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Contextual review: the instinctive impulse and unstructured normativism in judicial review

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Abstract

Contextual review is a judicial method that rejects doctrinal or categorical methods to guide judicial supervision of administrative action. Judges are invited to assess the circumstances of a claim in the round without any doctrinal scaffolding to control the depth of scrutiny; in other words, intervention turns on an instinctive judicial impulse or overall evaluative judgement. This paper identifies and explains the various instances where this method is deployed in judicial review in Anglo-Commonwealth administrative law. The efficacy of this style of review is also evaluated, using rule of law standards to frame the analysis. Its increasing popularity is a worrying turn, in part because its reliance on unstructured normativism undermines the rule of law.

Keywords: judicial review; contextual review; instinctive impulse; unstructured normativism; rule of law; depth of scrutiny

Introduction

Contextual review has seductive charm. When deployed as a judicial method for reviewing administrative action, 'formulaic rules' are rejected in favour of judicial instinct and the forensic exercise becomes inherently discretionary:[1]

> 'Has something gone wrong?' is the litmus test for determining which cases are deserving of the court's intervention, and cases which are not.

In other words, judges are invited to assess the circumstances of a claim in the round without any doctrinal scaffolding to control the depth of scrutiny. Traditional methods employed to guide the supervisory eye, such as scope, grounds or intensity of review, are replaced with a form of normative argumentation.[2] Contextual review, in the sense used in this paper, is a useful way to capture and think about this unstructured judicial style.[3]

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[1]PA Joseph 'Exploratory questions in administrative law' (2012) 25 NZULR 75, drawing on the language of Lord Donaldson in *R (Guinness plc) v Panel on Take-overs and Mergers* [1990] 1 QB 146.

[2]For an explanation of these other traditional methods used to express depth of scrutiny, in contradistinction to this type of contextual review, see DR Knight *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge: Cambridge University Press, 2018).

[3]See below, Part 1(a) for an extended explanation of the use of the term contextual review in this way.

Yet, despite all the seduction of simplicity, the surrender of doctrine for judgement in contextual review is intuitively troubling. If judicial review of administrative action finds its conceptual justification in the rule of law,[4] then it feels unfaithful to the rule of law to then abandon law for discretion – albeit discretion of the judicial kind.

I look at the case made for this unstructured form of contextual review, especially Philip Joseph's plea that we should embrace the instinctive impulse as the methodological heart of judicial review of administrative action.[5] I identify the extent to which this type of contextual review has been adopted in Anglo-Commonwealth judicial review of administrative action.[6] While not widespread, the allure of contextual review still proves attractive, perhaps increasingly so. We can see seeds of this judicial methodology in cases from England and Wales, New Zealand and Canada.[7] Contextual review can be found, in its strongest and emblematic form, in *R (Guinness plc) v Panel on Take-overs and Mergers* and cases which follow, where the court simply asks 'whether something has gone wrong that justifies the intervention of the court?'[8] Contextual review also captures, in its weaker form, doctrinal frameworks applied by the courts that are so open-textured that their essential feature is an overall evaluative judgement, such as substantive fairness or broad church expressions of reasonableness review. Against this backdrop, I then tease out our intuitive scepticism towards this form of unstructured normativism and explain the rule of law concerns it raises. Using Fuller's rule of law criteria, I explain the problems that arise if judicial method jettisons doctrine – ultimately concluding that contextual review is anathema to the rule of law.

1. Recognising contextual review: the instinctive impulse and unstructured normativism

In this part, I explain in more detail the characteristics that shape this style of review, identify where this style can be seen in Anglo-Commonwealth judicial review jurisprudence and, because contextual review remains fledging in form, identify some of the key voices championing its virtue.

(a) Contextual review as a style of review

Contextual review, in the sense used here, captures unstructured judicial judgement when reviewing administrative action. If we reflect on the meta-structure of judicial review, we can sketch different ways in which the courts determine the depth of review in individual cases; four key styles dominate Anglo-Commonwealth judicial review:[9]

(a) *scope of review*, based on an array of formalistic categories which determine whether judicial intervention is permissible;[10]

[4]See PP Craig 'Fundamental principles of administrative law' in D Feldman (ed) *English Public Law* (Oxford: Oxford University Press, 2009) para [13.16]; compare C Forsyth 'Of fig leaves and fairy tales' in C Forsyth (ed) *Judicial Review and the Constitution* (Oxford: Hart Publishing, 2000) p 29.

[5]Joseph, above n 1.

[6]Anglo-Commonwealth is a term I employ to refer to England and Wales, Australia, Canada and New Zealand: see Knight, above n 2, at 16. These jurisdictions represent a common cohort for comparative administrative law analysis, especially because they have 'a significant degree of doctrinal and institutional similarity': C Saunders 'Apples, oranges and comparative administrative law' [2006] AJ 423 at 427.

[7]For simplicity, I use the terms 'England' and 'English' to capture the system of judicial review in England and Wales: see generally R Ireland 'Law in Wales' in P Cane and J Conaghan (eds) *The New Oxford Companion to Law* (Oxford: Oxford University Press, 2008) p 1231.

[8]*Guinness*, above n 1, at 160.

[9]Knight, above n 2. The labels for the different styles are loosely drawn from the language and structure of Professor Stanley de Smith's acclaimed judicial review textbook as it changed over its lifetime: see Knight, above n 2, p 6, tracing the language change in de Smith *Judicial Review of Administrative Action* (Stevens, 1st edn, 1959) to Woolf et al *de Smith's Judicial Review* (Sweet & Maxwell, 7th edn, 2013).

[10]C Harlow 'A special relationship?' in I Loveland (ed) *A Special Relationship?* (Oxford: Clarendon, 1995) p 79 at p 83; M Taggart 'Reinventing administrative law' in N Bamforth and P Leyland (eds) *Public Law in a Multi-Layered Constitution* (Oxford: Hart Publishing, 2003) p 312; Knight, above n 2, ch 2 'Scope of review'.

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(b) *grounds of review*, based on a simplified and generalised set of grounds of intervention, especially the tripartite grounds canonised in the 1980s;[11]
(c) *intensity of review*, based on explicit calibration of the depth of scrutiny taking into account a series of constitutional, institutional and functional factors;[12]
(d) *contextual review*, based on an unstructured (and sometimes instinctive) overall judgement about whether to intervene according to the circumstances of the case.

Contextual review, in many respects, takes its colour from the rejection of the other doctrinal methods used to guide the courts' supervisory eye. Scope of review, grounds of review and intensity of review all rely on doctrine – albeit in different ways – to determine the applicable depth of scrutiny and frame the basis for intervention in individual cases. In contrast, contextual review emphasises an unstructured, normative and discretionary approach. As Joseph, one of the proponents of this style of review, argues: 'No amount of rule formalism can relieve the courts of their instinctual task in judicial review'.[13] Doctrine is condemned: a 'pedagogical morass' of rules plagued by 'terminological confusion'.[14] Simplicity is championed: the instinctive impulse provides the essential 'chemistry' of judicial review.[15] And we are counselled not to fear this unstructured contextualism and liberation of the judicial instinct. Joseph reassures us that the 'courts respect the ambit of administrative discretion and the limits of the adjudicative role, without imposing yet more distracting doctrine'.[16]

Joseph's belief in the instinctive impulse is the high point of contextual review. As catalogued below, the essential character of contextual review can also be seen in other scholarship and jurisprudence too, even if the embrace of judicial instinct or fully unstructured normativism is a little more muted. The styles of review sketched here, including contextual review, are necessarily generalised précis, limited in the extent to which they can capture the vast and nuanced doctrines or approaches existing at any point in time. But there remains value in sketching the essence and emphasis of the different methodological approaches to the determination of the depth of scrutiny. Distilling this form of contextual review and other key styles allows us to, with a degree of abstraction, grapple with their virtue – a task otherwise impractical across the plethora of individual rules, doctrines and principles that manifest those styles.

In summary, contextual review stipulates a particular style of review that emphasises an open-textured, normative appraisal in individual cases, without any scaffolding to guide the determination of the depth of scrutiny and whether to intervene or not. This sketch of contextual review should not be confused with the basic proposition that context is relevant – perhaps acutely so – to the supervisory jurisdiction. The facts and circumstances in which cases arise are recognised by all the methodological styles sketched above, to different degrees and in different ways. Of course, contextual review of the kind narrated here embraces that proposition most fully but it does not have a monopoly on the relevance of circumstances and surrounding context.

(b) Contextual review's jurisprudence

Contextual review's style can be identified in different parts of Anglo-Commonwealth jurisprudence, especially:

[11]See for example *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) and *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA); Knight, above n 2, ch 3 'Grounds of review'.

[12]See for example *Canada (Director of Investigation & Research) v Southam Inc* [1997] 1 SCR 748; *Pushpanathan v Canada (Minister of Employment & Immigration)* [1998] 1 SCR 982; *R (Bugdaycay) v Secretary of State for the Home Department* [1987] AC 514 (HL); *Wolf v Minister of Immigration* [2004] NZAR 414 (HC); *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728.

[13]Joseph, above n 1, at 75 and 80.

[14]Joseph, above n 1, at 81.

[15]Joseph, above n 1, at 101.

[16]Joseph, above n 1, at 87.

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(a) *Guinness*' something has gone wrong ground;
(b) broad church unreasonableness standards or grounds;
(c) other open-textured grounds; and
(d) non-doctrinal deference in human rights adjudication.

