Substantive Fairness Review: Heed the Amber Light!

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In this article, Professor Mullan examines various strands in the argument made for substantive fairness review in administrative law. He points out that Cooke P., of the New Zealand Court of Appeal, is an eloquent proponent of the theory, and therefore asks whether New Zealand is developing an indigenous approach to judicial review. He outlines the Canadian position, before going on to issue some warnings about the dangers in adopting too expansive an approach.

I. INTRODUCTION

In recent years, there has been a growing interest in the possibility of the courts' expanding the scope of their review of the administrative process to embrace the so-called "substantive fairness" of decisions. The incentives for this development have been various. First, the arrival of the new jurisprudence under which courts scrutinized the procedures of statutory authorities in the name of "fairness" as well as or instead of "natural justice" quite predictably invited the response that such an evolution in at least the terminology of judicial review should not be confined to the procedural arena.[1] This argument frequently was reinforced by the perceived difficulties of distinguishing between procedural and substantive matters.[2] Also at the largely theoretical level, there was a developing sense that the law of judicial review had simply become too complex and that there needed to be a more simple or unifying concept that could be deployed by courts and advocates. Thus, the notion emerged that beneath the traditional buzz words of judicial review were three essential concepts: illegality, unreasonableness and lack of

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1 See, for example, the writings of Professor Julius Grey of McGill University: "The Duty to Act Fairly After *Nicholson*" (1980) 25 McGill L.J. 598, 601-02 and "Can Fairness Be Effective?" (1982) 27 McGill L.J. 360, 368-70.

2 One example of this is afforded by judicial review on the basis of an absence of evidence which has sometimes been described as a procedural defect. I have discussed this previously in "Natural Justice and Fairness - Substantive As Well as Procedural Standards for the Review of Administrative Decision-Making?" (1982) 27 McGill L.J. 250, 269-71.

fairness in both its procedural and substantive senses. Indeed, in large measure, the most eloquent proponent of such a theory has been the present President of the New Zealand Court of Appeal, Cooke P., most recently and notably in his 1986 address to the Conference *Judicial Review of Administrative Action in the 1980s* and entitled "The Struggle for Simplicity in Administrative Law".[3]

Linked in the minds of many with these pleas for simplicity at the theoretical level was a desire to see an expansion in the scope of judicial review of the administrative process. Review in the name of jurisdiction, error of law, and procedural defects simply did not go far enough. The time had come to submit that process to *merits scrutiny* by the courts. In one sense this represented a demand for honesty in that it was perceived by some that the courts were already doing this, if not universally then in selected situations in the name of over-expansive concepts of jurisdiction and error of law.[4] However, for others, it represented a claim for a genuine expansion in the ambit of judicial activism. Jurisdiction and error of law were legal concepts which were simply antagonistic to review of what was really crucial in the administrative process - the substance of the decision taken.[5] So too was review for procedural deficiencies regarded as a snare and a delusion. The fairest procedures in the world did not guarantee the "correct" or most appropriate outcome. Therefore, if judicial review was to be worth all the time, effort and expenditure, and if citizens were to have an effective bulwark against an often faulty or fickle administration, then there simply had to be *merits review*.

In this paper, I want to make a tentative assessment of these various strands in the argument for substantive fairness review. I will devote some time to trying to discern what it is that "fairness" or "reasonableness" might actually mean in this context and, essentially, my thesis will be that if these concepts are to be deployed in the arena of judicial review, they should be interpreted or read in a narrow and relatively defined rather than open-textured sense. In part, this argument hinges upon my views as to the role of language in judicial discourse, but it is also influenced very heavily by my sense of the proper place of judicial review in a political system.

It is of course clear that views about the place of judicial review are in large measure matters of political import, though I will be arguing that the advocates of judicial review cannot be labelled readily as adherents to any particular mainstream political philosophy. In other words, within various political philosophies will be found divergences among the disciples as to the place of judicial review, this in some senses

3 See Michael Taggart (ed.) *Judicial Review of Administrative Action in the 1980s - Problems and Prospects* (Auckland, Oxford University Press, 1986) at p.1. This approach was presaged in an earlier paper: "Third Thoughts on Administrative Law" [1979] Recent Law 218.

4 For a powerful statement about the "doctrinal indeterminacy" of judicial review, see Allan C. Hutchinson "The Rise and Ruse of Administrative Law and Scholarship" (1985) 48 M.L.R. 293, 304-14. This point is made as part of a general condemnation of all judicial review.

5 Thus Hutchinson comments (ibid., 320):

> While the emphasis upon process and form may result in the protection of individual interests in the occasional dispute, individual interests cannot be effectively protected without resort to substantive precepts.

being a selection of the lack of sustained effort in relating the role of the judiciary to much of modern political thought. One can take one's pick as to whether this is indicative of either the peripheral nature of traditional courts or a failure on the part of lawyers and political theorists to engage in dialogue often enough. In a somewhat similar vein, I also want to enter a caution in regard to linguistic analysis and its relevance to the issue at hand. Here too, it needs to be emphasised that philosophies with respect to the nature of language are not politically neutral either. This is so not simply in terms of the politics of philosophical debate but also in terms of links that exist between philosophical argument and the broader political arena.

Because I am entering this debate conditioned by the years that I have spent as a student of Canadian administrative law, it seems to me most important to set the scene for a discussion of the issue of substantive fairness review by trying to discern whether the desirability of the introduction of such a concept into the general law of judicial review might vary as between jurisdictions. As a result, I will first examine whether there is a different philosophy with respect to judicial review in New Zealand as opposed to Canada and, if so, what impact if any that might have on this issue. That will also involve some assessment of a variety of factors that have contributed to the development of particular principles of judicial review within New Zealand and Canada. Of necessity, this assessment will be largely tentative and conjectural. I say this not only because of my increasing lack of familiarity with the New Zealand environment but also because many of the relevant factors are ultimately empirical matters and I have not carried out the detailed research necessary to come to anything like a definitive conclusion.

