987) 83, p 90.
48. 'Singapore Academy of Law Annual Lecture 2007: Australia's Contribution to the Common Law', 20 *Singapore Academy of Law Journal* 1, p 24.
49. ibid, p 25.
50. Above fn 9.
51. ibid, p 5.
52. 'The Making of Australian Administrative Law' in Cane (ed), *Centenary Essays for the High Court of Australia* (2004) 314, p 332.
53. ibid.
54. ibid.
55. ibid.
56. 'Merits Review and Judicial Review' (2000) 28 *Federal Law Review* 213 at p 243.
57. *Griffith University v Tang* (2005) 221 CLR 99.
58. *NEAT Domestic Trading v AWB* (2003) 216 CLR 277.
59. 'Disposing of Dicey: From Legal Autonomy to Constitutional Discourse?' (2000) 48 *Political Studies* 356, p 357.
60. ibid.
61. See above fn 28 and 29.
62. 'Administrative Law (2006) *New Zealand Law Review* 75, p 83.
63. Above n 45, p 5.
64. In *Wednesbury Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229 (CA).
65. Above n 45, pp14-15.
66. As described in *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 at p131 by Lord Hoffmann and at p 130 by Lord Steyn (HL).
67. Above in 39, p 97.
68. ibid, p 98.
69. Above n 26, pp 628-632.
70. *Canterbury Pipe Lines Ltd v Christchurch Drainage Board* [1979] 2 NZLR 347 at p357 (CA) per Woodhouse and Cooke JJ. *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at p 149 per Cooke J.
71. A Bill of Rights for New Zealand (presented by the Minister of Justice, 1985), p 86.
72. (1949) 336 US 106 at p 113.
73. (1976) 408 US 238 at p 257.
74. *Regina (SB) v Governors of Denbigh High School* [2005] 1 WLR 3372.
75. [2007] 1 AC 100.
76. 'Of Headscarves and Heresies' (2005) *Public Law* 685, p 695.
77. Above n 32.
78. 'Incommensurability and Valuations in Law' (1994) 92 *Michigan Law Review* 779.
79. 'The Sublime and the Beautiful: Incommensurability and Human Rights' (2006) *Public Law* 697.
80. 'Balancing, Constitutional Review and Representations' (2005) 31 *International Journal of Constitutional Law* 572.
81. Above n 69, p 856.
82. [2006] 1 AC 396 (HL).

Verbatim

Spigelman CJ on the retirement of Mason P

'You are perfectly, indeed uniquely, placed to investigate and explain to us all how it has come to pass that Sydney has become a world centre, indeed one of the bastions of, both evangelical Anglican theology and evangelical equity scholarship. Is there a connection?'

Allsop P on his swearing in as President of the Court of Appeal

'I have received many letters of congratulations from my colleagues on the Federal Court. Only one of them began "Dear Rat".'