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Yao Dong
Dame Sian Elias
Rosie Fowler

Robert French AC
Emma Palmer
Stephen Eliot Smith



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Address for all other communications:

The Student Editor
New Zealand Journal of Public and International Law
Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington, New Zealand
e-mail nzjpil-editor@vuw.ac.nz
fax +64 4 463 6365

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JUDICIAL REVIEW AND CONSTITUTIONAL BALANCE

*Dame Sian Elias**

Dame Sian Elias has served as Chief Justice of New Zealand for nearly 20 years and presided over the Supreme Court from its establishment in 2004 until March 2019. In this address, given to the New Zealand Centre for Public Law in February 2019, she offers some reflections about judicial review and its role in maintaining constitutional balance.

I have always hated the end game in chess. The end game as Chief Justice is almost as tedious and it is time-consuming. So it was very foolish of me to be tempted into this address at such a time.

The topic I chose hastily when the flyer for the event had to be sent out is "Judicial Review and Constitutional Balance". It seemed to offer plenty of wriggle room. A subtext I do not develop is the place in our constitutional order of the High Court. The High Court is the superior Court of inherent jurisdiction which has the obligation of maintaining the rule of law. That requires it to pay close attention to power wherever it is found. The Court has the especial responsibility described by Lord Diplock to adapt its processes "to preserve the integrity of the rule of law despite changes in the social structure, methods of government and the extent to which the activities of private citizens are controlled by government authorities".¹ In any hierarchy such as the courts, it is easy to get rapture of the heights. It is the High Court that maintains constitutional balance. Its jurisdiction needs to be carefully conserved.

The rule of law obligations described by Lord Diplock were concerned with public power. Lord Diplock is generally credited with having "popularized" the term "public law" in its modern sense,² even though he himself acknowledged that "the appreciation of the distinction in substantive law

* Chief Justice of New Zealand.

1 *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL) at 639–640 per Lord Diplock.

2 Robin Cooke "The Road Ahead for the Common Law" (2004) 53 ICLQ 273 at 274. The term "public law" had been used earlier in reference to international law rather than municipal law: see for example the reference to "public law" in *The "Franciska" (Mechelsen)* (1855) 2 Spinks Ecc & Ad 113 at 142, 164 ER 337 at 354 (Admir). Prize law, although administered by domestic courts, applied the law of nations: see discussion in John W Salmond *Jurisprudence: Or the Theory of the Law* (7th ed, Sweet & Maxwell, London, 1924) at 101.

between what is private law and what is public law has itself been a latecomer to the English legal system".³ It may be a bit bold at a lecture hosted by the New Zealand Centre for Public Law to say so, but one of the points I want to make is that judicial review and the obligations of the courts to maintain the rule of law are not confined to supervision of the actions of government authorities. They are not concerned only with public power, although that is a common misconception.

The dispersal through privatisation of public power and the great powers now exercised by private bodies and individuals in an era of big data may make it important to reconnect judicial responsibility with the broader conception of the rule of law and what is constitutional. And judicial review itself is one only of the procedures available to the courts by which they supervise compliance with the rule of law.

I do not want to diminish the huge achievement in bringing government actions securely under the rule of law. It has been the major development in law in my professional lifetime. It is still surprising to me to recollect how little the project had advanced at the time I studied constitutional and administrative law with Dr Northey in 1967 under the then new and alarming case method.

Much of the development has arisen out of legislation such as the Official Information Act 1982 which promotes good government. The climate of openness and justification and the standards democratically identified in the New Zealand Bill of Rights Act 1990 have changed the culture and method of government. Discretion is now systematised by policy statements, manuals and other forms of "soft law" which protect against arbitrariness and provide fair processes. Checks are provided within government and by adjudicators who observe natural justice. Effective redress for administrative error for most does not entail access to a court with general supervisory jurisdiction. Such non-judicial systems to secure good government may well mean more space for reasonable differences in application in the supervisory jurisdiction.

But, despite this tremendous achievement in the development of administrative law, the need for the supervisory jurisdiction provided by the independent judicial authority in the state remains. And changes to government and the power of private actors may turn up new applications. If, for example, the lives of real people are increasingly affected by soft law, the supervisory jurisdiction must respond, in application of the obligation under the common law to follow power.

In addition, I wonder whether in the success of the development of administrative justice we may have lost an older sense of what is constitutional, and, therefore, the province of the supervisory jurisdiction, at least outside the area of human rights. We may have lost familiarity with common law principles and methods which could well need to be pressed into service again to meet the challenges of the future. I want to touch on some of these ideas, although tentatively, because these are not fully thought-out positions. But first, I have to start with some general points.

3 *O'Reilly v Mackman* [1983] 2 AC 237 (HL) at 277 per Lord Diplock.

I A DISCLAIMER ABOUT JUDICIAL IMPORTANCE

It should not be necessary to say that I do not put courts or judicial review or other judicial processes at the centre of the constitution or as the principal bulwark against abuse of power. I have, however, learned from experience that suspicion of judicial aggrandisement makes it sensible to make this point clear whenever talking about such matters. I do not count judicial check as other than "auxiliary" protection in a constitutional order that is working properly.⁴ And it is weak protection. But, although weak and although peripheral to much of what is done to fulfil the rule of law, it is essential safety net.