II. JUDICIAL REVIEW: INDIGENOUS OR BRITISH?

In one of his recent judicial pronouncements,[6] Cooke P. felt constrained to emphasise that New Zealand administrative law was now "significantly indigenous". Despite the continued place of the Judicial Committee of the Privy Council in New Zealand law, and the still great reliance on British decisions and texts including de Smith's *Judicial Review of Administrative Action*[7] and its Commonwealth-wide ambitions, [8] there are some indications in the New Zealand jurisprudence that this remark can be justified. [9]

6 *Budget Rent A Car Ltd.* v. *Auckland Regional Authority* [1985] 2 N.Z.L.R. 414, 418. This statement came to my attention in a reading of Michael Taggart's paper "Judicial Review for Error of Law" delivered at the New Zealand Law Conference in Christchurch in 1987: See *N.Z. Law Conference, Christchurch, 1987 : Conference Papers* (Christchurch, 1987) 168.

7 Presently this is in its fourth edition and is edited by Professor J.M. Evans of Osgoode Hall Law School at York University: (4th ed., London, Stevens, 1980).

8 See Evans' Preface to the fourth edition at p. vii, though he does acknowledge the increasing difficulties of achieving such comprehensiveness.

9 In terms of Cooke P.'s own judgments, the most notably "New Zealand" or indigenous are probably *Daganayasi* v. *Minister of Immigration* [1980] 2 N.Z.L.R. 130 and *Bulk Gas Users Group* v. *Attorney General* [1983] N.Z.L.R. 129, the nuances of which are the principal focus of Michael Taggart's paper, supra n. 6.

To begin with, let me say that it is of no surprise to me that New Zealand, or any other Commonwealth country for that matter, would develop an indigenous administrative law. Despite a shared constitutional heritage with many other members of the Commonwealth, there is of course little or nothing in New Zealand's formal constitutional arrangements that prevents the evolution of a distinctively local form of administrative state.[10] Moreover, given that that flexibility exists, neither is it remarkable that New Zealand would move to its own form of that part of administrative law that is constituted by the relationship of the regular courts to the administrative state. Indeed, from one perspective this seems more likely in the New Zealand context than in Canada, where there are limited but definite constraints on legislative action both in the creation of aspects of the administrative state and in determining the scope of judicial review, each to be found in the judiciary provisions of the Constitution Act 1867[11] and, more recently, in the Canadian Charter of Rights and Freedoms[12] with its substantive and procedural protections and its provision for judicial enforcement. Indeed, in this respect, it surprised me to see that Cooke P., the proponent of a uniquely New Zealand administrative law, also believes that in New Zealand there is a constitutionally-guaranteed status for judicial review of all questions of law.[13] Suffice it to say that, despite the attribution of limitations on legislative capacities by virtue of the judiciary provision in the Constitution Act, the Supreme Court of Canada has clearly repudiated such arguments in relation to Canadian judicial review. Rather, it has drawn the line at judicial review for jurisdictional error and then only clearly for provincially-created bodies.[14] Most commentators see the question of whether there is any constitutional guaranteed minimum of judicial review as still being an open one in relation to federal statutory authorities.[15]

10 The rump of the New Zealand Constitution Act 1852 (U.K.) c.72 contains nothing that might be said to create a constitutionally-protected right to judicial review of the decisions of statutory authorities. As a result, any such argument must depend upon the existence of unwritten, customary constitutional principles.

11 30 & 31 Vict. (U.K.) c.3 (as renamed by the Constitution Act 1982, Schedule, Item 1, enacted by the Canada Act 1982 (U.K.) c.11) ss. 96-101.

12 Being Part I of the Constitution Act 1982 enacted by the Canada Act 1982 (U.K.) c.11, s.1.

13 Supra n. 3, 6:

> Whatever different shades of opinion there may be about refinements, we are on the brink of open recognition of a fundamental rule of our mainly unwritten constitution: namely that determination of questions of law is always the ultimate responsibility of the Courts of general jurisdiction.

14 *Crevier* v. *Attorney-General of Québec* [1981] 2 S.C.R. 220.

15 I have argued that *Reference re Court of Unified Criminal Jurisdiction: McEvoy* v. *Attorney General of New Brunswick* [1983] 1 S.C.R. 704 supports the constitutionally-protected nature of judicial review of federal statutory authorities: "Developments in Administrative Law: The 1982-83 Term" (1984) 6 Supreme Court L.R. 1, 5-7. However, this position is firmly rejected by Professor Peter W. Hogg in *Constitutional Law of Canada* (2nd ed., Toronto, Carswell, 1985) 423-24. See also R. Elliott "Constitutional Law - Judicature - Is Section 96 Binding on Parliament? - *Reference re Establishment of Unified Criminal Court of N.B.*" (1982) 16 U.B.C.L.R. 313 and "New Brunswick Unified Court Reference" (1984) 18 U.B.C.L.R. 127; and John D Whyte "Developments in Constitutional Law: The 1982-83 Term" (1984) 6 Supreme Court L.R. 49, 74-81.

Why is it that such differences among countries sharing a common law heritage are likely, indeed almost certainly inevitable? One explanation seems obvious. Given the choices as to the level of intensity of government activity and from among a great range of institutional forms for carrying out the multifarious types of such activity, it is surely concomitant that the need for judicial scrutiny of the resulting process will vary or at least will be perceived to vary. Despite the common constitutional heritage and, in particular, its sense of judicial independence and security of tenure, it is also not surprising that there will be differences in the extent to which superior court judges are regarded as appropriate supervisors of the administrative process. As a pure matter of technical competence judges may not be sufficiently qualified to render a "better" opinion than the statutory authority subject to review or, for that matter, a special statutory appeal body. Related to this are factors such as the expense and effectiveness of engaging in litigation, considerations which may vary considerably from jurisdiction to jurisdiction. Nor to be underestimated is the influence of other systems of law, though in Canada's case, perhaps somewhat surprisingly, the principal influence has been the United States rather than France. In part, this is so because even in the civil law jurisdiction of Québec, the public law of the province is common rather than civil law.

