Book Reviews

UNDERSTANDING ADMINISTRATIVE LAW IN THE COMMON LAW WORLD

Reviewed by Justice James Edelman and Susanna Connolly*

Understanding Administrative Law in the Common Law World, by Paul Daly, OUP, 25 October 2021, 320 pages, ISBN: 9780192896919. Hardcover £80.00.

Administrative law, in its most common application concerning statutory executive power, raises a fundamental question about judicial legitimacy in a parliamentary democracy. When Parliament has validly conferred power upon an executive decision-maker, how does a judge derive legitimacy to circumscribe the limits of that power? On one view, the judge is doing no more than recognising limits that Parliament impliedly imposed. Since no executive decision-maker has absolute, unlimited power, some limits must be discerned as being expressly or impliedly contained in the legislation. William Wade thus concluded that statutory interpretation lay at the heart of the identification of restrictions or conditions on the exercise of statutory executive power.[1] Australian administrative law has accepted this theory of William Wade and his successors.[2] The view was initially, and repeatedly, endorsed in the judgments of Brennan J,[3] and it now commands widespread support in Australia.[4] This theory of judicial review of statutory executive power has, however, been criticised by some who see the increasingly detailed and sophisticated statutory implications recognised by the judiciary as, in reality, creations of the common law and argue for an approach which treats judicial review as a common law doctrine. Paul Craig therefore argued that it "is not necessary for such principles to be cloaked with legislative intent".[5]

The true position may be that the two approaches are not really in conflict. One of the most significant bases for the recognition of implications, and the implied intention of Parliament, is the deeply rooted values of the common law.[6] Those values inform the presuppositions and reasonable expectations of the public, to which statutory executive power is directed, and therefore form the basis for implications that are naturally recognised. It is in that sense that, as Byles J explained in *Cooper v Wandsworth Board of Works*,[7] "the justice of the common law will supply the omission of the legislature". As Brennan J observed in *FAI Insurances Ltd v Winneke*,[8] "where legislation is silent as to conditions governing the exercise of a statutory power, it may be inferred that the legislature intended that the justice of the common law" should supply these conditions. Indeed, the recognition of such implications is not unique to the interpretation of statutes in administrative law. It can be seen in the interpretation of statutes in criminal law (implications of intention or knowledge), as well as contractual and trust documents (implications concerning the reasonable exercise of power), and in the latter case the parallel with administrative law has sometimes been noticed.[9] The really difficult questions of theory are how those common law values

* James Edelman: Justice of the High Court of Australia. Susanna Connolly: Senior Associate to Justice Edelman.

[1] HWR Wade, *Administrative Law* (Clarendon Press, 1961) 40.

[2] Including, for example, C Forsyth, "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review" (1996) 55 *Cambridge Law Journal* 122.

[3] *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 70; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 409; *Coutts v Commonwealth* (1985) 157 CLR 91, 105; *Kioa v West* (1985) 159 CLR 550, 609–611; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 34–36.

[4] See, eg, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 363–364 [67]; [2013] HCA 18; *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441, 479 [169]; 390 ALR 590, 633; [2021] HCA 17.

[5] P Craig, "The Common Law, Shared Power and Judicial Review" (2004) 24 *Oxford Journal of Legal Studies* 237, 238.

[6] *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 144 [64]; [2018] HCA 34.

[7] *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180, 194; 143 ER 414, 420.

[8] *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 408.

[9] *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661; [2015] UKSC 17.

are to be identified and the weight to be placed upon them in applying the implications based upon them. Recent writing has begun to provide answers to these, and related, fundamental questions.[10]

Dr Daly's monograph, *Understanding Administrative Law in the Common Law World*, is one huge step forward in answering these questions. It provides a framework of theory by which administrative law can be clearly and coherently developed. Dr Daly very helpfully explicates the common law values that form the basis of the presuppositions and reasonable expectations of those who are subject to the exercise of statutory executive power. His interpretative methodology is Dworkinian in the sense that it is concerned with the fit with judicial precedent, even if the judges had not necessarily subjectively known about those values, and also with normative justification.[11]

Dr Daly identifies four foundational values: individual self-realisation, good administration, electoral legitimacy, and decisional autonomy. Those values may not be exhaustive and may be expressed in different ways: "individual self-realisation" could be expressed in terms that included "human dignity", and "good administration" could be expressed in terms that included "efficiency". But, however expressed, Dr Daly has identified four of the most basic, underlying values that inform widespread expectations, which in turn inform the implications. The stronger the underlying value, the more compelling the implication will generally be, and the more difficult the implication will be to displace.

Sometimes the values will complement each other. An example is the right of notice which can form part of a requirement of procedural fairness. The strength of that right, and its forceful claim to recognition as an implication, lies in the reinforcing effect of several values. As Dr Daly observes, that right is grounded in the protection of individual interests, with greater disclosure required where final decisions impacting individual interests are involved.[12] It can also be understood in terms of good administration: a requirement of notice increases the likelihood that an executive decision-maker will have the relevant material before them and so improves the accuracy of the final decision.[13] Equally, concerns for efficiency are consistent with a defective notice being able to be cured by providing the further details or granting further time.[14]

In other circumstances, however, the values might conflict. In such circumstances, Dr Daly considers that the values should exist in a state of balance, such as in the general structure of the duty of fairness and the ability of the legislature to oust procedural protections by statute.[15] Another way of expressing this point is to say that when the values would point in conflicting directions so there is "potential conflict", they can be "balanced" by making one subject to the other.[16]

Dr Daly suggests that no one value can trump another,[17] and that each value should be given "as much effect as possible … without emptying the others of substance altogether".[18] In other words, although one value cannot eliminate another altogether, it can outweigh another.[19] Reconciling any conflict between the values must take account of the "strength of the competing values".[20] The real difficulty in cases of conflict is to work out which value should cede to the other.

