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**THE MODERN
ADMINISTRATIVE STATE:
REFLECTIONS ON INDIA
AND AUSTRALIA**

Central Administrative Tribunal
Inaugural Rajiv Gandhi Lecture

11 December 2010
New Delhi, India

The Hon. Michael Kirby AC CMG

CENTRAL ADMINISTRATIVE TRIBUNAL

RAJIV GANDHI LECTURE

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RAJIV GANDHI REMEMBERED

It is a great honour for an Australian jurist to be invited to deliver a lecture named after the late Prime Minister of India, Rajiv Gandhi. Especially so because this is the inaugural lecture, established to coincide with the meeting of the Administrative Tribunal of this, the most populous democratic and rule of law nation on earth.

I am conscious of the compliment extended to me by the attendance of two leading Ministers in the Government of India and of judges and members of the Central Administrative Tribunal (CAT) convened for their All-India conference, to mark the silver jubilee of the CAT (1985-2010). For this generosity, extended to me and, through me, to judges and lawyers in Australia, I express sincere gratitude.

The CAT was established in 1985 during the period that Rajiv Gandhi served as Prime Minister of India. It is proper, as this is the inaugural

* Justice of the High Court of Austral 1996-2009; Judge of the Federal Court of Australia 1983-4; Member of the Administrative Review Council of Australia 1976-84; Chairman of the Australian Law Reform Commission 1975-84.

lecture bearing his name, that we should all reflect, in a way that is not perfunctory, upon the remarkable career and contributions of Rajiv Gandhi.

He was the grandson of Jawaharhal Nehru, the foundation Prime Minister of India. He was the eldest son of Indira Gandhi, daughter of Nehru and of husband, Feroze Gandhi. He was educated in India at the Welham School and Doon School, and thereafter at Cambridge University and Imperial College in the United Kingdom. It was at Cambridge that he met his future wife, Antonia (Sonia) Maino, Sonia Gandhi, herself to play an important part in the public life of India.

Initially, Rajiv Gandhi did not exhibit a special interest in political life. Instead, he worked as a pilot in civil aviation, only entering politics on the death of his younger brother, Sanjay, in 1980. In 1981, he became an adviser to his mother and assumed the office of President of the Youth Congress of the Congress Party. When, in 1984, his mother was assassinated, Rajiv Gandhi was nominated by the Indian National Congress to be, and was later appointed as, the seventh prime minister of India. Shortly after his appointment, he secured a dissolution of Parliament and led his party to an unprecedented electoral victory, gaining the largest majority secured: 411 seats out of 542. Part of his success was attributed to his commitment to non-corruption; his embrace of modernity and technology; and his determination to tackle serious inefficiencies in the central government. It was these inefficiencies that caused serious economic loss both for the Indian economy and for citizens as well as foreign investors anxious to deal with, and invest in, a nascent India.

In accordance with his electoral commitments, Rajiv Gandhi's government embarked upon a major programme of reform in foreign policy; in security matters; in education; and in tackling the specific problems of the rural poor in India. He tackled the impediments of tariff policies and administrative procedures which impeded the embrace of new technology and improved administration. He quickly embarked upon the task of dismantling what had become known as the Licence Raj.

As part of Rajiv Gandhi's determination to simplify and modernise public administration in India, he sponsored and promoted the *Administrative Tribunals Act* 1985 which established the CAT. Its tribunals are unique in the sense that its members derive both from administrative and judicial backgrounds. Each division bench (of which there are 17 across the country) comprises a judicial and an administrative member. In this and other respects, the CAT functions in India in a way different from high administrative tribunals in other countries. It deals with cases relating to the recruitment and conditions of service of persons appointed to the public service and to posts under the control of the Government of India.

The object of creating the CAT in this way was both to streamline the mass of administrative decisions committed to its jurisdiction whilst at the same time relieving the High Courts in India of the burden of deciding litigation over such matters in the midst of the other pressing functions of those courts. The success of the CAT is signified by the fact that it has been operating for 25 years. It operates after a quasi-judicial model. It has borrowed features from the judicial institutions which have come to enjoy great respect and public support in India. But this presents a

problem, common to quasi-judicial tribunals, of ensuring a proper measure of accountability to the Executive Government and to the democratically elected legislature, for important decisions within the jurisdiction of CAT and other tribunals.

Truly, this obligation of accountability is one of the great challenges of the modern administrative state. As I shall show, it is a challenge that we also face in Australia.

This is not the occasion to review the many other large achievements secured by Rajiv Gandhi during his all too short a time in Indian public life. In 1989, following a setback at the polls, the Opposition BJP party formed a government. Rajiv Gandhi became the Leader of the Opposition. But he remained President of the Indian National Congress. In 1991, he was campaigning to win back government when, like his mother before him, he was assassinated not far from Madras. A memorial of stone and Indian national flags has been erected at the site of his untimely death. Yet the true memorial to the life of Rajiv Gandhi is to be found in the hearts of his fellow citizens who cherish his service to the democratic cause. And to the modernisation of India, its national economy and public administration.

