

# JUDGE BRIDLEGOOSE, RANDOMNESS AND RATIONALITY IN ADMINISTRATIVE DECISION-MAKING

THE HON ROBERT FRENCH AC\*

It is a general expectation that those who exercise official power requiring them to make decisions affecting members of our society will act rationally in doing so. There is a question whether consistently with that expectation and the rule of law there is room for decision-making processes which involve elements of an arbitrary nature which cannot be explained by rules of logic. A subset of the large question, which can be posed as a kind of thought experiment, is whether and to what extent official decision-making by the use of random processes such as ballots is supportable?

The application of random processes in judicial decision-making was imagined by the 16<sup>th</sup> century satirist, François Rabelais in his five book work *Gargantua and Pantagruel*. In book three, the story is told of an elderly judge, Bridlegoose, who is tried for delivering an erroneous judgment in a tax case which he reached by throwing dice. Bridlegoose had been a judge for 40 years. He had delivered 4000 judgments, 2309 of which had been appealed to a supreme court and affirmed. All of his cases had been decided by throw of dice. His defence in the particular case was that he may have misread the dice because of his failing eye sight. He maintained that there was nothing wrong with his way of deciding cases. He pointed to civil and canon law rules, some of which provided that in cases of doubt a lot could be used to determine the divine will. Even so, he would read all the pleadings, place them at either end of a table and after an extended period throw dice first to determine the defendant's score, then the plaintiff's. Asked why he bothered with the pleadings at all he said that the forms had to be observed and that the case must be allowed to ripen to maturity — citing a maxim — time is the father of truth. He also pointed out that cases were more likely to settle when they had dragged on for a while and the litigants were becoming tired and running out of money. In the end he was excused partly because he had given so many judgments over his 40 years which had been affirmed on appeal.

An American judge, John Marshall Gest, who served three terms as a judge of the Orphans' Court in Philadelphia, wrote about Bridlegoose's method in the *American Law Review* in 1924, and observed:

The method of Judge Bridlegoose indeed insures absolute judicial impartiality, [and] eliminates the irksome task of writing opinions, which to successful litigants are a superfluity, to the losers an aggravation ... <sup>1</sup>

\* Former Chief Justice of the High Court of Australia; Adjunct Professor, Law School, Monash University; Adjunct Professor, Law School, University of Western Australia; Distinguished Honorary Professor, Law School, Australian National University. This paper was delivered as the Twelfth Fiat Justitia Lecture at Monash University on 15 August 2017.

1 John Marshall Gest, 'The Trial of Judge Bridlegoose' (1924) 58 *American Law Review* 402, 409.

The latter observation would tend to undermine conventional wisdom that the purpose of reasons is to let the losing party know why it has lost.

Judge Gest remarked, no doubt as a criticism of proponents of judicial productivity measures, that Bridlegoose's method might meet with the approval of those theorists of his time who were inclined to regard a court as an administrative machine fulfilling a popular requirement for the hasty dispatch of business. Their views were contrasted, by the judge, with the view of those whom he called the 'few conservatives left, who prefer to regard a court as a place where justice is judicially administered'.<sup>2</sup>

There have occasionally been cases in which stalemated juries have decided their verdict by tossing a coin. Historically, those verdicts attracted the protection of a general rule enunciated by Lord Mansfield in *Vaise v Delaval*<sup>3</sup> under which such conduct could not be proven by evidence from another juror. Judge Gest sets out a number of such cases and the general rule in his paper.<sup>4</sup>

In 2000, a case was reported in the *Cincinnati Enquirer* of a jury which could not decide whether to convict a man of murder or manslaughter for the shooting of his girlfriend.<sup>5</sup> They tossed a coin and convicted him of murder. The jury had been deadlocked 11 to 1 on each charge with different dissenters and would have been unable to return a verdict without the coin toss. The matter came to the attention of the trial judge and was admitted in court by the foreman. A new trial was ordered. An Assistant Law Professor at the University of Louisville said, reassuringly, of the procedure adopted by the jury, 'I don't think it's widespread'.

It may be said, of course, that the resort to a toss of the coin was, from one perspective, a rational way of resolving a stalemate. However, a dissenting juror who was prepared to move from manslaughter to murder on the strength of the result of the toss was not deciding the case by reference to whether guilt of murder had been proven beyond reasonable doubt.

