

INSTITUTIONAL INTEGRITY AND PUBLIC LAW
AN ADDRESS TO THE JUDGES OF HONG KONG
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HONG KONG, 30 OCTOBER 2014

The sumptuary rules of the Chinese Imperial Civil Service established a rigidly defined set of dress requirements for all public officials: from the black lacquer-treated hats with protruding wings and the black boots trimmed with white lacquer to the ceremonial belts backed with jade, rhinoceros horn, gold or silver. Each distinctive sub-unit or rank of the civil service also had a badge of rank in the form of a cloth chest piece embroidered, in the case of the civil hierarchy, with birds in pairs. The top rank had two stately cranes soaring above clouds. The lowest rank had a pair of earth-bound quails, pecking the grass. The military ranks wore breast patches carrying images of fierce animals such as lions, tigers, bears and panthers.

There was one distinct civil service unit with a unique system of badge identification. Western scholars, by an inaccurate analogy with the Roman administrative system, called this unit the “censorial” or “supervising” branch of government. Its role was to maintain the integrity of the mechanisms of governance. Civil officials in this branch

had an embroidered breast patch which, uniquely, was identical for all members of the branch, regardless of rank. It displayed a legendary animal called a Xiezhi which could detect good from evil. Allegedly, it could smell an immoral character from a distance, whereupon the Xiezhi would leap upon the person and tear him or her to pieces¹.

The Xiezhi is a symbol of justice, equivalent to the blindfolded woman bearing equipoised scales in the Western legal tradition. As such a symbol it is engraved on the gavels in the law courts of the People's Republic of China. I interpose to note that Gulliver could not understand why justice was blind-folded. In Lilliput, the statue of justice not only dispensed with the blindfold, she had eyes in the back of her head. This is a much more accurate depiction of the contemporary judiciary. We call it case management.

The Chinese censorial system was organised as a separate branch of government to maintain surveillance over all other governmental activities and, thereby, enforce proper behaviour through processes of impeachment, censure and punishment. It also had the function of initiating recommendations for change of governmental policies, practices or personnel. The success of the Chinese Imperial

tradition as a system of administration, manifest in its longevity, has been attributed to the power and vigilance of the censorate².

The Thirteenth Century Mongol Emperor, Kublai Khan, once said of his governmental structure:

“The Secretariat is my left hand, the Bureau of Military Affairs is my right hand, and the Censorate is the means for my keeping both hands healthy.”³

Insofar as the Chinese system had a separation of powers which, given the overriding authority of the Emperor, could not be rigid, it was the censorate rather than the judicial arm of government that could be characterised as sufficiently independent to constitute a separate branch. Significantly, the censors had the right to directly address the throne by means of written memorials, without any intervening official commentary. If not independence in our sense, there was a substantial degree of institutional autonomy.

Of course, like any other branch of government the censorate was liable to develop institutional interests of its own. There is a natural tendency in any surveillance mechanism to come to believe that the administration of government exists for the purposes of being investigated. There would naturally be times when these processes were taken too far. One Imperial Grand Secretary complained about the continued intervention of censors in matters of administration. He said they were like the “squawkings of birds and beasts”⁴.

In the 1920s, Sun Yat-sen proposed that the Republic of China adopt a five yuan or branch system of government comprised of three branches from the Western governmental tradition – executive, legislative and judicial – and two from China’s past: an examination branch and a control or integrity branch. When an American constitutional lawyer proposed that modern constitutions should now incorporate a separate institutionalised integrity branch of government⁵, another American scholar drew attention to the similarity between that proposal and the Chinese Imperial tradition adopted by Sun Yat-sen⁶.

I introduced the concept of an integrity branch of government into Australian legal debate in the second *National Lecture Series on Administrative Law* for the Australian Institute of Administrative Law in 2004⁷. The first series was delivered by Sir Anthony Mason NPJ. In 2012 the Institute returned to this idea and made it the subject of the 2012 National Administrative Law Conference, when a number of papers were presented on the topic⁸. This year, the Chief Justice of Western Australia, Wayne Martin, has taken up the theme⁹.