The CAT is part of Rajiv Gandhi's legacy of administrative reform in this country. The 17 branches of the tribunal comprise 66 members, with half each from judicial and administrative backgrounds. Since its inception, the CAT has handled approximately 535,670 cases. Most of the judicial members are retired judges of the High Courts in India. Most of the administrative members are retired Secretaries in the Government of India. The very high level of the appointments to the Tribunal have

assured it of great respect; but also of a mixture of legal expertise and administrative practicality. By mixing the personnel of the CAT in such a way, the legislature and the Executive have sought to provide at once observance of the rule of law and attention to genuine administrative speed, economy and efficiency.

This is a bold and unique Indian experiment. So it is proper that this lecture should remember the political leader whose actions led to the creation of the CAT, with its ideals and considerable practical strengths. By incorporating experience from the judiciary and administration amongst the personnel of the CAT, the objective was to establish a speedy and relatively cheap and effective body that would avoid the problems of delay and cost that tend to ensnare the judiciary in India as in every land.

Rajiv Gandhi's aspirations for India went beyond even India's own borders and its vast population. He envisaged a modern nation, embracing education and technology, which would not only lift itself up, but would also offer an example and contribution to the service of all humanity. It is proper that we should remember his name and honour his achievement on a silver anniversary occasion such as this.

AUSTRALIAN ANALOGUES

Shared common features: Because India and Australia shared the historical experience of British rule, we share both certain advantages and disadvantages that came with that period of our respective national histories. It is easier, especially in India, to think of the disadvantages. However, certain of the good features of public administration in both of our countries need to be kept in perspective:

1. India and Australia share in common particular and beneficial features of British governmental institutional arrangement:
 - * Democratically elected parliaments;
 - * Uncorrupted officials, chosen, especially in the higher echelon, by independent procedures including impartial examinations, selection interviews and the application of objective standards;
 - * A tradition of apolitical service by the bureaucracy, with impartial advice, conforming to the law, to the government chosen from amongst those elected by the people; and
 - * The particular rule of non-involvement of the military in political affairs.

2. We share a strong and independence judiciary, established, independent of the elected branches of government, enjoying tenure of service and dedicated to upholding the rule of law, according to impartial understandings of the law, uninfluenced by political pressure and uncorrupted from other sources.

3. Neither Australia nor India inherited a developed system of administrative law, of the kind that was created in France and other countries of the civil law tradition. Judicial review was available in accordance with “prerogative” and statutory writs providing for legal supervision of administrative decisions. However, such review was generally not concerned with the merits of the administrative decision, but rather with matters of jurisdiction: whether the decision was made in conformity with the law; by fair and just procedures; and consistent with principles of rationality. Generally, the merits were left to be determined, within

these broad parameters, by the Minister or official who, in law, enjoyed the power to make the administrative decision.

4. A further inherited feature of British public administration was a culture of secrecy. The counsels of the Crown were regarded as secret since at least the time of Sir Francis Walsingham, whose duty in England was to root out enemies of the state in the dangerous reign of Queen Elizabeth I. The *Official Secrets Act* 1911 (UK) reinforced a high level of bureaucratic secrecy that was reflected in laws and practices adopted throughout the British Empire. The given justification for this secrecy was often explained as lying in the need for total candour by civil servants in advising ministers and others who wielded executive power. And the crucial need for Cabinet, or its equivalent at the apex of executive government, to be able to discuss matters freely and robustly, without having the prying eyes of antagonists, the media or political opponents intruding into the government's secrets. This regime of severe secrecy ultimately came into conflict with more modern notions of democratic governance; true accountability to the people; the value of whistleblowers in revealing corruption, illegality and impropriety; and the role of modern media, the internet and freedom of information legislation. Progress has been made in tackling such secrecy both in Australia and India. But there is no doubt that the starting point for India as well as for Australia was an administrative culture of impenetrable secrecy.
5. Allied with this culture was a political inheritance of firm, decisive executive government. Whereas the tripartite separation of powers observed under the Constitution of the United States of

America, and European nations, produce an executive president of very great powers, sometimes weakened by the constitutional separations, the Westminster tradition by which the executive was formed from political decisions made in the Lower House of the legislature, made for a system of decisive and strong government. Lord Hailsham, Lord Chancellor, once described it as a form of "elected dictatorship". Political allegiance, personal ambition, party whips and fear of opposition has tended to make the theoretical notion of executive accountability to the legislature more fictional than real. In fact, during the twentieth century, in countries of the Westminster parliamentary system, effective political control haemorrhaged continuously from the legislature to the executive; from the executive to its leadership; and sometimes from its leadership to external bodies such as political party conferences, officials and apparatchiks. The result may have been a more effective system of government than that provided by executive presidencies. But the outcome has also tended to be less responsive to the popular will, except at the crucial, intermittent and well-separated occasions when the executive in the legislature is required to account to the people in general elections. Even then, external forces including the media, religious organisations, international economic institutions - public and private - and terrorist forces have combined to reduce the true effectiveness of the political accountability of the governmental system.

