

STATUTORY INTERPRETATION AND RATIONALITY IN ADMINISTRATIVE LAW: NATIONAL LECTURE ON ADMINISTRATIVE LAW 2015

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800 years have passed since King John met with the Barons at Runnymede to seal a document which has become a part of a constitutional creation myth — the Magna Carta. The promises made in that document by King John, and repudiated within a matter of weeks with Papal authority procured by the King, were progenitors of the rule of law, described by one leading American constitutional law scholar as 'a celebrated historic ideal, the precise meaning of which may be less clear today than ever before.'¹

The term 'rule of law' seems to have made its first public appearance as the title to Pt II of Dicey's treatise — *Introduction to the Study of the Law of the Constitution*. His concept involved three propositions, the first of which required that no man could be punished or made to suffer in body or goods except by a distinct breach of the law established by ordinary legal means before the ordinary courts of the land. That requirement was contrasted with systems of government based upon the exercise of wide arbitrary discretionary powers. The second proposition required the law and the jurisdiction of the ordinary courts to apply to every person. The third proposition located the rule of law in the decisions of the courts.² His was a view of the rule of law whose principal attributes were described by Professor Jeffrey Jowell as 'certainty and formal rationality'.³ The idea of rationality informed by statutory purpose and meaning as interpreted by courts, as at least a partially unifying concept in administrative law, is the topic of this lecture. In its ordinary meaning one can say of it, as the plurality said of the legal standard of reasonableness in *Minister for Immigration and Citizenship v Li*,⁴ it 'must be the standard indicated by the true construction of the statute.'

I use the term 'partially unifying' conscious of the risks attendant upon the construction of all-encompassing theories or expositions of any area of the law and, in particular, administrative law. While clarity and simplicity in discussion is a desirable objective, it should not obscure the sometimes unresolved untidiness of legal history and the coral reef incrementalism of the common law.

The disclaimer having been entered, I think it useful to talk about rationality in a general way in relation to the exercise of statutory powers. It is closely related to the idea of the rule of law in its application to constraints on official power. That leads me to make some observations about the place of judicial review in that context.

The rule of law was defined for the United Kingdom in the 11th edition of Wade and Forsythe as the foundation of the British constitution with 'administrative law [as] the area of its most active operation'.⁵ The primary meaning given to it in that text is 'that everything must be done according to law'. That is:

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Every act of governmental power, ie every act which affects the legal rights, duties or liabilities of any person, must be shown to have a strictly legal pedigree.⁶

Because that proposition, left to itself, would accommodate unrestricted discretionary powers, a secondary meaning is proposed namely, that government should be conducted within a framework of recognised rules and principles which restrict discretionary power. Those rules and principles direct attention to statutory interpretation. They are described in Wade and Forsyth as rules which invoke 'parliamentary intention' to construe wide statutory discretions. The courts, according to the authors, 'have performed many notable exploits, reading between the lines of the statutes and developing general doctrines for keeping executive power within proper guidelines, both as to substance and as to procedure'.⁷

The account thus given of the rule of law in administrative law is given for a country without a written constitution which limits legislative power and entrenches judicial review. The premise for its operation is the continuing availability of judicial review which can constrain executive power by the way in which statutes conferring that power are interpreted, including by the limiting implications of procedural fairness.

It is in the process of judicial review that the principle of legality productive of common law freedoms and fundamental human rights is applied. That term, somewhat maligned for its generality, designates an approach by the courts to the interpretation of statutes so as to avoid or minimise their infringement of common law freedoms and fundamental principles of human rights. It is reflected in Lord Hoffmann's statement, sometimes called 'canonical', that:

Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.⁸

Mark Aronson and Matthew Groves, in the fifth edition of their valuable textbook on *Judicial Review of Administrative Action*, characterise the principle as having two components. The first is the assumption that parliament knows that the powers it grants will be interpreted wherever possible in conformity with fundamental rule of law values. The second is the rationalisation of that interpretive stance as a positive reinforcement of the democratic process whereby the courts force governments to make their intentions plain when introducing Bills into the Parliament which are designed to override those values.⁹ There is an argument that the principle may be informed by fundamental human rights and freedoms declared in International Conventions to which Australia is a party. In that application it may converge upon the interpretive principle favouring constructional choices compatible with international obligations in place at the time of the enactment of the relevant statute. Moreover, if it can be said of a fundamental human right or freedom that it has become part of customary international law, then it may arguably inform the development of the common law, including the principle of legality.