The tension between underlying values can be illustrated by circumstances in which individual self-realisation and good administration, as values by themselves, would point towards different results.

[10] See, eg, J Bell, *The Anatomy of Administrative Law* (Hart, 2020).

[11] P Daly, *Understanding Administrative Law in the Common Law World* (OUP, 2021) 23–25.

[12] Daly, n 11, 86.

[13] Daly, n 11, 87.

[14] Daly, n 11, 87–88.

[15] Daly, n 11, 2, 255–256.

[16] Daly, n 11, 24.

[17] See, eg, Daly, n 11, 13, 64, 67–68, 254.

[18] Daly, n 11, 64.

[19] Daly, n 11, 43, 92, 236.

[20] Daly, n 11, 235–236.

Materiality in procedural fairness is one such example. The implication of procedural fairness is founded upon strong and widespread expectations based upon the fundamental value of human dignity. The implication of materiality is based on widespread expectations concerned with efficiency. In *Hossain v Minister for Immigration and Border Protection* (*Hossain*),[21] the High Court of Australia confronted a circumstance where these values of dignity and efficiency conflicted in the conclusion to which each pointed. The High Court was required to consider whether, and when, a decision might not be quashed where although an error of law had been made the result would inevitably have been the same. Nettle and Edelman JJ held that the same issues would arise in a case where an applicant had been denied procedural fairness but the result would inevitably have been the same. This is an example of a circumstance described by Dr Daly as one where "the importance of robustly protecting interests that are important for an individual's autonomy and dignity … is tempered by the need to permit administrative decision-makers to render decisions in an efficient and effective way".[22] The High Court recognised that there will usually be an implication that non-compliance with a condition on the valid exercise of a decision-making power will only result in invalidity if the breach is "material".[23]

The recognition of the implication of materiality was not an immediate success. Although recognising that dignity would sometimes give way to efficiency, the Court did not provide significant guidance for how the two values would generally be balanced. The value of respect for dignity is one which, to use Dr Daly's expression, is "extremely weighty".[24] As Nettle and Edelman JJ recognised in *Hossain*, it cannot, in justice, be made always to yield to the value of efficiency in circumstances where the judge considers that the result would not be any different; there must be some circumstances where efficiency cannot qualify dignity.[25] For instance, in the United States apprehended bias is a ground of review that will permit "automatic reversal" and will "defy harmless-error review",[26] applying "[n]o matter what the evidence".[27] In the United Kingdom, it has also been held that even where it was plain that the result would not have been any different, a decision tainted by apprehended bias would be quashed.[28] Nettle and Edelman JJ said in *Hossain* that a serious denial of procedural fairness, with impact upon the dignity of the individual, is another such circumstance.[29]

Dr Daly recognises that the rules of administrative law, and the values that underlie it, will be in an appropriate state of balance only if dignity prevails over efficiency subject to the most exceptional circumstances, such as where the executive decision-maker is compelled by law to reach the same conclusion.[30] As Dr Daly expresses the point, "[g]ranting of relief in respect of an unlawful decision is generally the starting point even if the breach was procedural in nature and might not have had a material impact on the decision reached … Concern for the protection of individual interests can be understood to be key to this analysis".[31] That point of principle has not always been appreciated in Australia. There has been further confusion in Australia following *Hossain* about what is meant by materiality, who bears the onus of establishing materiality, and what is required to discharge that onus. In *MZAPC v Minister*

[21] *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123; [2018] HCA 34.

[22] Daly, n 11, 254–255.

[23] *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 134 [29] (Kiefel CJ, Gageler and Keane JJ); [2018] HCA 34.

[24] Daly, n 11, 236.

[25] *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 137 [40] (Nettle J), 147–148 [72] (Edelman J); [2018] HCA 34.

[26] *Neder v United States*, 527 US 1, 8–9 (1999).

[27] *Tumey v Ohio*, 273 US 510, 535 (1927). See also *Ward v Village of Monroeville*, 409 US 57 (1972).

[28] *R (Al-Hasan) v Secretary of State for the Home Department* [2005] 1 WLR 688, 702 [42]–[43]; [2005] 1 All ER 927, 943; [2005] UKHL 13. See also *Millar v Dickson* [2002] 1 WLR 1615, 1624 [16], 1647–1648 [85], 1072–1073; [2002] 3 All ER 1041.

[29] *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 137 [40] (Nettle J), 147–148 [72] (Edelman J); [2018] HCA 34.

[30] Daly, n 11, 168, citing *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board* [1994] 1 SCR 202.

[31] Daly, n 11, 164.

for Immigration and Border Protection, a majority of the High Court even placed the onus of proving materiality on the applicant.[32] That may have been a mistake in terms of authority. It may also have been a mistake in terms of principle. And it may now be that the only way to rebalance the scales, and ensure that the efficiency-based implication of materiality does not undermine and overwhelm the more basic and fundamental dignity-based implication of procedural fairness, is to reduce substantially, perhaps almost to nothing, the content of that which an applicant must prove in order to discharge the onus.

It is in providing the path to resolving difficult issues such as these that *Understanding Administrative Law in the Common Law World* is such a valuable and outstanding work. Dr Daly's book provides a deep, reflective approach to administrative law that establishes foundational values that guide the principles which, themselves, form the basis for the understanding and development of administrative law rules.

[32] *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441; 390 ALR 590, 633; [2021] HCA 17.