Another way of describing these factors is to look at them in terms of the pathology of judicial review litigation. The scope of judicial review may well be influenced by the type of applicants and respondents that the judges encounter. Thus, for example, if the bulk of respondents are expert, well-respected administrative tribunals, this may well have an effect on the generality of judicial review doctrine in the direction of much more restrained scrutiny. Similarly, if the seekers of judicial review are perceived to be engaged in a rearguard action against the administrative process, seeking to delay and frustrate the whole of that process, this too may come to have an impact on the reach of judicial review. Related to these factors is the type of decision that constitutes the bulk or majority of challenges. Once again, general doctrine may be affected by whether the typical challenge involves rather narrow issues of law such as decided by the regular courts in their other jurisdictions or broad discretionary powers or legislative interpretation exercises beyond the courts' ken. Furthermore, the nature of the reviewing court must be taken into account. If the legislature has established, as in New Zealand, a separate administrative law court populated by specialist administrative law judges, or if administrative law issues either in the form of conventional judicial review or statutory appeals from particular bodies constitute a very significant proportion of the court's daily work, then this may well have an impact on judicial perceptions as to the legitimacy of intervention and the ability of the courts to do so competently and broadly.[16]

16 The creation of an Administrative Division of the New Zealand Supreme Court (now High Court) in 1968 (Judicature Amendment Act 1968) with extensive appellate as well as judicial review jurisdiction finds only one true parallel in Canada: the Ontario Divisional Court which is similarly dominant in the administrative law arena and was also established as part of Ontario's remedial reform package (Judicial Review Procedure Act S.O. 1979, c. 48, now R.S.O. 1980, c.224; and Judicature Amendment Act No.4 S.O. 1970, c.97; and Judicature Amendment Act S.O. 1971,

At a more basic level, even within countries sharing the Westminster model of government, significant differences of a cultural and philosophical kind may begin to emerge with respect to matters such as autonomy and the place of separate communities of interest. The larger a country is, and the more diverse the cultures and interests existing within it, the more likely it is that shared common values will be fewer and the desirability of centralising forces less well-accepted. Rather, notwithstanding the complex of arrangements that constitutes any modern state and the pressure that creates for centralization in the name of efficiency if nothing else, pluralism and autonomy of systems may come to be recognized as important values and the scope for the intervention of generalists or central institutions restricted to occasions of necessity such as inter-group conflict.[17] In such a society, it is of course not unexpected that the judges of the superior courts are viewed by many with suspicion particularly if their backgrounds have not exposed them to the diversity of the country's cultures and interests and where their professional lives up to the time of their appointment have channelled them, whatever their previous backgrounds, into a process of thought and behaviour which can best be described as "legalistic". Indeed, even more pejoratively, the judiciary might be seen as having a commitment to a view about society as developed from the perspective of the self-interest of an increasingly influential elite.

III. THE CANADIAN POSITION

Let me be a little more specific about this latter point in a Canadian context. It seems clear that the conservatism of the common law and the restraints imposed by a strict system of precedent were in large measure responsible for the resolution of labour/management disputes and human rights claims, among others, being removed almost entirely from Canadian courts and reposed in supposedly expert administrative tribunals. Indeed, some would read the conservatism of the judges even more harshly and explain it not simply by reference to the formal structures of the system of precedent but more in terms of the judiciary's antipathy to labour and minority groups and any perceived threat to traditional property and cultural values. Confirmation for this came in the courts' subsequent attitude to the new processes as privative clauses were disregarded with review of the new tribunals' decisions not only extensive but also often in favour of management and landed interests and against labour and minorities. Such unrestrained judicial review also bespoke a rearguard action against the removal of jurisdiction from the superior courts and the exclusive purview of the legal profession.[18]

c.51. However, the frequent rotation of judges in and out of the Divisional Court has compromised its position as an expert administrative law court.

17 For an interesting exploration of such a theory in the context of division of powers in constitutional litigation, see Paul C. Weiler *In the Last Resort* (Toronto, Carswell/Methuen, 1974) 172-183. Autonomy of groups or "legal pluralism" is also the underlying theme of Professor Harry W. Arthurs' important work *'Without the Law' - Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto, University of Toronto Press, 1985).

18 This history has been documented by many writers. See, in particular, Bora Laskin "*Certiorari* to Labour Boards: The Apparent Futility of Privative Clauses" (1952) 30 Can. Bar Rev. 986; Paul Weiler *In the Last Resort*, ibid., Chapter 5 at p. 120; and

At a somewhat more benign but ultimately problematic level, it is also argued that judicial review appeals to lawyers because of its focus on individual rights and interests, matters that dominate legal education and the so-called liberal tradition of the profession.[19] Such a background simply does not prepare lawyers for an appreciation of collective interests which are the central concerns of so many modern legislative initiatives and also of the administrators who apply such statutes on a day-today basis.

While such an account is admittedly very simplistic, it does help to explain a lot about what is now the Canadian system of judicial review of administrative action as developed by a judiciary more attuned to the place of the administrative process and somewhat more diverse in its cultural and social background.[20] As expostulated by the Supreme Court of Canada, review is for the most part regarded as a reserve power to be exercised by the courts in limited circumstances.[21] Where an expert administrative tribunal is concerned, such review is to be respectful not only of privative clauses and other legislative indicia of judicial restraint and agency autonomy[22], but also of the tribunal's actual handling of its mandate in the sense that good faith efforts to deal with an issue in an even-handed manner are to be respected.[23] The standard of judicial review in such cases has the daunting threshold of "patent unreasonableness", and one which has been applied generally in the very reserve capacity that its normal linguistic connotations would seem to require. Linked to this central theme has been the development of the law with respect to what was previously regarded as the central concept of jurisdictional error. While review for jurisdictional error at least in relation to the decisions of provincial statutory authorities was held for the first time to be constitutionally protected from the ambit of privative or preclusive clauses[24], such review was to be very confined in its ambit. Patent unreasonableness was a species of

H.W. Arthurs "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osgoode Hall L.J. 1.

19 See John Willis "The McRuer Report: Lawyers' Values and Civil Servants' Values" (1968) 18 University of Toronto L.J. 351 and "Canadian Administrative Law in Retrospect" (1974) 24 University of Toronto Law L.J. 225, 228-29. See also Hutchinson, supra n.4, 320.

20 If one looks at the appointments to the Supreme Court of Canada in the last twenty years, one sees a dramatic change in the composition of the Court. At present, in its complement of nine, it includes two women (Wilson and L'Heureux-Dubé JJ.), three former Law Deans and highly respected academics (Beetz, LeDain, and La Forest JJ.), and now its first judge of Ukrainian origin, Sopinka J. Such changes in demography are also evident in the lower courts.

21 The key early decisions in this evolution are *Service Employees' International, Local No. 333* v. *Nipawin District Staff Nurses' Association* [1975] 1 S.C.R. 382 and *Canadian Union of Public Employees, Local 963* v. *New Brunswick Liquor Corporation* [1979] 2 S.C.R. 227.