Judicial supervision is a function that is vulnerable if not valued. The vulnerability in a constitutional system such as ours comes in part from legislation excluding or managing the jurisdiction of the courts. And there has been a renewed enthusiasm for such legislation in recent years.⁵ More recent privative clauses as well as earlier exclusions, as in in employment matters and arbitrations, create asymmetry in the legal order that should be reconsidered.

But supervisory jurisdiction is vulnerable too to judicial loss of nerve.⁶ Cheryl Saunders, the distinguished Australian constitutional scholar, points out that the tension between the executive and the judiciary in a parliamentary system (in which, she says, Parliament is "sometimes an unwitting bystander") "account[s] for judicial self-restraint in all jurisdictions, whether or not described explicitly in terms of deference" and it "underpins" what she describes as "the tug-of-war over privative clauses, which is a recurring feature of common law public law".⁷ So, talking about the constitutional role of the judiciary in checking power has always seemed to me to be a good idea. Like other aspects of our opaque constitution, it needs to be understood and valued by all in our society if we are not to sleepwalk into its erosion.

II AN ADMISSION OF JUDICIAL FRAILTY

Another reservation I want to flag at the outset relates to some of the pitfalls in judicial exposition of constitutional fundamentals, particularly in a system like ours. Lacking a primary text, it is necessary to work hard at understanding and explaining what is a contested constitution.

4 See James Madison "The Federalist No 51" in Alexander Hamilton, James Madison and John Jay *The Federalist* (Christopher Bigsby (ed), JM Dent, London, 1992).

5 See Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, Lexis Nexis, Wellington, 2018) at [2.60].

6 In retrospect at least, national security, in cases like *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL), may be thought to provide an illustration, notwithstanding the principles expounded in that case.

7 Cheryl Saunders "Common Law Public Law: Some Comparative Reflections" in John Bell and others (eds) *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, Oxford, 2016) 353 at 355–356.

I am a believer in the value of common law methodology. It has great virtues in explaining the exercise of judicial authority in reasons which must convince or else they will not long endure. The common law, as its great exponents have always acknowledged, is a method of change.⁸ It is a form of institutionalised discourse or method of argumentation. Its arguments survive only until defeated by better ones, usually responding to different social conditions and developments in knowledge and insight.

The common law method then is intensely contextual. That makes those who long for certainty and who like the security of rules very nervous. But it is part of the strength of the common law. The virtue of public reasoning in court judgments is that it lays out all sides of a matter. At times, such public reasoning has slowed down significant controversies that might have been destructive of social harmony and allowed the political processes to catch up.

The common law, however, depends on methodology which is careful, incremental, and modest. If that methodology is not adhered to, there is trouble. In his wonderful Maccabbean Lecture, Lord Goff spoke of pitfalls for judges.⁹ Few judges manage to avoid them completely. I know I have succumbed occasionally. And perhaps they are pitfalls too for academics.

Although Lord Goff is too polite to say so, the pitfalls he identifies arise out of vanity. There is "the temptation of elegance", a judgment so beautifully expressed that it deflects critical clear-sightedness. There is "oversimplification", with its dangers of under-inclusion and failure to grasp the complexities and difficulties of a working legal order. There is "the fallacy of the instant, complete solution" which treats law as an expression of will and neglects the historical context and movement from which it cannot be divorced. And there is the "dogmatic fallacy" of being unable to see the principles for the rules.¹⁰ All these temptations, succumbed to, have at times caused confusion at least for a time in the application of the supervisory jurisdiction.

To this list of pitfalls I would add the temptation of overconcentration on the latest case, or the latest law review article. Principles do not often emerge clearly except by reading a lot of law. And restatements of leading authorities are rarely improvements in exposing the thinking that led to the innovation in the first place. Original thinking is usually the best springboard for fresh thinking as to whether authorities remain compelling in the constant reappraisal that is the method of the common law.

8 Benjamin N Cardozo *The Growth of the Law* (Yale University Press, New Haven, 1924).

9 Robert Goff "The Search for Principle" in William Swadling and Gareth Jones (eds) *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford University Press, Oxford, 2004) 313.

10 At 318–320.

III THE CONSTITUTION

With those general matters of background, I turn to the constitution within which power is exercised and supervised by the courts. It is the background within which judicial review operates. And because the constitution of any country is the product of its unique history and constitutional and legislative instruments and doctrines, the different constitutional background makes judicial review different in each jurisdiction, no matter how closely related. Although in New Zealand we have always been comfortable looking to comparative law for help, some special care is necessary in this area.

So, judicial review in New Zealand differs from that in the United Kingdom in being so far resistant to a strict division between public and private law which treats judicial review as concerned with public law only.¹¹ As I come on to discuss, the statutory procedures for judicial review since 1977 apply to incorporated societies and other bodies governed by a constitution, rules or bylaws.

Judicial review in New Zealand also differs from Australia significantly in the continued requirement of jurisdictional error. It is true that in recent decisions the High Court of Australia has expanded the categories of error that it treats as jurisdictional, so that our law may be converging again in this respect.¹² But the reasoning used in Australian decisions is tied closely to a stricter separation of the judicial power than is applied in New Zealand and is complicated by federalism. It is rather startling to have cited to us in New Zealand human rights cases decisions such as *Momcilovic v R*,¹³ which turn on considerations peculiar to the judicial power of the Commonwealth under the Australian Constitution and High Court doctrine.¹⁴

The Canadian constitutional background also makes it necessary to take care in applying Canadian decisions. The Charter of Rights and Freedoms¹⁵ and s 35 of the Constitution¹⁶ (dealing with the rights of the aboriginal peoples of Canada) are fundamental law. In addition, the courts in Canada have not shrugged off the complications of jurisdictional error and have developed elaborate standards

11 See for example the Judicature Amendment Act 1977's amendments to the Judicature Amendment Act 1972. See also *Peters v Davison* [1999] 2 NZLR 164 (CA) for a consciously New Zealand approach.