(i) Guinness' *something has gone wrong ground*

The emblematic case for strong form contextual review is *R (Guinness plc) v Panel on Take-overs and Mergers*, where the English Court of Appeal adopted a test for intervention based on wrongness.[17] Lord Donaldson spoke of the courts stepping in when 'something had gone wrong of a nature and degree which required the intervention of the court'.[18] The body subject to review in that case – a private, unincorporated, self-regulatory body – was described as unique and sui generis. The absence of a legislative template on which to base review meant the court was driven to generate a more generalised basis for supervising the panel's activities (in the particular case, the refusal to adjourn a hearing about a potential breach of the panel's code on take-overs and mergers). This justified review, Lord Donaldson said, 'more in the round than might otherwise be the case and, whilst basing its decision on familiar concepts, should eschew any formal categorisation'.[19] In the end, however, the court ruled that the failure to adjourn a hearing did not justify intervention. But the seeds of a wrongness ground were sown.

Since then this approach has sometimes been relied on England and, more frequently, in New Zealand. And the approach often attracts the 'innominate ground' label – a term employed by Lord Donaldson himself – although it might be appropriately be described as the wrongness ground.[20]

A few English cases have echoed Lord Donaldson's loose test, albeit relatively infrequently. For example, it was successfully relied on in *Camelot Group plc*.[21] The incumbent operator of the national lottery challenged the lottery commission's actions in a tender process that attracted only two bids, after the commission ruled both bids non-compliant but then negotiated exclusively with the other bidder. Richards J ruled the decision to negotiate exclusively with one bidder was unlawful, relying explicitly on *Guinness*: 'The ultimate question is whether something has gone wrong of a nature and degree which requires the intervention of the court. In my judgment it has'.[22] Richards J floated other possible bases of intervention, such as unfairness, legitimate expectation, absence of reasons and unreasonableness, but did not find it necessary to resolve those claims, favouring a more generalised conclusion in the style of *Guinness*. Other cases, such as *Niazi* and *Lord Saville*, have recognised that the *Guinness* approach is available but found it was not made out on the facts.[23]

In addition, one possible reading of the Supreme Court's decision in *Miller (No 2)/Cherry* is that the decision to quash the prorogation of Parliament was predicated on the innominate ground's something has gone wrong test, albeit not explicitly.[24] While the heart of the case turned on an unjustified interference with the constitutional principle of parliamentary accountability, the Supreme Court's decision was notable for the absence of reference to grounds of review or other traditional methodological devices. The court was careful to avoid the improper purpose ground that had been relied on by the Inner House of the Court of Session but did not otherwise explicitly identify any other grounds that provided a doctrinal basis for intervention.[25] But the tenor of the judgment has a lot of sympathy

[17] *Guinness*, above n 1.
[18] *Guinness*, above n 1, at 160.
[19] *Guinness*, above n 1, at 159.
[20] *Guinness*, above n 1, at 160.
[21] *R (Camelot Group plc) v National Lottery Commission* [2001] EMLR 3.
[22] *Camelot Group plc*, above n 21, at [84].
[23] *R (Niazi) v Secretary of State for the Home Department* [2007] EWHC 1495 (Admin); *R (A) v Lord Saville of Newdigate* [2000] 1 WLR 1855. The approach also received warm praise from a Supreme Court judge in extra-judicial remarks: see Lord Carnwath's remarks below.
[24] *R (Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41, [2019] 3 WLR 589.
[25] This point has vexed many commentators, with a plethora of grounds or methods being suggested, including error of law, jurisdictional error, proportionality and a new breach of constitutional principle ground; see for example M Elliott *The Supreme Court's judgment in Cherry/Miller (No 2): a new approach to constitutional adjudication?* (24 September 2019)

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with the approach in *Guinness*; in other words, the exceptional circumstances of the case led the court to make a more generalised assessment of whether something had gone wrong that justified intervention.

Guinness' simple and uncomplicated style has found some favour in New Zealand especially. It has been relied on both explicitly and implicitly in a number of cases, including by appellate courts, although its methodological appropriateness continues to be contested. The ringing endorsement of *Guinness* came in the Court of Appeal's decision in *Electoral Commission v Cameron*, when the court ruled that a decision of the advertising standards board was unlawful.[26] As a self-regulatory body, the board only had a self-asserted jurisdiction, hence it was tricky to determine the lawfulness of a decision upholding a complaint about the electoral commission's advertising about an upcoming referendum on the electoral system. Instead, the court drew on *Guinness*' 'more flexible approach' and ultimately declared that the board had acted unlawfully by not respecting the overlapping but authoritative jurisdiction of the electoral commission. No ground of review needed to be identified; instead the court simply ruled that the board had acted in error.

Since then *Guinness* has occasionally been relied on in other cases – and increasingly so recently, although not without dissent.[27] A number of cases from the last few years give an impression of the courts' current attitude. First, we can see some flavour of *Guinness* in the Supreme Court's decision in *Ririnui*.[28] The court ruled that the sale of a government-owned farm was unlawful because of mistaken advice from another government department that the farm was not needed in the future to settle grievances with iwi and hapū under the Treaty of Waitangi. In so ruling, the majority was agnostic about whether the alleged error was one of law or fact: it was sufficient that the 'exercise of public power … was based on a material error'.[29] Thus, we see the generalised language of error, in an unqualified sense, creeping in, much like in *Guinness*. Secondly, in *Pora* the High Court overturned a decision made by Cabinet about the amount of ex gratia compensation payable to a wrongly convicted criminal.[30] Ellis J ruled that the failure to provide for inflation in policy guidance was unlawful. Her articulated basis for intervention was that 'something in public law terms [had] gone wrong', effectively adopting the argument that it was 'of no real moment' to isolate any particular ground of review.[31] Although not explicitly citing *Guinness*, its characteristic judgement and absence of doctrine was self-evident. Thirdly, Cull J in *ANZ Sky Tours* drew on *Guinness* to justify quashing Tourism NZ's decision to revoke a tour operator's accreditation to operate tours for Chinese tourists. 'A number of things went wrong' with Tourism NZ's process and 'the intervention of this Court is warranted', she said.[32] In reality, the judge could probably have relied on established grounds of review to justify intervention, because the claim turned on standard complaints, such as a flawed investigation, mistakes of fact, failure to disclose complaints, absence of reasons and disproportionate penalty. But it was convenient for the judge to bundle this up and conclude that 'something had gone wrong of a nature and degree that required the intervention of the court'.[33] Fourthly, in *NZ Steel*, Mallon J quashed a minister's decision not to impose import duties on Chinese steel coil because there were 'material errors' in

available at www.publiclawforeveryone.com; R Masterman and S Wheatle *Miller/Cherry and constitutional principle* (14 October 2019) available at www.ukconstitutionallaw.org; J Hamzah Sendut *The prorogation case: proportionality in all but name?* (8 October 2019) available at ukconstitutionallaw.org; A Sapienza *Miller 2 – jurisdictional error strikes back* (7 October 2019) available at www.adminlawblog.org.

[26] *Electoral Commission v Cameron* [1997] 2 NZLR 421.

[27] See also its recognition in *Health Authority Trust v Director of Health and Disability Consumer Advocacy* [2008] NZCA 67; *Wilkins v Auckland District Court* (1997) 10 PRNZ 395; *Issac v Minister of Consumer Affairs* [1990] 2 NZLR 606; *Taiaroa v Minister of Justice* (CP 99/94, High Court, 4.10.1994); *Shaw v Attorney-General (No 2)* [2003] NZAR 216; *Te Runanga o Ngai Tahu v Attorney-General* (CIV-2003-404-1113, 6.11.2003).

[28] *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056.

[29] *Ririnui* at [54] and [90] (Elias CJ and Arnold J; Glazebrook and O'Regan JJ concurring on this point).

[30] *Pora v Attorney-General* [2017] 3 NZLR 683.

[31] *ANZ Sky Tours Ltd v New Zealand Tourism Board* [2019] NZAR 951.

[32] *ANZ Sky Tours*, above n 31, at [148].

[33] *ANZ Sky Tours*, above n 31, at [148].

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the advice to the minister both about a part of the legal test and factual evaluation relating to that test.[34] Justice Mallon confidently assumed the presence of such errors was enough to vitiate the decision, without concern with their character – legal or factual – much as we saw in the Supreme Court's decision in *Ririnui*.

Finally, we can note one of the dissenting voices to the rise of *Guinness*' unstructured approach. In *AI (Somalia)*, Palmer J condemned the pleading of the innominate ground in judicial review of a decision of the immigration and protection tribunal.[35] He warned that the innominate ground from *Guinness* is 'not a legal test' and is 'circular, indeterminate and largely discretionary'.[36] Pointedly, he challenged those relying on *Guinness* to provide a fully justified basis for intervention:[37]

> If 'something' has gone wrong, sufficient to warrant a court interfering in the decision-making of a public body, the court ought to be able to describe what that 'something' is so as to justify with reasons why it is unlawful.

(ii) Broad church unreasonableness

Contextual review's style can also be seen in standards of reasonableness that are so broad in character that they accommodate varying depths of scrutiny and empower judicial judgement. In other words, if reasonableness is framed as being predominately dependent on context, it collapses to an overall judgement based on the circumstances.