22 E.g., *St. Luc Hospital* v. *Lafrance* [1982] 1 S.C.R. 974.

23 Examples of this are harder to find but a particularly important judgment is that of Laskin C.J.C. in *Capital Cities Communications Inc.* v. *Canadian Radio-Television Commission* [1987] 2 S.C.R. 141 where the use by the C.R.T.C. of policy guidelines to be applied in individual cases was approved by the Court with particular emphasis given to the fact that those guidelines had been developed in the context of extensive hearings involving the affected parties (at p. 171).

24 In *Crevier*, supra n. 14.

such error but the courts were instructed to be extremely circumspect in classifying an issue as one "preliminary" or "collateral" to a tribunal's jurisdiction thereby exposing any decision on such an issue to unrestrained judicial scrutiny.[25] Moreover, this clear message from the Supreme Court of Canada is one that, for the most part, has been heeded by the lower courts.[26] Also implicit in this, of course, is the position that the regular courts do not have a monopoly on questions of law and that there is no constitutional claim for judicial review of all such matters.

Indeed, in these days, to be in favour of judicial review in Canada is in many circles to be regarded as reactionary and a sure sign of a supporter of right wing causes. After all, if one looks to the United States' experience, it was right wing politicians from the Republican Party who wanted the Administrative Procedure Act amended to mandate the federal courts to engage in more open-ended review of the agencies. In some manner, the influence of left-leaning, Democratic Party-appointed judges and agency members had to be curtailed.[27] Yet this interpretation of struggle over judicial review in terms of the political spectrum between Right and Left or Conservative and Liberal is not totally supported by the facts. After all, there is something to the liberal tradition which sees judicial review as being one of the citizen's important bulwarks against the abuse of power of governments and their administrative arms. Collective interests do not always trump individual claims in our form of society. There is also no guarantee that all administrators will be meticulous and faithful in their discernment and carrying out of legislative mandates or sympathetic to the position of disadvantaged communities.[28]

In this respect, the examples of immigrants and the incarcerated are, I suspect, not confined to Canada. It is rare to find any members of such groups or their advocates[29]

25 "The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so": per Dickson J. in *New Brunswick Liquor*, supra n. 21, 233.

26 For a prime example, see *Ontario Public Service Employees Union* v. *Forer* (1985) 52 O.R. (2d) 705. I discuss this in my earlier piece, "The Supreme Court of Canada and Jurisdictional Error: Compromising New Brunswick Liquor" (1987) 1 Canadian Journal of Administrative Law and Practice 71, 92-96. In this article, I also discuss some more recent indications of backsliding by the Supreme Court of Canada.

27 The so-called Bumpers Amendment actually passed the Senate in 1982 but ultimately went no further. For a discussion, see Ronald M. Levin "Review of 'Jurisdictional' Issues Under the Bumpers Amendment" [1983] Duke L.J. 355.

28 This conflict of principles is best encapsulated by Professor Innis M. Christie, a labour lawyer, in "The Nature of the Lawyer's Role in the Administrative Process" [1971] Law Society of Upper Canada Special Lecture Series 1.

29 See, e.g., the writings of my correctional law colleagues at Queen's University, Allan S. Manson and Ronald R. Price: Allan S. Manson "Administrative Law Developments in the Prison and Parole Contexts" (1984) 5 Admin. L.R. 150 and "Releasing Prisoners and Information" (1985) 9 Admin. L.R. 52; and Ronald R. Price "Bringing the Rule of Law to Corrections" (1974) 6 Canadian Journal of Criminology and Corrections 209 and "Doing Justice to Corrections? - Prisoners, Parolees and the Canadian Courts" (1977) 3 Queen's L.J. 214. In the immigration arena see, for example, Julius H. Grey *Immigration Law in Canada* (Toronto, Butterworths, 1984) 161-62; and Christopher J. Wydrzynski *Canadian Immigration Law and Procedure* (Aurora, Canada Law Book, 1983) 458 ff.

in favour of restricted judicial review. For them, the courts are seen as a better hope than the administrators with whom they deal. Of course, there is nothing surprising about this. Another avenue of appeal represents another possibility, so why not have it even if the chances of success are only minimal? However, there are other factors at stake in examples such as this. Considerations of self-interest aside, there are often reasons to heed those embroiled in the processes of immigration and penitentiary and parole administration when they make claims about the abuse of legislative intent by administrators and assert that that intent may be better accomplished if there is ready access to the superior courts and open-ended review by the courts. Even in Canada, the place of the courts as the protector of the rights of individual citizens is not totally rejected by minorities and the disadvantaged. To many of them, the real myth is that of the enlightened, benign administrator and once that myth is exposed, much of the foundation for closely circumscribing judicial review disappears.

The difference between the situation of immigrants and the incarcerated on the one hand and, for example, the labour/management sector on the other can also be explained by reference to differences in the evolution of the respective communities. Because the state-imposed regulatory structures have created a generally hospitable environment for the resolution of disputes between labour and management, there are far greater constituency pressures for the treatment of the resulting system as self-contained and not subject to outside influences and, in particular, the courts of general jurisdiction. In contrast, there is far from any recognition of an overriding community of interest between regulatory structures and those regulated in the immigration and correctional law arenas. For such groups, a mediating facility such as provided by the regular courts is a necessity.

What is also clear is that Canada has at the political level made a huge though some would say inappropriate commitment[30] to judicial review with the adoption of a judicially-enforceable Charter of Rights and Freedoms. At a slightly less rarified level, this is also reflected in the extensive list of statutes in which the regular courts are designated as appeal authorities from the decisions of statutory bodies of many varieties.[31]

IV. WHITHER NEW ZEALAND? : AN OUTSIDER'S VIEW

How, if at all, does the situation in New Zealand differ from that in Canada? Let me assume for the moment that the general philosophy of judicial review of public bodies has been encapsulated by Cooke P. in the paper referred to earlier.[32] There, he states[33]

30 See, e.g., H.W. Arthurs, supra n. 17, 189-90.

31 It is, however, worth recording that the Canadian courts have not always interpreted "full" rights of appeal as eliminating the propriety of deference to the decision of the statutory authority in question. See, e.g., *Re Canadian Tire Corporation* (1987) 23 Admin. L.R. 285 (Ont. H.C. , Div. Ct.). The most useful article on the proper judicial approach to statutory appeals remains K.J. Keith "Appeals from Administrative Tribunals" (1969) 5 V.U.W.L.R. 123.