12 *Minister for Immigration and Citizenship v Li* [2013] HCA 18, (2013) 249 CLR 332.

13 *Momcilovic v R* [2011] HCA 34, (2011) 245 CLR 1.

14 A point I comment on in *Attorney-General v Taylor* [2018] NZSC 104 at [108]–[111].

15 Canadian Charter of Rights and Freedoms, pt 1 of the Constitution Act 1982, being sch B to the Canada Act 1982 (UK).

16 Constitution Act 1982, sch B to the Canada Act 1982 (UK), s 35.

of judicial review, which have been subjected to sudden adjustments and which are the subject of ongoing refinement.¹⁷

In New Zealand, we have taken a simpler path under the influence of those great public lawyers, Lord Cooke of Thorndon and Sir Kenneth Keith. Simplicity, however, remains a struggle and the allure of tests and rules is a strong one.

The old notion of the constitution was that it consisted of all the laws.¹⁸ We do not generally think of the constitution in that way today. Rather, even in a system uncontrolled by a primary text, the constitution consists of that which is fundamental to the legal order. And there is plenty of disagreement about what that is.

Maitland considered that the constitution of any country can only be understood from its general law and only as a snapshot at any particular time. He thought that "only those who know a good deal of English law are really entitled to have any opinion as to the limits of that part of the law which it is convenient to call constitutional".¹⁹ As he explains, there has been hardly any area of law which at one time or another has not been of constitutional importance. Land law in mediaeval times, criminal law in the struggles between the King and Parliament in the 17th century, the liability in tort of the servants of the Crown, and the grant of writs of habeas corpus (despite the return that detention is approved by the King) were the principal sites of constitutional contest long before the administrative state dominated legal issues of power.

On Maitland's view that a sense of what is constitutional turns on where the seat of constitutional contest is at any time, the constitutional is to be found in general law. Dicey was right. But Dicey also thought that enacted laws were not ranked according to importance, because of the dogma that allows the Dentists Act to trump the Act of Union if it conflicts.²⁰ That is hard to reconcile with reality. Even Dicey agreed that statutes were not equal in importance. And there are plenty of pointers in our law to suggest that they are not so regarded, including the legislative classification of ancient imperial statutes as "constitutional"²¹ and the classification of modern legislation as constitutional in the

17 See for example *Wilson v Atomic Energy of Canada Ltd* 2016 SCC 29, [2016] 1 SCR 770. See also the discussion in Sian Elias, Chief Justice of New Zealand "The Unity of Public Law?" (speech delivered at the second biennial Public Law Conference, Cambridge University, England, 13 September 2016).

18 Martin Loughlin *The Idea of Public Law* (Oxford University Press, Oxford, 2003) at 120.

19 Frederick Maitland *The Constitutional History of England* (Lawbook Exchange, Clark (NJ), 2007) at 526.

20 AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan, London, 1959) at 145.

21 Imperial Laws Application Act 1988, sch 1 "Constitutional enactments".

Cabinet Manual.²² The Supreme Court of the United Kingdom has attempted a classification of its own, to which it also added principles of the common law "fundamental to the rule of law".²³

Is Dicey right in the view that the Act of Union 1706 would be treated as repealed *pro tanto* if inconsistent in some respects with the Dentists Act 1878 because of the "fundamental dogma" of the "absolute legislative sovereignty of the King in Parliament"?²⁴ Many doubt it. Good sense should preclude the issue arising. But the approach taken by Laws LJ in *Thoburn v Sunderland City Council* is likely to receive close attention if it does.²⁵ A straw in the wind may be the decision of the United Kingdom Supreme Court in the *HS2* case.²⁶ In the case of collision between two important statutes, the Supreme Court was clearly reluctant to accept that s 9 of the Bill of Rights 1689 could be impliedly repealed even by a statute as significant as the European Communities Act 1972.²⁷

If some ancient statutes, themselves expressions of common law, are identified in modern legislation as "constitutional" and if the Cabinet Manual for more than 20 years has classified a number of modern statutes as "constitutional", is it so very revolutionary to think that some principles of the common law run so deep that they could not be discarded legitimately, as Sir Robin Cooke²⁸ and now the Supreme Court of the United Kingdom²⁹ have suggested? Sir Anthony Mason, the former Chief Justice of Australia, suggested that observance of democratic fundamentals would be in that category. Others would place judicial review in the classification of what is constitutional. That is

22 Cabinet Office *Cabinet Manual 2017* at 2.

23 *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324 [HS2] at [207].

24 Dicey, above n 20, at 145.

25 *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151.

26 *HS2*, above n 23.

27 Although it ultimately defined the clash away, the Court at [207] (Lord Neuberger and Lord Mance, with whom the other members of the Court expressed agreement) said:

The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list. The common law itself also recognises certain principles as fundamental to the rule of law. It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.

28 See *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398 per Cooke J: "Some common law rights presumably lie so deep that even Parliament could not override them."