That does not exclude the possibility that a conviction, absent a toss of the coin, would not have been reached in part on the basis of random neurobiological processes inscrutable even to the jurors themselves.

The topic of randomised jury verdicts does not require further discussion here, but mention of Lord Mansfield in the first reported case on the point, brings us to the title of this lecture series — the judgment in which he used it, and a connection in that judgment to a much quoted passage about reason in the exercise of statutory powers.

*Fiat justitia ruat caelum* is a Latin maxim with a considerable history and a range of uses. Its use by Lord Mansfield in 1770 when he reversed a judgment

2 Ibid.

3 (1785) 1 TR 11; 99 ER 944.

4 Gest, above n 1. Lord Mansfield's decision was mentioned recently in the judgment of the High Court in *NH v DPP (SA)* (2016) 334 ALR 191, 215 [81].

5 Associated Press, 'Jury Flips Coin to Decide Murder Verdict', *Cincinnati Enquirer* (Cincinnati), 26 April 2000.

of outlawry against John Wilkes is much cited.<sup>6</sup> There had been considerable outcry about the case and pressure on the courts which Mansfield had described as ‘tumults’ which had ‘shamefully insulted all order and government’.<sup>7</sup> He had received anonymous correspondence about the case, including what today would be called ‘hate mail’ as to which he said ‘[w]hat am I to fear? That *mendax infamia* from the press, which daily coins false facts and false motives? The lies of calumny carry no terror to me’.<sup>8</sup>

Evidencing the long and inglorious historical heritage of populist commentators and politicians who sometimes muddy the waters of contemporary civil discourse, even in the great State of Victoria, Mansfield said: ‘[a]udacious addresses in print dictate to us, from those they call the people, the judgment to be given now, and afterwards upon the conviction’.<sup>9</sup> He told ‘the whole world’ as he put it that ‘all such attempts are vain’:

The *constitution* does not allow reasons of State to influence our judgments: God forbid it should! We must not regard political consequences; how formidable soever they might be: if rebellion was the certain consequence, we are bound to say ‘*fiat justitia, ruat cælum*’.<sup>10</sup>

Mansfield pushed back against a strident public clamour of a kind familiar in our own times, with a firm declaration of his commitment to the law and its rational application without fear or favour, affection or ill-will as the judicial oath goes. It was a commitment reflected 250 years before his time in the words of William Roper, son-in-law of Sir Thomas More, appointed Lord Chancellor by Henry VIII and later executed by the same King. Roper said of his sainted father-in-law: ‘[w]ere it my father stood on one side and the devil on the other, his cause being good, the devil should have right’.<sup>11</sup>

An express statement of the principle that judicial power is to be exercised according to rules of reason appears from an earlier part of the proceedings in *R v Wilkes* when Lord Mansfield refused a grant of bail:

It is, indeed, in the discretion of the Court, to bail a person so circumstanced. But discretion, when applied to a Court of justice, means sound discretion guided by law. It must be governed by rule, not by humour: it must not be arbitrary, vague, and fanciful; but legal and regular.<sup>12</sup>

Those words echoed down the centuries. They were applied to the exercise of official statutory discretions by Lord Halsbury LC in *Sharp v Wakefield*.<sup>13</sup> They have been quoted on many occasions in later decisions including, in 2013, that

6 *R v Wilkes* (1770) 4 Burr 2527; 98 ER 327.

7 *Ibid* 2561 (Burr); 346 (ER).

8 *Ibid* 2562 (Burr); 347 (ER).

9 *Ibid* 2561 (Burr); 346 (ER).

10 *Ibid* 2561–2 (Burr); 346–7 (ER).

11 William Roper, *The Life of Sir Thomas More* (Cosimo Classics, 2009) 33.

12 (1770) 4 Burr 2527, 2539; 98 ER 327, 334.

13 [1891] AC 173, 179.

of the High Court in *Minister for Immigration and Citizenship v Li*,<sup>14</sup> a case concerned with unreasonableness as a ground for judicial review of administrative decisions.

Mansfield's words and their durability through 250 years reflect a pervasive and persistent expectation of rationality in the exercise of official powers, be they judicial or executive. That expectation is an aspect of the rule of law in our society. Any discussion of it must find its place in the larger context of that contested concept.