I use the word “integrity” in its connotation of an unimpaired or uncorrupted state of affairs. This involves an idea of purity which will often give rise to contestable propositions and issues of degree. Considered as a function of government, the concept focuses on institutional integrity rather than personal integrity, although the latter, as a characteristic required of occupants of public office, has implications for the former.

In any stable polity there is a widely accepted idea of how governance should operate in practice. The role of integrity institutions is to ensure that that expectation is realised, so that the performance of governmental functions is not corrupt, not merely in the narrow sense that officials do not take bribes, but in the broader sense of observing

proper conduct. Commentators, who stated that the concept of an “integrity branch” has “firmly taken root”, suggested that the idea of integrity in this context had four components: legality, fidelity to purpose, fidelity to public values and accountability¹⁰. I agree with this classification.

Maintaining the integrity of public institutions is a function performed by a wide variety of mechanisms in each of the legislative, executive and judicial branches of government. The principal purpose of these mechanisms is two-fold. First, to ensure that each governmental institution exercises the powers conferred on it lawfully in the manner in which it is expected or required to do, and for the purposes for which those powers were conferred, and for no other purpose. Secondly, each governmental institution must pursue the public values, including procedural values, which the particular polity expects it to obey.

The concept of a "separation of powers", in which distinct functions are performed by separate institutions, has always been an oversimplification. Much legislation is made by the executive and legislatures make executive decisions, to different degrees in different systems. The judiciary makes the law and, sometimes, administers the law. It has always been more accurate to describe the institutions of

government, as one American scholar said, as involving "separated institutions sharing powers"¹¹. So it is with integrity functions.

Such functions are performed, to give only a few examples, by Parliamentary committees, commissions of inquiry, auditors general, anti -corruption bodies, not least by the widely influential Hong Kong ICAC model. Preserving institutional integrity is a concern for all branches of government.

My focus is on the legal dimension of institutional integrity. This often arises in the civil law jurisdiction of the judiciary concerned with private institutions. For example, the enforcement of corporate governance standards in corporations law and the supervisory jurisdiction over international commercial arbitration, within the limits prescribed by the New York Convention. In a number of such contexts, the role of the courts can be usefully analysed in terms of the maintenance of the institutional integrity of the spheres of discourse under consideration. However, my principal concern was, and is, with the role of public law in enforcing the institutional integrity of the institutions of government.

Separate treatment of constitutional law, administrative law and statutory interpretation law remains useful in many respects. However, the integrative terminology of “public law” merges constitutional law, administrative law and the law of statutory interpretation, thereby treating the activity of governing as a distinct subject matter. In Australian jurisprudence, these three subject areas are closely interrelated.

Public law has been defined as:

“The assemblage of rules, principles, canons, maxims, customs, usages, and manners that condition, sustain and regulate the activity of governing.”¹²

Public law is, or should be, primarily concerned with the way the institutionalised governance system *generates* power, rather than focussing, as is often done, on the way in which power is constrained. Constraint is an inextricable component of the *conferral* of governmental power. Except in a totalitarian system, *all* power is conditional.

As one author has put it:

“..... [C]onstraints on power generate power. Thus understood, modern constitutional structures should not be seen to impose limitations on the exercise of some pre-

existing powers; these constitutional structures are the means by which political power is itself generated.”¹³

A central theme of my earlier writings on institutional integrity has been the use of the concept to identify limits on the proper exercise of judicial power. Constitutional law, administrative law and some aspects of the law of statutory interpretation, encompass constraints on the exercise of judicial power, as an integral component of the conferral of the power to make decisions affecting the legislative and the executive branches of government.

I believe it is useful to characterise this judicial role as the maintenance of the institutional integrity of the legislature and the executive. When the judiciary steps beyond that function, subject of course to legislative or constitutional authority, it may be in breach of the very kind of constraint on which its authority was predicated.

Such conduct, as Murray Gleeson NPJ so felicitously put it, raises issues of judicial legitimacy¹⁴. The characterisation of the relevant judicial role as one of maintaining the institutional integrity of other branches of government is a principled identification of the scope, and therefore of the boundary, of judicial authority.