6. The particular idea that lay at the heart of the theory of constitutional governance as practised, and bequeathed, by Britain, was that of ministerial responsibility to the legislature which, theoretically, could dismiss the government on a vote of no

confidence carried in the lower house of the legislature. In terms of principle, ministers in the executive government were answerable to the legislature, including for the conduct of officials in the great departments of state for which the minister was constitutionally responsible and accountable. In the nineteenth century, with a small central bureaucracy and few ministers, the system may have operated at Whitehall and Westminster, in the ways described by A.V. Dicey and others in their legal texts. However, by the time this system came to operate in Australia (federally after 1901) and India (after 1947 and even before), the central legislature had expanded greatly in its power; as had the ministry; as had the civil service, the tribunals and the independent authorities for which ministers were theoretically 'accountable'. In the event of error or wrong-doing on the part of officials, at least where their conduct or omission was not specifically authorised by, or known to, the minister, the notion of extracting a ministerial resignation came to appear, both in India and Australia, as more unreasonable and capricious. In the result, ministerial resignations became rare, unless some personal ministerial misconduct or wrong-doing existed or was suspected, making the minister's continuance in office a political and public liability for the government. In the age of a vastly expanding bureaucracy, the sanction of ministerial responsibility to the legislature and ministerial resignation demonstrated administrative errors by officials came to be seen as ineffective and even paltry. This realisation gave birth to the realisation that better and more effective responses were required obliging significant ventures in law reform.

7. Because the law tends to abhor a vacuum, a partial response to the institutional imperfections revealed by the foregoing developments in both of our countries has been an expansion, and partial modernisation, of the processes of judicial and quasi-judicial review of administrative decisions. The problem with the judicial writs, inherited by India and Australia from Britain, was the sometimes high technicality of the procedures; their limited capacity to re-examine suggested factual errors, made by decision-makers; the common necessity to establish an error 'on the face of the record' before relief could be provided; the uniform resistance of the courts to review of the evidentiary merits; the ambiguity of the notion of 'jurisdictional error' necessary to ground judicial review; and the legislative enactment of privative clauses by which parliaments attempted to exclude the courts from providing judicial review of ministerial, tribunal and other important executive decisions.

In partial response to these restrictive forms of review, both in India and Australia, the apex national courts developed from the constitutional language strong principles designed to protect the availability of judicial review; to enshrine it as a constitutional right; to safeguard the independence of the judge to whom it was entrusted; and to afford relief in a broad and expanding range of circumstances.

In India, many developments reflected the constitutionalisation of the response. By constitutional means, both India and Australia diverted from the English doctrine of parliamentary sovereignty whereby, in a case of dispute as to the content of a law, parliament always enjoys the power of the last say. As Dr. Durga Das Basu points out in his

introduction to his work, *Constitution of India*¹, the founders of the American constitution had learned from painful experience that a representative body (in this case the British Parliament in its taxation measures over the American colonies) could prove tyrannical. For this reason, the American *Declaration of Independence* demanded a federal independence constitution that was not “deaf to the voice of justice”. And hence they developed the concept of a judicial umpire with the last say both on issues of legislative power within the federation and on issues of fundamental rights.

Dr. Basu, writing of the Indian case, proceeds to describe the compromise achieved between the English notion of parliamentary sovereignty and the American constitutional idea of judicial review:

“[T]he harmonisation which our constitution has effected between parliamentary sovereignty and a written constitution with a provision for judicial review, is a unique achievement of the framers of *our* constitution. An absolute balance of powers between the different organs of government is an impossible thing and, in practice, the final say must belong to some one of them. This is why the rigid scheme of Separation of Powers and the checks and balances between the organs of the *Constitution of the United States* has failed in its actual working, and the judiciary has assumed supremacy over its powers of interpretation of the constitution to such an extent as to deserve the epithet of the ‘safety valve’ or the ‘balance-wheel’ of the constitution. ... Under the *English Constitution*, on the other hand, parliament is supreme and “can do anything that is not naturally impossible” (*Blackstone*) and the courts cannot nullify any Act of Parliament on any ground whatsoever. ... So English judges have denied themselves any power “to sit as a court of appeal against parliament”.

The *Indian Constitution* wonderfully accepts the *via media* between the American system of judicial supremacy and the English principle of parliamentary sovereignty, by endowing the judiciary with the power of declaring a law as unconstitutional if it is beyond

¹ 19th Ed., reprint, 2003, 39.

the confidence of the Legislature according to the distribution of powers provided by the constitution, or if it is a contravention of the fundamental rights guaranteed by the constitution or of any other mandatory provision of the constitution; but at the same time depriving the judiciary of any power of 'judicial review' of the wisdom of legislative policy. Thus it avoided expressions like 'due process' and made fundamental rights, such as that of liberty and property subject to regulation by the Legislature."

Still, as Dr. Basu explains, the Supreme Court of India itself discovered a species of 'due process' in Article 21 in the *Maneka Gandhi* case². Moreover, the judiciary of India declared that 'judicial review' is a 'basic feature' of the *Indian Constitution*, so that any amendment of the constitution, to take away judicial review of legislation on the ground of contravention of any provision of the constitution, was itself liable to be invalidated by the Court. This was so by the decision declaring certain features of the power of the constitution "basic" such that the express power of amendment of the constitution, conferred by Art. 368, was subject to "implied" limitations restricting any legislative alteration of the "basic features" or "basic structure" of the Indian Constitution³. These decisions, and the subsequent ruling concerning a mandatory procedure of judicial involvement in judicial appointments, so held as a result of the successive *Judges Cases*⁴ control the appointment of judges to the highest court in a way not observed in other countries⁵.