29 *HS2*, above n 23.

why clauses that oust the review jurisdiction of the courts are treated with such deep reserve by the courts. And why s 27 of the New Zealand Bill of Rights Act 1990 recognises the right to seek judicial review of decisions affecting rights and interests as a human right which is "fundamental".

In 1980, Lord Diplock said that the British constitution was based on the separation of powers.³⁰ He was criticised for doing so at the time. It seems to me, however, that a requirement of a distinct judicial authority arises inevitably out of the conception of the rule of law. If law is to rule, judicial authority to say so is necessary. The judicial power of the state must be independent of the other branches. On this view, the supervisory jurisdiction of the High Court is constitutional bedrock.

IV JUDICIAL REVIEW

Judicial review is supervisory jurisdiction. With respect to government and public entities, it was described by Brennan J as "neither more nor less than the enforcement of the rule of law over executive action".³¹ It checks the boundaries of power conferred on others. It is not original decision-making. It does not usurp authority conferred upon others. It is a procedure by which in New Zealand the High Court, the Court of inherent jurisdiction, keeps those exercising power within the boundaries of their lawful authority and requires them to act fairly, for proper purpose and reasonably. Judicial review is available to challenge either the exercise of a statutory power or failure to exercise it.

Questions of jurisdiction account for a great part of judicial review (because those exercising power must have the power they purport to exercise and keep within it). And such cases usually turn on questions of statutory interpretation which are entirely familiar judicial territory. But the scope of judicial review is not confined to questions of jurisdiction. There is a spectrum in which the relative institutional competencies of courts and political decision-makers vary according to the nature of the question in issue.³² And the discretion to exercise judicial review follows assessment of where on the spectrum judicial competence is seen to fall. Lord Hailsham warned against the use of "rigid legal classifications" in exercising the supervisory jurisdiction.³³ 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".³⁴

Mark Aronson and Matthew Groves, echoing similar statements made in his time by Felix Frankfurter, say that "the scope and grounds of judicial review have a degree of indeterminacy whose

30 *Duport Steels Ltd v Sirs* [1980] 1 WLR 142 (HL) at 157.

31 *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 70.

32 *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 at [29] per Lord Bingham. See also *Burt v Governor-General* [1992] 3 NZLR 672 (CA).

33 *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182 (HL) at 190.

34 At 190.

resolution in individual cases cannot be achieved by reference to doctrine alone".³⁵ And, 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. 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 seems preferable to regard the basis of review as remaining constant but its application as contextual.³⁶

We have wide procedural provisions for obtaining review. They are now contained in the Judicial Review Procedure Act 2016. They apply to exercises or proposed exercises or failure to exercise statutory powers, expansively defined to include powers conferred under statutes or under "the constitution or other instrument of incorporation, rules, or bylaws of any body corporate".³⁷ A "statutory power of decision" is defined for the purposes of the Act as a power to make a decision affecting the rights, powers, privileges, immunities, duties or liabilities of any person or the eligibility to receive a benefit or licence under any Act or under "the constitution or other instrument of incorporation, rules or bylaws of any body corporate".³⁸

We also have a long history of judicially reviewing bodies which control important activities even if they are not statutory bodies. In *Electoral Commission v Cameron*,³⁹ the Court of Appeal granted a declaration in relation to a decision taken by the Advertising Standards Complaints Board, an unincorporated body set up to regulate advertising practice under the rules of a society which represented major industry participants in the advertising industry. In application of the approach taken in *R v Panel on Take-overs and Mergers, ex parte Datafin plc*,⁴⁰ the Court accepted the argument that the coercive effect derived from collective standard setting meant that the functions exercised were essentially public powers amenable to judicial review. But it thought "a more direct route available in New Zealand" was to be found in the provisions of the procedure for judicial review and the definition of statutory powers and statutory powers of decision exercised by bodies incorporated or not.⁴¹ Although the Court considered that a past decision could be dealt with by way

35 Mark Aronson and Matthew Groves *Judicial Review of Administrative Action* (5th ed, Thomson Reuters, Sydney, 2013) at [1.40].

36 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.

37 Judicial Review Procedure Act 2016, s 4 definition of "statutory power of decision".

38 Section 4.

39 *Electoral Commission v Cameron* [1997] 2 NZLR 421 (CA).

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

41 *Electoral Commission v Cameron*, above n 39, at 429.

of judicial review, the future decisions in prospect were met by the Court "by a declaration under the Declaratory Judgments Act 1908 without resort to judicial review".⁴²

V A LITTLE HISTORY OF ADMINISTRATIVE LAW

It still amazes me to remember how recent many of the foundational cases in administrative law are. When I studied administrative law in 1967, *Ridge v Baldwin* was only four years old.⁴³ Most of the seminal cases mentioned by Lord Diplock in *O'Reilly v Mackman* had yet to be decided.⁴⁴ Indeed, the great House of Lords case of *M v Home Office*, which finally brought the prerogative under the control of the courts in the United Kingdom, was not decided until 1993.⁴⁵

Before then, the prerogative of mercy had been judicially reviewed in New Zealand in *Burt v Governor General*.⁴⁶ Cooke P for the Court took the view that the mere fact that a decision has been made under the prerogative does not exempt it from judicial review, provided only the subject matter is one courts are competent to deal with. The Court of Appeal accepted that the exercise of the prerogative to ensure that elementary standards of fair procedure have been followed were appropriate for court review. It expressed the view that:⁴⁷

... it must be right to exclude any lingering thought that the prerogative of mercy is no more than an arbitrary monarchical right of grace and favour. As developed it has become an integral element in the criminal justice system, a constitutional safeguard against mistakes.

