THE HARKNESS HENRY LECTURE

"HARD LOOK" AND THE JUDICIAL FUNCTION

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I. INTRODUCTION

My theme is the rule of law and the function of the courts in upholding it. It traverses topics covered by Sir Ivor Richardson in his address to you last year and I am conscious of some presumption in attempting it in his wake. With only eight months experience in the job, I cannot pretend to deal with the subject from a judicial perspective. Rather, my thoughts are shaped by years of attempting, with little success, to persuade judges to accept greater responsibility for controlling executive action.

The "hard look" of my title, which I draw from North American legal thinking, has not been my experience of exercise of the judicial function in what Sir Ivor Richardson preferred to call "public interest litigation". That has been, I suggest, an approach which should be reconsidered. Three circumstances in particular prompt re-assessment of the role of judicial review in New Zealand.

In the first place, the New Zealand Bill of Rights Act 1990 provides a measure against which executive action can be tested readily. The rights-based approach it requires of the courts has profound implications for judicial decision-making. It affects not only the subject matter of adjudication, but also its processes and remedies. Behind the Act stand the international covenants it implements, with a body of international law available to be drawn on and against which the performance of New Zealand domestic courts can be measured. New Zealand's ratification of the Optional Protocol to the International Covenant on Civil and Political Rights provides a mechanism for direct international vindication of the rights should the domestic courts prove inadequate. It would be naive to believe that our Judges will not care about the figures they cut on the world stage. The international legal community draws on traditions and experiences different from those we have largely inherited and about which we have perhaps been too smug.

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In the second place, complacency about the competence of the public service has been jolted by a decade of dislocation and change, and associated deregulation. Increasingly, achievement of public good is left to private enforcement, through legislation such as the Commerce Act 1986, the Fair Trading Act 1986, and the Employment Contracts Act 1991. Such private enforcement frequently entails recourse to the courts in cases which are politically charged, and which have significant consequences for the distribution of benefits and costs through the community.

Finally, New Zealand is in a period of constitutional change. In addition to the sweeping reform of the electoral system, other constitutional fundamentals are being reviewed. They include the position of the sovereign, the place of the Treaty of Waitangi in the constitutional structure, and the restructuring of the courts to remove the oddity of recourse to the Privy Council as our final court of appeal. How these changes and re-assessments will work out in practice is not easy to predict. If a consequence of the changes to the electoral system is that legislation becomes more difficult to pass through Parliament, we may see executive encroachment upon the law-making function. If coalition government inhibits executive action, administrative decision-making by officials may fill the gap. If effective law-making through legislation becomes more difficult and executive action is inhibited or is channelled to achieve minority goals by power sharing, then, in an increasingly rights-conscious society, those seeking to achieve social and economic objectives could well turn to the courts. Whether this will be the effect if the role of the state contracts is not clear. The growth of judicial review from the 1950s occurred at a time of state expansion. It may be, as some commentators have suggested, that diminution of the role of the state will lead to a corresponding withdrawal by the courts. I refer to these possibilities not to express any view of how matters will work out, but to indicate that the changes already under way prompt close attention to the function of the courts in the scheme of things.

In addressing this topic, I am conscious that the perspective of a lawyer is a limited one. That is in part a measure of the poverty of the discourse between disciplines in our community. It is usually embarrassing to read the writings of judges on the role of the judiciary. Too often, they seem a grab for power. And the insistence of judges that their role is constitutional is easily dismissed as anti-democratic self-aggrandisement. Recent indications of public interest and disquiet about the role of the judiciary suggest that its function is imperfectly understood within the community. I suggest that such lack of understanding is mirrored to an extent in the judiciary and amongst practising lawyers. So although I acknowledge deficiencies dealing with the topic from a legal perspective, I offer my comments as a contribution to a wider debate which is timely and important.

II. The Rule of Law

Constitutional legitimacy in our system of government is based upon the rule of law. That will always be the case where power is organised and not arbitrary. In such states, ultimate or sovereign power must rest upon the rule of law, if only because, as R T E Latham pointed out more than 50 years ago:

> ...where the purported sovereign is anyone but a single actual person, the designation of him must include the statement of rules for the ascertainment of his will, and these rules, since their observance is a condition of the validity of his legislation, are rules of law logically prior to him.[1]

Because of our constitutional history, some of the most significant norms of constitutional law are judge-made rules of the common law. They are augmented by great statutes such as Magna Carta, Habeas Corpus, the 1689 Bill of Rights and modern statutes such as the Constitution Act 1986, as well as the legislation which provides for electoral rights and regulates executive action and responsibility, among which the Official Information Act 1982, State Sector Act 1988, Public Finance Act 1989, Fiscal Responsibility Act 1994, and the New Zealand Bill of Rights Act 1990 are critical. But fundamentally the constitution rests on the decisions of the judges.[2]

Through evolution, and largely as a result of the 17th century struggles between the King and Parliament, the constitution today recognises two sources of constitutional powers: the Queen in Parliament and the Queen's Courts. The Queen in Parliament makes law. The judges enforce legality and, in addition, are themselves a source of law through development of the common law which they create. Under the New Zealand constitution there is not a tripartite division of power between the legislative, executive and judicial branches of government. Instead, the executive carries the law into effect at the direction of Parliament and under the supervision of the courts.[3] The prerogative power exercised by the executive is no longer properly to be seen as a source of authority beyond the law but, as Sedley describes it, as "... the power, within the law, to fill constitutional

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1 Latham, RTE *The Law and the Commonwealth* (1949, reprint 1970), 523 (citations omitted).

2 A position to be contrasted with countries having written constitutions where judge-made law supplements the written instrument.