The premise of the availability of judicial review is subject, in the United Kingdom, to the sovereignty of parliament which has been described as 'an ever-present threat to the position of the courts; [which] naturally inclines the judges towards caution in their attitude to the executive, since Parliament is effectively under the executive's control'.¹⁰

Both the United Kingdom and New Zealand can be regarded, for Australian purposes, as thought experiments in which judicial supervision of the legality of executive action is not anchored by a written constitution entrenching judicial review. In New Zealand, s 15(1) of the *Constitution Act 1986* (NZ) provides that the Parliament of New Zealand continues to

have full power to make laws. There is no express limit on that power nor entrenchment of judicial review. Its entrenchment in the Australian setting has been established at Commonwealth and State levels by judicial interpretation of the Commonwealth Constitution and implications flowing from it.

In both the United Kingdom and New Zealand there have from time to time been suggestions of a common law constraint upon the powers of the parliament to unseat deep-seated common law doctrines and, in particular, a constraint on power to dispense with judicial review of administrative action. In 1979, Sir Owen Woodhouse, President of the Court of Appeal of New Zealand, speaking extra-judicially, stated that 'there really are limits of constitutional principle beyond which the Legislature may not go and which do inhibit its scope.'¹¹ In the 1980s, his successor Sir Robin Cooke, adverted to the possibility of such constraining principles in three cases.¹² He said:

we have reservations as to the extent to which in New Zealand even an Act of Parliament can take away the rights of citizens to resort to the ordinary Courts of law for the determination of their rights.¹³

Baragwanath J, a decade later in 1996, quoted from that passage but added:

constitutional peace and good order are better maintained by adherence to conventions rather than judicial decisions.¹⁴

In the United Kingdom in 1995, Lord Woolf, writing extra-curially, identified two principles upon which the rule of law depended:

- the supremacy of parliament in its legislative capacity;
- the functions of the courts as final arbiters in the interpretation and application of the law.

Lord Woolf acknowledged that legislation could confer or modify statutory jurisdictions and control how courts exercised their jurisdiction. He drew a line at legislation which would undermine, in a fundamental way, the rule of law upon which the unwritten constitution depended, for example, by removing or substantially impairing the judicial review jurisdiction of the court, a jurisdiction which he described as 'in its origin ... as ancient as the common law, [predating] our present form of parliamentary democracy and the Bill of Rights'.¹⁵

In 2006, those sentiments were echoed in three of the judgments in the House of Lords in its decision in *Jackson v Attorney General* upholding the legislative ban on fox hunting. Baroness Hale observed that:

The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny ... In general, however, the constraints upon what Parliament can do are political and diplomatic rather than constitutional.¹⁶

Most recently in *AXA General Insurance Ltd v HM Advocate*¹⁷, Lord Hope referred to the possibility that an executive government enjoying a large majority in the Scottish Parliament, dominating the only Chamber in that Parliament, might seek to use its power to abolish judicial review or diminish the role of the courts in protecting the interests of the individual. He said:

Whether this is likely to happen is not the point. It is enough that it might conceivably do so. The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.¹⁸

There has, of course, been pushback against the proposition by those who see parliamentary sovereignty in the United Kingdom and New Zealand as relevantly unqualified. Lord Bingham in his book on the *Rule of Law* was one of them and quoted the Australian scholar, Professor Jeffrey Goldsworthy, in support of his views. Other leading scholars have divided on the question. Professor Jeffrey Jowell has realistically observed that it would take some time, provocative legislation and considerable judicial courage for the Supreme Court of the United Kingdom to concretely assert the primacy of the rule of law over parliamentary sovereignty.¹⁹

What is striking about the various statements suggesting the existence of some deep-seated common law constraints in the United Kingdom and New Zealand is a core concern about the location of the responsibility to authoritatively interpret statutes conferring powers on the executive. Absent judicial review of such powers, the executive becomes the interpreter of the legality of its own actions and thus for all practical purposes, the legislator — evoking Montesquieu's nightmare of tyranny.