The most vivid example of this style is the Canadian approach to reasonableness following *Dunsmuir*.[38] For several decades Canadian courts used to calibrate the depth of scrutiny on a preliminary basis, relying on different standards of review.[39] However, in *Dunsmuir*, the Supreme Court collapsed two different standards of unreasonableness (patent unreasonableness and reasonableness simpliciter) into a singular and more generalised formulation of unreasonableness.[40] Therefore, apart from cases where correctness review is appropriate, the determination of the depth of review takes an implicit and floating character, presenting a more discretionary and open-textured style of review. Binnie J was especially alert to the fact that collapsing the two standards of reasonableness generated a form of unstructured contextualism. In his separate reasons in *Dunsmuir*, he warned that '[c]ontextualizing a single standard of review' simply moved debates about the appropriate level of deference from a choice between two standards to '*within* a single standard of reasonableness' to determine the appropriate level of deference.[41] Later, in *Alberta Teachers' Association*, he correctly highlighted the amount of discretion it generated: '"Reasonableness" is a deceptively simple omnibus term', giving judges 'a broad discretion to choose from a variety of levels of scrutiny from the relatively intense to the not so intense'.[42]

Since *Dunsmuir*, the breadth of the reasonableness standard has become readily apparent; in successor cases in the Supreme Court, the effective depth of scrutiny has varied from something close to correctness, to ordinary reasonableness, to manifest (*Wednesbury*-style) unreasonableness.[43] But rather than taking explicitly doctrinal form as in the pre-*Dunsmuir* days, the calibration of depth

[34] *New Zealand Steel Ltd v Minister of Commerce and Consumer Affairs* [2018] NZHC 2454.

[35] *AI (Somalia) v Immigration and Protection Tribunal* [2016] NZHC 2227, [2016] NZAR 1471.

[36] *AI (Somalia)*, above n 35, at [44].

[37] *AI (Somalia)*, above n 35, at [46].

[38] *Dunsmuir v New Brunswick* [2008] 1 SCR 190. See generally P Daly '*Dunsmuir's* flaws exposed' (2012) 58 McGill LJ 1; DJ Mullan 'Unresolved issues on the standard of review in Canadian judicial review of administrative action - the top fifteen!' (2013) 42; D Stratas 'The Canadian law of judicial review' (2016) Queen's LR 27.

[39] Knight, above n 2, ch 4.

[40] *Dunsmuir v New Brunswick* [2008] 1 SCR 190.

[41] *Dunsmuir*, above n 40, at [139].

[42] *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association* [2011] 3 SCR 654 at [87]. See also *Canada (Attorney-General) v Canadian Human Rights Commission* [2013] FCA 75 at [12].

[43] *Canada (Canadian Human Rights Commission) v Canada (Attorney-General)* [2011] 3 SCR 471; *Alberta Teachers'*; *Catalyst Paper Corp v North Cowichan (District)* [2012] 1 SCR 5, discussed in Daly, above n 38.

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of review remains inchoate and at large. Reasonableness in Canada now 'floats' along an infinite spectrum of deference – a judicial method once condemned in the prologue to *Dunsmuir*.[44] As the Supreme Court itself later put it in *Catalyst Paper*, reasonableness 'is an essentially contextual inquiry'.[45]

The state of this broad church reasonableness is under review as the Supreme Court again reflects on the appropriate framework for judicial review.[46] However, one strong possibility is endorsement of contextual unreasonableness as the monolithic judicial method, by collapsing correctness review into its ambit.

Reasonableness standards or grounds thus provide ample room for the unstructured contextualism to be delivered. The Canadian experience is an especially powerful example of the normative dimension of this style of review but efforts to contextualise the unreasonableness ground in English and New Zealand jurisprudence could equally qualify as instances of contextual review.[47]

(iii) Open-textured grounds

Grounds that are so open-textured that they boil down to a judicial judgement, typically in the round, also deliver a type of contextual review. The potentially discretionary nature of unreasonableness, as a ground of review, has already been alluded to. We can add substantive fairness and abuse of power as two possible grounds which provide similar open-textured appraisal. Admittedly, their status as 'grounds' of review remains in flux; the common law lacks a clear threshold or rule-of-recognition for when a novel basis for intervention has been canonised as a legitimate ground.[48] Regardless, if deployed, these grounds or bases for intervention provide opportunities for contextual review.

Substantive fairness was heavily touted as a potential ground of review in New Zealand in the late 1980s and early 1990s. The possibility of a ground that looked at fairness in the round, beyond its procedural form, was strongly championed by Lord Cooke. In *Thames Valley*, he argued in favour of substantive fairness, 'shading into but not identical with unreasonableness'.[49] Substantive fairness would allow judges to consider, he said, 'the adequacy of the administrative consideration given to a matter and of the administrative reasoning' and would provide 'a measure of flexibility enabling redress for misuses of administrative authority which might otherwise go unchecked'.[50] The courts initially toyed with this ground,[51] but its emergence was probably overtaken by variegation of the unreasonableness ground; however, it continues to be pleaded – typically unsuccessfully – today.[52]

Similarly, abuse of power has been touted as an independent ground of review, as well as featuring as the effective heart of another ground. For example, Lord Brightman in *Puhlhofer* spoke of abuse of power as a ground of review.[53] So too did Sedley LJ in *Bancoult* and Hammond J in *Lab Tests*.[54] Abuse of power also operates as the essential evaluative calculus for the substantive legitimate expectation

[44]*Law Society of New Brunswick v Ryan* [2003] 1 SCR 247 at [20] and [44]; compare *Canada (Citizenship and Immigration) v Khosa* [2009] 1 SCR 339 at [108].

[45]*Catalyst Paper*, above n 43, at [18]. See also *Khosa*, above n 44, at [59].

[46]*Bell Canada v Attorney General of Canada*; *Canada (Minister of Citizenship and Immigration) v Vavilov* (SCC, appeal heard December 2018).

[47]See for example Lord Cooke's proposed simplification of the reasonableness ground in *R (International Traders' Ferry Ltd) v Chief Constable of Sussex* [1999] 2 AC 418 at 452 and *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at 549; along with a similar suggestion from Thomas J in *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 and 403.

[48]Knight, above n 2, ch 3 'Grounds of review'.

[49]*Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd* [1994] 2 NZLR 641 at 652 (McKay and Fisher JJ agreeing the decision should be quashed but expressing some caution about substantive fairness as a ground of review).

[50]*Thames Valley*, above n 49, at 652.

[51]See for example *Northern Roller Milling Co Ltd v Commerce Commission* [1994] 2 NZLR 747 (HC).

[52]See for example *Lowrie v Hutt City Te Awa Kairangi* [2019] NZAR 620 (HC).

[53]*R (Puhlhofer) v Hillingdon London Borough Council* [1986] AC 484 at 518 (HL).

[54]*R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] QB 365 at [60]–[61]; *Lab Tests Auckland Ltd v Auckland District Health Board* [2009] 1 NZLR 776 (CA) at [386].

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ground. Famously, in *Coughlan* the test of whether it was unlawful to frustrate a substantive legitimate expectation was framed in terms of abuse of power: 'so unfair that to take a new and different course will amount to an abuse of power'.[55] The assessment of abuse of power is inevitably circumstantial and imbued with significant discretionary judgement.

(iv) Non-doctrinal deference

The current approach to deference in human rights adjudication in England and New Zealand, while in a slightly different setting than common law judicial review, also exhibits some loose sympathy with this type of contextual review. The courts have rejected attempts to give deference any doctrinal form when evaluating the proportionality of limitations on rights. Instead, the question of whether any deference should be afforded to a primary decision-maker is treated as a matter of respect and weight applied in the ordinary course of judging.

The ground was laid in *Daly*, with Lord Steyn's now famous concluding remark about the nature of the proportionality test: 'In law context is everything'.[56] This signalled a move towards a free-floating principle of contextualism that was ultimately to colour the preference for a non-doctrinal form of deference through the weight principle. The leading authority on this point is Lord Bingham's speech in *Huang*, with which all other members of the appellate committee in that case joined.[57] The House of Lords was called on to determine the proper approach to be applied when appellate immigration authorities assessed whether the ministerial refusal of leave to remain breached applicants' right to family life under the Human Rights Act 1998.[58] In essence, the House of Lords ruled that any questions of deference should simply be determined on a case-by-case basis in the ordinary way by applying 'weight' to the views of the administration. Lord Bingham was critical of attempts to structure these considerations by reference to various devices: 'due deference', 'discretionary areas of judgment', 'margin of appreciation', 'democratic accountability', 'relative institutional competence' and so forth.[59] He said doing so had the tendency to 'complicate and mystify what is not, in principle, a hard task to define, however difficult the task is, in practice, to perform'.[60] Instead, a non-doctrinal approach was preferred:[61]

> The giving of weight to factors … is the performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice.

Thus we see the preference for questions of deference in the context of the proportionality calculus to be addressed through implicit judicial judgement in the round over attempts to express deference through doctrine. Without any need to explain relative weighting, this unstructured appraisal shows some kinship with contextual review, although its impact will not be as potent as for strong forms of contextual review because the proportionality test itself provides some structure for the adjudicative task.

This preference for non-doctrinal deference and weight has been reinforced subsequently by the House of Lords and Supreme Court in a number of cases and has extended more generally into

[55] *R (Coughlan) v North and East Devon HA* [2001] QB 213 (CA) at [57]; approved in *R (Reprotech (Pebsham) Ltd) v East Sussex County Council* [2003] 1 WLR 348 at [34]. See also *R (Begbie) v Secretary of State for Education and Employment* [2000] 1 WLR 1115 and *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237.

[56] *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at [28].

[57] *Huang v Secretary of State for the Home Department* [2007] 2 AC 167.

[58] Lord Bingham treated the question as the same for all authorities: the adjudicator, Immigration Appeal Tribunal and Court of Appeal.

[59] *Huang*, above n 57, at [14].

[60] *Huang*, above n 57, at [14]

[61] *Huang*, above n 57, at [16].