I hope it may be of interest to the judiciary of Hong Kong for me to discuss the development in Australian jurisprudence of this focus on institutional integrity over the last two decades or so. First, the principle underlying the separation of powers between the judiciary and other branches of government, including the legislature at both national and State level, have been reformulated in terms of maintenance of the institutional integrity of the judiciary. Secondly, in a related and overlapping jurisprudential development, the foundations of administrative law have been constitutionalised and expressed in terms of institutional integrity by placing the concept of jurisdictional error at the heart of Australian administrative law.

The High Court of Australia first adopted the language of "integrity" when it created a new constitutional doctrine that the Commonwealth Constitution imposed limits upon the constituent States of the Commonwealth with respect to their legislative authority over the Supreme Courts of the States¹⁵. In doing so, the High Court extended the separation of powers doctrine from the national to the State level. The States, it found, could not pass legislation which compromised the integrity of State courts as repositories of the judicial power of the Commonwealth. By 2004, the High Court expressed this doctrine in the language of "institutional integrity"¹⁶.

In 2010, the High Court significantly extended the effect of this new doctrine beyond matters of procedure to matters of substance. It held that a State legislature could not deprive a Supreme Court of its administrative law supervisory jurisdiction over inferior courts and tribunals¹⁷. The principle that there existed an irreducible minimum requirement of judicial review for national courts¹⁸, was extended to the State Constitutions.

In the legal tradition with which I am most familiar, the expansion of judicial review has been one of the great projects of the law over the last half century or so. Judicial review has developed in all advanced legal systems beyond a narrow concept of legality or strict *ultra vires*. This development manifests, in my opinion, a concern with institutional integrity.

Such a role is quite distinct from merits review for which separate statutory provision is often made. Merits review is concerned to ensure that the correct or preferable decision is made in a particular case and that the fairness, consistency and quality of decision-making is maintained. To use the terminology of “branches”, judicial review is a

manifestation of the integrity branch of government, whereas merits review is a manifestation of the executive branch.

The practice of judicial review, whether expressly authorised by constitutions, codes or statutes, or as a development of judge made law, inevitably gives rise to tension between the judiciary and those whose conduct is being reviewed. It is an important objective of all mechanisms of governance that the inevitable tension should be a creative tension. How this is to be achieved depends upon the extent to which a formal separation of powers is entrenched in the constitutional arrangements of a nation.

Contemporary debates about judicial activism are only the latest in a long history of conflict over judicial review. In the common law tradition, there was an intense period of conflict between the Court of Kings Bench and the Stuart kings over the Court's assertion of a supervisory jurisdiction.

The solution to an equivalent conflict in France, after the Revolution, was a strict separation between the judiciary in the *ordre judiciaire*, which exercises the civil and criminal jurisdiction, and the *ordre*

administratif. The administrative law developed by the Conseil d'Etat, and its subordinate court structure, appears to be indistinguishable from the operation of judicial review in the common law tradition. Indeed, because of the absence of a detailed code, the law administered by the Conseil d'Etat developed in ways similar to the judge made law of the common law tradition.

In French law *le principe de légalité* encompasses general principles of law - *les principes généraux du droit* - which include a range of propositions¹⁹ that are very similar to the development in the common law tradition of principles of administrative law and of principles of the law of statutory interpretation. In common law jurisprudence the latter are now also referred to collectively as the principle of legality²⁰.

In both the civil and common law traditions the principle of legality goes beyond issues of legality, narrowly understood, to encompass duties to give a fair hearing, to act impartially, to give reasons and, to varying degrees in different jurisdictions, to recognise a range of human rights. It extends to ensuring that powers are exercised for the purpose for which they were given and in the manner in which they were intended to be exercised, either expressly or on the basis of a procedure

which is in conformity with public expectations of how government actors ought behave in the particular nation.

An independent judiciary, confident in its own autonomy, does not need to be hesitant in asserting its right to enforce the rule of law in these respects. Nevertheless, as controversies in many nations attest, those who find their conduct constrained by judicial intervention frequently assert that the judiciary has gone too far. Sometimes these criticisms are valid. More often, however, they merely reflect the frustration of powerful people who are used to getting their own way and cannot do so because of proper legal constraints.