In the United Kingdom and New Zealand those questions are questions about common law constitutionalism. They were touched on by Sir Owen Dixon in 1957 in his well-known paper to the Australian Legal Convention under the title 'The Common Law as an Ultimate Constitutional Foundation'.²⁰ He spoke of the common law as 'a jurisprudence antecedently existing into which our system came and in which it operates'.²¹ He described it as the source of the supremacy of the Parliament at Westminster manifested in the proposition that an English court could not question the validity of a statute. He quoted Salmond's answer to the question 'Whence comes the rule that acts of parliament have the force of law?' The answer was '[i]t is the law because it is the law and for no other reason that it is possible for the law to take notice of'.²²

On the way in which common law rules are applied, which are protective of common law principles, Sir Owen asked the rhetorical question:

Would it be within the capacity of a parliamentary draftsman to frame, for example, a provision replacing a deep-rooted legal doctrine with a new one?²³

The question was a little delphic. It was not entirely clear whether Sir Owen was raising a matter of fundamental principle about 'deep-rooted legal doctrines' or addressing the practical difficulty of drafting a statute to displace such principles.

In comments following Sir Owen's paper, Lord Morton of Henryton in effect challenged the correctness of his observation about deep-rooted doctrine.²⁴ In reply, Sir Owen became less delphic and said it related to his conception of what a draftsman was really capable of doing. He mentioned many attempts in various statutes in Australia over the years to reverse the presumption of innocence and said 'they have not managed it very well in the face of what courts have done'.²⁵ His observations therefore were about the power of statutory interpretation in the maintenance of deep-rooted doctrines against statutory incursion. They emphasised the centrality in Australia of the judicial interpretation of statutes as protective of such basic principles as the presumption of innocence.

In Australia, unlike the United Kingdom and New Zealand, written Commonwealth and State Constitutions, read together, constrain official power, be it legislative, executive or judicial. The legislative power of the Commonwealth is confined to the subjects upon which the Commonwealth Parliament is authorised to make laws and is subject to guarantees and prohibitions set out in the Constitution or implied from it. The legislative power of the States is conferred, not by reference to enumerated heads of power, but by general grants under their own Constitutions. They are, however, subject to the paramouncy of Commonwealth

legislation and the guarantees and prohibitions, express or implied, to be found in the Commonwealth Constitution and which are applicable to State Parliaments. The executive and judicial powers of the Commonwealth and of the States are also subject to the constraints, express or implied, imposed by the Commonwealth Constitution and in the area of State executive power by the State Constitutions themselves and by statutes made under those Constitutions. No law can confer upon a public official unlimited power. Such a power could travel beyond constitutional constraints.

Importantly in Australia, unlike the United Kingdom and New Zealand, the jurisdiction of the High Court to judicially review the purported exercise of powers of officers of the Commonwealth is entrenched in s 75(v) of the Constitution. The continuing existence of the State Supreme Courts is protected by implication from Ch III of the Constitution, as is their traditional supervisory jurisdiction over official actions and inferior courts. The question of fundamental common law constraints on the legislative powers of the Commonwealth or State parliaments to affect judicial review is unlikely to arise in that context.

In that connection I note in passing that in 1998, the High Court in *Union Steamship Co of Australia Pty Ltd v King*²⁶ referred to the position of the New South Wales State Parliament authorised by its Constitution to make laws for the peace, order and good government of the State. After observing that the exercise of legislative power by the Parliament of New South Wales is not susceptible to judicial review on the ground that it does not secure the welfare and the public interest, the Court said:

Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law ... a view which Lord Reid firmly rejected in *Pickin v British Railways Board*,²⁷ is another question which we need not explore.²⁸

The question has not been further explored in Australia, although it was mentioned in passing in *South Australia v Totani*.²⁹

To accept the centrality of judicial review in our system of government, as in that of the United Kingdom and New Zealand, is to accept the centrality of the judicial function in interpreting the statutes under which official powers are exercised.

The connection between statutory interpretation and a concept of rationality for the purpose of administrative law directs attention to what courts do when they interpret statutes, because what they do defines the logic of the statute which, in turn, under a general rubric of rationality, or reasonableness, defines the area of judicial supervision of the exercise of statutory powers.