Although the Court concluded that the absence of a formal procedure had not been shown to be unfair in the particular case "at any rate at present", it sounded the warning that "it is inevitably the duty of the Court to extend the scope of common law review if justice so requires".⁴⁸

42 At 430. The Declaratory Judgments Act 1908 was home-grown legislation which expanded the use of declaratory judgments beyond the English rules of the time. See Brian Gould "Declaratory Judgments in New Zealand" (PhD Thesis, University of Auckland, 1962).

43 *Ridge v Baldwin* [1964] AC 40 (HL). Dr JF Northey was critical of *Ridge v Baldwin* in JF Northey "Certiorari Made More Certain" [1967] NZLJ 324.

44 *O'Reilly v Mackman*, above n 3.

45 *M v Home Office* [1994] 1 AC 377 (HL) was described by Sir William Wade as the most important constitutional law case in 200 years and by Sir Stephen Sedley as the "last prize" of the Civil War; see Stephen Sedley "The Royal Prerogative" in *Lions under the Throne: Essays on the History of English Public Law* (Cambridge University Press, Cambridge, 2015) 123 at 140.

46 *Burt v Governor-General*, above n 32.

47 At 681.

48 At 683.

The implication of the rather Delphic decision of *Anisminic Ltd v Foreign Compensation Commission*⁴⁹ was not realised in the United Kingdom until *O'Reilly v Mackman*,⁵⁰ although a new High Court judge in New Zealand had grasped its implications in 1973, in the first case I ever appeared in.⁵¹ Mine was an extremely nervous debut. I argued that in New Zealand we should apply *Anisminic* in the interpretation of an ouster clause to permit judicial review where there was an excess of jurisdiction, and that such excess of jurisdiction arose equally where the tribunal addressed the wrong question or failed to take into account a relevant consideration as in cases where "want of jurisdiction" arose in the narrow sense of lack of jurisdiction to enter into an inquiry.

Cooke J was overturned by the Court of Appeal in the result in *Car Haulways* (although not on the law).⁵² But he was in a position to restate the approach authoritatively for New Zealand in *Bulk Gas Users Group v Attorney-General*,⁵³ drawing on the decision of the House of Lords in *O'Reilly v Mackman*.⁵⁴ Earlier this year, in *H v Refugee and Protection Officer*,⁵⁵ the Supreme Court of New Zealand applied *Bulk Gas Users Group* in interpreting a privative clause in the Immigration Act 2009 as ineffective to oust judicial review for an error of law which had caused the statutory process provided for in the legislation to fail.

In *O'Reilly v Mackman*, Lord Diplock referred to the leading speech of Lord Reid in *Anisminic* as having:⁵⁶

... liberated English public law from the fetters that the courts had theretofore imposed upon themselves so far as determinations of inferior courts and statutory tribunals were concerned, by drawing 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.

49 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL). The Tribunals and Inquiries Act 1958 (UK) 6 & 7 Eliz II c 66 had repealed (by s 15) or rendered ineffective (by s 11) most of the privative clauses on the United Kingdom statute book with the exception of two (one of which was in issue in *Anisminic*).

50 *O'Reilly v Mackman*, above n 3. See *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, which completed the triumph of *Anisminic*.

51 *Car Haulways (NZ) Ltd v McCarthy & Attorney-General* SC Auckland A8/73, 8 August 1973 (Cooke J).

52 *Attorney-General v Car Haulways (NZ) Ltd* [1974] 2 NZLR 331 (CA).

53 *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA).

54 *O'Reilly v Mackman*, above n 3.

55 *H (SC 52/2018) v Refugee and Protection Officer* [2019] NZSC 13.

56 *O'Reilly v Mackman*, above n 3, at 278.

The breakthrough that the *Anisminic* case made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, i.e., one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported "determination", not being a "determination" within the meaning of the empowering legislation, was accordingly a nullity.

As Cooke J pointed out, the shift represented by *Anisminic* did not come out of a blue sky. It represented a decision in favour of one of two bodies of existing doctrine. Justice Scalia later expressed the view that "judges should not waste their time" on the "mental acrobatics" of jurisdiction.⁵⁷ And yet, jurisdiction exerts a strong pull. It attempts to explain the supervisory jurisdiction. As such it "expresses a conclusion that judicial intervention is appropriate".⁵⁸ The Canadian academic Harry Arthurs expressed the same view in describing "jurisdiction" as a "mediating" concept for judicial review.⁵⁹ That seems to be the way it is developing in Australia, with the expansion of the grounds for jurisdictional error.⁶⁰

In *Bulk Gas Users Group*, Cooke J said that if an authority applied a wrong test and so did not exercise their true powers, "the privative clause would not apply, because there would be a lack of jurisdiction in the sense recognised in *Anisminic*".⁶¹ In any event, Cooke J recognised that the privative clause did not purport to preclude proceedings for a declaration in advance of the decision.⁶²

It leaves intact the ordinary jurisdiction of the High Court in its discretion under the Declaratory Judgments Act 1908 and the Judicature Amendment Act 1972 to grant declarations as to, for instance, the interpretation of Acts or the validity of proposed exercises of statutory power. Those two Acts overlap, as s 7 of the latter recognises.