32 Supra n. 3. It should be noted, however, that there is a question about the extent to which Cooke P.'s philosophy of judicial review has achieved judicial acceptance,

(in what is a distinct and admitted echo of the views of Lords Diplock[34] and Roskill [35] in the House of Lords that judicial review can be reduced or simplified to three grounds), that the courts should intervene where a decision-maker fails to "act in accordance with law, fairly or reasonably". In this same paper, he asserts that judicial review for error of law is part of New Zealand's unwritten constitution,[36] that review for unfairness includes substantive as well as procedural claims,[37] and that privative clauses should be stricken from the statute books.[38]

Initially, what is very surprising about all of this is the very heavy reliance upon English authorities and thought. Even allowing for an understandable judicial reticence in discussing the decisions of other New Zealand judges, this is somewhat ironic given his claims elsewhere for an indigenous New Zealand administrative law. Nevertheless, that has little to do with the question of where New Zealand differs from Canada in terms of the scope of judicial review. First, as already pointed out, there is simply no acceptance in Canada that judicial review for all errors of law is constitutionally protected. Indeed, Cooke P. 's assertion that privative clauses should cease to exist is indicative not only of an adherent to a constitutional position but also of one who believes that open-ended judicial review is a "good thing", an analysis supported further by his advocacy of both substantive fairness and reasonableness review. Up to this point, there is little or no evidence of the Supreme Court of Canada accepting that "fairness" has a substantive as well as a procedural content in the realm of judicial review of statutory authorities[39] and, while the language of "reasonableness" is certainly deployed in that arena, it is almost invariably used in its *Wednesbury Corporation* sense of a decision "so unreasonable that no reasonable authority could ever have come to it"[40] or now, more commonly, in its indigenous Canadian form and explicitly qualified by the adjective "patently".

particularly at the High Court level. See, e.g., *N.Z.I. Financial Corporation* v. *N.Z. Kiwifruit Authority* [1986] 1 N.Z.L.R. 159 (Henry J.) and *Wellington Regional Council* v. *Post Office Bank Ltd.* (Unreported, Wellington, December 22, 1987, CP 720/87,Greig J.). (On this latter case, see Graham Taylor "Post Office closures escape review" *National Business Review* (Wellington) March 11 1988, 52). A rather more restrained approach is also revealed by Brennan J. of the High Court of Australia in a paper delivered at the same Conference: "The Purpose and Scope of Judicial Review", supra n. 3, 18. Finally, for practitioner reaction, see D.F. Dugdale's review of the book of the proceedings: [1987] N.Z.L.J. 124.

33 Ibid., 5-6.

34 See *Council of Civil Service Unions* v. *Minister for Civil Service* [1985] A.C. 374, 408-11.

35 Ibid., 414-15.

36 Supra n. 13.

37 Supra n. 3, 10.

38 Ibid., 8: "Their disuse by legislative draftsmen would be a further advance in the struggle for simplicity."

39 I have discussed the Canadian position on substantive fairness most recently in "Natural Justice - The Challenges of *Nicholson*, Deference Theory and the Charter", in Neil R. Finkelstein and Brian MacLeod Rogers (eds.) *Recent Developments in Administrative Law* (Toronto, Carswell, 1987) 1, 24-27.

40 *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223, 230 (per Lord Greene M.R.). Earlier at p. 229, he also spoke of "... a decision

In the course of his paper, Cooke P. also describes the law of judicial review in another way that can be contrasted usefully with the Canadian position. At one point, he talks about judicial review for error of law involving the reviewing court asking whether the statutory authority in question "was ... empowered to determine conclusively the relevant question of law".[41] Here, he seems to come close to what some would describe as the question that is central to judicial review under Canadian law. However, once again relying upon English authority,[42] he then demonstrates a vital difference with present, though admittedly not previous Canadian judicial attitudes. "[R] arely, if ever,"[43] will an administrative authority or tribunal be held to have been so empowered! Not even a privative clause is to be taken as an indication of tribunal conclusiveness on issues of law. This contrasts dramatically with the present Canadian position that not only privative clauses but other legislative devices such as the conferral of power in subjective terms are indicative of a legislative reposing of trust in a statutory authority with respect to the determination of questions of law. While perhaps not going as far as presuming in favour of the statutory authority being the authoritative voice on all issues of both law and fact, the Canadian courts clearly adopt what the English academic writer Paul Craig has described as the third least activist of four positions on his spectrum of "functionalist" approaches to judicial review: deference to the tribunal's determination of questions of law depends upon an analysis of the respective abilities of court and tribunal in relation to the question of law in issue but with no predisposition towards the attitude that the regular courts possess a unique expertise with respect to questions of law.[44]

What are the explanations for such divergence in the law relating to judicial review? Here, I am obviously on rather shaky ground but let me hazard a few speculations. As already indicated, I do not think that the difference can be explained by any formal constitutional variations as between the two jurisdictions. To the extent that the constitutional law of a country is based in large measure on customs and conventions and to the extent that there is no reason why countries with the same constitutional roots should continue to share the same pattern of unwritten and implied constitutional evolution, it might, of course, be said that the New Zealand constitution is now one that attributes a rather different constitutional status to judicial review than Canada, even though, as opposed to New Zealand, Canada has some written warrant for judicial review in its Constitution Act. However, the so-called "living tree" theory of constitutional law depends upon clear justifications derived from political, historical and social sources for the evolution that is being asserted. To this extent, there may therefore be little difference between the methodology involved in discerning why a particular view is held and determining the current constitutional status.

so absurd that no sensible person would ever dream that it lay within the powers of authority."

41 Supra n. 3, 7.

42 *In re Racal Communications Ltd.* [1981] A.C. 374 (H.L. (Eng.)) and *O'Reilly* v. *Mackman* [1983] 2 A.C. 237 (H.L. (Eng.)).