The foregoing developments have been accompanied by others enlarging the right to reasons from administrative officials beyond the

² *Maneka Gandhi v Union of India* 1978 SC 597.

³ See *Golak Nath v State of Punjab* 1967 SC 1643; *Keshavanada v State of Kerala* 1973 SC 1461; *Minerva Mills v Union of India* 1980 SC 1789 (pars.21-26, 28, 91, 93-94); *Sampat v Union of India* 1987 SC 386; *Union of India v Raghbir* 1989 SC 1933 (par.7).

⁴ *S.P. Gupta v Union of India* 1982 SC 149; *Union of India v Sankalchand Seth* AIR 1977 SC 2328.

⁵ *Supreme Court Advocates v Union of India* (1993) 4 SCC 441; *Special Reference No.1 of 1998* (1998) 7 SCC 739.

traditional understandings of English law⁶. When, in Australia, I attempted to introduce a similar principle into the local common law and to apply the Indian judicial reasoning, my attempt was overruled. It was rejected by the High Court of Australia in *Public Service Board of New South Wales v Osmond*⁷. Chief Justice Gibbs, explaining the reasoning of the High Court said⁸:

“Fourthly, Kirby P referred to a line of Indian decisions in which it has been held to be “settled law that where an authority makes an order in exercise of a quasi-judicial function, it must record its reasons in support of the order it makes”: *Siemens Engineering & Manufacturing Co. of India Limited v Union of India*⁹. This, it was said, is “a basic principle of natural justice. These decisions appear to state the common law of India, although without a detailed knowledge of the course of decisions in that country, it would be hazardous to assume they have not been influenced by the provisions of the Constitution of India or by Indian statutes. ... Where the rules of the common law of Australia are unclear or uncertain, assistance may be gained from a consideration of decisions of other jurisdictions, but where the rules are clear and settled, they ought not to be disturbed because the common law of other countries may have developed differently in a different context. If the common law of India ... requires reasons to be given for administrative decisions, it is different from that of Australia.”

Notwithstanding this setback, important decisions of the High Court of Australia, over many years, have defended the independence and separation of the federal judiciary; the impermissibility of attempting to confer on it functions inimical to the exercise of the judicial power; and strict protection of the tenure of federal judges, so that they will not be susceptible to short-term appointments, procedures of executive

⁶ *Maneka Gandhi v Union of India* (1978) 1 SCC 248.

⁷ (1986) 159 CLR 656.

⁸ (1986) 159 CLR 656 at 668.

⁹ (1976) 63 AIR (SC) 178 at 1789.

renewal, or political or other interference¹⁰. In a more recent line of cases, the High Court of Australia has held that there are also restrictions on the functions that can be conferred on State judges because, under the Constitution, they must be “suitable receptacles” for the exercise of federal jurisdiction¹¹.

In both India and Australia, therefore, the strong assertion of judicial independence and its protection by the apex court have been important means of upholding legality and proper exercise of jurisdiction on the part of executive governments. However, these advances, whilst important, do not represent an adequate, or comprehensive, response to the burgeoning growth to the administrative state. It is for that reason that, both in Australia and in India, new laws have been enacted, and new tribunals created, in order to respond more effectively to the challenges presented by the vast growth of public administration, necessary to serve the complex needs of modern societies.

New statutory administrative law: The last three decades, both in India and Australia, have witnessed a remarkable advance in administrative law, stimulated by constitutional doctrine and reinforced by legislative responses to the growth of the modern administrative state.

One great teacher, of both our countries, Upendra Baxi (who taught me jurisprudence at Sydney University in the 1960s) has made highly pertinent observations on the advance of Indian administrative law in his

¹⁰ *R v Kirby: Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254; and *Kartinyeri v The Commonwealth* (1998) 195 CLR 337.

¹¹ *Director of Public Prosecutions (NSW) v Kable* (1997) 189 CLR 51; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45.

“Introduction” to Professor I.P. Massey’s *Primer on Indian Administrative Law* (“IAL”)¹²:

“Administrative law is no doubt a conceptually awkward and fuzzy notion and yet at the same moment an ever-growing doctrinal sphere because it has no fixed terrain. ... The IAL in a special sense constitutes the common law of the Constitution as for the most part it is un-codified, though it is clear that regulatory agencies and tribunals always concurrently making their own “law” have always existed and are now growing apace.

Different images of IAL emerge from the varied constituencies of law persons. If for Justices, the IAL emerges as a field for the exponentially growing judicial review or adjudicatory powers, it constitutes for legal practitioners a virtual (in a pre-digital sense) goldmine. The literally fantastic growth of IAL is “big business” for the legal profession, augmenting their influence, prestige and power. For law reformers, the IAL is an untidy and messy field which needs constant landscaping and the law academics stand offered by the IAL some unusual challenges for teaching and research; further, as with lawyers, academic eminence stands built upon successful performances of narrating doctrinal development. Law students not merely improve their knowledge-base by studying the IAL, but also improve their competitive credentials for public service and judicial examinations. This diversity of interests that generate and sustain IAL development also signifies that many different material/institutional interests are at play in conventional approaches towards its understandings.

