

NATURAL JUSTICE: IS THERE TOO MUCH, TOO LITTLE OR JUST THE RIGHT AMOUNT?

*Justice John Basten QC**

Justin Cartwright's recent book, *The Song before it is Sung* is a fictional account of the relationship between Isaiah Berlin and a German nationalist, and attempted assassin of Hitler, Adam von Trott. The author's literary device is that the fictional Berlin bequeaths to a protégé, the protagonist of the story, all his files of correspondence. The story is the life-consuming struggle of the protégé to make something of the legacy.

I felt a little as Berlin's protégé did, as I confronted today's topic. A plea for more particularity was rejected unequivocally by an enigmatic Robin Creyke: clearly she wanted me to do some thinking.

Because the question is clearly unanswerable without criteria, the first step must be to identify the standard against which the current obligations in relation to natural justice must be judged.

I would invite you to consider the issues, obliquely, from two perspectives. First, if you read anything of the contending writings about the desirability of a bill of rights for Australia, you will know that a principal argument of the nay-sayers is that it will tilt the balance of power away from the elected representatives of the people, who make the law, in favour of appointed judges, whose primary function is (or should be) to apply the law; to mould, perhaps, but not create the law.

The cause of that anticipated shift lies in the imprecision of the standards inevitably adopted in bills of rights. Broad discretionary powers invite creative lawyering and judicial activism. Because the legislature is subject to constitutional constraints diminishes the authority of the legislature. I need not rehearse the usual responses, but two should be briefly noted. One is that if human rights principles contained in international instruments, which attract almost universal support from democratic states, are to be meaningful, we should accept the constraints they impose on our legislature,. A second response is that a grundnorm of parliamentary democracy is the 'rule of law'. When Blackburn J said of Yolngu law in *Milirrpum v Nabalco Pty Ltd*¹:

If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me.

He was seeking to articulate the deepest level at which Yolngu society conformed to our notions of the rule of law. But inherent in the principle that the executive arm of government, the officers and agents of the government, are bound by the law they administer are some basic principles of 'due process'.

* NSW Supreme Court. This paper was presented at the 2007 AIAL National Administrative Law Forum.

Powers are conferred for a purpose and must be used to effectuate that purpose. The laws are to be applied appropriately and fairly, not arbitrarily, unreasonably, corruptly or capriciously. In the context of a criminal prosecution Deane J once remarked in *Jago v District Court (NSW)*²:

The general notion of fairness which has inspired much of the traditional criminal law of this country defies analytical definition. Nor is it possible to catalogue in the abstract the occurrences outside or within the actual trial which will or may affect the overall trial to an extent that it can no longer properly be regarded as a fair one. Putting to one side cases of actual or ostensible bias, the identification of what does and what does not remove the quality of fairness from an overall trial must proceed on a case by case basis and involve an undesirably, but unavoidably, large content of essentially intuitive judgment.

You will see my point: basic elements of the rule of law, which underlies our polity reflect the concept of 'due process of law', to use the language of section I of the 14th Amendment to the US Constitution, which is reflected in Art 14 of the International Covenant on Civil and Political Rights. The courts already apply these principles. To an extent they are constitutionally entrenched by Chapter III of the Constitution and particularly s 75(v): Plaintiff S157/2002 v The Commonwealth³. Even where they are not, attempts by legislators to oust judicial review by use of jurisdictional facts based on an opinion, privative clauses, and exhaustive codes of procedure tend not to be given the scope and effect their drafters intended. And these are concepts of indeterminate application and involve imprecise standards. Concepts of rationality and fairness are by no means the exclusive concern of the legally trained: nevertheless judges apply them and hence define their proper scope of operation. In so doing, the courts have the power, in a very real sense, to chart the boundaries of their own powers.

That brings me to the second perspective I would invite you to consider. We have all read – some of us probably know by rote – the canonical description of the role of judicial review expressed by Brennan J in *Quin v NSW*⁴. I will repeat it:

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

I raise it, not to state the obvious, nor to doubt its truth, but rather because we need to bear in mind its justification. It is true because it reflects the doctrine of separation of powers, which forms part of the rule of law. We have been told that the separation of powers is entrenched in our Commonwealth Constitution, but does not operate to invalidate a law at the state level: *Clyne v East*⁵; *Building Construction Employees and Builders' Labourers Federation (NSW) v Minister for Industrial Relations*⁶. However, those cases uphold the legislative supremacy of the Parliament; they do not address limitations on judicial power arising from the doctrine. To apply more generally the dictum that there is no separation of powers at the State level would be to remove the constraints which have always been fundamental to the limited scope of judicial review. The separation of powers doctrine is not only fundamental to judicial independence; it is also fundamental to limiting the proper role of the courts. The courts should not legislate, nor administer the laws, except to the extent necessary to control excesses of power, or failures to use powers properly.