3 Refer *M* v *Home Office* [1994] 1 AC 377, 395 per Lord Templeman.

spaces and exercise governmental choice."[4] Even within its shrunken sphere, it is increasingly the subject of statutory encroachment (as through the application of the New Zealand Bill of Rights Act 1990), and the subject of close judicial supervision.[5]

In matters not affecting the legitimacy of Parliamentary law making, Parliament and the courts adhere to their respective functions: "Parliamentary supremacy over the judiciary is only exercisable by statute. The judiciary enforce the law against individuals, against institutions and against the executive."[6]

The role of the courts is to enforce the law. The courts themselves are subject to the rule of law and for that reason cannot usurp powers lawfully exercised by other agencies. The courts will therefore respect all acts of the executive within its lawful province. Ensuring that such actions are lawful, however, is the province of the courts exercising the powers of judicial review which flow from the rule of law and the courts' obligation to enforce it. Lord Diplock in the *CCSU* case[7] classified the grounds upon which judicial review controls executive action under the triumvirate of "illegality, irrationality and procedural impropriety," with the acknowledgment that a further ground of "proportionality" might be around the corner. Although the classification is useful, all are really aspects of insistence upon legality. That is the constitutional duty of the courts. The courts operate at the boundaries, not usurping the judgment of the body which exercises the power, but making sure it is exercised for legitimate purpose, fairly and reasonably. Without those conditions, the exercise of power is unlawful. Although judicial review is thought of as a public law concept for the control of public agencies, the function being exercised by the court in its supervisory jurisdiction is essentially the same as is applied in other areas. Wherever power is conferred and its exercise turns upon the exercise of judgment the role of the court is supervisory. So, for example, an appellate court will not substitute its discretion for the exercise of a discretion conferred upon a lower court and will not attempt to second-guess the judgments of directors of companies or trustees acting within their powers and reasonably.

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4 Sedley, "The Sound of Silence: Constitutional Law without a Constitution" (1994) 110 LQR 270, 290. See *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864; *M v Home Office* (supra note 3): *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 All ER 244.

5 *R v Secretary of State for the Home Department, ex parte Fire Brigades Union & Ors* [1995] 2 All ER 244. *Burt v Governor General* [1992] 3 NZLR 672, 678 per Cooke P.

6 *M v Home Office,* supra note 3, at 395, per Lord Templeman.

7 *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374.

III. Judicial Self Doubt

In public interest litigation, judicial self restraint is palpable. It is evident in reference to concepts of "justiciability," "administrative expertise" and "judicial activism." Labels such as these, while no doubt convenient shorthands for significant debate, are particularly unhelpful. In part, they perpetuate mythology about the judicial function and confusion about the political process. The suggestion that modern judicial review is a recent development by activist judges insufficiently deferential to democratic process, is convincingly countered by Stephen Sedley.[8] It is historically inaccurate. Worse, as Sedley points out, the suggestion that it is only the *use* of judicial power which is activism dangerously obscures the truism that:

> Abstention from judicial review is just as much a deliberate judicial activity, based just as much on jurisprudential and policy considerations and with just as many constitutional and political repercussions as judicial interventionism.[9]

Sedley characterises the history of judicial review since the 1920s in the United Kingdom until recent times as having been a long sleep, punctuated only by the "snore" of Wednesbury.

IV. "Justiciability"

The concept of "justiciability" is often question-begging. It usually indicates an attitude that some questions are not appropriately resolved through the courts because they raise policy choices more appropriately considered by the executive or legislative branches of government. The concern about court determination of issues affecting wide policy turns in part upon a democratic concern about judicial decision-making and partly upon the capacity of the judicial process to address the policy choices thrown up.[10]

The democratic concern often entails reference to the doctrine of separation of powers. Thus, for example, in *Takaro Properties v Rowling* Richardson J,

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8 Sedley, "The Sound of Silence," supra note 4, at 278.

9 Idem.

10 See *CREEDNZ* [1981] 1 NZLR 172, 197-198, per Richardson J; *Hawkins v Minister of Justice* [1991] 2 NZLR 530, 536 per Richardson J.

in rejecting the imposition of liability in negligence in the case of an invalid exercise of statutory power by a Minister, referred explicitly to the doctrine.

> In terms of the concept of separation of powers, the responsibility for basic policy decisions is vested in other branches of Government and is not ordinarily monitored by the judicial branch through the granting of private law remedies to citizens adversely affected by such policy decisions. [11]

Reference to the separation of powers is common in judgments supporting the argument for judicial restraint.[12]

In application, the concern not to intrude into areas of high policy has resulted in the creation of no-go areas for the courts. Thus, in *Council of Civil Service Unions v Minister for the Civil Service*[13] the House of Lords held that it was "for the government and not for the courts" to decide whether requirements of national security outweighed the duty of fairness:

> [T]he Government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security.[14]

Lord Roskill was of the view that a number of prerogative powers could not properly be made the subject of judicial review:

> Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers, as well as others, are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.[15]

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11 *Takaro Properties v* Rowling [1978] 2 NZLR 314, 333; See also *X & Ors (minors) v Bedfordshire County Council* [1994] 4 All ER 602

12 See eg *R v Home Secretary ex parte Fire Brigades Union,* supra note 4, at 267-268 per Lord Mustill (dissenting); *Duport Steels Ltd v Sirs* [1980] 1 WLR 142 at 157 and 169 per Lord Diplock and Lord Scarman respectively.