A universal concept of the rule of law is hard to pin down. Ideas about its elements vary from society to society as a function of their histories, culture and constitutional systems. In Australia, with a written federal *Constitution*, it is possible to say that the rule of law involves the following elements:

1. All official power derives from the Commonwealth and state constitutions or laws made under those constitutions.
2. There is no such thing as unlimited official power.
3. The powers conferred by law on public officials must be exercised lawfully, rationally, fairly and in good faith. Those terms when examined closely are largely embraced by a generalisation of the idea of rationality. The term 'reasonableness' has been used to define a limit on official power which may embrace rationality but go beyond it.
4. The courts have the ultimate responsibility of resolving disputes about the limits of official power.

In judicial decision-making the expectation of rationality is underpinned by the requirement that judges give reasons for their decisions. In *Wainohu v New South Wales*<sup>15</sup> Justice Kiefel and I referred to the centrality to the judicial function of a public explanation of reasons for final decisions and important interlocutory rulings. We quoted from the first edition of *Broom's Constitutional Law*, published in 1866, in which it was said:

A public statement of the reasons for a judgment is due to the suitors and to the community at large — is essential to the establishment of fixed intelligible rules and for the development of law as a science ...<sup>16</sup>

The provision of reasons, as former Chief Justice Murray Gleeson wrote in 1995, promotes good decision-making and the acceptability of decisions which are made. And importantly:

it is consistent with the idea of democratic institutional responsibility to the public that those who are entrusted with the power to make decisions, affecting the lives

14 (2013) 249 CLR 332.

15 (2011) 243 CLR 181 ('*Wainohu*').

16 Ibid 213–14 [54], quoting Herbert Broom, *Constitutional Law Viewed in Relation to Common Law, and Exemplified by Cases* (Hodges, Smith, & Co, 1866) 152.

and property of their fellow citizens, should be required to give, in public, an account of the reasoning by which they came to those decisions.<sup>17</sup>

The provision in public of reasons for decision is an application of the open court principle. It exposes to scrutiny the processes that lie at the heart of the judicial function including the ascertainment of facts, the identification of relevant rules of law and the application of those rules to the facts coupled with the exercise of any relevant discretion. In *Wainohu* the Court held that a law of New South Wales conferring administrative power on a serving judge, acting *persona designata*, to make a declaration against an organisation under the *Crimes (Criminal Organisations Control) Act 2009* (NSW), was invalid. It was invalid because it did not require the judge to give reasons for the decision and was held to confer an administrative function on him which was incompatible with his judicial role.

The provision of reasons for administrative decisions is not a requirement of common law. The High Court so held in *Osmond*.<sup>18</sup> A majority of the Court of Appeal of New South Wales<sup>19</sup> had held that the Public Service Board of New South Wales was obliged to give reasons for dismissing Mr Osmond's appeal to that Board against a decision refusing his application for appointment to the position of Chairman of a Land Board. The High Court allowed an appeal against the decision of the Court of Appeal.<sup>20</sup>

Kirby P, who was part of the majority of the Court of Appeal, had said that the duty of public officials exercising statutory power is to act justly, fairly and in accordance with their statute.<sup>21</sup> Normally where there is a power to make discretionary decisions affecting others they would be obliged to state their reasons. Gibbs CJ in the High Court, however, held that the conclusion reached by the majority in the Court of Appeal and reflected in the judgment of Kirby P, was 'opposed to overwhelming authority'.<sup>22</sup> Extensive references to that 'overwhelming authority' followed.<sup>23</sup> By way of answer to policy arguments in favour of the giving of reasons, Gibbs CJ referred to the risk of casting additional burdens on administrative officers with associated costs and delay and perhaps a lack of candour on the part of the officers concerned.<sup>24</sup> The other members of the Court agreed with the Chief Justice.

Deane J referred to recent statutory requirements for the provision of reasons and observed:

That is a good thing since the exercise of a decision-making power in a way which adversely affects others is less likely to be, or to appear to be, arbitrary if the decision-maker formulates and provides reasons for his decision.<sup>25</sup>

17 Murray Gleeson, 'Judicial Accountability' (1995) 2 *The Judicial Review* 117, 122.

18 *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 ('*Osmond*').