43 Supra n.3, 7.

44 P.P. Craig *Administrative Law* (London, Sweet & Maxwell, 1983) 41-42.

Among the factors that I would advance tentatively as bearing upon this issue are the following, though not in any particular order of importance. First, in comparison with Canada, until recently there has not been the same tradition in New Zealand of entrusting tasks to allegedly independent agencies.[45] When part of the reason for the establishment of such agencies is because of unacceptable judicial performance and a desire to have the task in question dealt with by experts, it is not surprising that there are accompanying legislative indicia of the need for judicial restraint and, moreover, constituency demand for tribunal autonomy. By way of contrast, District Court judges in New Zealand act as administrative tribunals in a significant range of situations and the High Court and Court of Appeal are the appeal bodies from many statutory decisions.[46]

Secondly, and further on the issue of legislative language, intensity of judicial review may have a lot to do with the way in which administrative power is created legislatively. If a statutory authority is bestowed with wide discretionary powers and instructed to act, for example, by reference to broad considerations pertaining to the public interest as is the case for many Canadian statutory authorities,[47] the courts are less likely to feel competent to intervene. On the other hand, if the statutory empowering language is closely defined rather than being open-textured, the courts may be far more inclined to categorize that language as raising issues of law ripe for the judicial reassessment. It would require a comparative study of the language of the statutes and regulatory instruments of both countries to determine whether open-texture language and broad grants of power are more common in Canada than in New Zealand. However, some confirmation for this may be found in the circumscribed manner in which New Zealand judges generally scrutinize broadly-expressed grants of power reposed in Ministers of the Crown and the Royal Representative.[48]

In terms of these considerations, one sector may be particularly relevant in explaining the differences in the principles of and attitudes towards judicial review in the two countries. The New Zealand courts read the privative clauses in labour relations legislation sympathetically[49] and were never disposed to be interventionist in their scrutiny of the former Court of Arbitration created by the Industrial Conciliation and

45 This has, of course, changed rather dramatically in recent times with the establishment of bodies such as the Broadcasting Tribunal, the Securities Commission, the Commerce Commission and the Equal Opportunities Commission.

46 The present and future role of District Court judges as part of the administrative tribunal process is well-canvassed in *Administrative Tribunals: A Discussion Paper* (Legislation Advisory Committee, 1988) at pp. 31-33 particularly.

47 Though it is rare among Canadian statutes, the considerations listed in s. 3 of the Broadcasting Act R.S.O. 1970 c.B-11 (entitled "Broadcasting Policy for Canada") indicate the breadth of factors relevant to the jurisdiction of the C.R.T.C. and the polycentricity of many of the issues that come before it.

48 See, e.g., *Wellington Regional Council* v. *Post Office Bank Ltd.* supra n. 32, *CREEDNZ* v. *Governor-General* [1981] 1 N.Z.L.R. 172, and *Ashby* v. *Minister of Immigration* [1981] 1 N.Z.L.R. 222.

49 D.L. Mathieson *Industrial Law in New Zealand* (Wellington, Sweet & Maxwell (N.Z.) Ltd., 1970) 271-75.

Arbitration Act.[50] In Canada, as already detailed, the isolation was not accomplished nearly so easily. The judiciary and various actors in the regulated community fought an intense rearguard action against the legislative attempts to establish a self-sufficient regime. The consequence was that general judicial review came to have an extremely poor reputation amongst not only those regulated but also amongst those whose regulatory role was seemingly threatened by the inappropriate interventions by the courts of general jurisdiction: members of labour relations boards and labour arbitrators. Moreover, to the extent that these adjudicative tasks were performed in many instances by some of the more powerful and influential members of the academic legal community, there was also a significant spillover effect in a great deal of Canadian academic writing about the general system of judicial review. Thus, one finds a far greater trend to reject expansive judicial review, indeed judicial review altogether, in Canadian academic literature than is the case in either Australia or New Zealand. Moreover, lest this be dismissed as a self-interested over-valuation of the role of Canadian legal academics, it should also be pointed out that the emergence of a far more restrained attitude towards judicial review of the administrative process is in large part attributable to the appointment to the superior court benches of a number of influential labour and human rights lawyers and academics who had served as tribunal and board members and arbitrators.[51]

Thirdly, relevant also is a range of attitudinal and cultural factors of considerable indeterminacy. There seems far less of the cult of the expert in New Zealand and much more scepticism about the civil servant who exercises so much administrative power either directly under statutes or regulations or by virtue of the necessary and extensive delegations of power that take place in the operations of government. In contrast, the judiciary may be more trusted than their counterparts in Canada, a not surprising phenomenon given the widespread use in Canada of judicial appointments even at the High Court and Court of Appeal levels as part of an over-extensive system of political spoils. This may well induce a far greater sense among New Zealanders of the judiciary as the neutral, apolitical arbitrators of complaints against the over-reaching of statutory authorities. There may also be a more prevalent attitude in New Zealand that questions of "law" are for lawyers and judges, not the administrative arm of government, a belief that also explains the perpetuation of the Diceyan philosophy that in "our" system, the law of the land is administered by the ordinary courts to which all have access. "Having one's day in court" means "having one's day before a regular court of general jurisdiction", not some specialist court or administrative tribunal all of which are assumed to be staffed by second rate personnel who therefore dispense second rate law. Not that such attitudes do not exist in Canada but, while in Australia, I was astonished by the editorial railings against bodies such as the Family Court and the New South Wales Land and Environment Court and at the pleas that these tasks be given to "real" judges. One can also point to the judicialization of Australia's Administrative Appeals

50 Of course, with the reformation of the old system and the creation of the Labour Court, the legislative regime in New Zealand is now quite different.

51 The most prominent example is the former Chief Justice of Canada, Bora Laskin, but one also sees the influence of a labour law background in the influential judgments (e.g. *Forer*, supra n. 26) of Blair J.A. of the Ontario Court of Appeal, to name but one other.

Tribunal as reflective of a deep-seated desire for traditional adjudicative forms.[52] It is, of course, highly inflammatory even in decent circles in New Zealand to extrapolate from the situation in Australia. I will, therefore, refrain from further elaboration!

A greater sense of community and shared values may also make the task of judicial review that much easier and more readily acceptable in New Zealand. Put another way, there may be far greater confidence that the judiciary will scrutinize the performance of a statutory authority against the background of a generally-accepted sense of the purposes and goals of the legislation in question. As well as this being the product of greater homogeneity, it may also in large measure stem from the lesser magnitude of the administrative state and the tasks assigned to it in a comparatively small society. Whether that remains realistic in a situation of increasing cultural and ethnic diversity, greater questioning of "traditional" values and particularly those to do with the role of women, a widening wealth gap between rich and poor, and the not unrelated political commitment to relatively unregulated entrepreneurial activity, as well the remarkable growth of a legal elite, is a highly contentious question and one that I am certainly not qualified to answer though, of course, even in the real world, perceptions are often way behind reality!