In many jurisdictions the grounds upon which judicial review is permitted may be expressed in amorphous terms which invite the judiciary to intervene wherever a judge does not like the result. The standards applied in administrative law can be stated at different levels of generality. When stated in such terms as preventing “abuse of power” or advancing “good administration”, it becomes very difficult to draw the line between review on the basis of legality and review on the basis of merits.

There is a noticeable tendency over recent decades to expand the scope of judicial intervention by adopting vague general tests such as “abuse of power” or “proportionality” or “legitimate expectations” in lieu of longstanding, but more limited, principles. The same occurs with tests including the word “reasonable”. In the context of the frequently fraught relationship between the judiciary and the executive, this is a weasel word²¹. Such tests invite the judiciary to step beyond the scope of the conditional authority which has been conferred upon it. They do not provide the judiciary with a principled boundary beyond which judicial power should not go.

The Australian judiciary, generally, but by no means universally, has been more tough minded – some would say narrow minded – in holding the line, than the judiciaries of most other nations with which we compare ourselves. This approach has been described as “Australian Exceptionalism” in administrative law. This label was not meant as a compliment²².

We do not talk of a “dialogue” between the judiciary and the executive or legislative branches, as Canadians do. We have not adopted the idea of “proportionality” which has entered English law from

Europe, as a generally applicable concept. We have narrowly confined the idea of “legitimate expectations”. We have also rejected the idea of “deference” towards administrative decision-makers, of the kind adopted in the United States²³, to some degree Canada and, for a time, in England. Deference, or the European equivalent, “margin of appreciation”, is only necessary if the standard to be applied is too wide or too vague. The last word on “deference” has not been written. In about two weeks Justice Gageler of the High Court of Australia will deliver a lecture on “Deference”. (As the NSW Bar Association’s Inaugural Spigelman Oration on Public Law).

As Lord Hoffmann NPJ said:

“My Lords, although the word ‘deference’ is now very popular in describing the relationship between the judicial and the other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are.

That is a question of law and must therefore be decided by the courts.

...

The principles upon which decision-making powers are allocated are principles of law. ... [W]hen a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law.”²⁴

When intervention by a court is understood as ensuring the institutional integrity of legislative or executive decision-making, the judiciary is more likely to act with appropriate restraint. When purporting to ensure that the executive does not exceed its lawful powers, it is of supreme importance that the judiciary must not exceed its own. The issue, as I have noted, is one of judicial legitimacy.

Perhaps the most frequently cited statement of the scope of judicial review in Australia, is that of Sir Gerard Brennan, formerly Chief Justice of Australia and a Non-Permanent Judge of the CFA. His Honour said:

“The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs

the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it, but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent to which they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."²⁵

Many of the disputes which arise in administrative law in Hong Kong will give rise to issues under the Bill of Rights. Australia has no such comprehensive statement of rights, although we do invoke a common law bill of rights²⁶.

Questions of proportionality and deference may be treated differently in such a constitutional context as exists in Hong Kong. Indeed, the High Court of Australia has deployed proportionality analysis when interpreting purposive powers of the Commonwealth Parliament. The application of Bill of Rights jurisprudence in Hong Kong will qualify the applicability of the Australian approach to the common law of judicial review. I continue with that qualification.

The first requirement for interpreting any text is to understand and give full weight to the nature of the document. That is why a national constitution must be interpreted as an instrument of government.²⁷ That is why a statute must be interpreted in accordance with the public values of the system of government, such as the presumptions grouped under the principle of legality. That is also why a written commercial contract must be interpreted so as to provide as much commercial certainty as the words permit. Judicial review, most commonly involves review of the exercise of statutory powers.

The principal thrust of Australian administrative law is focused on issues of institutional integrity. This appears from the central role in Australian administrative law jurisprudence now played by the concept of "jurisdictional error"²⁸. This concept may be best regarded as a mode of expressing a conclusion. Nevertheless, it is a principled basis for delineating the limit of judicial authority, in a way that alternative formulations do not do. The distinction emphasises that what is being enforced is institutional integrity, rather than achieving what appears, with the benefit of hindsight, to be individualised justice.

Nevertheless, the jurisdictional/non-jurisdictional distinction is a much contested concept. Justice Felix Frankfurter once described the idea of a jurisdiction as “a verbal coat of too many colours”²⁹. He also referred to the “morass” in which one can be led by “loose talk about jurisdiction” and concluded that “‘jurisdiction’ competes with ‘right’ as one of the most deceptive of legal pitfalls”³⁰.