19 *Osmond v Public Service Board of New South Wales* (1984) 3 NSWLR 447.

20 *Osmond* (1986) 159 CLR 656.

21 *Osmond v Public Service Board of New South Wales* (1984) 3 NSWLR 447, 467–70.

22 *Osmond* (1986) 159 CLR 656, 662.

23 *Ibid* 662–3.

24 *Ibid* 668.

25 *Ibid* 675.

It might be said that a decision given without reasons or the possibility of reasons is arguably, at least from the point of view of the person affected by it, functionally equivalent to a decision made by a toss of the decision-maker's coin.

A practical effect of statutory requirements for reasons for decision has been to lift the decision-making process above the level of holistic and intuitive judgments which may be unexceptionable but may be affected by randomised thought processes, prejudices and values.

In the 1970s I was a part-time legal member of the Social Security Appeals Tribunal in Perth. It was then an administrative body providing a species of non-statutory review of decisions in relation to social security benefits. One regular class of case before the Tribunal required a determination whether two recipients of benefits were 'living together on a bona fide domestic basis as man and wife'. If they were, they were entitled to only the married rate of benefit which was less than twice the single rate. Prior to the introduction of the administrative law package in the second half of the 1970s a typical expression of relevant fact-finding by a departmental officer appeared on a claimant's file in the following terms: 'there is no way these two aren't shackled up together'. After the introduction of the package, white forms with blue boxes appeared on the file with sections to be filled in by the officers setting out evidence, facts found and conclusions therefrom. Whether the actual quality of decision-making was improved, I do not know. Undoubtedly, a discipline was imposed which had not existed before.

It took a while for the function of reasons for decision to be understood. Not long after my appointment to the Federal Court in 1986, I was asked by a senior officer of the Department of Immigration to come and speak to departmental staff on how to frame their reasons to avoid being overturned on judicial review. I declined. Perhaps I had that conversation in mind when I wrote in *Minister for Immigration and Ethnic Affairs v Taveli* that:

a properly authenticated statement of reasons ... as evidence of the truth of what it says, namely, that the findings made, the evidence referred to and the reasons set out were those actually made, referred to and relied upon in coming to the decision in question ...<sup>26</sup>

That is not to say that the courts have expected reasons for administrative decision to be models of precision. The ideal must yield to the real. As the High Court plurality said in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* '[t]he reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error'.<sup>27</sup> Every proverb has its counter proverb of course. In *Soliman v University of Technology Sydney* the Full Court of the Federal Court said that '[its] eyes should not be so blinkered as to avoid discerning an absence of reasons or reasons devoid of any consideration of a submission central to a party's case'.<sup>28</sup>

26 (1990) 23 FCR 162, 179.

27 (1996) 185 CLR 259, 272, quoting *Collector of Customs v Pozzolanic* (1993) 43 FCR 280, 287 (Neaves, French and Cooper JJ).

28 (2012) 207 FCR 277, 296 [57].

So reasons are good, but it is a theme of this lecture that rationality has its limits. Oliver Wendell Holmes Jr in a much quoted remark in his book *The Common Law*, published in 1881, said:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even with the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.<sup>29</sup>

The judicial function inevitably requires judgments which are normative or evaluative in character and cannot be reduced to the application of logical rules with binary outcomes. Examples include decisions turning upon the characterisation of conduct as reasonable or done in good faith or careless, the characterisation of events following on from conduct as foreseeable or too remote to attract liability. In competition law the definition of the ‘relevant market’ is a qualitative decision sometimes described as a purposive focussing process.<sup>30</sup> A similar kind of judgment is brought to bear in determining whether the effects of certain conduct or transactions on competition involve ‘substantial lessening of competition’. The judgments required in patent cases about whether a claimed invention does not involve an inventive step may require the court to answer the question whether the claimed invention would be obvious to a skilled but unimaginative worker in the relevant field fixed with knowledge of the prior art.<sup>31</sup>

In the field of discretionary decisions such as sentencing or the grant or withholding of equitable remedies, the judge’s reasons are expected to explain the factual and legal basis of the decision including the significance attributed to different circumstances of the case. That said, the High Court has spoken of the sentencing process as involving an instinctive synthesis.<sup>32</sup> It is significant that discretion is not treated as wrongly exercised just because appellate judges might have exercised it in a different way. The familiar statement that the exercise of a discretion is a matter on which reasonable minds might differ, indicates that, beyond a certain point in judicial reasoning, there may be a gap to the decision which cannot be bridged by a simple process of logic leading to one of two possible results.