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the broader human rights context.[62] The New Zealand Supreme Court has also shown the same reluctance to give deference doctrinal form in the leading cases under the New Zealand Bill of Rights Act 1990.[63]

(v) Summary

Contextual review, in its strong form, is captured by the 'something has gone wrong' test employed in the *Guinness* case in England in the late 1980s. It continues to provide an occasional basis for intervention, increasingly so in New Zealand nowadays. In addition, the discretionary and non-doctrinal characteristics of contextual review can be found in other methodological approaches, albeit more subtly at times. Broad church forms of unreasonableness, in Canada especially, and other open-textured grounds exhibit strong sympathy with contextual review. To a lesser degree, so too does the rejection of doctrinal deference in human rights adjudication in favour of deference being determined in the round as a matter of weight and respect.

It is worth noting that, within the Anglo-Commonwealth family, Australia is unusual because it does not seem to adopt any form of contextual review of this kind. But that is perhaps unsurprising given its continuing commitment to abstract formalism synonymous with the scope of review style.[64]

This catalogue points to contextual review of this kind being dotted in some spots in Anglo-Commonwealth judicial review, suggesting this is a style of review that needs to be taken seriously. This is consistent with moves to more circumstantial and normative approaches in the supervisory jurisdiction over the last half century or so, especially as judicial review has been called on to pioneer more complex terrains of administrative law and governance.[65] It might be notable that some of the key cases where contextual review has been employed lie at the outer reaches of public law, especially in cases involving quasi-public bodies operating without traditional legislative authority and frameworks. However, it is not my purpose here to explicate that trend or to unpick the reasons for that trajectory; my interest lies in demonstrating the existence of a particular style of review that allows its virtue or otherwise to be examined.

(c) Contextual review's advocates

The case for contextual review has also been fortified by scholars and judges, often speaking extra-judicially. A number of key figures, especially from New Zealand, have been key in plotting a path towards unstructured normativism in judicial review.

First, as explained earlier, Joseph has been the most explicit protagonist of the instinctive impulse and unstructured contextualism.[66] His preference for normative argumentation inexorably translates into what he characterises as the 'instinctive impulse'.[67] And his embrace of the instinctive impulse goes beyond the critique of a legal realist; Joseph brings the judicial hunch into the foreground and makes a normative case for it being the very lodestar for judicial intervention. Perhaps oddly, Joseph then argues that, if judges are satisfied that the instinctive wrongness threshold is met, judges should 'fit applications for judicial review within an established ground of review'.[68] The decision to intervene is then

[62]See for example *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100; *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420; *R (Animal Defenders International) v. Secretary of State for Culture, Media and Sport* [2008] 1 AC 1312 at 33 (and, in that context, 'great weight'); *R (Quila) v Secretary of State for the Home Department* [2012] 1 AC 621; *R (Nicklinson) v Ministry of Justice* [2014] 3 WLR 200 at [166]–[171], [348]; *R (Lord Carlile) v Secretary of State for the Home Department* [2014] UKSC 60. See also *Kennedy v Charity Commission* [2014] 2 WLR 808 (correctness review, along with an emphasis on 'weight', in the context of common law unreasonableness review) and *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591 (especially the emphasis on 'context' determining intensity and weight to the primary decision-maker's view); Knight, above n 2, ch 4.

[63]*R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1, especially at [111] (Tipping J) and [268] (Anderson J).

[64]Knight, above n 2, at Part 2.2.2.

[65]Knight, above n 2, p 245.

[66]Joseph, above n 1, and see Introduction above.

[67]Joseph, above n 1, at 74.

[68]Joseph, above n 1, at 74 and 80.

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retrospectively recast with doctrine in order to imbue it with a degree of legitimacy; the charade of legal reasoning is preserved – despite Joseph's condemnation of formalism and doctrinal method. That said, Joseph proposes dramatic editing of the grounds of review, only leaving the two broad grounds: illegality and procedural impropriety. But this veneer of ex post facto justification should not distract from his central argument: the instinctive impulse should be the nub of judicial supervision.

Secondly, Lord Cooke is famous for his simplicity project, where he promoted a model of judicial review that was shorn of formalism and technicalities.[69] Instead he encouraged the idea that judges ought to retain the broad power to intervene to address injustice wherever it was seen – thus manifesting the essence of contextual review. His targets were many: a simplified statement of the tripartite grounds ('reasonably, fairly, in accordance with law');[70] the language of jurisdiction and jurisdictional error (a 'rather elusive thing'),[71] formalistic natural justice ('fairness' to be preferred),[72] narrowly defined standing (echoing Lord Diplock's condemnation of 'outdated technical rules of locus standi'),[73] and *Wednesbury* unreasonableness (a 'tautologous formula' and an 'unfortunately retrogressive decision').[74] And his strong advocacy for the adoption of 'substantive fairness' as a legitimate ground of judicial review most squarely channels Lord Donaldson's remarks in *Guinness* – remarks he was quite supportive of.[75] Substantive fairness allowed judges, he said, to consider 'the adequacy of the administrative consideration given to a matter and of the administrative reasoning' and enabled 'a measure of flexibility enabling redress for misuses of administrative authority which might otherwise go unchecked'.[76] He saw this ground as 'shading into but not identical with unreasonableness'.[77]

Thirdly, New Zealand's long-serving chief justice, Dame Sian Elias, continued in Lord Cooke's footsteps before her recent retirement; she is known as an especially vocal critic of doctrinal forms of deference and the idea of variable intensity. She described deference as 'dreadful'[78] and said spectrums of unreasonableness were 'a New Zealand perversion of recent years'.[79] She has also rejected attempts to articulate structured forms of curial deference, both in judicial review cases,[80] and in statutory appeals.[81] Like Lord Cooke, she preferred simple and discretionary standards for intervention. '[T]here is no need for any amplification of reasonableness or fairness', she said, as 'both [take] their shape from context'.[82] Reflecting on New Zealand's development of administrative law principles, she spoke warmly about its 'simpler path of

[69]DR Knight 'Simple, fair, discretionary administrative law' (2008) 39 VUWLR 99. See also M Taggart 'The contribution of Lord Cooke to scope of review doctrine in administrative law' in P Rishworth (ed) *The Struggle for Simplicity in the Law* (Butterworths, 1997) p 189; DR Knight 'Mapping the rainbow of review' (2010) NZ Law Rev 393.

[70]*New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 at 552.

[71]*Bulk Gas Users Group Ltd v Attorney-General* [1983] NZLR 129 at 136.

[72]*Daganayasi v Minister of Immigration* [1980] 2 NZLR 130.

[73]*Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 3)* [1981] 1 NZLR 216.

[74]*R (International Traders' Ferry Ltd) v Chief Constable of Sussex* [1999] 2 AC 418 at 452; *Daly*, above n 56, at 549.

[75]R Cooke 'Fairness' (1989) 19 VUWLR 421 at 426; 'The discretionary heart of administrative law' in C Forsyth and I Hare (eds) *The Golden Metwand and the Crooked Cord* (Clarendon, 1998) p 203 at p 212; 'Foreword' in GDS Taylor *Judicial Review* (Butterworths, 1991) p iv; 'Foreword' in PA Joseph *Constitutional and Administrative Law in New Zealand* (Brookers, 2nd edn, 2001) p vi; 'The road ahead for the common law' (2004) 53 ICLQ 273 at 284.

[76]*Thames Valley*, above n 49, at 653.

[77]*Thames Valley*, above n 49, at 653. See also *Northern Roller Milling Co Ltd v Commerce Commission* [1994] 2 NZLR 747. Despite Lord Cooke efforts in the late 1980s and early 1990s, it failed to gain any real traction as ground in itself; see PA Joseph 'The contribution of the Court of Appeal to Commonwealth administrative law' in R Bigwood *The Permanent New Zealand Court of Appeal* (Hart Publishing 2009) p 41 at p 65.

[78]*Ye v Minister of Immigration* (NZSC, transcript, 21–23 April 2009, SC53/2008) at 179 (Elias CJ), quoted in Knight (2010), above n 69, at 400.

[79]*Astrazeneca Ltd v Commerce Commission* (NZSC, transcript, 8 July 2009, SC 91/2008) 52.

[80]*Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597 at [5] (questions not 'helpfully advanced by consideration of the scope and intensity').

[81]*Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 and *McGrath v Accident Compensation Corporation* [2011] 3 NZLR 733. See A Beck 'Farewell to the forum otiosum?' [2011] NZLJ 269 and E Willis 'Judicial review and deference' [2011] NZLJ 283.

[82]S Elias 'Administrative law for living people' (2009) 68 CLJ 47 at 48. See also S Elias 'Righting administrative law' in D Dyzenhaus et al (eds) *A Simple Common Lawyer* (Oxford: Hart Publishing, 2009) p 55.

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optimistic contextualism' and pondered rhetorically about the futility of doctrine ('is the search for better doctrine ultimately doomed?').[83] While Dame Sian perhaps contemplated a deeper and more intellectually-informed contextualism than the instinctive approach, the shades of *Guinness* are obvious.

Finally, a couple of senior English judges have shown some sympathy towards instinctive, unstructured or contextual review. For example, as mentioned earlier, Lord Steyn famously emphasised the contextualism of (public) law: 'In law context is everything'.[84] While perhaps a trite endorsement in itself, those brief remarks have been seized on by others to justify a non-doctrinal turn. And, more recently, Lord Carnwath explicitly commended *Guinness*' instinctive approach in extra-judicial remarks. Dismissing the notion of sliding scales of intensity and *Wednesbury's* traditional deferential approach, Lord Carnwath instead confessed his judicial approach was much closer to the 'characteristically pragmatic approach' set out in *Guinness*.[85]

(d) Conclusion

This brief survey showcases some of the key forms of contextual review found in Anglo-Commonwealth jurisprudence. The instinctive impulse and unstructured normativism pops up in a number of places, sometimes explicitly, sometimes implicitly. And we find a number of advocates of this style of review continuing to make the case for a greater role for judicial judgement and overall appraisal – they should be acknowledged as legitimate judicial method, they argue.