Fourthly and finally, reference should be made again to a range of practical considerations which may have an effect on the intensity of judicial scrutiny of the administrative process. The cheaper, procedurally easier, less disruptive of the administrative process that judicial review is, the more likely it is to be acceptable to all affected constituencies and the wider its actual scope. Similarly relevant is the matter of internal appeals and review of administrative decisions. The more elaborate such systems of review, the less the need for far-reaching judicial overview. How Canada and New Zealand match up in this respect, I am not all sure. However, it is a little bit surprising to find advocacy of merits review by the regular courts where there exists an Ombudsman who, as in most Canadian jurisdictions, can condemn a decision simply as "wrong".[53]

V. FAIRNESS AND REASONABLENESS REVIEW

All of this may seem to have been a rather long and tortuous introduction to the principal focus of this paper. Nevertheless, I regard it as essential to set the scene for any evaluation of a simplified code of judicial review of administrative action based on error of law, fairness and reasonableness. It has also been designed to show that such assessments are contingent, and that even for countries as similar in legal tradition as New Zealand and Canada are not necessarily the same. On the other hand, having said all that, I do want to suggest that there are potential problems with such a simplified

52 I discuss this phenomenon in "Alternatives to Judicial Review of Administrative Action - The Commonwealth of Australia's Administrative Appeals Tribunal" (1983) 43 La Revue du Barreau 569, though, subsequently, particularly with the advent of high volume jurisdictions, there has been a significant increase in procedural flexibility. See Tenth Annual Report of the Administrative Review Council 1985-86 (Canberra, Australian Government Publishing Service, 1986) at paras. 137-38.

53 See New Zealand Ombudsmen Act 1975, s. 22 (1)(a).

judicial review code which in my view transcend any differences between the nature of the administrative state in both countries.

I have referred above to the simplified basis of judicial review as a "code". One sense of that word is that of codification as in "Civil Code" and, indeed, the statement of the scope of judicial review in those terms is very much the kind of provision that would be located comfortably in such a codification of the law. However, while my use of the term had that in mind, I was much more concerned to evoke a sense of "code" as meaning a surrogate or cipher for more complex or detailed ideas or information. In a colloquial sense, we often think of a "code" as a device for hiding the true meaning of a message from all but the initiated but, of course, the use of codes is not so confined. In every-day discourse, we all use codes frequently not to hide our meaning from anyone but because it is a convenient and efficient short-hand way of conveying a message to our audience. The initiated are assumed to be all within listening range. With respect to judicial review, the question I therefore want to raise by the use of the word "code" is whether the new simplified regime is one that involves a reasonable consensus as to its fuller and more complex meaning or whether it really produces a code in its furtive or secretive sense. If the latter, then its value must be highly questionable since it may lead to very mixed messages in all affected constituencies: other judges, lawyers, administrators, and aggrieved individuals and groups.

One of the principal reasons advanced by Cooke P. for the use of language such as "fairness" and "reasonableness" is his desire to simplify judicial review. If one simplifies the language of review, the law will itself be simplified.[54] Such an argument has very obvious appeal. We are all very aware of the criticisms to which law and lawyers are subjected on the score of language. The monopoly on knowledge is preserved, it is said, by the obfuscation of ideas through the use of jargon, excessive verbiage and, even now, if all else fails, Latin - indeed, Latin pronounced in a way unrecognizable even to a scholar of that tongue. For the most part, lawyers are seen as communicating in a code in its furtive and secretive sense. Nevertheless, one should not dismiss entirely the capacity of lawyers to use language in a subtle and ultimately useful manner in order to impose limits and variations on the scope of legal doctrines. There may, therefore, be dangers in trying to reduce the range of discourse in areas of the law that have evolved over a considerable period of time and where the issues are complex. Administrative law has particular claims to make in this respect given the breadth of governmental activity that is subject to the principles of judicial review.

In his lecture, Cooke P. dismisses arguments against a movement to a straight reasonableness standard uncluttered by any limiting adjectives or other qualifying language by both questioning the usefulness of such language and by expressing confidence in the capacity of the judiciary to understand that review based on a straight reasonableness standard does not involve open-ended review of the exercise of all statutory and other forms of public power. Judges will understand, for example, that deference and restraint are necessary where policy-making functions and broad discretions are being attached.[55] Perhaps he is correct; but, for my part, I think this view places

54 Supra n. 3, 5.
55 Ibid., 14-15.

too much trust in the capacity of judges to interpret the new code correctly and attributes too little weight to the power of language. More particularly, I would argue that a movement in the discourse of judicial review away from the *Wednesbury* standard or, in Canada, away from patent unreasonableness to just plain unreasonableness would have a natural tendency, whatever the intentions, to lead lower court judges to believe that the scope for intervention in the administrative process had been increased significantly. The language of qualification in the existing code of judicial review very obviously was introduced to make it abundantly clear that in most situations the judiciary should be extremely cautious in their scrutiny of the administrative process. Indeed, the criticism has often been that even such restraints are not always ample, a point made recently with considerable force by Professor G.L. Peiris, using as his examples many of the same British decisions cited approvingly by Cooke P.[56]

In this respect, it is rather remarkable that Cooke P. looks for precedent support[57] for his new simplified test to the decision of the House of Lords in the first London transport fares case,[58] a decision that is regarded by many critics[59] as the latter day equivalent of *Roberts* v. *Hopwood* and its striking down of a municipality's decision to provide a minimum wage for adult labour irrespective of the sex of the employee.[60] By interfering in the name of fairness and reasonableness in the Labour Council's decision to subsidize cheaper fares out of moneys collected from local ratepayers, the House of Lords was said to have been trespassing on the autonomy of local bodies and in demanding that the Council try to achieve at a least break-even situation in its fares policies, imposing its own particular brand of economic and social thinking on the body charged with making such judgments.

There are, of course, occasions when the law can become imprisoned or enslaved by the language of existing doctrine and one does not have to look too far in the history of judicial review of public bodies to find examples of this. One such instance is the evolution of the principles of review for procedural unfairness.[61] For generations, that review was based on the language of natural justice, a term from the philosophical and theological realms that also came to have its special code meaning in the judicial arena. The only problem was that the way in which the meaning of the code evolved eventually led to a situation where the application of the principles or rules of natural justice was far too limited. As a result, a new terminology emerged in what was a typically common law manner: bodies which were not subject to the principles of

56 G.L. Peiris "*Wednesbury* Unreasonableness: The Expanding Canvas" [1987] 46 C. L.J. 53. Indeed, Peiris is critical of the overuse of review in the name of *Wednesbury* itself and urges a return to its basic philosophy of restraint.