Put together, the different images under gird a distinctly liberal legal ideology. The IAL, like administrative law formations in all liberal societies or constitutional democracies, celebrates the values of a “rule of law” based state and society. The social meaning of the rule of law is just this: the rule of law means that power must always be rendered accountable here-and-now, governance be made progressively just, and the state incrementally ethical.”

This magnificent summation of Indian administrative law could apply word-for-word to the position in Australia. Even the last comments on

¹² U. Baxi, “Introduction” (“The Myth and Reality of the Indian Administrative Law”), I.P. Massey, *Primer on Indian Administrative Law*, xv at xvi.

the nature of a “rule of law society” apply equally to us. As Lord Bingham, another great teacher of the law in recent decades, observed during his lifetime, the rule of law is more than merely the law of rules. It connotes a commitment to universal values of justice and to human dignity to which our legal systems, however imperfectly, continuously strive¹³.

In India, Rajiv Gandhi’s government established the CAT and every decade has brought new legislation with new tribunals and new concepts. Amongst these, the *Right to Information Act* of 2005 has introduced to India some of the basic changes to the concept of accountability that we have also seen in Australia. An Indian audience will be well familiar with these administrative law reforms. It does not need me to lecture about them. However, because Australia shares with India many critical similarities (especially a written constitution, rights to constitutional review, a federal governmental system and representative democracy), it may be of interest and value to tell you of some of the major changes that have come about in the past three decades in Australia’s response to the administrative state. The changes have been introduced at the federal level as well as in the States and Territories of Australia. Most of the have arisen by virtue of legislative measures, although some have been introduced by judicial decision.

So great have been the innovations involved in legislative changes to administrative law at the federal level in Australia that a new system has been detected and is described as the “New Administrative Law”. Time allows only the briefest sketch of the federal legislative innovations.

¹³ Lord Bingham, “The Rule of Law” (2007) 66 *Cambridge Law Journal* 67 at 81; cf. M.D. Kirby, “The Rule of Law Beyond the Law of Rules” (2010) 33 *Australian Bar Review* 195 at 197-200.

They grew out of a series of official reports, commissioned by successive governments in recognition of the inadequacy of the constitutional theory of ministerial accountability to provide for a truly effective review of administrative decisions. The reports included the Kerr Report of 1971 by the Administrative Review Committee; the Bland Committee Report of 1973 on administrative discretions; and various reports of the Australian Law Reform Commission and of the Administrative Review Council, which have pushed forward the provision of remedies designed to improve public administration and to afford better means of civic accountability.

Amongst the most important legislative enactments in Australia have been:

- * *Administrative Appeals Tribunal Act 1975 (Cth)*;
- * The creation, by that Act, of the Administrative Review Council;
- * *Federal Court of Australia Act 1976 (Cth)*;
- * *Ombudsman Act 1976 (Cth)*;
- * *Administrative Decisions (Judicial Review) Act 1977 (Cth)*;
- * *Freedom of Information Act 1982 (Cth)*;
- * *Human Rights & Equal Opportunity Commission Act 1986 (Cth)*;
- * *Privacy Act 1988 (Cth)*;
- * *Protected Disclosures Act 1994 (NSW)* dealing with the protection of whistleblowers who disclose official information allegedly for justifiable reasons.

Each of the foregoing Acts introduces novel and distinctive ideas into the law governing public administration in Australia. In one sense, the most comprehensive was the establishment of a national ombudsman, who

could receive, investigate and make recommendations about complains concerning public administration. This accessible, cheap and effective form of review has proved useful as supplementing the more formal procedures of judicial and quasi-judicial litigation.

In some ways, the most universal of the reforms in Australia was introduced by the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). Not only did this Act collect, modernise and simplify the old 'prerogative writs', enacting them for the first time as part of a modern federal statute. It also introduced for the first time, as ancillary to the new procedures of judicial review, a right in persons affected by defined administrative decisions to secure reasons for the decision of federal administrative officials. In a stroke, this provision overcame the traditional reluctance of the common law to recognise a right to reasons for administrative decisions. Often, the right to reasons provided the foundation for effective judicial review which, in earlier times, could easily be rebuffed by non-communicative official responses.

The key parts of the ADJR Act, in this respect, state:

- “13(1)Where a person makes a decision to which this section applies, any person who is entitled to make an application to the Federal Court or the Federal Magistrates' Court ... in relation to the decision may, by notice in writing given to the person who made the decision, request him or her to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.
- (2) Where such a request is made, the person who made the decision shall, subject to this section, as soon as practicable, and in any event within 28 days after receiving the request, prepare the statement and furnish it to the person who made the request.”

There are a limited number of exceptions to the application of the ADJR Act and to the operation of the right to reasons. But, this statutory innovation has proved a keystone in the building of the new Australian administrative law. It has been copied in a number of the Australian States.