13 Supra note 7.

14 Ibid, at 402 per Lord Fraser.

15 Ibid, at 418. However, his Lordship's views were expressed to be "as at present advised".

That approach can be contrasted with the approach of the Canadian Supreme Court in *Operation Dismantle v the Queen*[16]. The case concerned a challenge to a decision by the Canadian Government to permit the United States to test cruise missiles in Canada. The basis of the challenge was that the testing of the missiles would lead to an increased threat of nuclear war and was accordingly a violation of s 7 of the Charter of Rights and Freedoms, guaranteeing life and security of the person. All judges agreed with the conclusion of Madam Justice Wilson as to justiciability. Disputes of a political or foreign policy nature could be assessed by the court. Although the court would not "second guess" the executive on matters of defence, it was under a constitutional obligation to consider a claim that a decision taken in the interests of national defence violated rights under the Charter, and to decide the matter. National defence was not, therefore, a talisman such as had been invoked in the *CCSU* case and its precursor *Chandler v Director of Public Prosecutions,*[17] to ward off judicial supervision.

The judgment of Wilson J also considered the question of justiciability in relation to the objection to the court's fitness to decide questions of broad policy. The judge pointed out that judicial review of administrative tribunals often raises significant policy content. The real issue was suggested to be "not the *ability* of judicial tribunals to make a decision on the questions presented, but the *appropriateness* of the use of judicial techniques for such purposes":

> I cannot accept the proposition that difficulties of evidence or proof absolve the court from making a certain kind of decision if it can be established on other grounds that it has a duty to do so. I think we should focus our attention on whether the courts *should* or *must* rather than on whether they *can* deal with such matters. We should put difficulties of evidence and proof aside and consider whether as a constitutional matter it is appropriate or obligatory for the courts to decide the issue before us.[18]

After reviewing the American literature and case law based on the "political questions doctrine" and referring to the judgment of Lord Devlin in *Chandler,*[19] Wilson J agreed with the view that "the courts should not be too eager to relinquish their judicial review functions, simply because they are called upon to exercise it in relation to weighty matters of state."[20]

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16 (1985) 18 DLR(4th) 481.

17 [1964] AC 763.

18 *Operation Dismantle v the Queen*, supra note 16, at 500.

19 Ibid, at 519.

20 Ibid, at 503.

The difficult questions for judicial review arise not in cases where illegality is manifest because the power purportedly exercised falls outside the four corners of the statute. Rather, they arise where the unlawfulness alleged is a matter of balance between competing interests or is one of degree (as in the case of challenges based on standards as imprecise as fairness, reasonableness or proportionality). In all such cases the approach of the Canadian Supreme Court requires the competing interests to be directly confronted. As Wilson J recognised, a reviewing court must be scrupulous not to substitute its own judgment for that of the person entrusted with the power to decide. Were it to do so, it would infringe basic legal principle and usurp the function, which is not its to exercise.[21] As Sir John Laws has commented, these well known limits upon the jurisdiction of judicial review:

> [H]ave nothing whatever to do with problems about the judges embarking upon political disputes. They are simply a function of the rule of law: the judges are no more than anyone else entitled to exercise power which legally belongs to another.[22]

But because the trigger for intervention by a court exercising supervisory jurisdiction is in part a matter of degree, and to that extent is a policy decision taken in individual cases by judges, the underlying concerns which prompt the shorthand references to "justiciability" or "political question" analysis, need to be directly confronted and understood. If they are not, the legitimacy of judicial intervention will be misunderstood and confidence in the judiciary will be eroded. The two substantial objections wrapped up in the label "justiciability" are that judicial review is anti-democratic, and that, because of the subject matter of questions involving high policy, the judicial process is inappropriate.

V. Judicial Review and Democratic Principle

In *X v Morgan Grampian*[23] Lord Bridge asserted that:

> The maintenance of the rule of law is in every way as important in a free society as the democratic franchise.[24]

At first sight startling, this statement merits serious attention. Although the doctrine of separation of powers is generally invoked by the courts in

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21 Idem.

22 Sir John Laws, "Law and Democracy" [1995] PL 72, 78.

23 [1991] 1 AC 1.

24 Ibid, at 48.

support of deference to policy making by the legislature or executive, that is not its principal function in the Anglo-American tradition.[25] The purpose of the doctrine of separation of powers, as Justice Brandeis, dissenting in *Myers v US*,[26] explained, is not to promote the efficiency of government but to prevent the exercise of arbitrary power. The rationale for the separation of powers expressed by James Madison in The Federalist[27] is that, while in a democratic system government is primarily controlled by the people, "experience has taught mankind the necessity of auxiliary precautions." Judicial review is an auxiliary check upon legislative and executive abuse of power. The control which a modern government exercises over the legislature and the executive, when combined with the complexity of executive government, makes vindication or approval of much policy by the ballot box uncertain.

Against such background, abdication by the judiciary of its responsibility to scrutinise executive actions with care may clothe those actions with a legitimacy in the eyes of the electorate which is not justified. As Gerald Gunter has pointed out, "safeguarding the structure of the political process is a major judicial obligation".[28] Professor Neil MacCormick has perceptively argued that any adequate overall view of law must recognise that it is "a form of institutionalised discourse or practice or mode of argumentation".[29] Executive decision-making is a process which is often not readily accessible to those affected by it. Although great strides have been made in recent years to improve the transparency of decision-making, it remains the case that powerful interest groups find it easier to be admitted to executive deliberations than others who may nevertheless be directly affected.[30] On the other hand, although I do not minimise the costs of litigation, the courts are accessible to all and court business is conducted in public. The judicial process has the capacity to be highly participatory. Although judges are appointed, they deal with real life problems in actual cases which anchor their decisions to the actual community. As Alexander

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25 The French theory for the separation of powers emphasises the exclusive functions of the three branches: see Barendt, "Separation of Powers and Constitutional Government" [1995] PL 599.