The jurisdiction remains supervisory. Its availability is discretionary. Its exercise is often declined as inappropriate where a statutory appeal provides adequate remedy.⁶³

⁵⁷ *City of Arlington, Texas v Federal Communications Commission* 569 US 290 (2013) at 301.

⁵⁸ Aronson and Groves, above n 35, at [1.140].

⁵⁹ HW Arthurs *"Without the Law": Administrative Justice and Legal Pluralism in Nineteenth Century England* (University of Toronto Press, Buffalo, 1985) at 208–209, as cited in Michael B 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.

⁶⁰ *Minister for Immigration and Citizenship v Li* [2013] HCA 18, (2013) 249 CLR 332.

⁶¹ *Bulk Gas Users Group v Attorney-General*, above n 53, at 135.

⁶² At 135.

⁶³ In *HS2*, above n 23, it was held (at [77]) that the appeal provided for did not overcome the deprivation of the first instance determination.

VI PUBLIC AND PRIVATE

I want to return to speak about the extent to which the supervisory jurisdiction in New Zealand is concerned with public law.

Cooke J distinguished the public/private divide adopted in *O'Reilly v Mackman* on the basis of the different procedures available under the then Judicature Amendment Act 1972 from those in England.⁶⁴ He also held that declaratory remedies in New Zealand for breach of natural justice continued to be available outside the procedure for judicial review.⁶⁵ But, indeed, the better course might simply have been to reject the distinction between public and private power for the purposes of judicial intervention as inconsistent with the history of the supervisory jurisdiction and the rule of law for reasons given by many academic commentators, starting with Sir William Wade.⁶⁶

Direct rejection would have pre-empted arguments that recent changes in some legislation to manage the process of judicial review⁶⁷ (which follow the leave and time limits adopted in the United Kingdom) destroy the basis on which *O'Reilly v Mackman* was distinguished. And the failure to say unmistakably that judicial review is concerned with law, not simply that law which is thought of as "public", might have avoided the view that seems to be developing in cases such as *Problem Gambling* and *New Zealand Maori Council v Foulkes* that some public law context is required for judicial review.⁶⁸

The public/private division may also have contributed to the very narrow grounds of review suggested in *Mercury Energy Ltd v Energy Corporation of New Zealand Ltd*,⁶⁹ albeit rather tentatively. In *Ririnui v Landcorp Farming Ltd*,⁷⁰ the majority reasons explain that none of the parties in that case sought to enlarge the categories for review of a commercial decision discussed in *Mercury*. The Court, therefore, proceeded on the assumption argued.

64 *Bulk Gas Users Group v Attorney-General*, above n 53, at 134.

65 At 135.

66 HWR Wade "Public Law, Private Law and Judicial Review" (1983) 99 LQR 166; and HWR Wade "Procedure and prerogative in public law" (1985) 101 LQR 180. See also Dawn Oliver *Common Values and the Public-Private Divide* (Butterworths, London, 1999); and 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. See also the discussion in Michael Taggart "'The Peculiarities of the English': Resisting the Public/Private Law Distinction" in Paul Craig and Richard Rawlings (eds) *Law and Administration in Europe: Essays in Honour of Carol Harlow* (Oxford University Press, Oxford, 2003) 107.

67 See for example Immigration Act 2009, s 249.

68 *Attorney-General v Problem Gambling Foundation of New Zealand* [2016] NZCA 609, [2017] 2 NZLR 470 [*Problem Gambling*]; and *New Zealand Maori Council v Foulkes* [2015] NZCA 552, [2016] 2 NZLR 337.

69 *Mercury Energy Ltd v Energy Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC).

70 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056.

Mercury Energy may be looking increasingly ragged following *Ririnui*. The approach in *Mercury Energy* may be contrasted with the approaches taken in Canada in *Shell Canada Products Ltd v City of Vancouver*,⁷¹ and in *Alberta v Elder Advocates of Alberta Society*,⁷² where it was accepted that liability may attach to public actors in equity if such liability is not inconsistent with statutory responsibilities. It may yet adapt to meet the common law doctrine of prime necessity, discussed by the New Zealand Court of Appeal in *Vector Ltd v Transpower New Zealand Ltd*.⁷³

The impossibility of a clear distinction between public and private law is seen in cases arising out of the liability of local authorities in negligence, including for non-feasance.⁷⁴ The abandonment of the distinction would provide a more satisfactory basis for cases such as *Finnigan v New Zealand Rugby Football Union Inc (No 3)*.⁷⁵ (Ted Thomas, senior counsel in *Finnigan*, to this day thinks the case was a private law one, while his junior always thought it was a public law case.) It would provide a more secure foundation for cases concerning native proprietary interests in Canada, Australia and New Zealand. In these cases, the Crown has been held to be a fiduciary in respect of dealings in the property of native proprietors in *Guerin v The Queen*⁷⁶ and the cases which have followed it in Canada, and in *Proprietors of Wakatu v Attorney-General* in New Zealand.⁷⁷ Binnie J for the Canadian Supreme Court has described the "multitude of relationships between the Crown and aboriginal people", which meant their interests:⁷⁸

... could not be put on the same footing as a government benefits program. The latter will generally give rise to public law remedies only. The former raises considerations "in the nature of a private law duty" ...