Even more innovative, was the ambit of the jurisdiction conferred by the Federal Parliament on the Administrative Appeals Tribunal (AAT) established by the Act of that name of 1975. Whereas, previously, statutory tribunals and authorities in Australia were generally confined to re-considering an initial administrative decision against the criteria of legal accuracy and procedural fairness, and were restricted in their remedies to quashing a defective decision and remitting it to be made again by the relevant official, the AAT had conferred on it a much larger jurisdiction. This was substantively to re-make the original decision, in most cases. As it was often stated, the Tribunal was authorised to step entirely into the shoes of the original administrative decision-maker and to make the decision which that administrator ought to have made in the first place: the so-called “correct or preferable” decision¹⁴.

Exceptions to the application of the AAT Act to administrative decisions are acknowledged by the fact that its jurisdiction is confined to those decisions specifically brought within its purview. Generally speaking (although not universally) decisions made by Ministers cannot be remade by the Tribunal. When the novel jurisdiction to remake decisions was conferred on the Tribunal, it initially caused a deep

¹⁴ *Drake v Minister for Immigration and Ethnic Affairs (Drake No.1)* (1979) 2 ALD 60. See also *Drake v Minister for Immigration and Ethnic Affairs (Drake No.2)* (1979) 2 ALD 634.

foreboding in the Australian public service and a scramble ensued to place federal administrative decisions outside the jurisdiction of the AAT. Nonetheless, in the way the Tribunal has operated, many of the old fears have disappeared. By and large, the AAT has been accepted by observers as a useful adjunct to public administration by officials and a stimulus both to the lawfulness, fairness and quality of federal administrative decisions. Certainly, the legislation has been highly innovative. It is a distinctive departure from the restraining traditions of the common law and British administrative practice to which both India and Australia were heir.

As in the case of the CAT, established in India ten years after the *Australian Administrative Appeals Tribunal Act 1975* (Cth), provision is made for appointments of the AAT in Australia of persons with both legal (judicial) backgrounds and administrative backgrounds and experience. Thus provision is made by s6(2) of the Act for the appointment of (federal) judges as presidential members, appointed under a separate commission either as president or deputy president. In addition, some recently retired judges, federal and state, have been appointed as presidential members of the AAT. As to non-presidential members, a general direction is given that the appointments may be made including as Senior Members, of a person with “special knowledge or skill relevant to the duties” of that office (s7(1B)(a)(b)). And as a presidential member, if either the person is an enrolled legal practitioner or:

- “(b) Has had experience, for not less than 5 years, at a high level in industry, commerce, public administration, industrial relations, the practice of a profession or the service of a government or of an authority of a government; or
- (c) Has obtained a degree of a university, or an educational qualification of a similar standing, after studies in the field of law, economics or public administration or some other field

- considered by the Governor-General to have substantial relevance to the duties of such a member; or
- (d) Has ... special knowledge or skill in relation to any class of matters in respect of which decisions may be made in the exercise of powers conferred by an enactment, being decisions in respect of which applications may be made to the Tribunal for review.”

As in the case of the CAT in India, the appointment provisions have led to the creation of a mixed tribunal with members who have a broad range of backgrounds, talents, interests and experience. It has meant that in many cases a currently serving, or retired, judge (federal or State) may sit with a retired senior public servant; an academic with expertise in public administration or even retired distinguished military, diplomatic and other personnel. This broad range of experience has ensure that the Tribunal has generally been seen to keep its feet on the ground and to take properly into account practicality, reality, costs and civic responsibilities.

The net result of these large reforms, which have been further stimulated by freedom of information, human rights and privacy legislation, has been a “quiet revolution”, in Australian administrative law, practice and culture. As Mr. Michael Head in his text *Administrative Law: Context and Critique*¹⁵ observes:

“Over the past three decades, a rising demand for greater recognition of basic rights against the government, combined with the demand for more ready access, uniformity, flexibility and certainty has led to considerable developments in administrative law. *In Re Pochi and Minister for Immigration and Ethnic Affairs*¹⁶, Deane J described the changes as a ‘quiet revolution’, though many tradition-bound complexities, inconsistencies and restrictions

¹⁵ Federation Press 2005, 214.

¹⁶ (1979) 2 ALD 33.

continue. The New Administrative Law, as it has been called, has four components:

1. Steps by the courts themselves extend and somewhat regularise their powers of judicial review, often dismantling previous narrow restrictions – for example, the expansion of such doctrines as procedure fairness and jurisdictional error.
2. Legislation in both federal and state levels to simplify and sometimes extend the scope of judicial review – for example, the [ADJR] Act.
3. Federal and state legislation to introduce non-judicial review, through Administrative Appeals Tribunal (AAT), ombudsmen and freedom of information (FOI) provisions.
4. The establishment of the Administrative Review Council [to keep the new system under constant review and development].

Administrative law's development and application are currently being influenced by the shift in the public sector in what is termed managerialism, which evaluates processes on the basis of output, not the common law conceptions of fairness of procedures. It is also affected by dismantling of some rights, government funding cuts, deregulation, widespread privatisation and the introduction of concepts such as "user pays", including in relation to funding for the Ombudsman and Legal Aid, and access to the AAT and developments under FOI legislation."