26 272 US 52 (1926).

27 Hamilton, Madison & Jay *The Federalist*, No.51 (Bigsby ed, 1992) p 266.

28 See also Ely, J H *Democracy and Distrust: A Theory of Judicial Review* (1980), especially chapter 4, "Policing the Process of Representation: The Courts as Referee" 73f; and *A Bill of Rights for New Zealand - a White Paper* (Department of Justice, 1985).

29 MacCormick, "Beyond the Sovereign State" (1993) 56 MLR 1, 10.

30 Capelletti, M *The Judicial Process in Comparative Perspective* (1989), p46. In the New Zealand context, this point is also made in Mulgan, R *Democracy and Power in New Zealand: a Study of New Zealand Politics* (1989).

Bickel has pointed out, the legislator (whether executive rule maker or member of parliament) deals typically with abstract or dimly foreseen problems.[31]

These democratic apologies for judicial function cannot be taken too far. But it is important not to overlook that the courts not only check abuse of power, but also can assist in the democratic process. The court processes, as well as the electoral processes, permit the individual affected to participate in government. Moreover, the obligation of the courts to give reasons assists in explaining government to the people and to the executive and legislature. Again, I do not want to exaggerate this feature, although I think it has the potential to be extremely important. I acknowledge that the decisions of the courts are often not readily accessible and suggest that the judges need to pay more attention to improving communication of decision-making.[32] But the discourse permitted by the judicial process does have the capacity to improve decision-making by both the executive and the legislature. This is a theme developed in American jurisprudence in considering the role of the courts in improving administrative decisions which are rule-making.

To the extent that judicial review requires consideration of all relevant matters and deliberation in reasoning rather than the exercise of "naked preferences"[33] judicial review can be seen not as anti-democratic but as a protector of "deliberative democratic values." To those concerned that judges lack technical expertise to supervise policy determinations, it can be said that technical expertise is not a prerequisite for judicial review. As Justice Wilson indicated in *Operation Dismantle*,[34] if the courts are obliged to exercise a function, they are obliged to become informed about an issue arising in the performance of that function.

In any event, concern about judicial competence in technical matters is substantially exaggerated. Technical issues arise before the courts every day. Moreover, the workings of the Official Information Act have revealed what has been intuitively believed by a number of observers, that the courts are wrong to defer unduly to administrative expertise:

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31 Bickel, AM *The Least Dangerous Branch* (1962) p.20.

32 Perhaps through press summaries and admission of television filming.

33 Rossi, J "Redeeming judicial review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry" [1994] Wisconsin Law Review 763 820.

34 Supra, note 16.

> A comprehensive technical evaluation may have expertly skimmed the surface of the problem and never touched its depths. Tendering a full accounting of the technical aspects of a problem may fall far short of taking full account of its legal aspects. A court should not then turn inferior and abdicate its responsibility for review merely because the problem it confronts calls for massive homework.[35]

A democratic perspective reminds us that technical decision-making should not be implemented "in isolation of the democratic process." Most regulation turns upon value judgments as to where costs, risks and benefits should fall. Technical analysis is often inconclusive and deference to perceived technical expertise may blunt democratic controls:

> Major changes in policy should be articulable in common language, easily comprehended by reviewing courts and the regulated industry, and the beneficiaries of a regulatory scheme. Otherwise, we run the risk of divorcing the exercise of bureaucratic expertise from the democratic process. If agencies anticipate that the reasoned basis for their rules and policies will be subject to the scrutiny of reviewing courts, agencies will be more likely to formulate reasons in *understandable* language, relating to the policies advanced. Only if the bases for policy changes are articulated in understandable terms will courts be able to review them for rationality, or Congress be able to review them for responsiveness to the will of the people. Thus, by invoking the hard look doctrine to review the sufficiency of an agency's reasoned analysis, courts play a role in ensuring that the dialogue of bureaucratic expertise is compatible with the democratic process.[36]

VI. The Limits of Adjudication

Allied to concerns about the courts' expertise in assessing legislative and executive decision-making, is the more fundamental objection that supervision of executive action, particularly of the rule-making type, is inherently unsuitable for judicial determination. The limitations of the adjudicative process, it is said, make it impossible for the court to be fully informed as to the effect of a decision upon those not present before the court. Such cases are said to be examples of the "polycentric disputes" described by Lon Fuller in his influential essay "The Forms and Limits of Adjudication".[37] Fuller defines a polycentric problem as one which affects

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35 Traynor, "Essay on States Revolving in Common Law Orbits" (1968) Cath. ULR 401, Reprinted in the Traynor Reader, 38, Nousvwrons, 155, at 191-192.

36 Rossi, supra note 33, at 820-821.

37 Fuller, L "The Forms and Limits of Adjudication" (1978) 92 Harvard Law Review 353.

many parties and has "interacting points of influence" which can be figuratively described as the shift in the pattern of tensions created if one strand in a spider web is pulled.

Such disputes, Fuller suggests, are difficult to handle by adjudication, which depends upon the presentation of argument only by parties to the particular dispute. He considered that such problems could be solved, "at least after a measure", by "Parliamentary methods which include an element of contract in the form of the political 'deal".[38] This thinking has recently been invoked by Neil LJ in the English Court of Appeal,[39] discussed in a recent article by John Allison.[40]

Fuller's views were tentative. The article was unfinished and he expressed some considerable reservations about its direction during his lifetime.[41] Fuller himself acknowledged that it was important to realise that the distinction involved in characterising a dispute as polycentric or not is often a matter of degree:

> There are polycentric elements in almost all problems submitted to adjudication. A decision may act as a precedent, often an awkward one, in some situation not foreseen by the arbiter... In lesser measure, concealed polycentric elements are probably present in almost all problems resolved by adjudication. It is not, then, a question of distinguishing black from white. It is a question of knowing when the polycentric elements have become so significant and predominant that the proper limits of adjudication have been reached.[42]

The polycentric implications of a decision are greatly amplified in legal systems which adhere to precedent.