In the interpretation of statutes, the courts are often faced with a choice between more than one plausible reading. That kind of choice may be informed by the context and purpose of the provision. There are cases, however, in which it cannot be explained as simply the inevitable outcome of applying pre-existing logical rules. That is illustrated by the difficulties experienced in the attempts to develop

29 O W Holmes Jr, *The Common Law* (Little, Brown, and Company, 1881) 1.

30 *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1991) 33 FCR 158; *Air New Zealand Ltd v Australian Competition and Consumer Commission* (2017) 344 ALR 377.

31 *Patents Act 1990* (Cth), s 18(1)(b) read with s 7(2). See generally *The Wellcome Foundation Ltd v VR Laboratories (Aust) Pty Ltd* (1981) 148 CLR 262; *Lockwood Security Products Pty Ltd v Doric Products Pty Ltd [No 2]* (2007) 235 CLR 173; *AstraZeneca AB v Apotex Pty Ltd* (2015) 257 CLR 356.

32 *Wong v The Queen* (2001) 207 CLR 584, 611 [75], quoting *R v Williscroft* [1975] VR 292, 300; *Markarian v The Queen* (2005) 228 CLR 357, 373–5 [37]; *DPP (Vic) v Dalglish (a Pseudonym)* (2017) 91 ALJR 1063, 1066–8 [4]–[12].

machine-based artificial intelligence which can reason about the application of legal texts — a generic term which includes statutes. As explained in a paper published earlier this year in the journal *Artificial Intelligence and Law*,<sup>33</sup> a basic assumption of logic-based approaches is that it is possible to create a logical expression of a given text that is a faithful and authoritative expression of the text's meaning. There are three elements of that assumption:

- (1) that legal texts have a determinate logical structure;
- (2) that there is a logical formalism sufficiently expressive to support the full complexity of legal reasoning on these texts, and
- (3) the logical expression can achieve the same authoritative status as the text from which it is derived.<sup>34</sup>

In the determination of contested points of law, as Julius Stone argued, legal conclusions are rarely compelled by legal premises. As Martin Krygier, in 1986, characterised Stone's position:

On the contrary, the material systematically left open 'leeways of choice' within which judges *had to* decide, whether consciously or not, by 'advertence to factors of justice and social policy, transcending any mere syllogistic relation to or among rules of law formally [announced] in the available cases.' Decisions made in these leeways were in no sense compelled by pre-existing law. A choice having been made, new law was created.<sup>35</sup>

In addition, Stone identified in the common law 'Categories of Indeterminate Reference':

When courts are required to apply such standards as fairness, reasonableness and non-arbitrariness, conscionableness, clean hands, *just* cause or excuse, *sufficient* cause, *due* care, adequacy, or hardship, then judgment cannot turn on logical formulations and deductions, but must include a decision as to what justice requires in the context of the instant case. This is recognised, indeed, as to many equitable standards, and also as to such notorious common law standards as 'reasonableness'. They are predicated on fact-value complexes, not on mere facts.<sup>36</sup>

There may be complex mixes of fact finding and value judgments in the application of criteria which condition the existence or exercise of a statutory power by a public official. There were criteria of that kind in play in the *Malaysian Declaration Case*, decided in 2011.<sup>37</sup> They conditioned the power of the Minister for Immigration to declare a country as a safe third country to which asylum

33 L Karl Branting, 'Data-Centric and Logic-Based Models for Automated Legal Problem Solving' (2017) 25 *Artificial Intelligence and Law* 5, 7–8.

34 *Ibid.*

35 Martin Krygier, 'Julius Stone: Leeways of Choice, Legal Tradition and the Declaratory Theory of Law' (1986) 9(2) *University of New South Wales Law Journal* 26, 28–9 (emphasis in original) (citations omitted), quoting Julius Stone, *Precedent and Law: Dynamics of Common Law Growth* (Butterworths, 97).

36 Julius Stone, *Legal System and Lawyers' Reasonings* (Stanford University Press, 1964) 263–4 (emphasis in original) (citations omitted).