In *Wik Peoples v Queensland*, Brennan CJ, who dissented in the result on the basis of statutory interpretation, accepted that when discretionary power "whether statutory or not" is conferred for exercise on behalf of or for the benefit of others, fiduciary obligations may arise on established

71 *Shell Canada Products Ltd v City of Vancouver* [1994] 1 SCR 231.

72 *Alberta v Elder Advocates of Alberta Society* 2011 SCC 24, [2011] 2 SCR 261.

73 *Vector Ltd v Transpower New Zealand Ltd* [1999] 3 NZLR 646 (CA) at [51].

74 *Stovin v Wise* [1996] AC 923 (HL) at 938–939 per Lord Nicholls of Birkenhead dissenting. *Stovin v Wise* is discussed by the New Zealand Supreme Court in *Body Corporate 207624 v North Shore City Council (Spencer on Byron)* [2012] NZSC 83, [2013] 2 NZLR 297; *North Shore City Council v Attorney-General* [2012] NZSC 49, [2013] 3 NZLR 341; and *Couch v Attorney-General (No 1)* [2008] NZSC 45, [2008] 3 NZLR 725.

75 *Finnigan v New Zealand Rugby Football Union Inc (No 3)* [1985] 2 NZLR 190 (CA). See also *Nagle v Feilden* [1966] 2 QB 633 (CA); and *Datafin*, above n 40.

76 *Guerin v The Queen* [1984] 2 SCR 335.

77 *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423.

78 *Wewaykum Indian Band v Canada* 2002 SCC 79, [2002] 4 SCR 245 at [74].

equitable principle or by analogy.⁷⁹ It is not inconceivable, then, that the response of the legal order to the special claims of native populations may continue to require further consideration under principles of equity and common law.

A distinction between public law and private law is difficult to apply. Functions are rarely able to be classified as starkly, leading to suggestions in some recent cases of exceptions for public law "context".⁸⁰ But, indeed, all legal interests which depend on state enforcement may be said to be sound in public law. The labels "public" or "private" do not provide any principled distinction. And a distinction is not easily reconciled either with the form of our judicial review statutory procedures,⁸¹ or with the general procedures of the courts available to control power. In *Baigent's* case, Gault J suggested development of existing common law rights of action in tort might be more effective to provide remedies for breach of rights than "public law damages".⁸² There is still room for movement here.

Sir David Williams showed that administrative justice is not an island, but is connected to the mainland of the common law. More attention needs to be paid to these connections.⁸³ There is risk to both public law and private law if public law is seen as apart. Power and its abuse are familiar problems in law, not confined to public law. In *Ridge v Baldwin*,⁸⁴ Lord Reid drew on private law cases concerned with control of power.⁸⁵ Many of the principles applied in administrative law were developed in tort, contract, company law, labour law, criminal law, and equity. Modern administrative law, as Sir Anthony Mason has remarked, "has its roots in private law".⁸⁶ That is not to say that there is not value in considering the role of what is public power. All such power is necessarily limited because unfettered discretion in a constitutional order based on the rule of law is, as Sir William Wade

79 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 96 per Brennan CJ.

80 See for example *Problem Gambling*, above n 68, at [41]–[50].

81 Under the expansive scope of the Judicature Amendment Act 1972, post-1977.

82 *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA) at 718 per Gault J.

83 See generally David Williams "Criminal Law and Administrative Law: Problems of Procedure and Reasonableness" in Peter Smith (ed) *Criminal Law: Essays in Honour of JC Smith* (Butterworths, London, 1987) 170 .

84 *Ridge v Baldwin*, above n 43.

85 See the cases cited by Lord Reid in *Ridge v Baldwin*, above n 43, from 68–72, for example: *Fisher v Keane* (1878) 11 ChD 353 (Ch); and *Dawkins v Antrobus* (1879) 17 ChD 615 (CA). See also *R v Chancellor, Masters and Scholars of the University of Cambridge* (1723) 1 Stra 557, 93 ER 698 [*Dr Bentley's Case*]; and *Wood v Woad* (1874) LR 9 Ex 190.

86 Anthon Mason "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 LQR 238 at 238.

said, a contradiction in terms.⁸⁷ But so too is all power exercised over and on behalf of others in an incorporated society, in a company, in a club, or through contract where there is disparity in bargaining power or unconscionable dealing.⁸⁸ We should be open to these ideas.

A distinction between "self-regarding" and "other-regarding" capacity or power, might provide a more principled basis for judicial review.⁸⁹ "Other-regarding" powers must be exercised in the interests of others or in the wider public interest. Such approach is at least consistent with the overlap between equitable principles and those applied in judicial review. Even then, it may be advisable in a world increasingly conscious of interdependence and disadvantage as well as of the huge resources able to be mobilised by the state and some private actors, to leave room for development. I am thinking here of Mr Pickles, as Mike Taggart suggested we should,⁹⁰ and Jaws, of which Stephen Sedley warned in his Hamlyn lectures.⁹¹

Sir David Williams in his writing and McLachlin J in the Supreme Court of Canada have each recognised the reality that governmental power is of a quality that requires special attention. Sir David said:⁹²

... where big government moves there is no such thing as "ordinary powers", for those powers are exercised in a context of financial domination and control of information and access to political channels to which no natural person could aspire.