In the most recent edition of their well-established book on *Statutory Interpretation in Australia*, Professors Pearce and Geddes have spoken of the duty of the court in statutory interpretation. There are frequent challenges of ambiguity of meaning, vagueness of expression and occasional internal inconsistency. But as the learned authors said:

No matter how obscure an Act or other legislative instrument might be it is the inescapable duty of the courts to give it meaning.³⁰

The courts give meaning to statutes in accordance with principles derived from the common law and from interpretive statutes and sometimes from statute specific interpretive provisions. Typically, the courts look to text, context and purpose. They may make implications such as an implied requirement to observe procedural fairness as a condition of the exercise of a power, which might adversely affect the subject. Importantly, the statute is not just a piece of software to be loaded up into the official decision-maker and into the courts on judicial review. Its logic is defined by interpretation.

There has been some debate about the role of legislative intention in relation to statutory interpretation. In the Foreword to the first edition of Pearce and Geddes, Sir Garfield Barwick described the construction process as the search for 'the intended meaning; though the intention is to be sought from the words used'. The role of intention can be seen there as conclusory rather than anterior to construction. So too, in *Project Blue Sky Inc v Australian Broadcasting Authority*,³¹ the plurality (McHugh, Gummow, Kirby and Hayne JJ) said:

the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.³²

The question of authorial intention in legal texts generally was considered in the context of intention to form a trust in *Byrnes v Kendle*.³³ In their joint judgment, Heydon and Crennan JJ quoted an observation by Charles Fried, a former Solicitor-General of the United States, who dismissed the proposition that there was any point, whether in interpreting poetry or the Constitution, in seeking to discern authorial intent as a mental fact. He said:

we would prefer to take the top off the heads of authors and framers — like soft-boiled eggs — to look inside for the truest account of their brain states at the moment that the texts were created.

In a passage quoted by Heydon and Crennan JJ, Fried said:

The argument placing paramount importance upon an author's mental state ignores the fact that authors writing a sonnet or a constitution seek to take their intention and embody it in specific words. I insist that words and texts are chosen to embody intentions and thus replace inquiries into subjective mental states. In short, the text *is* the intention of the authors or of the framers.³⁴

The role of legislative intention in statutory construction has been discussed expressly in recent decisions of the High Court. In *Lacey v Attorney-General (Qld)*,³⁵ six Justices of the Court said:

The legislative intention [referred to in *Project Blue Sky*] is not an objective collective mental state. Such a state is a fiction which serves no useful purpose. Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.³⁶

The judgment drew an important distinction between the relevant usages of intention and purpose. The application of the rules of construction will properly involve the identification of a statutory purpose, which may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials. The purpose of a statute is not something which has an existence independent of the statute. It resides in its text, structure and context.

The distinction reflects the ordinary usage of purpose in the sense of the object for which a thing exists. One can discern a purpose for a constructed thing such as a tool without having to inquire about the intention of its maker. It is also possible to say that the purpose of the human eye is to enable people to see without having to inquire whether it reflects the intention of its creator. Purpose may be discerned in relation to a statutory provision without conjuring the numinous notion of legislative intention. Purpose in this sense informs the logic of the statute, which is connected to a broad concept of rationality in the exercise of powers conferred by the statute and amenable to judicial review. It is a more useful term in that context in identifying the legal limits of power than that of legislative intention. Where

purpose is not readily discernible, other aspects of a statute — its scope and subject matter may define its logic.

There is a variety of ways in which the word 'logic' can be used. It can refer to the study of the principles of reasoning. It can refer to a mode of reasoning or simply to valid reasoning. A statute conferring powers on an official may possess an internal logic defined as a class of reasons or pathways of reasoning which will support a valid exercise of that power. Logic, as used here, is closely connected to the ordinary meaning of rationality. That ordinary meaning is of a process of decision-making based on, or in accordance with, reason or logic. I do not suggest that it is inappropriate to use the word 'reasonableness' in this setting. My preference for rationality goes back a long way to a judgment I wrote as a Federal Court Judge in 1992, which really encompasses the theme of this lecture in which I said:

There is a pervasive requirement for rationality in the exercise of statutory powers based upon findings of fact and the application of legal principle to those facts ... A serious failure of rationality in the decision-making process may stigmatise the resultant decision as so unreasonable that it is beyond power. Alternatively, lack of rationality may be reflected in a failure to take into account relevant factors or the taking into account of irrelevant. Each of these heads of review seems to collapse into the one requirement, namely that administrative decisions in the exercise of statutory powers should be rationally based.³⁷

I must confess that I had forgotten that I had written that until revisiting, in connection with this lecture, Dr Airo-Farulla's article on 'Rationality and Judicial Review of Administrative Action'³⁸ in which it is quoted. It may be compared with the concept of reasonableness seen in the plurality judgment in *Li*, in which their Honours said:

Whether a decision-maker be regarded, by reference to the scope and purpose of the statute, as having committed a particular error in reasoning, given disproportionate weight to some factor or reasoned illogically or irrationally, the final conclusion will in each case be that the decision-maker has been unreasonable in a legal sense.³⁹

And hopefully not found to be inconsistent with that proposition. To say that rationality, in the sense that I have used it, is a necessary condition of the valid exercise of a statutory power, is to say no more than that a particular exercise of the power must be supported by reasoning which complies with the logic of the statute. It must lie within that class of reasons or reasoning pathways which support a valid exercise of the power. That class may be large for a broad discretion conferred in a statute without a well-defined purpose. It may be more limited in other cases.

The logic of a statute in this sense might be understood as requiring that the reasoning process of a decision-maker in deciding to exercise a power under the statute:

- is a reasoning process — ie a logical process, albeit it may involve the exercise of a value judgment, including the application of normative standards, and the exercise of discretion;
- is consistent with the statutory purpose;
- is not directed to a purpose in conflict with the statutory purpose;
- is based on a correct interpretation of the statute, where that interpretation is necessary for a valid exercise of a power — error of law which does not vitiate a decision is thereby excluded;
- has regard to considerations which the statute, expressly or by implication, requires to be considered;
- disregards considerations which the statute does not permit the decision-maker to take into account;
- involves finding of fact or states of mind which are prescribed by the statute as necessary to the exercise of the relevant power;

- does not depend upon inferences which are not open for findings of fact which are not capable of being supported by the evidence or materials before the decision-maker.

The permitted pathways to the statutory decision may also be limited to those that comply with procedural requirements which may be express or implied. Decision making which complies with the logic of the statute will therefore also:

- result from the application of processes required by the statute or by implication, including the requirements of procedural fairness.

It should also result from a diligent endeavour by the decision-maker to discharge the statutory task.

The matters listed are put on the basis that they all go to power. They reflect various categories of jurisdictional error, a term coined for historical reasons. They are not exhaustive, but reflect the requirement that the exercise of a statutory power should be rational.

A generalised requirement for rationality so understood is not a novel doctrine. It is well-established that every statutory power and discretion is limited by the subject matter, scope and purpose of the statute under which it is conferred.⁴⁰ It has also been said that every power must be exercised according to the rules of reason. In 1965, Justice Kitto, paraphrasing *Sharp v Wakefield*, said:

a discretion allowed by statute to the holder of an office is intended to be exercised according to the rules of reason and justice, not according to private opinion; according to law, and not humour, and within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself.⁴¹

Mason J, in *FAI Insurances Ltd v Winneke*⁴², quoted that passage and linked it to the general proposition that the extent of discretionary power is to be ascertained by reference to the scope and purpose of the statutory enactment.

It follows from the above that the requirement that a power conferred by a statute be exercised rationally, is a requirement not met merely by the avoidance of absurdity. I have referred earlier to the consideration of reasonableness as a constraint upon official power in the decision by the High Court in 2013 in *Li*.⁴³ In that case the Migration Review Tribunal (the Tribunal) had refused an adjournment to an applicant for an occupationally-based visa. The applicant was awaiting a revised skills assessment from a body called Trade Recognition Australia. The Tribunal proceeded to a decision adverse to the applicant without waiting for that revised assessment which was critical to her success. In holding that the decision of the Tribunal was vitiated by unreasonableness, Hayne, Kiefel and Bell JJ referred to *Wednesbury Corporation*⁴⁴ and said:

The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision — which is to say one that is so unreasonable that no reasonable person could have arrived at it.⁴⁵

Indeed, the Master of the Rolls, Lord Greene in *Wednesbury Corporation*, made the point that bad faith, dishonesty, unreasonableness, attention given to extraneous circumstances, and disregard of public policy, were all relevant to whether a statutory discretion was exercised reasonably.⁴⁶ As the joint judgment said in *Li*:

Whether a decision-maker be regarded, by reference to the scope and purpose of the statute, as having committed a particular error in reasoning, given disproportionate weight to some factor or

reasoned illogically or irrationally, the final conclusion will in each case be that the decision-maker has been unreasonable in a legal sense.⁴⁷

I have used the word 'rationality' as a general concept in this setting rather than 'reasonableness'. The term 'reasonable' may describe a decision with which one agrees and 'unreasonable' a decision with which one emphatically disagrees. The ordinary meaning of the term, according to the *Oxford English Dictionary*, includes the idea of having sound judgment and being sensible. That shade of meaning tends to take people into the territory of the legality-merits distinction, which defines the constitutional limits of traditional judicial review. In so saying, I acknowledge that people tend to use whatever terms of abuse come to hand to describe decisions with which they vehemently disagree and 'irrational' is one even though it may not be related to a failure of logic.

It is not necessary in using rationality, as I do, to hold that it has the character of a statutory implication — a condition on the exercise of power. Compliance with the logic of the statute means compliance with its express and implied requirements. Rationality, which describes the kind of reasoning that is essential to that compliance, is hardly an implication. Although reasonableness has been described as an essential condition of the exercise of a power that may in most, if not all cases, be no more than a way of saying that the logic of the statute and the rational processes that comply with it, must be followed.

It may also be possible to draw a distinction between rationality and reasonableness on the basis that not every rational decision is reasonable. That distinction may be seen as a vehicle for a proportionality analysis which I would not want to explore further here.

It is perhaps important to observe by way of qualification at the end of this lecture that rationality can accommodate a variety of decision-making processes. Sometimes decisions have to be made in the face of uncertainty or in the face of alternatives which are within power and where, on the basis of the materials before the decision-maker, no relevant distinction can be drawn between them. In an interesting paper entitled 'Rationally Arbitrary Decisions (in Administrative Law)',⁴⁸ Professor Adrian Vermeule of the Harvard Law School, suggested that there are some cases in which decision-makers run out of what he calls first order reasons for a decision. He argues that the law must not adopt a cramped conception of rationality which would require decision-makers to do the impossible by reasoning to a decision where reason has exhausted its powers. His observations are made largely in the context of difficult decisions of regulatory agencies balancing competing considerations. The information is simply not available to enable a clear determination to be made. One case he cites is the Secretary of the Interior having to decide whether to list a particular lizard as a threatened species under the *Endangered Species Act*. The methodology previously used to estimate the number of lizards in a given area had been exposed as worthless. Newer methods were not yet operational. No-one had any rational basis for estimating how many lizards there were. What then should the Secretary do and what should the court say the Secretary may, may not or must do. The relevant federal appellate court in that case decided that if the science on population size and trends was under-developed and unclear, the Secretary could not reasonably infer that the absence of evidence of population decline equated to evidence of its persistence. Professor Vermeule preferred the reasoning of the dissenting Judge Noonan, who said:

It's anybody's guess ... whether the lizards are multiplying or declining. In a guessing contest one might defer to the government umpire.⁴⁹

A simpler example might arise where a decision-maker has to allocate a limited number of licenses to a larger number of equally deserving applicants. Who is to say that allocation by lots, while arbitrary in one sense, would be arbitrary in a legal sense. Vermeule warns against a phenomenon of what he called 'judicial hyperrationalism'. Based on the culture of

the law which celebrates reason giving and the assumption that the rule of law requires first-order reasons for every choice, he observed:

there are seeds, within administrative law itself, of a more capacious and enlightened view, under which the rule of law will rest satisfied with second-order reasons, at least where first-order reasons run out.⁵⁰

To that I would add if rationality requires anything, it is an open mind.