It follows, I think, that (at least in the context of administrative law) if someone says there is 'too much natural justice' they mean that the courts, by way of judicial review, have overstepped the proper limits of their powers, by manipulating the imprecise concepts such as 'fairness' and 'reasonableness' to impose on officers of the executive standards of behaviour which were not mandated by the laws, properly understood.

Such a statement is itself imprecise: it is not an allegation of rule-breaking nor (usually) impropriety; rather it is saying that the existing adjustment of the tension between the three arms of government is inappropriate. The charge so understood is as hard to substantiate as it is to dismiss. Despite that, it should always be taken seriously, for two main reasons. The first is that we are all inclined to arrogate power to ourselves, if we can properly do so. Nor is that always bad: we do not wish to be ruled by officials like the mythical subordinate who, when asked by his superior, critically, 'Are you ignorant or just apathetic?', replied 'I don't know and I don't care'.

Secondly, responsible judicial officers are not necessarily power hungry, but they may exercise power to achieve justice between the parties, as it appears to them. It is understood that judicial review achieves administrative justice only incidentally, but it takes a disciplined mind to resist the natural inclination to achieve justice for the individual litigant. In judicial review cases, we see an individual pitted against the organisational authority of the government. Some judges instinctively seek to uphold government authority, from which their own positions derive. Others may feel more strongly attracted to the appearance of injustice suffered by the individual. To maintain a remorseless focus on legalities is not always easy.

But there is a more fundamental problem which underlies the question. From the point of view of a judicial officer, the task can be unduly challenging. In effect, the laws tend to give very little guidance in answering specific questions. Generally speaking, a statute (and we are almost always dealing with statutory powers) confers a power in terms which operate at a high level of generality. The court is required to assess the legality of the exercise at a level of particularity. The circumstances of its exercise may vary greatly and the legislature is, perhaps understandably, often silent as to mandatory procedures: what is appropriate in one situation may not be in another. But who is to judge – the repository of the power, as it is exercised, or the court after the event? It is common for the availability of a power to be conditional on an officer's satisfaction as to relevant circumstances; it is less usual to find a provision stating that the necessary procedural steps are those thought fair and reasonable by the officer in the circumstances.

Opinions can be reviewed for error, but we know that the scope of the available grounds is constrained: *R v Connell*; *Ex parte Hetton Bellbird Collieries Ltd*⁷; *Buck v Bavone*⁸; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*⁹. But when it comes to procedural fairness, the procedures adopted are assessed objectively by the court. The fact that a decision-maker did not invite the affected party to comment on particular material, is assessed by asking whether the material was adverse to the interests of the applicant and should therefore have been put to the applicant for comment: *Kioa v West*¹⁰, *Minister for Immigration and Multicultural Affairs; Ex parte Miah*¹¹.

The 'satisfaction' criterion has the effect of converting the criterion of engagement of power from an objective fact to the officer's assessment thereof: as Gummow J put it in *Minister for Immigration and Multicultural Affairs v Eshetu*¹², a properly formed opinion becomes the relevant jurisdictional fact. This approach is assumed in relation to an exercise of judicial power: *Parisiene Basket Shoes Pty Ltd v Whyte*¹³; *Timbarra Protection Coalition Inc v Ross Mining NL*¹⁴. The alternative view would, as Dixon J noted, be so inconvenient as to the unlikely to have been intended. But it is at least arguable that a similar approach could be adopted in relation to administrative procedures. In relation to tribunals, standard provisions state:

For the purposes of any inquiry, the Tribunal –

- (a) shall not be bound by the rules of evidence and may inform itself of any matter it thinks fit;
- (b) shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms; and

- (c) may give directions relating to procedure that, in its opinion, will enable costs or delay to be reduced and will help to achieve a prompt hearing of the matters at issue between the parties

These have been treated as freeing the tribunal of any legal obligation to apply the rules of evidence: *Qantas Airways Ltd v Gubbins*¹⁵ (Gleeson CJ and Handley JA). Might they not be read as a 'satisfaction' clause, governing procedures? And if that were correct in relation to tribunals, might not a similar approach be adopted in relation to decision-makers who are not, either by their office, or by the nature of the power or other aspects of the statutory context, compelled to follow particular procedures? In other words, absent an indication to the contrary, and although it should be assumed that a decision-maker must accord procedural fairness, his or her own view of what is procedurally fair in particular circumstances should be treated as sufficient, unless it can be shown that the failure to take a particular step was reviewable in accordance with principles established in *Buck v Bavone*.