The most sustained attack on the distinction between jurisdictional and non-jurisdictional error came from the pen of D M Gordon with respect to jurisdictional facts³¹. Lord Cooke of Thorndon extended the attack to the distinction between jurisdictional and non-jurisdictional errors of law, commencing with his 1954 unpublished PhD thesis at Cambridge University³² and sustained by him in the New Zealand Court of Appeal and in the House of Lords. It was a frequently reiterated theme of Justice Kirby’s in the High Court of Australia³³.

I am of the view that the distinction between permissible and impermissible conduct, as manifest in the distinction between jurisdictional and non-jurisdictional error is real, indeed fundamental. Whatever the difficulties of drawing the line may be, it remains a fundamental distinction³⁴. As Murray Gleeson NPJ once put it: “Twilight does not invalidate the distinction between night and day”³⁵.

The criticism has often been advanced that there is no single test or theory or logical process by which the distinction can be determined³⁶. In my opinion, that does not detract from the validity of the distinction. The life of the law, as Oliver Wendell Holmes Jr famously said, has not been logic, but experience. The concept of institutional integrity, I believe, helps us to understand the nature of the distinction.

To say that different judges may come to different conclusions as to the significance of a particular error and, accordingly, to determine whether or not it is “jurisdictional”, is not to identify an infirmity from which every other approach advanced in substitution for the terminology of “jurisdiction” does not also suffer. However, it has a more principled basis than the alternatives.

In 1995, the High Court of Australia refused³⁷ to adopt the reasoning of the House of Lords which, in substance, abolished the distinction between jurisdictional error and error within jurisdiction³⁸. Since that time, the High Court has emphasised the significance of the distinction between jurisdictional and non-jurisdictional error as limiting the scope of executive power³⁹. The English jurisprudence has the effect that the central distinguishing factor is that between law and fact. This is no less difficult of application than the jurisdictional/non-

jurisdictional distinction. In the Australian perspective, the proposition that any error of law is capable of invalidating administrative decision making, extends the reach of judicial authority too far.

In 1999, in one of my first judgements as Chief Justice of NSW, I emphasised the significance of a finding that a fact was jurisdictional⁴⁰. Soon afterwards, the High Court had occasion to do the same⁴¹. These cases came as a surprise to some legal academics who thought that the distinction had been superseded⁴². The language of jurisdictional fact is now entrenched.

The primary meaning of jurisdiction in a legal context is “authority to decide”⁴³. Such authority is always capable of ascertainment in an objective way. The test of “jurisdictional error” has been formulated in a number of different but equivalent ways, e.g. whether or not the relevant element is:

- “[a] condition of jurisdiction”.⁴⁴
- “[a] preliminary question on the answer to which ... jurisdiction depends”.⁴⁵
- the “criterion, satisfaction of which enlivens the power of the decision-maker”.⁴⁶

- an “event or requirement” constituting “an *essential* condition of the existence of jurisdiction”.⁴⁷

Each such test raises an issue of institutional integrity.

The process of identifying what facts or opinions or procedural steps are jurisdictional is a matter which turns, usually, on a process of statutory interpretation. All of the relevant principles of the law of statutory interpretation apply. The fact that different judges may reach different conclusions with respect to matters of this character is not surprising in view of the range of elements that must be taken into account when interpreting a statute.

I wish to conclude by re-emphasising the importance of judges resisting the temptation to stray beyond the proper bounds of judicial power. The constitutional doctrine of the separation of powers is a two-way street. There is a fundamental differentiation between matters which are properly subject to the exercise of judicial power and matters which should be subject to the institutions of political accountability. The very fact that it is the judiciary itself which decides what is an appropriate exercise of judicial power, imposes a significant burden of circumspection on judges.

Such restraint must be manifest in the interpretive tasks in which judges are engaged. It is all too easy to dress up a conclusion, reached on other grounds, by selecting from the smorgasbord of maxims and principles of interpretation those which assist the achievement of a pre-determined result. Intellectual honesty is a core obligation of the judicial oath.