I am sure that Indian observers will notice that many of the same challenges as have arisen in India are currently under consideration in the Australian Commonwealth.

The result is that the reform first initiated by the courts of India, based on the special features of the Indian Constitution, and carried forward into public administration by reforms initiated under the leadership of Rajiv Gandhi, have had their counterparts in my own country. In some ways, a number of broader reforms have been adopted there that may deserve consideration in India. The current challenge is to maintain the impetus

for rational and systematic change with improved accountability in an age of managerialism accompanied by severe budgetary restraints.

If Professor Upendra Baxi is correct, it seems unlikely that change and development in administrative law in India will retreat. Great national administrative tribunals, such as the Administrative Appeals Tribunal in Australia and the Central Administrative Tribunal in India, will continue to perform their important statutory functions. But in both cases, these tribunals need to be aware of the broader constitutional and statutory settings within which they are called upon to perform their respective duties.

THE FUTURE?

The creation of the CAT and AAT means that both India and Australia have large national tribunals with important decision-making functions affecting specified aspects of public administration. In the case of the CAT in India, the focus of decision-making is narrower, being primarily concerned with the recruitment and conditions of service of persons appointed to public service offices and posts in the central government. Although, in the case of the Australian AAT, there are administrative decisions of this character that fall within the AAT's jurisdiction, the wide and comprehensive range of its other jurisdiction means that it decides cases in a more diverse variety of fields. On the other hand, the number of cases dealt with by the CAT, including annually, is substantially larger than the cases decided by the AAT. This is a reflection of the huge population served by central tribunals in India and the much smaller population of Australia.

I conclude these remarks with a reflection on the need to maintain ongoing vigilance in the review of administrative law reform, both in India and Australia. In both countries, these reforms have been novel and challenging. But they can scarcely represent the last word, given the ever-expanding functions of government; the alterations in the ways of delivering public services; and the innovations in the provision of remedies, stimulated by the remarkable advances in technology, particularly information technology.

Based on the experience of each national tribunal, a number of suggestions might be considered for the next 25 years, in order to keep the institutions of administrative law abreast of the modern administrative state:

1. Given the legislative competition amongst appointable people for appointment to serve on bodies such as the CAT and the AAT, it is essential that appointing authorities should recruit and appoint only the most suitable candidates. Not all retired judges and senior officials are suitable for appointment to a tribunal, working under great pressure and faced with severe urgencies and ever-present complexities in decision-making;
2. In Australia, the retirement date from service as a federal judge is ordinarily 70 years (in some Australian States, it is 72 or 75 years). The Indian judicial retirement age from the High Court at 62. This is a relic of colonial traditions. It is needlessly young. Consideration is pending for a constitutional amendment (to art.224(3) of the Indian Constitution). Originally, until the 15th amendment in 1963, retirement was required at 60 years. These provisions have resulted in discarding appointed judges of high talent, despite the needs of the judiciary and the severe backlog of

cases. The early retirement provisions have also resulted in pressure to secure appointment to other Executive Government bodies, so as to utilise the abilities of retired judges. Some such pressure arises from judges themselves, facing retirement at an age when they know that they have the talent and deserve to continue public service which is congenial to them intellectually and financially. In Australia, there has been a suggestion that compulsory retirement of federal judges at 70 years needs to be altered to a higher age. But compulsory retirement at 62 years in India is very low by world standards. It certainly deserves reconsideration;

3. In selecting judicial members for appointment to the CAT or AAT, respectively, it is highly desirable that attention should be given to those judges primarily who have had particular experience in administrative law and in the practice of high turnover tribunals. Many judges do not have that experience. Simply because candidates have been judges is no guarantee that they will necessarily be suitable for the different kind of work presented by administrative tribunals. Inevitably, such tribunals will often involve many parties who are not legally represented and whose cases need speedy and expert resolution;
4. If Australian experience in the AAT is any guide, consideration might now be given in India to expanding the “judicial” appointments to the CAT beyond retired judges of the High Court and, similarly, beyond official who have been departmental secretaries. The broader range of expertise that can be available for appointment to the AAT in Australia has proved a definite strength of that body. High talent can sometimes be found amongst senior advocates, other civil servants, selected

academics and those whose interests, experience and attitude make them suitable for appointment;

5. Rules, whether express or implied, restricting the lobbying of government ministers and appointing officials, to secure appointments of particular persons to the national administrative tribunal should be observed. This is especially so because of the responsibility of both CAT and AAT to review high decisions of government and its officials, sometimes sensitive and also political, and to do so with integrity, impartiality and independence. The very reason for choosing senior past officials is to secure the appointment of persons to the CAT and the AAT who are safely outside the field of temptation or influence;
6. It is highly desirable that there be regular audits of the performance of such important national tribunals: both of the tribunal itself and of individual members within them. This does not mean assessing performance by criteria which disrespect the independence of office-holders in their decision-making. However, attempts should be made, in principled ways, to derive lessons from particular cases, experience, annual reports and complaints, to make sure that the national administrative tribunal and its members are subject to their own proper necessities of accountability, whilst always observing the need to respect the decision-making independence of the office-holders;
7. In the modern era, it would seem desirable to substitute transparent procedures for appointment to such tribunals for the 'old boy' network that existed in the past. Public advertisements, independent interviews of candidates and expert assessments of the past record and application of those seeking recruitment to the tribunal should be introduced, where not already in place. Whilst

this is always important in the case of statutory tribunals, it is especially important where the tribunal has the responsibility of reviewing significant and sensitive decisions made by or for the government;