Professor Davis in his Administrative Law Treatise considers that Fuller's analysis is useful "whenever a satisfactory alternative way of disposing of a controversy can be found" but points out that:

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38 Ibid, at 400.

39 *RT and TG v Secretary of State for the Home Department and Criminal Injuries Compensation Board* unreported judgment of the Court of Appeal, May 4 1994.

40 Allison, "The Procedural Reason for Judicial Restraint" [1994] Public Law 452.

41 Davis, KC *Administrative Law Treatise* (2nd ed, 1979) Vol.2, p 312.

42 Supra note 37, at 397-398.

> The plain fact is that the Supreme Court *does* adjudicate many polycentric problems every year, and it does so successfully in the sense that the society accepts the results. Perhaps Supreme Court adjudication of polycentric problems should even be regarded as an outstanding feature of the American governmental system. [43]

He suggests that:

> What the system needs is not abstract rumination that polycentric questions cannot be resolved in the way they are being resolved, but more attention to procedural devices for better development of legislative facts ... [44]

This suggestion is one echoed by the Woolf Committee in its consideration of increased use of amicus briefs and the introduction of a Director of Civil Proceedings.[45] It is also a theme which has been raised on a number of occasions by Sir Ivor Richardson, who, in his 1995 Harkness Henry lecture, referred to the need to adopt the technique of the Brandeis brief.[46] In recent years New Zealand courts have received a range of statistical, historical and sociological material to assist them in dealing with polycentric disputes. But the courts have so far been most reluctant to make decisions in cases where the result will affect the allocation of scarce resources. Such caution is appropriate, but it can be carried too far. All decisions shift cost and risk to some extent. It is hard to think of any administrative law decision which would have done so to the extent of the common law's perfection of limited liability through *Saloman v Saloman*[47] or the imposition of liability in negligence upon the "neighbour" principle expounded in *Donoghue v Stevenson.*[48]

Although caution is to be expected, it would be quite wrong for the 'abstract rumination' of polycentricity to be used to deter judicial review in public interest litigation. Adjudication may not be ideal, but it is the best system we have yet devised for resolving disputes in the last resort and, until a better system emerges, judicial intervention is essential in public interest litigation to provide a check against executive and legislative over-reaching and to maintain the rule of law. That does not preclude reforms designed

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43 Davis, supra note 41 at 316.

44 Idem.

45 Allison, supra note 40, at 471.

46 Richardson, I "Public Interest Litigation" (1995) 3 Waikato Law Review 1.

47 [1897] AC 22.

48 [1932] AC 562.

to improve the information available to judges, although ultimately I suspect that many polycentric questions will continue to be decided, as Davis puts it, "on the basis of nothing better than the justice's general education and experience, including, inevitably a substantial element of guesswork."[49] The reality is that a judiciary paralysed by self-doubt about the limits of adjudication will not be able to respond in the cases of greatest human rights and social needs. As Leventhal has observed: "How should the courts proceed in political thickets? Carefully; pragmatically."[50]

VII. Hard Look Review

Judicial review based upon what I would call four-corners illegality and procedural irregularity attracts close judicial scrutiny. Fairness and legitimate expectation as to process, once controversial bases for review, are now established. They are easily defended by recourse to parliamentary intent; could parliament have intended that decision makers should act unfairly?

On the other hand, review of outcomes of the decision-making process is still timid and usually dressed up in procedural language, often with a strained appearance. In limited circumstances a condition precedent to lawful decision-making will raise a ground of illegality which the courts will look at closely.[51] But in all other cases, when it comes to assessing the outcome of executive decision-making, the courts are largely adrift. *Wednesbury* is the only established principle, and it is lacking. Concepts such as mistake of fact,[52] the so-called "innominate" ground of unfairness[53] and proportionality[54] remain controversial. Review upon the basis that excessive weight has been given to unimportant considerations and inadequate weight to those which are patently of great significance, is generally regarded as heretical. These grounds for review, all of which as counsel I have urged upon courts with little success, seek to maintain a line between what is legitimate judicial supervision and what is illegitimate judicial usurpation.

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49 Supra note 41, at 316.

50 Leventhal, H "The Courts and Political Thickets" (1977) 77 Columbia Law Review 345.

51 *CCSU* supra note 7 at 410, per Lord Diplock; *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 at 751 per Lord Templeman.

52 *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 at 145-149 per Cooke J.

53 *R v Panel on Takeovers and Mergers, ex parte Guinness PLC* [1990] 1 QB 146, 160 per Lord Donaldson MR; *Thames Valley EPB v NZFP Pulp and Paper Limited* [1994] 2 NZLR 641 at 652-3 per Cooke P.

54 *R v Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696.

The courts should not be reluctant to interfere where decisions have clearly gone wrong. That will be the case when a decision-maker has proceeded on a mistaken view which is material to the decision, where a truly important consideration has been paid no more than lip service, or where the result is patently unfair or disproportionate in its effect. Of course these standards depend on judgements of degree. But there is nothing new in that. Such standards have been applied by judges confident of the principle upon which they act.[55] But too often judges shrink from looking closely at the outcome of administrative decision-making in the mistaken view that applying such tests amounts to trespassing upon the merits of the decision.