As propounded many years ago by the founder of positivist jurisprudence, John Austin, there is a clear distinction between legitimate and spurious interpretation.⁴⁸ A century ago, the foremost American legal scholar of the era, Roscoe Pound, further developed the concept of spurious interpretation. The contemporary relevance of his observations make them worthy of extensive quotation. This is one of my favourite passages and deserves to be better known, not least by advocates of American style “dynamic interpretation”.

Roscoe Pound said:

“The object of genuine interpretation is to discover the rule which the lawmaker intended to establish; to discover the intention with which the lawmaker made the rule, or the sense which he attached to the words wherein the rule is expressed ... Employed for these purposes,

interpretation is purely judicial in character; and so long as the ordinary means of interpretation, namely the literal meaning of the language used in the context, are resorted to, there can be no question. But when, as often happens, these primary indices to the meaning and intention of the lawmaker fail to lead to a satisfactory result, and recourse must be had to the reason and spirit of the rule, or to the intrinsic merit of the several possible interpretations, the line between a genuine ascertaining of the meaning of the law, and the making over of the law under the guise of interpretation, becomes more difficult. Strictly, both are means of genuine interpretation. They are not covers for the making of new law. They are modes of arriving at the real intent of the maker of existing law. The former means of interpretation tries to find out directly what the lawmaker meant by assuming his position, in the surroundings in which he acted, and endeavouring to gain from the mischiefs he had to meet and the remedy by which he sought to meet them, his intention with respect to the particular point in controversy. The latter, if the former fails to yield

sufficient light, seeks to reach the intent of the lawmaker indirectly. ...

On the other hand, the object of spurious interpretation is to make, unmake, or remake, and not merely to discover. It puts a meaning into the text as a juggler puts coins, or what not, into a dummy's hair, to be pulled forth presently with an air of discovery. It is essentially a legislative, not a judicial process

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Pound went on to say:

“ ... The bad features of spurious interpretation, as applied in a modern state, may be said to be three: (1) That it tends to bring law into disrepute, (2) that it subjects the courts to political pressure, (3) that it reintroduces the personal element into judicial administration. ... In the first place, in a modern state, spurious interpretation of statutes, and especially of constitutions, tends to bring law into disrepute. Law is no longer the mysterious thing it was once. This is an age and a country of publicity. It is no longer possible to impose upon the public by covering legislation with the cloak of interpretation. ... The disguise

is transparent and futile, and can only result in creating or confirming a popular belief that courts make and unmake the law at will. Second, in a common-law country where questions of politics and economics are so frequently referred to the courts, the knowledge that courts exercise, or may exercise, a power of spurious interpretation subjects the courts to political pressure which can not but impair the general administration of justice. ... Finally, spurious interpretation reintroduces the personal element into the administration of justice. The whole aim of law is to get rid of this element. And, however popular arbitrary judicial action and raw equity may be for a time, nothing is more foreign to the public interest, and more certain in the end to engender disrespect if not hatred for the law. The fiction of spurious interpretation can no long deceive anyone to-day. The application of the individual standard of the judge instead of the appointed legal standard is quickly perceived, and is, indeed, suspected too often where it has not occurred.”⁵⁰

I cannot put these propositions better. That is why I have extracted them at such length. Judicial review does raise issues about excessive judicial intervention in executive decision-making and Pound's analysis retains its relevance in this regard.

As I said at the outset, my comments have focussed only on Australian jurisprudence⁵¹. Nothing I have said should be understood as commenting on the law of Hong Kong as it exists or as it may develop. I repeat I am very aware that much of what I have said can be impacted by the protection of human rights entrenched in the Basic Law and the Bill of Rights Ordinance. Australia has no such Bill of Rights. However, I trust some of you might find the language of "institutional integrity" helpful as a guide to determining the proper scope of judicial review of administrative decision making.

That there is a unifying theme, is suggested by the uniform reaction of those whose conduct is assessed in the performance of an integrity function. At the outset I mentioned the Imperial Grand Secretary who complained that the Chinese censor's conduct was like the "squawkings of birds and beasts". From Parliamentary question time to judicial review, from Auditor-General's reports to Corruption Commission investigations, from parliamentary committee hearings to

Royal Commission reports, those whose conduct is in question are apt to use terminology similar to “squawkings” in their own defence. That does suggest something similar is going on in all these processes.