But before we succumb to contextual review's seductive charm, we must scrutinise its virtue or otherwise. In the next part, I evaluate the extent to which contextual review is consistent with our basic understanding of the rule of law, teasing out intuitive concerns about rejecting doctrine in favour of judgement.

2. Evaluating contextual review: anathema to the rule of law

In order to evaluate contextual review as a judicial methodology, first, I propose using rule of law criteria as a means of assessing the efficacy of judicial review styles; secondly, I use those criteria as a basis for evaluating contextual review of this kind.

(a) Methodological rules and the rule of law

We lack systemic criteria for evaluating methodological rules in judicial review. Much of the commentary on the developments in grounds, standards or styles of review is ad hoc or intuitive in its appraisal. For example, one of the main studies testing different means of expressing deference bases its evaluation on whether one is more 'robust' than another.[86] Intuition may have a role, as I admitted at the outset, but my aim here is to explicate the factors that feed into that intuition.

For that purpose, I enlist the rule of law as a way to frame and organise that evaluation. In particular, Fuller's principles of legality are well regarded as a set of standards for examining rule-based systems for their value and virtue.[87] Fuller identified eight criteria.[88] First, laws ought to be *general*, in the

[83]S Elias 'The unity of public law?' in M Elliott et al (ed) *The Unity of Public Law* (Oxford: Hart Publishing, 2018) pp 15 and 35.

[84]*Daly*, above n 56.

[85]Lord Carnwath 'From judicial outrage to sliding scales' (ALBA Annual Lecture, November 2013) p 19.

[86]P Daly *A Theory of Deference in Administrative Law* (Cambridge University Press, 2012).

[87]LL Fuller *The Morality of Law* (New Haven, Conn: Yale University Press, 1964). See generally C Murphy 'Lon Fuller and the moral value of the rule of law' (2005) 25 Law & Phil 239; J Waldron 'Why law – efficacy, freedom, or fidelity?' (1994) 13 Law & Phil 259; M Loughlin *Foundations of Public Law* (Oxford: Oxford University Press, 2012) pp 333–335. Fuller's criteria have been echoed by a number of others writing on the rule of law. See for example J Raz 'The rule of law and its virtue' (1977) 93 LQR 195; T Bingham *The Rule of Law* (Penguin, 2011).

[88]There has been some debate about whether these criteria are expressions of morality or not but this characterisation is not important for present purposes. See Fuller, above n 87, pp 53 and 204; Raz, above n 87, at 226; Loughlin, above n 87, p 334.

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sense that there must be rules of some kind. Secondly, laws ought to be promulgated and *publicly accessible*. Thirdly, laws should be *prospective*. Fourthly, laws should be *clear*. Fifthly, laws should be *non-contradictory*. Sixthly, laws should *not require the impossible*. Seventhly, laws should be *relatively stable*. Finally, there should be *congruence between law and official action* applying that law.

If we treat the different methodological styles in judicial review, such as contextual review, as rule-regimes which regulate the exercise of power and discretion of judges, then rule of law scholarship, such as Fuller's, provides a suitable framework for evaluating the appropriateness and efficacy of these methodological styles. To put it another way, judicial review of administrative decision-making is not merely the judicial *supervision* of the application of rules by the administration but also involves the *creation and deployment* of rules about the exercise of judicial power, whether those rules take the form of doctrines, principles or other curial devices. Judges are agents of public power too. Thus we can apply rule of law standards to their exercise of power, in a similar way to how we apply rule of law standards to exercises of power by the administration.

It might be argued that methodological form is less important than, say, the achievement of administrative justice or substantive rule of law outcomes. In other words, we should be most concerned with whether the judicial styles have the capacity to address grievances and right any wrongs. However, my work elsewhere suggests that the dominant judicial styles – scope of review, grounds of review, intensity of review and contextual review – all have the necessary variability to support the goals of administrative justice.[89] The different styles merely provide greater or lesser demands on judges when applying general principles of administrative law to individual cases and reasoning through any intervention. To put it another way, if we think about judicial review in terms of the modulation of the depth of scrutiny, all the styles enable significant variability in supervisory method even though the manner and means of that variability differ.[90]

(b) Contextual review and the rule of law

Fuller's criteria provides a useful framework for assessing the virtue of contextual review. I explain below the expectations these criteria place on judicial methodology in the context of supervisory review, before judging contextual review's degree of compliance.[91]

There are some caveats to this analysis. First, the key target of this evaluation is the strong and emblematic forms of contextual review, such as *Guinness*' wrongness approach or Joseph's instinctive impulse. As explained earlier, contextual review inevitably has different shades. Critical evaluation will thus be most acute in relation to these strongest forms but may be more muted in relation to weaker forms of contextual review where the unstructured normativism is not as extensive. At certain points in the following text I nod to specific instances of this unevenness. Secondly, as will be apparent, the criteria tend to overlap at times and sometimes converge. It is also important to note that some of these criteria are aspirational in character; even Fuller did not characterise them as absolute duties.[92] They are useful, though, in exposing lines of analysis. Thirdly, although it will become clear that contextual review performs poorly on many criteria, that does not necessarily signal that alternative doctrinal approaches are necessarily superior; they too will have strengths and weaknesses when tested against the demands of the rule of law, sometimes on similar dimensions to contextual review.[93] The evaluation here is not summative and inevitably there are trade-offs that must be made between

[89]Knight, above n 2. See also M Taggart 'Proportionality, deference, *Wednesbury*' [2008] NZ Law Rev 424 at 150 ; DGT Williams 'Justiciability and the control of discretionary power' in M Taggart (ed) *The Province of Administrative Law* (Hart Publishing, 1997) p 103 at p 106.

[90]Knight, above n 2, ch 6 'Conclusion'.

[91]This analysis draws heavily on the normative evaluation in Knight, above n 2, ch 5 'Contextual review'.

[92]Fuller, above n 87, p 43. The only one he marks out as essential is promulgation (public accessibility of law to those affected).

[93]For a similar analysis of the different doctrinal-based styles, see Knight, above n 2, ch 2 (scope of review), ch 3 (grounds of review) and ch 4 (intensity of review).

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the different criteria. However, working through the criteria helps illuminate the virtues of different styles.

(i) Generality

Fuller's explanation of generality focuses on the need for rules. A preference is expressed for 'general declarations' of rules, over other forms of commanding compliance.[94] The faithful application of previously declared rules – combining the idea of generality with congruence – is seen to be an essential feature of social ordering through law; a functioning legal order demands 'the existence of a relatively stable reciprocity of expectations between lawgiver and subject'.[95] Fuller recognises the preference for rules is only aspirational; he speaks of a 'struggle' between 'broad freedom of action' and declared general rules.[96] This recognises an important trade-off when assessing generality – between flexibility and responsiveness on the one hand, and consistency and predictability on the other.[97]

Contextual review is highly sceptical about rules seeking to guide the judiciary's supervisory eye. In its strong form, as explained earlier, contextual review embraces the 'instinctual impulse'.[98] Shorn of any constraints or limiting parameters, the task of the supervising judge is to assess, in the round, whether there is any basis for judicial intervention. Joseph argues that it is this inarticulate premise – not principles or doctrines or curriculum – that lies at the heart of the judicial role.[99] Characterising it in its baldest form, the method can be described (whether colloquially or pejoratively) as a 'sniff test':[100]

> An impugned decision may invite a demonstrable reaction; a decision, viewed in the round, may be 'whiffy'. Seasoned litigators apply the 'sniff test' where the decision-making goes palpably awry.

As the earlier survey showed, the method can also be cloaked in more law-like terms, such as 'overall evaluation', the 'innominate ground', and 'abuse of power'. But the essence is the same. Everything is up for grabs, in the light of context and circumstances: judicial review reduces to 'what the whole shebang is'.[101]

Thus, contextual review is based on discretion, rather than rules, and unashamedly so. Seen pejoratively, contextual review enables and commends 'palm tree justice';[102] extensive judicial discretion such as this was criticised by Lord Scarman in *Duport Steels Ltd v Sirs*: 'Justice in [developed] societies is not left to the unguided, even if experienced, sage sitting under the spreading oak tree'.[103]

While unstructured normativism associated with contextual review frees the reviewing eye from formal restraints, it does not explicitly manifest a particular depth of scrutiny. Judges may decide for themselves whether there is any basis for intervention, without any guidance about how deeply to test the administration's decision or justification. Yet, there is a degree to which this form of review tends to promote more intensive supervision, because curial discretion is not limited by any doctrine. However, in principle, the method of review may also result in review which is, in substance, still deferential. This will not be dictated or assured by law's immediate structure, though. Instead, it will turn on the values and vision of the reviewing judge – especially as administrative law lacks a generally

[94]Fuller, above n 87, p 210.
[95]Fuller, above n 87, p 209.
[96]Fuller, above n 87, p 213.
[97]On equality and consistency, see Fuller, above n 87, p 211.
[98]Joseph, above n 1, at 74. See also JC Hutcheson 'The judgment intuitive' (1929) 14 Cornell LR 274 ('judicial hunch').
[99]Joseph, above n 1, at 74.
[100]Joseph, above n 1, at 77.
[101]Joseph, above n 1, at 80.
[102]The palm tree justice metaphor is drawn from Judges 4:5 ('And she dwelt under the palm tree of Deborah between Ramah and Bethel in Mount Ephraim: and the children of Israel came up to her for judgment').
[103]*Duport Steels Ltd v Sirs* [1980] 1 WLR 142 at 168.