A substantial impediment to proper perspective is the fixation with what has come to be known as "*Wednesbury* unreasonableness." The principle takes its name from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation.*[56] Lord Greene MR was not purporting to lay down any new foundation for review and as other commentators have pointed out,[57] the principles described in his judgment are ancient ones. His Lordship did not confine his statement to cases where the courts are reviewing the decision of a public body. Instead he was clear that they are principles which the court applies when considering any question of discretion, as opposed to considering an appeal.[58]

Wednesbury was decided in 1947. It concerned a local authority's grant of a licence to operate a picture theatre, upon the condition that no children under 15 years of age should be admitted to performances on Sundays unless accompanied by an adult. In 1947, that was a matter upon which the court accepted that honest and sincere people could hold different views. But it is what Lord Greene said about the concept of "reasonableness" which continues to mesmerise:

> It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming, and in this case, the facts do not come anywhere near anything of that kind. The court is entitled to investigate the action of the local authority with a view

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55 See eg Cooke P in *Daganayasi,* supra note 51; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 30 per Mason CJ (applying the principle of proportionality to a statute restricting free speech).

56 [1948] 1 KB 223.

57 Sedley, "The Sound of Silence", supra note 4 at 278.

58 Supra note 56, at 228.

> to seeing whether they have taken into account matters which they ought not to, or conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it.

Subsequent cases have sought to explain "so unreasonable that no reasonable authority could ever have come to it" by terms such as "irrational" or "perverse". In practice, the threshold for judicial review on the ground of *Wednesbury* unreasonableness is extremely high.

The "hard look" approach to judicial review pioneered in the United States by Judges such as Judge Harold Leventhal[59] and Chief Justice Bazelon is not the *Wednesbury* approach. Those judges advocated strict judicial scrutiny of administrative action as a protection against administrative arbitrariness. The approach is characterised by close attention to the reasons given by a decision maker and a refusal to assume that unexplained conclusions are based upon adequate facts and reasons. Chief Judge Bazelon considered that such an approach was particularly important in cases touching on:

> Fundamental personal interests and life, health and liberty. Those interests have always had a special claim to judicial protection, in comparison with the economic interests at stake in a rate making or licensing proceeding.[60]

I have some doubts about the emphasis of the "hard look" school upon the provision of reasons as a remedy for arbitrariness: to insist on reasons in administrative decision-making may be wishful thinking (as some commentators have suggested) and bad decisions can readily be dressed up with a show of reasons. But a hard look approach does seem to me to be the responsibility of the courts, particularly in cases where human rights or fundamental values are affected. In such cases, it is wrong for the courts to hold back unless satisfied that a decision is one that no reasonable administrator could have taken, or is "perverse" or "irrational". As Lord Greene noted in *Wednesbury,* such unreasonableness is pitched at a level

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59 See eg *Greater Boston Television Corp v Federal Communications Commission* (1970) 444 F 2d 841,850-853 and *Environmental Defense Fund Inc v Ruckelshaus* (1971) 439 F 2d 584.

60 *Environmental Defence Fund Inc v Ruckelshaus,* ibid, at 598.

which shades into bad faith. The protection of fundamental rights should not defer to a decision maker who is manifestly wrong even if in good faith.

The supervisory jurisdiction does depend on assessment of degree. In cases where human rights or fundamentals of the constitution (such as electoral rights) are encroached upon, the European test of proportionality is a more appropriate guide than *Wednesbury*. Proportionality does not substitute appellate scrutiny for supervisory scrutiny. It permits the decision maker a "margin of appreciation." But the margin of appreciation in cases of fundamental rights must be, as Chief Judge Bazelon suggests, narrower than in other cases. In some cases, where there are no balancing commensurate considerations and the human right is significant (as would be the case if identified in the New Zealand Bill of Rights Act 1990), there may be no room for a 'margin of appreciation.' Fundamental rights require "hard look review." The test to be applied is whether the erosion of rights is disproportionate to the benefit obtained. The adoption of the New Zealand Bill of Rights Act 1990 provides an accessible reference against which such questions can be systematically assessed.

There are a number of straws in the wind suggesting that the test of proportionality and the approach of hard look in the case of fundamental rights are the direction in which judicial review is heading. The High Court of Australia has applied a test of proportionality in cases in which statutes encroached disproportionately upon the right to freedom of expression, not articulated in the Australian constitution but necessarily inferred by the court as essential to the democratic process.[61] In the *CCSU* case, Lord Diplock indicated that proportionality as a measure for judicial review was a possible adoption. In *R v Home Secretary, ex parte Brind,*[62] a case also concerned with freedom of expression, Lord Templeman explicitly invoked the test of proportionality and doubted the sufficiency of a *Wednesbury* approach in cases of interference to human rights.

> The discretionary power of the Home Secretary to give directions to the broadcasting authorities imposing restrictions on freedom of expression is subject to judicial review, a remedy invented by the judges to restrain the excess or abuse of power. On an application for judicial review, the courts must not substitute their own views for the informed views of the Home Secretary. In terms of the Convention, as construed by

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61 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

62 [1991] 1 AC 696.