Remember the Xiezhi, the mythical animal that could smell an immoral character from a distance and thereupon would tear him or her apart. Thus is the integrity function performed.

¹ See Ray Huang, *1587, A Year of No Significance: The Ming Dynasty in Decline*, Yale Uni P, Newhaven (1981) pp53-54.

² See Charles O Hucker, *The Censorial System of Ming China*, Stanford Uni P, Stanford, California (1966) p3.

³ Ibid, p6.

⁴ Ibid, p 297.

⁵ See Bruce Ackerman, “The New Separation of Powers” (2000) 113 *Harvard Law Review* 633 at 694-696.

⁶ See William P Alford, “Book Review” (2000) 113 *Harvard Law Review* 1677 at n 96.

⁷ Dennis Pearce (edited) *AIAL National Lecture Series on Administrative Law* AIAL Canberra 2004. The three lectures, delivered in Sydney, Adelaide and Brisbane, were entitled, respectively, The Integrity Branch of Government; Jurisdiction and Integrity and Integrity and Privative Clauses. The first lecture was also published in 2004 *78 Australian Law Journal* 724. I return to this theme in an address to the Australian Public Sector Anti-Corruption Conference, 2007: “The Significance of the Integrity System” published in 2008 *4 The Original Law Review* 39 and in Tim Castle (ed) *Speeches of a Chief Justice: James Spigelman, 1998-2008* CS2N Publishing, Sydney 2008. This and my other writings referred to below are accessible on the website of the Supreme Court of NSW. (www.courts.nsw.gov.au/SC under “Speeches”)

⁸ See *AIAL Forum* No. 70, October 2012.

⁹ Hon Wayne Martin “Forewarned and four-armed: Administrative Law Values and the Fourth Arm of Government” (2014) 88 *Australia Law Journal* 106

¹⁰ See Lisa Burton and George Williams “The Integrity Function and ASIO’s Extraordinary Questioning and Detention Powers” (2012) 38 *Monash Uni Law Rev* 1 at 23-24.

¹¹ Richard Neustadt *Presidential Power*, Signet, 1964 p 42.

- 12 Martin Loughlin, *The Idea of Public Law* (2003) Oxford University Press at 115; Martin Loughlin, *Foundations of Public Law* (2010) Oxford University Press at 11.
- 13 Loughlin, *Foundations of Public Law* supra at 12.
- 14 See M Gleeson “Judicial Legitimacy” (2000) 20 Australian Bar Review 4.
- 15 *Kable v DPP* (NSW) (1996)189 CLR 51.
- 16 *Fardon v Attorney General(Qld)* (2004) 223 CLR 575 at [15,23,37,41,101-102]. See also *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45 at [63].
- 17 *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531.
- 18 See *Plaintiff S 157/2002 v Commonwealth* (2003) 211 CLR 476 at [98].
- 19 See N Brown & J S Bell *French Administrative Law* (5th ed) Clarendon Press Oxford 1998 pp214ff; Morand-Deville, Jacqueline “Le principe de légalité” in *Cours de droit administratif* Montchrestien, 2007 pp 241 ff; Eisenmann, Charles, “Le droit administratif et le principe de légalité”, *EDCE*, 1957 pp 25 ff; Peiser, Gustave “Le développement de l’application de principe de légalité dans la jurisprudence due Conseil d’Etat” *Melange CHAPUS*, Montchrestien, 1992 pp 517 ff; Labetoulle, Daniel “Principe de légalité et principe de sécurité juridique” *Melange BRAIBANT* Dalloz, 1996 pp 403 ff; Tesoka, Laurent “Principe de légalité et principe de sécurité juridique en droit administratif Francaise” *AJDA* 2006 at pp 2214 ff.
- 20 See J J Spigelman “The Principle of Legality and the Clear Statement Principle” (2005) 79 *Australia Law Journal* 769.
- 21 See my observations in *Attorney-General (NSW) v X* (2002) 49 NSWLR 653 at 667.
- 22 See M. Taggart “Australian Exceptionalism in Judicial Review” (2008) 36 *Federal Law Rev* 1
- 23 *Chevron USA Inc v Natural Resources Defense Council Inc* 467 US 837 (1984)
- 24 *R (Prolife Alliance) v British Broadcasting Corp* [2003] *EMLR* 23 at [75].
- 25 *Attorney General (NSW) v Quin* (1990) 170 CLR 1 at 35-36.
- 26 See James Spigelman *Statutory Interpretation and Human Rights: The McPherson Lecture Series*, University of Queensland Press, 2008 Cr App 22-29.
- 27 As Prof Paul Freund once put it: “We ought not read the Consitution like a last will and testament lest it become one”, quoted by Brest P, “The Intentions of the Adopter are in the Eyes of the Beholder” in Hickok Jr EW, *The Bill of Rights: Original Meaning and Current Understanding* (University Press Virginia, Charlottesville, 1991) p 21.
- 28 J J Spigelman “The Centrality of Jurisdictional Error” (2010) *Public Law Review* 77. See also Ronald Sackville “The Constitutionalisation of State Administrative Law” (2012) 12 *Aust J of Admin Law* 127 at 130–132.
- 29 *United States v L A Tucker Truck Lines* 344 US 33, 39 (1952).
- 30 *City of Yonkers v United States* 320 US 685, 695 (1944).
- 31 Commencing in (1929) 45 *LQR* 458 and (1931) 47 *LQR* 386, see the list in P Craig *Administrative Law* (5th ed) p479n and see M Aronson “The Resurgence of Jurisdictional Facts” (2001) 12 *Public Law Rev* 17 at 19n.