37 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.



seekers might be sent pursuant to s 198A of the *Migration Act 1958* (Cth). The decision-maker's assessment or evaluation may be required by the criterion or it may be the criterion itself. It is possible but not easy to reduce the decision-making process to logical rules where evaluative elements are involved and even more so where the decision-maker's state of mind itself conditions the exercise of the power.

Rationality as a requirement of official decision-making has its limits. Nevertheless, it is expected of all decision-makers to the extent that it can take them towards their decision. An exercise of a statutory power must be supported by reasoning which complies with the logic of the statute. It must lie within that class of reasoning pathways which support a valid exercise of the power. That class may be large for a broad discretion conferred in a statute without a well-defined purpose. It may be more limited in other cases.

The logic of a statute in this sense requires that the reasoning process of a decision-maker in deciding to exercise a power under the statute:

- is a reasoning process — ie, so far as possible a logical process, albeit it may involve the exercise of a value judgment, including the application of normative standards, and the exercise of discretion;
- is consistent with the statutory purpose;
- is based on a correct interpretation of the statute, where that interpretation is necessary for a valid exercise of a power — an error of law which does not vitiate a decision is thereby excluded;
- has regard to considerations which the statute, expressly or by implication, requires to be considered;
- disregards considerations which the statute does not permit the decision-maker to take into account;
- involves findings of fact or the existence of states of mind of the decision-maker which are prescribed by the statute as necessary to the exercise of the relevant power;
- does not depend upon inferences which are not open or findings of fact which are not capable of being supported by the evidence or materials before the decision-maker.

The permitted pathways to the statutory decision may also be limited to those that comply with procedural requirements which may be express or implied. Decision-making which complies with the logic of the statute will therefore also:

- result from the application of processes required by the statute or by implication, including the requirements of procedural fairness.

It will also result from a diligent endeavour by the decision-maker to discharge the statutory task. The matters listed go to power. They cover varieties of jurisdictional error, a term coined for historical reasons. They are not exhaustive,

but reflect the requirement that the exercise of a statutory power should be rational in the sense which I have used that term.

The requirement that a power conferred by a statute be exercised rationally, is therefore not met merely by the avoidance of absurdity. In *Minister for Immigration and Citizenship v Li*<sup>38</sup> the Migration Review Tribunal had refused an adjournment to an applicant for an occupationally-based visa. The applicant was awaiting a revised skills assessment from a body called Trade Recognition Australia. The Tribunal proceeded to a decision adverse to the applicant without waiting for that revised assessment which was critical to her success. In holding that the decision of the Tribunal was vitiated by unreasonableness, Hayne, Kiefel and Bell JJ referred to *Wednesbury Corporation*<sup>39</sup> and said:

The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision — which is to say one that is so unreasonable that no reasonable person could have arrived at it ...<sup>40</sup>

Indeed, the Master of the Rolls, Lord Greene in *Wednesbury Corporation*, made the point that bad faith, dishonesty, unreasonableness, attention given to extraneous circumstances, and disregard of public policy, were all relevant to whether a statutory discretion was exercised reasonably.<sup>41</sup> As the joint judgment said in *Li*:

Whether a decision-maker be regarded, by reference to the scope and purpose of the statute, as having committed a particular error in reasoning, given disproportionate weight to some factor or reasoned illogically or irrationally, the final conclusion will in each case be that the decision-maker has been unreasonable in a legal sense.<sup>42</sup>

I am inclined to use the word ‘rationality’ in this setting rather than ‘reasonableness’. The term ‘reasonable’ may describe a rational decision with which one agrees. Its obverse ‘unreasonable’ can describe a rational decision with which one emphatically disagrees. The ordinary meaning of the term ‘reasonable’, according to the *Oxford English Dictionary*, includes the idea of having sound judgment and being sensible. That shade of meaning can lead beyond the boundaries which define the constitutional limits of traditional judicial review. In so saying, I acknowledge that people tend to use whatever terms of abuse come to hand to describe decisions with which they vehemently disagree and ‘irrational’ is one even though it may not be related to a failure of logic.

Rationality in the sense of compliance with the logic of the statute means compliance with its express and implied requirements. It is not an implication but it may pick up implied requirements from the statute. Although reasonableness has been described as an essential condition of the exercise of a power that may in

38 (2013) 249 CLR 332 (‘*Li*’).