> the European Court, a margin of appreciation must be afforded to the Home Secretary to decide whether and in what terms a restriction on freedom of expression is justified.
>
> The English courts must, in conformity with the *Wednesbury* (supra) principles discussed by Lord Ackner, consider whether the Home Secretary has taken into account all relevant matters and has ignored irrelevant matters. These conditions are satisfied by the evidence in this case, including evidence by the Home Secretary that he took the Convention into account. If these conditions are satisfied, then it is said that on *Wednesbury* principles the court can only interfere by way of judicial review if the decision of the Home Secretary is "irrational" or "perverse."
>
> The subject matter and date of the *Wednesbury* principles cannot in my opinion make it either necessary or appropriate for the courts to judge the validity of an interference with human rights by asking themselves whether the Home Secretary has acted irrationally or perversely. It seems to me that the courts cannot escape from asking themselves whether a reasonable Secretary of State, on the material before him, could reasonably conclude that the interference with freedom of expression which he determined to impose was justifiable. In terms of the Convention, as construed by the European Court, the interference with freedom of expression must be necessary and proportionate to the damage which the restriction is designed to prevent.
>
> My Lords, applying these principles I do not consider that the court can conclude that the Home Secretary has abused or exceeded his powers. The broadcasting authorities and journalists are naturally resentful of any limitation on their right to present a programme in such manner as they think fit. But the interference with freedom of expression is minimal and the reasons given by the Home Secretary are compelling.[63]

There is much food for thought here. The courts will defer to the "informed" views of the Home Secretary. Interference with fundamental freedoms must be "necessary and proportionate." The reasons given by the Home Secretary were weighed and found "compelling," and the assessment was made that the interference with freedom of expression was "minimal."

Where democratic processes are in issue, as illustrated by *Nationwide News Pty Ltd v Wills*,[64] close judicial scrutiny of the outcome is critical because it is antecedent to substantive legislative decision-making. For this reason, Justice Stone, in his famous footnote in the *Carolene Products*

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63 Ibid, at 751 (emphasis added, citations omitted).

64 Supra note 56.

case[65] raised the question whether legislation affecting political processes should be "subjected to more exacting judicial scrutiny" than those dealing, for example, with regulation of commerce. This is a theme developed by John Hart Ely[66] and Frederick Schauer.[67] In Canada, the courts, acting on the basis of the right to vote contained in the Charter, have scrutinised with particular care legislation and administrative action affecting the electoral processes.[68]

I suggest the proper approach to the scope of judicial review is that there is a continuum, depending upon the importance and nature of the interests entrenched upon and the extent of that entrenchment. At one end of the spectrum there is no room for any margin of appreciation at all; the courts must, in performance of their constitutional duty, decide whether action is legal or not and not defer to any discretion in the decision maker. I do not consider that it matters whether the decision being impugned is that of the legislature or the executive. In the case of the legislature, we can expect such cases never to arise. They are referred to by Lord Cooke in his essay on "Fundamentals"[69] and touched upon by him in a few judgments.[70] Such cases might arise if parliament were to purport to put someone to death without trial, or withhold the franchise on racial grounds.

At the other end of the spectrum are cases where the decision maker is entrusted with power on a consensual basis, where those affected by the decision are of equivalent bargaining strength. Commercial arbitrations are one ready example. In such cases, the margin of appreciation permitted could ordinarily be expected to be extremely wide.

Along the continuum between the two are cases where those affected by the exercise of power are in a position of weakness, or the power being exercised has implications for significant aspects of their lives, such as the ability to work. In such cases, the margin of appreciation will be adjusted. It does not seem to me to matter much in assessing such factors

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65 *United States of America v Carolene Products Company* (1937) 304 US 144, 153.

66 Ely, JH *Democracy and Distrust: A Theory of Judicial Review* (1980).

67 Schauer, "Judicial Review of the Devices of Democracy" (1994) 94 Columbia Law Review 1326.

68 See *Re Dixon v Attorney General of British Columbia* (1989) 59 DLR (4th) 247; *Re Scott and Attorney General of British Columbia* (1986) 29 DLR (4th) 544; *Reform Party of Canada v Canada (Attorney-General)* [1993] 3 WWR 139.

69 [1988] NZLJ 158.

70 *Taylor v NZ Poultry Board* [1984] 1 NZLR 394, 398; *Fraser v State Services Commission* [1984] 1 NZLR 116, 121; *NZ Drivers' Assn v NZ Road Carriers* [1982] 1 NZLR 374,390.

whether the power is exercised by a public body under a statute or by a private body such as the stock exchange.[71] The function of review is the same.

At the top end will be the cases involving fundamental freedoms, particularly those recognised in the New Zealand Bill of Rights Act 1990. Such rights and freedoms are not absolute and may require adjustment if there are competing rights of equivalent status. The margin of appreciation where human rights are affected is narrower and requires close judicial scrutiny. Where there are no competing rights, there may be no margin of appreciation. Depending on the extent of the interference with rights, the reasons of the decision maker will have to be compelling and the result in terms of the benefits achieved will have to be proportionate to the infringement of the rights.

That we are some distance from this model can be illustrated by reference to two recent decisions. They are the *Maori Electoral Option* case[72] and the decision of the English Court of Appeal in *R v Ministry of Defence, ex parte Smith.*[73] Both ultimately turned on the application of the *Wednesbury* test of irrationality in cases touching human rights.

The *Maori Electoral Option* case concerned the conduct of the 1994 Maori Electoral option. The option (to choose between the Maori or the General Rolls) was necessary to fix the number of Maori seats under the Electoral Act 1993, thus determining the number of seats in the new MMP parliament and permitting their boundaries to be established. I was counsel in that case and would not ordinarily have referred to it, but it illustrates my

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71 See eg *NZ Forest Products Ltd v NZ Stock Exchange* [1984] 2 NZCLC 99,051 (injunction upheld against NZFP to protect thousands of its shareholders who would have been prevented by a proposed takeover from selling their shares on an open market); *Finnigan v NZ Rugby Football Union Inc (No.2)* [1985] 2 NZLR 181 (a decision of the NZRFU to send a representative team to tour South Africa was, in a series of decisions, held to be reviewable, culminating in the granting of an interim injunction stopping the tour); *R v Panel on Take-overs and Mergers, ex parte Datafin Plc* [1987] QB 815 (Panel on Take-overs and Mergers held subject to judicial review since it operated as an integral part of a governmental framework regulating financial activity in the City of London); cf *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan,* [1993] 2 All ER 853 (a decision of the Club's Disciplinary Committee held not susceptible to judicial review, despite the Club's effective regulation of a significant national activity).