32 Aronson "Resurgence" supra at 19n.

33 See *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 123; *Re Minister for Immigration and Multicultural Affairs; Ex parte Holland* (2001) 185 ALR 504 at [22]; *Re McBain: Ex parte Catholic Bishops Conference* (2002) 209 CLR 372 at 439; *Ex Parte Applicant S20/2002* supra at [120].

34 See e.g. *R v Refugee Tribunal Ex parte Aala* (2000) 204 CLR 82 at [163].

35 Gleeson op cit at 35-36.

36 See, e.g. P Craig *Administrative Law* (6th ed) London, Sweet & Maxwell, 2008. Ch 14.

37 *Craig v South Australia* (1995) 184 CLR 163.

38 *Anisminic Ltd v Foreign Compensation Commission* (1969)2 AC 147 at 171; *Page v Hull University Visitor* (1993) AC 682.

39 See e.g. *Kirk* supra at [100].

40 See *Timbarra Protection Coalition Inc v Ross River Mining NL* (1999)46 NSWLR 55.

41 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135.

42 See Mark Aronson "The Resurgence of Jurisdictional Facts" 2001 12 Public Law Review 17. See Spigelman supra "Centrality of Jurisdictional Error" pp 85-87.

43 *Minister for Immigration and Multicultural and Indigenous Affairs v B* [2004] HCA 20 at [6].

44 *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 429-430.

45 *The Queen v The Judges of the Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113 at 125.

46 *Corporation of City of Enfield* supra at 148.

47 *Craig v South Australia* supra at 177.

48 See John Austin *Lectures on Jurisprudence Vol 2*, (4th ed, 1879) John Murray, London at 1029-1030. See also my extended discussion of this distinction in "Legitimate and Spurious Interpretation", J J Spigelman *Statutory Interpretation and Human Rights: McPherson Lecture Series Vol 3*, (2008) University of Queensland Press, Ch 3.

49 Roscoe Pound "Spurious interpretation" (1907) 7 *Columbia Law Review* 379 at 380-382.

50 See *ibid* at 384-385.

51 The debate in Australia is by no means over. See e.g. Chris Steytler and Iain Field "The Institutional Integrity Principle: Where are we now and where are we headed?" (2011) 35 *Uni. of W.A. Law Rev* 227; Suri Ratnapala and Jonathan Crowe "Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power" (2012) 36 *Melbourne Uni Law Rev* 175; Brian Mason "Jurisdictional Facts after Plaintiff M70" (2013) 24 *Public Law Rev* 37; Stephen Forrest "The Physics of Jurisdictional Error" (2014) 25 *Public Law Rev* 21.