There are objections to this approach. First, it will be very difficult, especially in cases where no procedures are specified, to know whether the decision-maker even gave attention to something of which all we know is that it did not happen. The practical effect of that approach may be to remove any basis for a challenge based on lack of procedural fairness in many cases. Because reasons are not available in relation to procedural steps, the affected party will need to rely on inferences drawn from the known facts, as in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*¹⁶. In effect, the 'satisfaction' test bears similarities to the 'deference' doctrine to administrative decision-making, adopted in North America, although this is not the place to analyse the differences: *Chevron USA Inc v Natural Resources Defense Council Inc* 467 US 837 (1984), discussed in *Corporation of the City of Enfield v Development Assessment Commission*¹⁷.

Consequences not prescribed

The previous discussion related to the difficulty in identifying mandatory procedural requirements, where the legislature is silent. The second area of difficulty is where standards are prescribed, or may be implied, but the consequences of breach are not. The question is whether breach carries automatically the invalidity of the exercise of power, some other consequence, or no consequence at all.

Generally, the consequence of procedural unfairness is invalidity, and relief will usually follow: *Re Refugee Review Tribunal; Ex parte Aala*¹⁸. The same consequence is likely to follow for other forms of judicial error: the label reflects the consequence. Sometimes, as we know, the legislature seeks to avoid that result by removing the power to grant relief – by use of a privative clause. Such clauses have always caused difficulties because the statute must be seen to impose a mandatory requirement (were it not mandatory relief would not lie for breach) and to deny the availability of a remedy for breach. In some cases the High Court has described the result as an expansion of the valid operation of the power: *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*¹⁹.

In other cases, the Court has focussed on the process by which a result is achieved, namely the reconciliation, by an exercise in construction, of two apparently irreconcilable provisions: *Plaintiff S157*. In *R v Hickman; Ex parte Fox and Clinton*²⁰ Dixon J identified either the process (or the result – views have differed) as removing all constraints on the exercise of the power, except the need for the repository to make a decision which is 'a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body': p 615. That language, though expressed in positive, rather than negative, terms is not dissimilar to that found in the judgment of Latham CJ in *Hetton Bellbird*. In other words, a privative clause may be a means of saying that it is for the decision-maker to be satisfied that the pre-conditions to the exercise of power exist.

At an intellectual level that result is reasonably satisfying. The decision-maker has not been freed from legal constraints, but has been invested with powers, subject to conditional constraints, to determine what in the circumstances, is sufficient to satisfy the obligation to act fairly and when those steps have been taken. If the officer appears to have acted capriciously or grossly unfairly, it may be inferred that the correct test was not understood, not applied, or not applied in good faith.

The privative clause is an awkward, counter-intuitive way of achieving that result. If the legislature wishes to achieve such a result it should do so more directly, in the interests of transparency and greater certainty.

But there will remain cases, the norm rather than the exception, where the legislature will not seek to identify the consequences of procedural breaches. There are two reasons for this. One is that administrative procedural requirements are rarely specified or if specified, not comprehensively. Secondly, as already noted, statutes tend to speak at a level of generality, whereas the effect of a breach must be evaluated at the level of the particular. That is not to say that trivial breaches of procedural fairness will not invalidate a decision, but that serious breaches of procedural fairness will: see *Ex parte Aala* ²¹(Gaudron and Gummow JJ) and Aronson, Dyer and Groves, *Judicial Review of Administrative Action*²². On the other hand, what procedural fairness requires in a particular case may not be the same as that which a generally applicable statutory procedure provides.

Whether rules of procedural fairness derive from the general law or by implication from a particular statutory scheme, it is clear that in most cases the scope and content of procedural fairness will turn on the effect of a statute. It follows that the question for discussion can only be answered by reference to trends or tendencies. Further, one would wish to deal discretely with different categories both of legal requirements and areas of operation.