Those remarks were written by David Williams in 1984. It may perhaps not be as self-evident today that natural persons or commercial organisations cannot aspire to positions of equivalent dominance. It may be that we need to develop ideas of power which are less hitched to classification of the power as public or private, transcending the continuing problems of characterisation in the contracting state and recognising the realities of power exercised through contract.

In the meantime, where public bodies contract, the power they exercise must still be for proper purpose as was held by the Supreme Court of Canada in *Shell Canada*.⁹³ McLachlin J there rejected

87 HWR Wade and CF Forsyth *Administrative Law* (11th ed, Oxford University Press, Oxford, 2014) at 296.

88 See for example the discussion of prime necessity in *Vector Ltd v Transpower New Zealand Ltd* [1999] 3 NZLR 646 (CA).

89 Michael Taggart "The Province of Administrative Law Determined?" in Michael Taggart (ed) *The Province of Administrative Law* (Hart Publishing, Oxford, 1997) 1 at 5.

90 Michael Taggart *Private Property and Abuse of Rights in Victorian England: The Story of Edward Pickles and the Bradford Water Supply* (Oxford University Press, Oxford, 2002).

91 Stephen Sedley *Freedom, Law and Justice (The Hamlyn Lectures, 50th series)* (Sweet & Maxwell, London, 1999) at 38.

92 David Williams "Statute Law and Administrative Law" (1984) 5 Stat L Rev 157 at 168.

93 *Shell Canada Products Ltd v City of Vancouver*, above n 71, at 240–241 per McLachlin J.

the argument that Vancouver City was free to contract as if a private sector contractor in declining to deal with Shell while it did business with South Africa. McLachlin J took the view that the Council undertaking, under statutory powers which were limited, commercial and contractual activities with public funds and with wider consequences than for the parties to the contract, could not act as a private individual, but must exercise its contractual power in the public interest.

It is not clear that the same reasoning does not apply to the requirements of natural justice as well as to proper purpose. If so, some of the statements in the recent decision of the Court of Appeal in *Problem Gambling* may need to be treated with caution.⁹⁴

Judicial review does not entail the court substituting its judgment for that of the primary decision-maker, as long as there is scope for justified exercise of choice. But if a judge considers that only one reading of a statute is correct or if only one outcome is available to a decision-maker acting reasonably, then the judge must intervene.⁹⁵ And in exercising this constitutional function, the courts cannot defer to assertions of political authority, the public good or financial constraints.

VII CONCLUSION

Public law today occupies space that until comparatively recently was the province of constitutional law only. Until 1940, there was no such subject as "administrative law" taught in New Zealand law schools. The judges and the profession considered that there was "really no such special branch of the law" and that if distinct from general law, at most it was but an aspect of constitutional law.⁹⁶ Sir Michael Myers, as Chief Justice, eventually acquiesced in the inclusion in the curriculum for the LLB degree of what he said "the law professors are pleased to call 'administrative law'".⁹⁷

Two comments can be made about the extent to which we have moved on from this Diceyan complacency. First, it strikes me as ironic that the procedure of judicial review, which preceded the development of modern administrative law, seems today to be so closely associated with it that we have forgotten its older provenance and the extent to which it is available to ensure observance of law, including in relation to areas generally thought of today as private law. Secondly, subject only to some adjustment for the march of rights, administrative law seems largely to have eclipsed constitutional law. In a constitutional setting like ours, that means that there is a risk that in judicial review we start too often in the middle, instead of at the beginning with what is foundational in the legal order.

There may be signs of some repositioning. Although in 1960 Professor De Smith thought that constitutional law and administrative law occupied "distinct provinces" if also "a substantial area of

94 *Problem Gambling*, above n 68, at [34].

95 Louis Jaffe *Judicial Control of Administrative Action* (Little, Brown & Co, Boston, 1965) at 572, as cited in Michael Taggart "Outside Canadian Administrative Law" (1996) 46 UTLJ 649 at 651.

96 Michael Myers "The Law and the Administration" (1940) 2 NZ J Pub Admin 38 at 44.

97 At 44.

common ground",⁹⁸ the latest editions of his text have suggested more convergence as the emphasis on ultra vires as the foundation of judicial review has waned.

The supervisory jurisdiction may be best understood as constitutional review, which is observed by public and private actors alike if they have power to affect the rights or interests of others. Judicial review to ensure that such power is not abused does not weaken, but strengthens good administration and the rule of law.⁹⁹ Felix Frankfurter warned against "an undue quest for certainty" in relation to administrative law.¹⁰⁰ Sir David Williams suggested that, in the long term, the courts would help in the development of a more ordered legal system if they intervened "where intervention is constitutionally desirable".¹⁰¹ That approach does not lend itself to tests and bright lines. But if it encourages a better constitutional sense, Mr Pickles,¹⁰² and Jaws,¹⁰³ and all who exercise power over others, may yet join administrators and officials under the rule of law.

98 SA De Smith "The Lawyers and the Constitution: an Inaugural Lecture" (speech to the London School of Economics and Political Science, London, 1960), as cited in Taggart, above n 89, at 1.

99 KC Davis "The Future of Judge Made Public Law in England" (1961) 61 Colum L Rev 201.

100 Felix Frankfurter "The Task of Administrative Law" (1926) 75 U Pa L Rev 614 at 619.

101 Williams, above n 83, at 171.

102 Taggart, above n 90.

103 Sedley, above n 91, at 38.