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mandated purpose and objective. While other styles of review inevitably enable the judicial method to also be influenced by the reviewing judge's values (sometimes covertly), contextual review tends to amplify those values because its essence is constructed around value-judgements.

In its weaker form, contextual review manifests deference in terms of respect and weight. Context and circumstances dominate but doctrinal structure is eschewed. Unlike its stronger, instinctive sibling, deference takes a deliberative role in the judicial process. That is, the importance of the notion of deference is acknowledged. However, it is not marked out for special treatment. Instead, it is introduced implicitly into the balance, through the familiar practice of attributing weight to the views of others, variously described.[104] Weight and respect are at the centre of this weaker form of contextual review. But the language of 'weight' is perhaps confusing because, as Hickman explains, weight is also used to describe that balancing of countervailing factors. In the context of 'affording weight' to those with greater relative expertise and knowledge, as was the case in *Huang*, the process is more akin to respecting another's views.[105] Indeed, this method appears to strongly embrace and adopt Dyzenhaus' famous characterisation of 'deference as respect'.[106] Again, the deployment of deference or variability through the vehicle of weight does not dictate particular depths of scrutiny. Anything is possible. There can be more or less scrutiny, depending on the context and circumstances. 'Weight is, by its very nature, variable'.[107]

In both its strong and weak form, contextual review strongly prioritises adaptability and flexibility over consistency and predictability. The banishing of doctrinal structure opens the field to judicial intervention. Under this style of review, the courts have an imprimatur to intervene as and when they assess it is necessary. But this has a vivid trade-off with consistency and predictability. The triggers for intervention are an individualised judicial assessment about whether the circumstances justify intervention – thresholds which are difficult to predict and prone to inconsistent outcomes based on the preferences of different judges. Proponents of contextual review are not troubled by this though. For example, Joseph's embrace of the instinctive impulse is openly dismissive of the value of predictability in the judicial function.[108]

None of the styles of review, understandably, can or should eradicate judicial discretion in the supervisory jurisdiction but some seek to extenuate it through the use of doctrine. With the absence of any doctrinal scaffolding, contextual review must look to other methods to provide guidance and bridle judicial discretion. However, these methods are generally amorphous and weak. Judicial discipline remains the principal controlling mechanism. Joseph, for example, argues that the impulse is tempered by the implicit constraints of the 'judicial mindset';[109] namely, a 'judge's knowledge and experience of the law, the disciplines of the judicial role and the commitment to do practical justice'.[110] He argues that '[d]emocracy imposed limits to the acceptability of judicial review' weigh heavily on judges, meaning matters such as the separation of powers and relative expertise must be factored in. 'The imperative to uphold the rule of law legitimises judicial review but does not condone a judicial usurpation'.[111] Sometimes judges may 'experience the instinctual impulse', Joseph explains, but still may decide not to intervene 'for fear of overstepping the judicial function'.[112] To these implicit constraints, he adds the need to follow the instinctive impulse with the language of law, that is, the

[104]Daly, above n 86, p 7 (epistemic deference); T Hickman *Public Law after the Human Rights Act* (Oxford: Hart Publishing, 2010) p 172 (non-doctrinal deference); TRS Allan 'Judicial deference and judicial review' (2011) 127 LQR 96 at 98 and 108 (single-level integrated analysis).

[105]Hickman, above n 104, p 129.

[106]D Dyzenhaus 'The politics of deference: judicial review and democracy' in M Taggart (ed) *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) p 279 at p 286.

[107]Hickman, above n 104, p 137.

[108]Joseph, above n 1, at 75 and 81.

[109]Joseph, above n 1, at 80.

[110]Joseph, above n 1, at 79.

[111]Joseph, above n 1, at 80.

[112]Joseph, above n 1, at 80.

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expectation that the instinctive impulse will be cloaked in 'familiar administrative law language'.[113] We are encouraged to trust the judiciary's – 'generally … pragmatically cautious' – judgement.[114]

The difficulty with these constraints is that they are not manifest – we are asked to trust judges to get things right, without any obvious comfort being provided. Concepts of law, justice and the key principles of public law (such as sovereignty, the separation of powers and the rule of law) are contested. Judicial figures are not homogeneous. While these matters may cause judges some pause on an individual basis, their ability to promote consistency and predictability is poor. In days gone by when most judicial applications were heard by a common bench or small pool of judges,[115] consistency and predictability arose from the stable personnel charged with adjudication. But nowadays the number of superior court judges has expanded and they are drawn from judges with increasingly diverse backgrounds and different experiences.[116] Thus, contextual review does little to ameliorate the absence of rules and to promote consistency or predictability.

(ii) Public accessibility

The virtue of public accessibility has a number of aspects. First, from an instrumental perspective, openness helps expose the legal regime and power exercised to scrutiny and critique.[117] Secondly, the promulgation of publicly accessible rules is an essential ingredient in understanding a legal regime (viz clarity) and being able to predict the outcome of cases.[118] Thirdly, public promulgation has a non-instrumental aspect in the way it enhances the legitimacy and 'basic integrity' of the legal regime.[119] Rule-making and rule-application are both undertaken by the courts when exercising their supervisory jurisdiction and are inevitably intertwined; furthermore, judicial discretion assumes a powerful role. Thus it is also necessary under this criterion to be attentive to transparency in the judicial reasoning process. Fuller highlighted the importance of reason-giving as an aspect of accessibility (and clarity); it is properly taken for granted, he says, that the courts 'must explain and justify their decisions [and] that they must demonstrate that the rules they apply are "grounded in principle"'.[120] This criterion therefore values the public articulation of principles or rules governing the courts' supervisory jurisdiction, along with the reasoned elaboration of the basis on which those principles or rules are applied in particular cases. This is consistent with the 'culture of justification' which the courts tend to expect of administrative decision-makers nowadays.[121]

Contextual review gives the appearance of judicial candour and honesty, but the reason for intervention may not be apparent. The identification and application of the depth of review need not be a feature of judicial reasoning and exposition. Nor does the essential flaw need to be explained. Strong form contextual review, which channels the judicial impulse, does not provide an open and transparent basis for judicial intervention. It is embedded in the mind of the judge. While the judicial impulse that there is something awry that requires judicial attention is colloquially candid, it does not disclose a legal or intellectual justification for overturning a decision. Law's style and language is eschewed in favour of

[113]Joseph, above n 1, at 79.

[114]Joseph, above n 1, at 81.

[115]See for example L Blom-Cooper 'The new face of judicial review' [1982] PL 250 (Eng); PA Joseph 'The contributions of the Court of Appeal to commonwealth administrative law' in R Bigwood (ed) *The Permanent New Zealand Court of Appeal* (Oxford: Hart Publishing, 2009) p 41 (common membership of the New Zealand Court of Appeal for long periods).

[116]See for example AW Bradley and KD Ewing *Constitutional and Administrative Law* (Pearson, 14th edn, 2007) p 388; Judicial Working Group *Justice Outside London* (2007) para [42]; R Clayton 'New arrangements for the administrative court' [2008] JR 164.

[117]Fuller, above n 87, p 51.

[118]Fuller, above n 87, p 50.

[119]Fuller, above n 87, pp 212, 214 and 222.

[120]LL Fuller *Anatomy of Law* (Westport, Conn: Greenwood Press, 1976) p 91.

[121]E Mureinik 'A bridge to where?' (1994) 10 SAJHR 31; D Dyzenhaus 'Law as justification' (1998) 14 SAJHR 11; Taggart, above n 89, 461. On reason-giving, see generally PP Craig 'The common law, reasons and administrative justice' [1994] CLJ 282; AP Le Sueur 'Legal duties to give reasons' (1999) 52 CLP 150; M Elliott 'Has the common law duty to give reasons come of age yet?' [2011] PL 56.

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sensation and human reaction. The result is a trigger which is internal and individual to the judge. While sincere, it is not lucid. Any value of candour is lost because the language of law is shunned and the basis for intervention is not translatable for external observers. Sure, judges may still seek to express the nature of the instinct in their reasons, but the sniff test does not dictate they do so.

Indeed, the judgement about intervention risks being explained ex post facto, with the veneer of law-like justifications that did not directly inform the original decision to intervene; in other words, reverse-reasoning. As explained above, Joseph suggests that the judicial instinct should subsequently be justified through the language of law. While he argues that the instinctive impulse provides 'insight into the true nature of judicial review', he later qualifies himself by suggesting judges should still 'fit applications for judicial review within an established ground of review'.[122] This is a confession of support for the principle of reverse-reasoning:[123]

> Has something gone *wrong* that calls for judicial intervention and correction? If the answer is 'yes', the judge must translate the instinctual impulse into 'legal' language that can explain and justify the court's intervention. The judge must identify a recognised ground of review and show how the decision-maker has failed to comply with the law…

The potential dissonance between instinct and principle is also seen in Laws LJ's unusually candid judgment in *Abdi*, when applying the abuse of power test for legitimate expectations.[124] Laws LJ admitted that he was inclined to determine the case 'on the simple ground that the merits of the Secretary of State's case press harder than the appellant's'.[125] However, his Honour described it as 'very unsatisfactory' to conclude on that basis, without some justification by principle.[126] Laws LJ's candour is to be applauded. But his remarks expose the potentially venal nature of the judging process, where contextual review is in play. As Poole says, it points to a 'decision based upon an assessment of the arguments presented by counsel, and/or judicial instinct, propped up ex post – almost laughably – on the vague invocation of even vaguer principles'.[127] The deployment of 'principled patina' does not disguise the original instinctive judgement.[128] Thus, where contextual review takes its nakedly instinctive form, we have reason to be sceptical about any reasons which accompany a decision to intervene.