The utility of rationality in the sense I have used it in this lecture is to emphasise the centrality of statutory interpretation to judicial review of administrative action. It is the statute properly construed according to common law and statutory interpretive rules, including the application of the principle of legality, implications as to procedural fairness and characterisation of statutory criteria as jurisdictional facts, that will define the logic of decision-making under it and therefore the minimum requirements for the valid exercise of official power.

Endnotes

- 1 R H Fallon Jr, 'The Rule of Law' as a Concept in Constitutional Discourse' (1997) 97 *Columbia Law Review* 1, 1.
- 2 A V Dicey, *Introduction to the Study of the Law of the Constitution* (Palgrave MacMillan, 10th ed, 1959) 184, 188-95.
- 3 Jeffrey Jowell, 'The Rule of Law Today' in J Jowell and D Oliver (eds) *The Changing Constitution* (Oxford University Press, 6th ed, 2007) 24.
- 4 (2013) 249 CLR 332, 364 [67].
- 5 H W R Wade and C F Forsyth, *Administrative Law* (Oxford University Press, 11th ed, 2014) 15.
- 6 Ibid.
- 7 Ibid 16.
- 8 *R v Secretary for the Home Department Ex parte Simms* [2003] 2 AC 131.
- 9 Mark Aronson and Matthews Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) [3.380].
- 10 Wade and Forsyth, above n 5, 19.
- 11 Sir Owen Woodhouse, 'Government under the Law', (Price Milburn for the New Zealand Council of Civil Liberties, 1979).
- 12 *Brader v Ministry of Transport* [1981] 1 NZLR 73, 78; *Fraser v State Services Commission* [1984] 1 NZLR 116; *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398.
- 13 *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 390.
- 14 *Cooper v Attorney-General* [1996] 3NZLR 480, 485.
- 15 Lord Woolf MR, 'Droit Public — English Style' (1995) *Public Law* 57, 68.
- 16 *R (Jackson) v Attorney General* [2006] 1 AC 262, 318 [159].
- 17 [2012] 1 AC 868.
- 18 Ibid 913 [51].
- 19 Jeffrey Jowell, 'The Rule of Law and its Underlying Values' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (Oxford University Press, 2011) 11, 32.
- 20 (1957) 31 *Australian Law Journal* 240.
- 21 Ibid.
- 22 Ibid 242, citing John W Salmond, *Jurisprudence: Or, The Theory of Law* (Steven & Haynes, 2nd ed, 1907) 125.
- 23 Ibid 241.
- 24 Ibid 250.
- 25 Ibid 253.
- 26 (1988) 166 CLR 1.
- 27 [1974] AC 765, 782.
- 28 (1988) 166 CLR 1, 10.
- 29 (2010) 242 CLR 1, 29 [31].
- 30 D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Australia, 8th ed, 2014) 8.
- 31 (1998) 194 CLR 355.
- 32 Ibid 384 [78] (footnote omitted).
- 33 (2011) 243 CLR 253.
- 34 Ibid 282–283 [95] citing 'Sonnet LXV and the "Black Ink" of the Framers' Intention', *Harvard Review*, vol 100 (1987) 751, 758–59 (emphasis in original, footnotes omitted).
- 35 (2011) 242 CLR 573.

- 36 Ibid 592 [43] (footnotes omitted).
37 *TCN Channel Nine Pty Ltd v Australian Broadcasting Tribunal* (1992) 28 ALD 829, 861.
38 (2000) 24 *Melbourne University Law Review* 543.
39 (2013) 249 CLR 332, 366 [72].
40 *R v Secretary for State for the Home Department; Ex parte Simms* [2000] 2 AC 115. 131.
41 *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177, 189.
42 (1982) 151 CLR 342, 368.
43 (2013) 249 CLR 332.
44 *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 223.
45 (2013) 249 CLR 332, 364 [68].
46 [1948] 1 KB 223, 229.
47 (2013) 249 CLR 332, 366 [72].
48 Adrian Vermeule, 'Rationally Arbitrary Decisions (in Administrative Law)', (25 March 2013), *Harvard Public Law Working Paper* No 13-24 <<http://ssrn.com/abstract=2239155>>, 2.
49 Ibid citing *Tucson Herpetological Society*, 566 F 3d 883.
50 Ibid.