39 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

40 *Li* (2013) 249 CLR 332, 364 [68].

41 [1948] 1 KB 223, 229.

42 (2013) 249 CLR 332, 366 [72].

most, if not all, cases be no more than a way of saying that the logic of the statute and the rational processes that comply with it, must be followed.

Rationality in the sense I have discussed may not take the decision-maker the whole distance to decision. Sometimes decisions have to be made in the face of unresolvable uncertainty or in the face of alternatives which are within power and where, on the basis of the materials before the decision-maker, no relevant distinction can be drawn between them. In a paper entitled ‘Rationally Arbitrary Decisions in Administrative Law’, Professor Adrian Vermeule of the Harvard Law School described limits to rationality by reference to cases in which decision-makers run out of what he called first-order reasons for their decisions.<sup>43</sup> He argued that the law should not adopt a cramped conception of rationality which would require decision-makers to do the impossible by reasoning beyond the point at which reason has exhausted its powers.<sup>44</sup> His observations were made particularly in the context of decisions of regulatory agencies in the United States balancing competing considerations in the face of absence of information which enables a clear determination to be made.

By way of example, the Secretary of the Interior in one case had to decide whether to list a particular lizard as a threatened species under the *Endangered Species Act*. The methodology previously used to estimate the number of lizards in a given area had been exposed as worthless. No-one had any rational basis for estimating the number of lizards. A federal appellate court decided that if the science on population size and trends was unclear, the Secretary could not reasonably infer that the absence of evidence of population decline equated to evidence of its persistence. Professor Vermeule preferred the reasoning of the dissenting Judge Noonan, who encapsulated the problem and his preferred resolution of it by saying ‘[i]t’s anybody’s guess ... whether the lizards are multiplying or declining. In a guessing contest one might defer to the government umpire’.<sup>45</sup> It is probably not enough to dismiss the persuasiveness of that proposition by saying that agency deference is no part of Australian jurisprudence. The case was dealing with an absence of information to choose between alternative decisional options where a decision, one way or the other, had to be made. The question may then reduce to — who makes the decision that has to be made, the agency or the court?

Vermeule poses the question: how can a court decide when reasons run out and it is rational to be arbitrary? He proposes, as one criterion, what he calls ‘mirror-image reversibility’ in order to judge when that case has arisen. If there are two possible outcomes, A and B in the exercise of a statutory power and an agency decision either way could be characterised as arbitrary then one can say — first order reasons have run out. The approach by Judge Noonan in such a case would accept that the agency had to make one of two arbitrary decisions and the court should defer to its choice — there being no other basis for attacking it. In such

43 Adrian Vermeule, ‘Rationally Arbitrary Decisions in Administrative Law’ (2015) 44 *Journal of Legal Studies* S475, S476–8.

44 Ibid S498.

45 Ibid S484, quoting *Tucson Herpetological Society v Salazar*, 566 F 3d 870, 883 (9<sup>th</sup> Cir, 2009).

a case, on Vermeule's argument, although he does not say so, the decision could have been determined by a throw of the dice.

Risk assessment may inform a precautionary principle in some areas where risk can be assessed. But there is a difference between risk and uncertainty. Absent risk there may just be uncertainty. As Vermeule puts it 'in decision making under genuine uncertainty, agencies operate at the frontiers of reason'.<sup>46</sup> In some cases there may be risk on both sides of the decision-making ledger. Statutes of course may require agencies to make certain assumptions in the face of uncertainty. That does not mean, as Vermeule argues, that the courts have a basis for reading a de facto requirement of what he calls 'maximin decision making into the general rationality requirements of administrative law'.<sup>47</sup>

A homely example of a decision-maker's response to unresolvable uncertainty is the challenge sometimes faced by the Commissioner of Taxation or his officers in making default assessments of a taxpayer's assessable income, absent any reliable information about finances. In *Trautwein v The Federal Commissioner of Taxation*,<sup>48</sup> the Court spoke of the nature of decision-making by the Commissioner in such cases. Latham CJ said:

In the absence of some record in the mind or in the books of the taxpayer, it would often be quite impossible to make a correct assessment. The assessment would necessarily be a guess to some extent, and almost certainly inaccurate in fact. There is every reason to assume that the legislature did not intend to confer upon a potential taxpayer the valuable privilege of disqualifying himself in that capacity by the simple and relatively unskilled method of losing either his memory or his books.<sup>49</sup>

A 'guess' has more of the random in it than an estimate. It may involve the selection of a figure from a plausible range but there is an inescapable element of the arbitrary in the decision-making process. Many years after *Trautwein* in *Briggs v Deputy Federal Commissioner of Taxation (WA)* Sheppard J, after quoting from the judgment of Latham CJ, said:

It may be true ... that s 167 is not the gateway to fantasy and that it is not open to the Commissioner either to pluck a figure out of the air or to make an uninformed guess. But that the process may go close to guesswork, and yet be lawful, is established by what Latham CJ said in the passage quoted from his judgment in *Trautwein's* case ...<sup>50</sup>

Is a throw of the dice in cases of unresolvable uncertainty an acceptable surrogate for a guess by the umpire as Judge Noonan put it? The position of the Supreme Court of the United States in that respect is not encouraging. Justice Kagan, writing for the Court in 2011 in an immigration case, *Judulang v Holder*, said:

46 Ibid S493.

47 Ibid.

48 (1936) 56 CLR 63 ('*Trautwein*').

49 Ibid 87.

50 (1987) 14 FCR 249, 269.

If the [Board of Immigration Appeals] proposed to narrow the class of deportable aliens eligible to seek [legal] relief by flipping a coin — heads an alien may apply for relief, tails he may not — we would reverse the policy in an instant. That is because agency action must be based on non-arbitrary, “relevant factors” ...<sup>51</sup>

The last quoted proposition advanced by Justice Kagan does not work for all forms of decision-making. Cases may arise in which a decision-maker has to allocate a limited number of licenses to one of a number of equally deserving applicants or otherwise choose between competing interests with equally valid claims. Allocation by ballot, while arbitrary in one sense, reflects the choice of the ballot outcome as a relevant, indeed determinative, factor. There are examples of statutory provisions providing for decision by ballot. The *Mining Act 1978* (WA) provides, in s 105A, for the mining warden to determine, by use of a ballot, which of a number of applicants equal in time should be granted a tenement. The provision was discussed by the High Court in *Hot Holdings Pty Ltd v Creasy*<sup>52</sup> on the question whether the warden’s decision to hold a ballot was available to certiorari. The answer to that question was ‘yes’. There are other examples in the statute books. If those statutes and the preceding discussion establish anything it is that random processes are not inconsistent in certain cases with lawful decision-making.

In a book entitled *Random Justice*, Professor Neil Duxbury at the London School of Economics undertook an extended consideration of the use of randomisation for social decision-making purposes.<sup>53</sup> The primary thesis which emerged from the book is that there is an aversion to decision-making by lot indicative of a distinct attraction, possibly even an addiction, to reason. Even where resort to lot will produce decisions that are impartial and cost effective when compared with the time and cost of reasoning a way to a decision, ‘there rarely exists any inclination to decide by resort to sortition’.<sup>54</sup> The process of legal decision-making is generally considered to be more important, he suggests, than the quality of the decisions. His explanation for the preference for reason over impartial lots is expressed thus:

what we seek, particularly in legal decision-making, is not right answers but attributable answers — answers for which somebody can be held responsible or accountable. More than this, we commonly want legal answers which are serious as well as attributable ...<sup>55</sup>

That is perhaps the general answer to the question about the use of dice or their equivalent in administrative decision-making — always acknowledging that there may be non-logical elements, even random processes, affecting the reasoning and choices of the decision-maker.

51 565 US 42, 55 (2011) (citations omitted).

52 (1996) 185 CLR 149.

53 Neil Duxbury, *Random Justice: On Lotteries and Legal Decision-Making* (Oxford University Press, 1999).

54 *Ibid* 14.

55 *Ibid*.

A person on the losing side of somebody else's decisional choice may find therapeutic value in the existence of a decision-maker who can be blamed. If the decision was made by a roll of dice, one could, if a believer, rage against God. Otherwise one must stand mute before 'Fortuna', the Goddess of chance who, unlike justice, wears no blindfold but does have a wheel which can be spun and a tendency to send the Goddess Nemesis against those who complain about random outcomes.