In relation to the former, natural justice can be divided, for example, into procedural fairness, disinterest and the decision process. In each case courts undertaking judicial review are likely to have a subconscious tendency to adopt standards which are close to those under which they operate. The High Court has warned against this tendency more than once: see *Minister for Immigration and Multicultural Affairs v Jia Legeng*²³ and *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*²⁴. Nevertheless, judgments tend to be replete with references to 'evidence', 'onus of proof' and other trappings of the judicial process: such language may not reveal error, but one could be more confident that judicial decision-making is not being used as the paradigm if such terminology were eschewed.

In relation to areas of operation, much restatement of the law has derived from the migration decision-makers. The modern jurisprudence commenced, on one view, with the departure, in *Kioa v West*²⁵, from *Salemi v Mackellar (No. 2)*²⁶ and *The Queen v Mackellar; Ex parte Ratu*²⁷. An earlier generation of cases arose in the industrial arena: see, eg, *Hickman, Hetton Bellbird*. Thus, attention has focused on tribunals and decision-makers who act on submissions (with or without a hearing) in matters initiated by an individual seeking a benefit. Far fewer cases deal with natural justice in relation to other forms of decision-making: cf *National Companies and Securities Commission v News Corporation Ltd*²⁸. And when such cases do arise, often they are seen as turning on statutory construction, with little attention to principles of natural justice. In the other class, there is a continuing reluctance to accord proper emphasis to statutory context in addressing the engagement of natural justice principles and their content.

This raises issues which cannot be addressed today, but I would like to finish with a question. One finds too many statements that interference with rights or interests (leaving aside legitimate expectations) engages natural justice provisions to be allowed to suggest

otherwise. The issue is thus usually posed as going to the 'content' of the requirements and a debate as to whether these can diminish in particular circumstances to zero. However, this discussion is often unhelpful: what needs to be decided is whether a particular regime admits of a particular requirement, for example to give notice of intention to act, and an opportunity to respond. Sometimes even that element is missing, as with the power to arrest or issue a search warrant, although, of course, statutory preconditions must be exercised for a proper purpose.

More intriguingly, the content of procedural fairness with respect to a single power may vary with circumstances. Thus an element of urgency may diminish procedural requirements. This factor renders the life of the official uncertain, especially if required (without legal training) to second-guess what attitude a court will later take, with all the benefits of hindsight and time for analysis after full argument from lawyers. Of course, the difficulties can be addressed by appropriate guidelines and policies for the official. But guidelines will be ignored by the court if thought not to be consistent with the law.

To conclude, I do not know if we have the balance right, because there are many distinct operations to be balanced. Are there tendencies revealed by the case-law which can be assessed? Even that I find hard to judge. But what is clearly important is for judges to have in the forefront of their minds the need to assess decisions according to the administrative context and not against a paradigm drawn from the exercise of judicial power. Secondly, they must be conscious of the constitutional principles which both justify and constrain judicial review.

Endnotes

- 1 (1970) 17 FLR 141 at 267
- 2 (1989) 168 CLR 23 at 56-57
- 3 (2003) 211 CLR 476
- 4 (1990) 170 CLR 1
- 5 (1967) 68 SR(NSW) 385
- 6 (1986) 7 NSWLR 372.
- 7 (1944) 69 CLR 407 at 430 and 432
- 8 (1976) 135 CLR 110 at 118-119
- 9 (1996) 185 CLR 259 at 274-276
- 10 (1985) 159 CLR 550
- 11 (2001) 206 CLR 57
- 12 (1999) 197 CLR 611 at [130
- 13 (1938) 59 CLR 369
- 14 (1999) 46 NSWLR 55
- 15 (1992) 28 NSWLR 26, 29-30
- 16 (1971) 124 CLR 97
- 17 (2000) 199 CLR 135 at [39]-[48].
- 18 (2000) 204 CLR 82
- 19 (1995) 183 CLR 168
- 20 (1945) 70 CLR 598
- 21 204 CLR 82 at [59]-[60]
- 22 (3rd ed, 2004) p 457-46
- 23 (2001) 205 CLR 507
- 24 (2005) 79 ALJR 1009
- 25 (1985) 159 CLR 550
- 26 (1977) 137 CLR 396
- 27 (1977) 137 CLR 461
- 28 (1984) 156 CLR 296