57 Supra n. 3, 17.

58 *Bromley London Borough Council* v. *Greater London Council* [1983] 1 A.C. 768.

59 See, e.g., Hutchinson, supra n. 4, 306-11. Hutchinson footnotes some of the other critical literature at p. 310, fn. 77.

60 [1925] A.C. 578. Harold Laski's article on the House of Lords' judgment remains a powerful and timely statement on the dangers of judicial review for such policy initiatives. See "Judicial Review of Social Policy" in *Studies in Law and Politics* (New Haven, Yale U.P., 1932) 202.

61 I have argued in favour of this evolution in "Fairness: The New Natural Justice?" (1975) 25 University of Toronto L.J. 281.

natural justice might still owe a more limited duty of procedural fairness to those affected by their decision. Now, of course, the language of procedural fairness has more or less taken over and the potential applicability of procedural fairness obligations admitted with respect to virtually all public bodies.

As already noted, however, the emergence of the new terminology for procedural review had the effect of encouraging claims to be made for it which probably went beyond what its progenitors might have anticipated. Fairness is a term that suggests far more than simply procedural review. At its most expansive, it evokes the spectre of completely open-ended review of the merits of a decision. In his lecture, Cooke P. takes pains to make it clear that his support of substantive fairness as a ground of judicial review does not involve such a broad notion of its scope.[62] He also remarks that the precise parameters of this difficult concept remain to be worked out.[63] The question that this raises is whether there are really gaps in the existing grounds of substance review that require the deployment of completely new general terminology to ensure their filling. Put another way, the need for a new concept or terminology was obvious in the arena of procedural review, but does the same need exist for substance review?[64]

In his recent article, Peiris argues that the *Wednesbury* standard of reasonableness can and has been deployed to accommodate those areas of administrative conduct about which there has been concern in recent times but for which relief seemed difficult to obtain or was simply not available.[65] In particular, he refers to the emergence of review for breach of fiduciary duties, failure to honour undertakings, and defeat of justified expectations. One could also add inconsistency of decision-making.[66] Of course, some judges have also seen these as examples of the new doctrine of substantive unfairness[67] and I suppose in one sense the route by which the evolution or development takes place might be said to be irrelevant provided that the law has become more in accordance with what are appropriate principles of judicial scrutiny of the administrative process. Nevertheless, as a matter of judicial technique, it does seem to me that there is more to be said for using existing frameworks for the development of new but ultimately incremental expansions in the scope of judicial review if possible rather than invoking a new, general concept of potentially over-broad application and allowing it to be delimited as specific situations confront the courts. While such a new departure was probably necessary in the case of procedural review because of existing

62 Supra n. 3, 11.

63 Ibid., 12.

64 For greater elaboration of these arguments, see "Natural Justice and Fairness", supra n. 2, 274-96.

65 Supra n. 57, 62-74. Note, however, that Peiris is far from favouring all these developments.

66 For criticism of this as a basis for review, see H. Wade MacLauchlan "Some Problems with Judicial Review of Administrative Inconsistency" (1984) 8 Dalhousie L.J. 435.

67 See, e.g., *Noel & Lewis Holdings Ltd.* v. *The Queen* (1982) 1 Admin L.R. 290 (F.C., T.D.) and *Fung* v. *Minister of Employment and Immigration* (1986) 18 Admin. L.R. 260 (F.C., T.D.) as well as the Enlish authorities discussed by Cooke P., supra n. 3,10-11, and most notably *R.* v. *Inland Revenue Commissioners, Ex parte Preston* [1985] A.C. 835.

doctrinal limitations and their stifling effect on demands for a more appropriate basis for the judicial implication of procedural standards, it is not at all clear that the same was imperative for substantive review. Of course, also underlying this argument is my sense that judicial review of the administrative process has too much of a tendency to be over-broad anyway. As a result, the occasions for judicial imperialism in the form of new, over-arching concepts should be extremely limited in this sphere.

A further possibility is suggested by Professor Dennis Galligan in his recent work.[68] Galligan refers to a third category of fairness - formal fairness. Within this concept, "wrongs" such as breach of undertakings, defeat of justified expectations, and inconsistency of treatment can be fitted without going as far as allowing the courts to engage in an assessment of the substantive fairness or objective merits of decisions. As with the distinctions between procedure and substance, those between formal and substantive fairness are fraught with difficulties at least at the margins. (Can we ever talk about what is substantively fair in isolation from the contextual considerations that are said to constitute formal unfairness? When does formal unfairness trump an obviously "correct" outcome? Can that issue be avoided?) Indeed, Galligan himself acknowledges these difficulties and expresses reservations. Nevertheless, the examples given do raise issues that are more limited and arguably more within the courts' area of competence at least provided the matching of formal injustice against substantive outcomes is avoided. To this extent, it therefore deserves to be asked whether or not the concerns of judges such as Cooke P. might not be met by a careful delineation of the concept of "formal unfairness".

VI. CONCLUSION

It is fashionable among British academics to speak about "green light" and red light" theories of judicial review.[69] For those using such terminology, the support of substantive fairness review is a clear indicator of a "red light" proponent. It entails the perpetuation, if not expansion, of the central role of the courts as a check upon arbitrary exercises of executive power. The same would be said in Canada. Even accepting that there is a variety of reasons for judicial review of administrative action being more expansive in New Zealand than in other superficially equivalent jurisdictions, the case for substantive fairness review is a difficult one to make. Because of its vagueness, and also the invitation that it might be read as giving for a more expansive judicial review of the merits of decision-making by statutory authorities, it has the potential to enlarge the scope of judicial review beyond what is desirable even for New Zealand, as well as spawning a body of law the predictive value of which is increasingly suspect. At the very least, movements in this direction should be treated as under an "amber light".[70]

68 Dennis Galligan *Discretionary Powers - A Legal Study of Official Discretion* (Oxford, Clarendon Press, 1986) 152-161.

69 See Carol Harlow and Richard Rawlings *Law and Administration* (London, Weidenfeld and Nicholson, 1984) Chapters 1 and 2.

70 Harlow and Rawlings themselves employ this extension of the metaphor (ibid.,47ff). See also Leigh Hancher and Matthias Ruete's review of their book: "Forever Amber?" (1985) 48 M.L.R. 236.