72 *Taiaroa v Minister of Justice* [1995] 1 NZLR 411 (CA).

73 [1996] 1 All ER 257.

concerns about *Wednesbury* well. I shall try not to let too much indignation peep through.

The option as implemented by the executive proceeded on the assumption that there was no duty to inform all Maori eligible to exercise the option about it, but only those who had identified themselves previously on the electoral rolls as being Maori. The discrepancy was, on the Crown's evidence, between 55,466 and 59,000 people. (The Court of Appeal judgment is in error in referring to a range between 12,000 and 59,000.) The executive did not appreciate that the discrepancy was nearly as large and mistakenly believed the electoral rolls were satisfactory. In the High Court, Justice McGechan was of the opinion that executive conduct was to be judged according to whether it was "irrational." The Court of Appeal applied a test of whether the conduct of the executive throughout was "tenable" or "reasonable." The argument advanced that a more strict test was required in a case involving the rights to political representation of a disadvantaged indigenous minority people, with special claims to protection under the Treaty of Waitangi, was not addressed by the Court of Appeal in its brief judgment. Leave to appeal, on grounds which raised the sufficiency of the *Wednesbury* approach, was refused by the Court of Appeal. An application for special leave was denied by the Privy Council.

Justice McGechan had held that the decision was not reviewable because the Minister and his officials acted on views of the facts which were "tenable" on information available at the time (although proven to have been to some extent wrong) and did not act "irrationally." That conclusion was on the basis that:

> In the end, this case calls for decision under the cold legalism of administrative law, which looks at process rather than result.[74]

Although he accepted that the Minister and Cabinet acted on a misconception which was an important element in their decisions and that "Maori have been disadvantaged, to an extent not precisely measurable, but of some significance," review was not available. Similarly, the Court of Appeal concluded that "what was done was far from perfect but it passes the test of reasonableness".[75] Hard look review, which should in my view have been prompted by the fundamental electoral rights at

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74 *Taiaroa v Minister of Justice,* High Court, Wellington, CP 99/94, 4.10.94, McGechan J, p3.

75 Supra note 72 at 418.

stake, would not have countenanced a result in which "a significant number" of Maori were disadvantaged.

My second illustration is a recent decision of the English Court of Appeal.[76] Judicial review had been sought on a policy of the Ministry of Defence (taken under the prerogative) that prohibited homosexual people from serving in the Armed Forces. The case for the appellants did not seek to depart from an irrationality formulation although they argued that "in judging whether the decision maker has exceeded [the] margin of appreciation, the human rights context is important." The Court of Appeal accepted that approach but concluded that the policy could not be "stigmatised" as irrational. The judgments perpetuate the notion that "the threshold of irrationality is a high one".[77] In the course of his judgment, Sir Thomas Bingham MR, dealing with the question of irrationality, said:

> The greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational. That is good law and, like most good law, common sense. Where decisions of a policy-laden, esoteric or security-based nature are in issue, even greater caution than normal must be shown in applying the test, but the test itself is sufficiently flexible to cover all situations.[78]

In the *Ministry of Defence* case, the court clearly felt hampered by the lack of adequate information which a Brandeis brief could have provided, and was conscious of the fact that a review of policy by the Armed Forces was under way. The Court of Appeal also clearly felt uncomfortable with applying the provisions of the European Human Rights Convention as a standard in English domestic law. That problem at least is overcome for New Zealand by the adoption of the New Zealand Bill of Rights Act 1990, but whether our courts will depart from the "high threshold" of irrationality may be doubted, particularly in cases where there is high policy content.

VIII. Conclusion

My view is that we need to move on from *Wednesbury* if judicial supervision is to be appropriate to human rights needs. The position here, I fear, is still that described by Anthony Lester in a recent article commenting on the *Ministry of Defence* case:

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76 *R v Ministry of Defence, ex parte Smith* [1996] 1 All ER 257.

77 Ibid, at 266, per Sir Thomas Bingham MR; Henry LJ and Thorpe LJ agreed.

78 Ibid, at 264.

> To put it crudely, our courts will review the merits of an administrative decision only if the decision-maker acts "*Wednesbury* unreasonably" by "taking leave of his senses".[79]

As Lester goes on to point out:

> European standards of judicial review are stricter. They forbid not only decisions which are senseless, or procedurally unfair, or made for an improper purpose, but also decisions that represent an unnecessary and disproportionate interference with basic rights and freedoms.[80]

It is ironic that judges of the common law tradition should lag. Over the long haul, I do not believe they will. I leave the last word to Lord Cooke of Thorndon whose contribution to this area of the law I cannot hope to see equalled in my lifetime.

> The world is moving, as it seems to me, towards an international law of human rights. The process will be lengthy, not least because of religious and ethnic and economic differences. In the long run, figuratively marathonian, it will be achieved.[81]

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79 Lester, A "Judges and Ministers" London Review of Books, 18 April 1996, p.10.

80 Idem.

81 *R v Barlow* (1995) 14 CRNZ 9, 24.