Weak form contextual review, which is built around the weight principle, performs slightly better due to weight typically being a concept expressly deliberated on by judges. But the mediation of the balance between vigilance and restraint is largely latent. The variation of intensity does not necessarily take explicit form. The dominant ingredient is the weight to be afforded, based on the circumstances. However, as the judicial process of weighting has a deliberative dimension, the factors informing the weight afforded will often merit mention in the judicial reasoning process. To this extent, the weak form of unstructured contextualism parts company with its stronger sibling. Using weight as an anchor has limitations though. First, even within existing judicial practice, the application of weight can have a relatively amorphous character. Secondly, contextual review does not demand transparency; it is merely incidental. Explicit deliberation on the factors influencing weight, and therefore the depth of scrutiny, is not guaranteed.

Moreover, while this form of contextual review is anchored by an existing legal device (weight), it is still strongly informed by judicial discretion and judgement.[129] Notably, Hickman links weight directly back to the judicial instinct: it is 'something that courts do *instinctively* as part of the exercise of

[122]Joseph, above n 1, at 74 and 80.

[123]Joseph, above n 1, at 74.

[124]*R (Abdi & Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363.

[125]*Abdi*, above n 124, at [67].

[126]*Abdi*, above n 124, at [67].

[127]T Poole 'Between the devil and the deep blue sea' in L Pearson et al (eds) *Administrative Law in a Changing State* (Oxford: Hart Publishing, 2008) p 15 at p 40.

[128]Poole, above n 127, p 40.

[129]J King 'Institutional approaches to judicial restraint' (2008) 28 OJLS 409 at 411.

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judging'.[130] Indeed, Hickman suggests it is something that any rational decision-maker does when presented with a person who has knowledge and expertise that the decision-maker lacks. 'When they recognise their lack of knowledge or competence relative to another person, they understandably give weight to their views'.[131] This connection to judicial instinct suggests a reasonable degree of synergy between the strong and weak forms of this supervisory method. Given this discretion, it is again inevitable that the weight or latitude to be afforded is, at least in part, dependent on self-perception of the judicial role and corresponding values.

(iii) Prospectivity

A retroactive law is, in Fuller's account, a 'monstrosity' – objectionable in terms of both morality and efficacy – and thus prospectivity is seen as an important virtue.[132] However, Fuller was also prepared to admit that, in the context of a system of generally prospective laws, laws with retroactive effect may in some circumstances be tolerable.[133] Notably, he acknowledged that judicial adjudication of disputes inevitably has some retroactive effect, so deeper analysis is required to parse and condemn any retroactivity.[134]

Contextual review, viewed as a methodological framework, does not raise any pure retrospectivity problems because the style is presumed to be constant. However, because contextual review performs poorly in terms of generality and clarity (due to the prominence of judicial discretion and lack of predictability), the inevitably retrospective effect of judicial adjudication in practice becomes more acute.

(iv) Clarity

Clarity is described by Fuller as 'one of the most essential ingredients of legality'.[135] This criterion condemns vagueness and obscurity in legal rules.[136] Much of the underlying rationale for this principle is legal certainty. Laws should be clear in meaning so that they are capable of being obeyed and in order that people can live their lives conscious of the legal consequences which may flow from their actions.[137] Thus, this criterion factors in concerns about predictability within the legal regime. Fuller is also concerned that lack of clarity – regimes that are vague, indefinite and favour governmental discretion – may 'rob' the regimes of their legitimacy.[138] In the case of judicial review methodology, this criterion addresses how clearly the principles governing the deployment of the courts' supervisory jurisdiction are expressed, whether they are understandable and whether they unduly rely on standards which are vague or indeterminate.

Contextual review scores relatively poorly in terms of clarity, both in its strong instinctive form and its weaker form as weight and respect. Here, the concern lies in the lack of certainty arising from reliance on value-judgements and indeterminate standards or triggers for intervention. The incorporation of general standards was not condemned out of hand by Fuller.[139] 'Common sense standards of judgement' – ordinary language that has meaning outside law – are treated as acceptable means of providing clarity, especially where the nature of the subject-matter is not suitable for more specificity.[140] However, he warned against too readily employing standards, when these standards are capable of conversion into rules with greater clarity – otherwise, the elaboration of meaning is delegated, undesirably, to adjudicative bodies to determine on a case-by-case basis.[141]

[130]Hickman, above n 104, p 135 (emphasis added).
[131]Hickman, above n 104, p 135.
[132]Fuller, above n 87, p 53.
[133]Fuller, above n 87, p 53.
[134]Fuller, above n 87, p 56. See also Fuller, above n 120, p 100.
[135]Fuller, above n 87, p 63.
[136]Fuller, above n 87, pp 63, 212 and 213.
[137]Fuller, above n 87, pp 209 and 212.
[138]Fuller, above n 87, p 212.
[139]Fuller, above n 87, p 64, instancing standards such as 'good faith' and 'due care'.
[140]Fuller, above n 87, p 64.
[141]Fuller, above n 87, p 64. Here, Fuller highlights the instances the problematic use of the standard of 'fairness' in commercial dealings.

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Here, where contextual review is equated with generalised standards like abuse of power or unreasonableness (framed in its abstract, meta formulation), their use does not meet the expectations demanded. While the adoption of standards such as these – or the colloquial judicial instinct – mandates a clearly stated judicial trigger for intervention, the case–by–case style that results brings vagueness and indeterminacy to the supervisory task, generating a lack of legal certainty about its operation and its likely outcomes.

Similarly, resort to weight and respect in the weaker form of contextual review also brings a lack of clarity. Notions of weight and respect, while not foreign concepts in themselves, do not promote legal certainty. The influence of other views or the extent of respect to be afforded by the reviewing judges remain a discretionary judgement: both in terms of whether to give weight or respect and, if so, how much. Again, as explained above, predictability is not enhanced by this method.

(v) Non-contradiction

The focus of non-contradiction is the schematic unity of the system and the extent to which it is bound together by principle.[142] In other words, this criterion values coherence. Coherence contrasts law as a seamless web with law as a patchwork quilt. Although consistent treatment contributes to coherence, coherence raises broader questions about the meta-architecture of judicial review, that is, its organising theory or manner in which it is systematised. The focus extends to matters such as its comprehensiveness, connectedness and internal unity.[143] Fuller commends coherence, not just in rule-making but in rule-application too. This he describes as a 'problem of system', where the 'rules applied to the decision of individual controversies cannot simply be isolated exercises of judicial wisdom'; even when deployed, they must maintain 'some systemic interrelationship' and display 'some coherent internal structure'.[144] Coherence and non-contradiction are enhanced by 'principles that transcend their immediate application' and 'bind the elements of law into a coherent system of thought'.[145]

As is evident, contextual review rejects schematic structure, at least from a doctrinal perspective; there is no attempt to promote coherence through legal devices. Traditional legal techniques which encourage consistency, connectedness, and unity of approach and doctrine are absent. Viewed in this way, contextual review comes across as incoherent.

An alternative view, though, is that the singular criterion for interference – albeit cast in terms of instinct or other abstract values – has a certain neatness about it. While the absence of legal doctrine means the singular criterion is not amplified, the existence of a meta-principle governing judicial intervention manifests unity, even if it is drawn in esoteric terms. On the other hand, unity and coherence tend to erode in implementation. As discussed above, the practical application of this standard is prone to much more individual interpretation by judges based on their personal preferences and values. The discretionary nature of judgement risks inconsistency and coherence being collapsed as individual judges apply this standard in different ways. Coherence is difficult to produce, given the lack of law.

(vi) Non-impossibility

In Fuller's original account, non-impossibility is focused on the (in)ability to achieve compliance with rules. In other words, concern is expressed about standards set by rules that cannot be achieved. Fuller acknowledges that, with questions of possibility, 'no hard and fast line' could be drawn and virtue was more a question of degree.[146] In this context, concerns do not directly arise because the rules and methodology deployed by judges are self-created and judges are unlikely to fashion totally unachievable rules to regulate their own behaviour.

[142]See also R Dworkin *Law's Empire* (Cambridge, Mass: Harvard University Press, 1988) p 167; N MacCormick *Rhetoric and The Rule of Law* (Oxford: Oxford University Press, 2009) pp 189 and 193.

[143]K Kress 'Coherence and formalism' (1993) 16 Harv J L & Pub Policy 639.

[144]Fuller, above n 120, p 94.

[145]Fuller, above n 120, p 94.

[146]Fuller, above n 87, p 79.

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Interpreting this criterion more liberally, however, we can treat it as raising two allied dimensions relating to the practicality of achieving compliance. First, this criterion can speak to the extent to which the methodological style provides a hortatory framework which readily promotes compliance by the administration. While judicial review's immediate role is the policing of administrative legality, it also has an important collateral role in articulating and elaborating the principles of good administration that ministers, public bodies and officials ought to honour. These principles of good administration have currency both within and beyond the system of judicial review itself – described by Harlow and Rawlings as its 'hortatory function'.[147] While our predominant concern here is the system of judicial review itself, the utility of the principles of review beyond the system and in administrative law generally should not be ignored when evaluating a methodological style. Secondly, this criterion can also speak to the practicality of proving compliance in judicial review proceedings. In other words, we can employ this criterion to explore the effect of contextual review on the litigation and supervision process. It is attentive to any procedural consequences and how the style of review might affect advocacy and deliberation in judicial review hearings and decisions.

Dealing first with judicial review's hortatory role, contextual review does not manifest clear educative principles which are capable of being deployed elsewhere. Adjudication is value-based and normative; the absence of doctrinal principles means what judges do does not readily provide a means to educate or structure bureaucracy in other contexts. The legal methodology is unspecific and internal to the supervisory judge. The method is one grounded in higher-order values, such as the rule of law, rather than operational principles. The heavily contested nature of the rule of law means it does not send clear messages. The emphasis on abstract values over doctrine comes at a cost. As Harlow and Rawlings note, the hortatory role of judicial review is threatened by the 'imprecise application of … imprecise principle [s]'.[148] They sympathise with complaints from the administration that some principles of judicial review are too vague, contextual or uncertain, such as is apparent under contextual review: '[T]he "intuitive judgement" of courts can be difficult to fathom, let alone predict!'[149] Similarly, Halliday warns that the impact of judicial review on the administration attenuates if doctrine fails to send consistent and clear messages, particularly when the doctrine is 'uncertain and contingent on context'.[150]

Here, in the case of contextual review, the judicial methodology is circumstantial and normative. It generates little, if any, operational guidance for the bureaucracy. Its emphasis is on judicial-righteousness, deployed in ex post facto review in particular cases. While over time, it might be argued, the corpus of cases may manifest specific trends about when the judicial instinct is engaged, this still may not provide reliable guidance. First, it is reliant on the very thing contextual review of this kind objects to – the generalisation of principles over the circumstantial assessment in particular cases. Secondly, contextual assessment cannot guarantee consistent and coherent outcomes, because the judicial instinct is by definition circumstantial. Inconsistent and contradictory outcomes and trends may result.

Moving into the forensic domain, we can also reflect on the practicality of contextual review in the supervisory process. On a simplistic level, contextual review is eminently practical. On its face, simplicity in the supervisory lens is suggestive of simplicity in procedure. Unconstrained by doctrine seeking to circumscribe the judicial eye, procedural restrictions become unnecessary as de novo review is encouraged. It follows that the evidential corpus should not be restricted, else something that may trigger the judicial instinct could be lost. Filtering the lines of argument and analysis is left to the judicial

[147]C Harlow and R Rawlings *Law and Administration* (Cambridge: Cambridge University Press, 3rd edn, 2009) p 669. Harlow and Rawlings say the goal of the hortatory or educative function is 'ultimately the internalising by administrators of legal values' (p 728). The establishment of general principles for the proper exercise of discretion helps promote good decision-making on a prophylactic basis ('fire-watching') rather than merely addressing deficiencies after the fact ('fire-fighting') (p 728). See also S Halliday *Judicial Review and Compliance with Administrative Law* (Oxford: Hart Publishing, 2004) p 15; M Hartogh and S Halliday *Judicial Review and Bureaucratic Impact* (Cambridge : Cambridge University Press, 2004).

[148]Harlow and Rawlings, above n 147, p 728.

[149]Harlow and Rawlings, above n 147, p 728.

[150]S Halliday *Judicial Review and Compliance with Administrative Law* (Oxford: Hart Publishing, 2004) p 143.

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gut-instinct: 'Has something gone wrong that calls for judicial intervention and correction?'[151] While simple in form, this entails a plenary style of procedure and evidence, with consequent costs.

On a deeper level, the workability of contextual review is undermined by its enigmatic character. The supervisory process is reactive and adversarial, not inquisitorial. For the power of the judicial instinct to be harnessed, litigants must provide evidence which piques or alleviates the judicial instinct, along with argument which explains it. But this is dependent on a reasonable degree of alignment between litigants and the supervisory judges – hence unpredictable 'gut-feelings' dominate. How then do litigants – private plaintiffs and state actors – shape their case in anticipation? The lack of predictability risks litigants bombarding the courts with the highest order of evidence in every case, and extending the argumentation accordingly. No stone is left unturned. This has, in principle, significant procedural implications in terms of the cost and length of hearings. A prudent plaintiff will inevitably seek to advance each and every argument that might trigger a judge's instinct. Faced with wide-ranging arguments that are difficult to anticipate, a prudent defendant will similarly be expected to mount a wide-ranging defence. This has the potential to ratchet up the evidential corpus required in any particular case.[152] Any need for preliminary permission for judicial review, in those jurisdictions where such approval is required, only goes some way to ameliorate this concern; general criteria for permission such as 'arguability' have been criticised for being discretionary in themselves and failing to provide a coherent sifting mechanism.[153]

Contextual review's enigmatic form also has the potential to meddle with the style of argument. The critical standard for intervention is ultimately abstract – dependent on the intuition and values of individual judges and their reaction to the facts and circumstances. So much turns on the type of judge allocated to the particular case, a factor which is often not known in advance of the hearing. While realists rightly argue that this is a feature of all adjudication, contextual review amplifies this problem because it does not temper the judicial personality. The absence of doctrine means there is no legal scaffolding to limit, anchor or structure the dynamics of argument, unlike the other styles of review. Judicial predilections shape the argument in a way which litigants must be prepared to meet. Moreover, the instinctive approach risks removing the language of law, in which advocates are trained and skilled. If judicial deliberation need not be expressed in or be constrained by law, then neither must the arguments of advocates.[154]

(vii) Stability

Stability, in the sense employed by Fuller, requires that laws not change too frequently.[155] The objection, as with retrospective rules, is that instability makes the law unpredictable and difficult to comply with. Hence, there is a degree of overlap between this criterion and the criteria looking at clarity, prospectivity and non-impossibility; they all address the predictability of laws and their ability to be complied with.

Contextual review does not explicitly provide for evolution or modification of its rules. This is because the approach adopts contextual judicial discretion at its core. Changes to judicial philosophy or the accommodation of novel circumstances present no impediment to this style – they are readily accommodated internally within the existing judicial methodology, conditioned by instinct or weight and respect. Again, though, the lack of explicit instability does not mean contextual review performs well under this criterion; as discussed under other criteria, the prominence of unarticulated judicial discretion means, in reality, that those affected have little ability to predict outcomes and are faced with the potentially shifting sands of judicial judgement.

[151]Joseph, above n 1, at 74.

[152]See for example an analysis of these evidential pressures in Canada as the standards of review have become more generalised: B Oliphant and LJ Wihak '*Dunsmuir* and the scope of admissible evidence on judicial review' (2019) 69 UTLJ 31.

[153]V Bondy and M Sunkin *The Dynamics of Judicial Review Litigation* (Public Law Project, 2009) pp 49–70.

[154]For similar arguments about the problems of open-ended moral reasoning and the value of legally directed adjudication in the context of the proportionality test see FJ Urbina 'A critique of proportionality' (2012) 57 Am J Juris 49.

[155]Fuller, above n 87, p 79.

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(viii) Congruence

Congruence insists that official action is faithful to declared rules.[156] This criterion seeks to bind the other criteria with a focus on operation and implementation. Fuller is quick to rebut the idea that the merger of law-maker and law-applier, as is the case here, necessarily brings congruence. First, the nature of the judicial hierarchy means congruence may still be impaired because the making of law by judges is always subject to higher court (dis)approval. Secondly, there remains room for dissonance between the declaration and application of law, even by the same actor.[157] So, this principle allows us to examine the fidelity between the rule and regime expressed by judges and applied by judges. This aspiration for congruence, fidelity and candour is based on the same impulse that has driven the courts to develop similar expectations of administrative decision-makers. The courts expect administrators to faithfully apply the law. This principle expects the same of judges.

Like adherence to the other principles of efficacy, contextual review presents the appearance of congruence. However, at a deeper level its operation is more troublesome. The embrace of the judicial instinct and the resort to the judicial assessment of weight and respect mean incongruence is unlikely to specifically arise. But that is because the 'rules' capture and manifest the judgement made on implementation. Thus, there is unlikely to be any separation between the two. Candour is encouraged and, indeed, given a prominent place within the supervisory process – but to the exclusion of declared rules. To the extent that reasoning and deliberation are recognised within contextual review (at best in a limited fashion), it brings with it the risks of reverse-reasoning, as discussed above. If this results, then the reasons risk masking the true basis for intervention, disclosing a lack of judicial candour and jeopardising congruence.

Conclusion

Under contextual review, normative reasoning is heralded and doctrinal structure condemned. Based around a broad judicial assessment of whether anything has gone wrong which justifies intervention, unstructured normativism can be seen in a number of aspects of Anglo-Commonwealth jurisprudence. Emblematic is the innominate 'wrongness' ground, along with cognate calls to embrace the judicial hunch or instinct. Shades of contextual review can also be recognised in umbrella forms of unreasonableness, the abuse of power principle and, to a lesser degree, non-doctrinal deference. Unsurprisingly, assessed against expectations of the rule of law, contextual review – especially its emblematic and strongest forms – performs poorly against almost every criterion. Its rejection of doctrine in favour of normative judicial judgement or instinct is anathema to Fuller's conception of the rule of law.

At its heart, contextual review has a strong vision of the courts being active and instrumental in addressing administrative justice and ensuring constitutional righteousness. Attempts to shackle that judicial power or to insist on explicit consideration of the limitations of judicial supervision in individual cases are rejected. The expertise and values of judges provide the necessary, albeit inconspicuous, comfort that the courts will appropriately discharge their supervisory functions. Yet this requires large doses of trust – something that sits uncomfortably with the culture of justification which has become a key mantra of administrative law in recent decades.

[156]Fuller, above n 87, p 81.

[157]Fuller, above n 87, p 82 ('the tune called may be quite undanceable by anyone, including the tune-caller'). King echoes this concern, when he worries about the gap between 'what judges say and do': J King 'Proportionality' (2010) NZ Law Rev 327 at 334.

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