8. It would seem entirely appropriate that consultations concerning appointments and criteria for appointment should be made with representative associations of civil servants, professional legal and other bodies, and consumer and other groups affected by tribunal decision-making. Such bodies should also be constantly consulted concerning the performance of such tribunals. Particular logjams or difficulties that have arisen in the discharge of their duties should be subject to regular and searching scrutiny;
9. Persons appointed to tribunals will often need fresh education or training so that they will be comfortable with the range of functions and procedures that are observed by the tribunal. A lifetime's experience in the civil service may not necessarily prepare an office-holder for the formalities and particular natural justice requirements of a body working by procedures involving public hearings. Even for judges, used to court procedures, it may be desirable, or even necessary, to afford training and discussion relating to the different culture that must be expected of a decision-maker in a high turnover administrative tribunal;
10. Such a tribunal should not necessarily slavishly follow the procedures, formalities and traditions of the courts. Whilst it is important to observe some court-like elements (including independence of parties, removal from political engagement and observance of fair procedures), many of the formalities of the courts need to be adjusted in discharging the functions of a large administrative tribunal. In Australia, some of the criticisms of the

AAT have concerned its suggested tendency (certainly in its early years) to follow too closely the formal procedures of the courts, with their inevitable consequences in cost and delay. Whilst repeatedly emphasising the need to obey the requirements of procedural fairness¹⁷, many decisions and observations of scholars, practitioners and others have criticised the AAT for adopting an unduly adversarial posture. Such critics typically urge a higher level of informality in securing evidence and conducting proceedings¹⁸. Some of these Australian debates may be relevant to the CAT in India;

11. The very nature of many of the reviews considered by bodies such as the CAT and the AAT is such that they need to be decided quickly to be of any use to the persons and agencies involved. Delay is thus a special problem. This is even more acute than in much court litigation. There is therefore a special urgent need to monitor delay in administrative tribunals, and also in the courts to which resort is subsequently had for judicial review;
12. In the event that judicial review proceedings (in India in the High Courts and in Australia in the Federal Court) add significantly to the delays in the resolution of urgent administrative decisions, some thought may need to be given to alternative methods of independent review. I am aware that, in India, one alternative proposed was direct access from the CAT to the Supreme Court. I do not favour that solution. Of course, I understand how the suggestion comes about. However, it is important to protect a final

¹⁷ *Re Taxation Appeals* NT 94/281 and Deputy Commissioner of Taxation (AAT, Matthews J, 11 April 1995, unreported).

¹⁸ H. Whitmore, "Comment" (1981) 12 *Federal Law Review* 117; *Re Hennessy and Secretary, Department of Social Security* (1985) 7 ANLN 113; R.K. Todd, "Administrative Review Before the Administrative Appeals Tribunal: A Fresh Approach to Dispute Resolution?" (1991) 12 *Federal Law Review* 71, 95; D. Gill, "Formality and Informality in the AAT" in *Administrative Law: Retrospect and Prospect* (1989) 58 *Canberra Bulletin of Public Administration* 133;

national court from becoming swamped in particular classes of cases, involving special issues. In Australia, the direct access to the final court afforded by s75(v) of the Constitution, threatened, at one stage, to overwhelm the jurisdiction of the High Court of Australia by a flood of proceedings challenging administrative decisions in the particular fields of refugee and immigration law. Ultimately, statutory and procedural answers were found for this problem. The preferable course is to reserve the final national court to important questions of legal principle and doctrine and significant test cases. The Supreme Court of India is already overburdened, as to some extent is the High Court of Australia. The solution to the mass jurisdiction of tribunals such as the CAT and the AAT is not to shift judicial review proceedings specially into the apex court. It is to provide a sufficient and appropriate triage mechanism so that that court can select such proceedings, within the class, as are suitable to the character of that court as the highest legal tribunal of the nation. Self-evidently, it is essential to bring practice in relation to proceedings in the High Courts and Supreme Courts into the letter of the law, as it has been interpreted and explained by the Supreme Court itself.

These are but a few thoughts, offered in tribute to the CAT, its current and former members, its officers and those who have sought the exercise of its jurisdiction. One advantage of the legal traditions, administrative practices and common language that we share in India and Australia is that countries such as ours can continue to learn from each other. On every journey to India I have secured new ideas for the discharge of my own duties. Sometimes, as in the *Osmond Case* (concerning the right to reasons for administrative decisions), the Indian

principle was ahead of our times in Australia. But wise judges and uncorrupted office-holders in both countries can sometimes stimulate new ideas. And the ultimate criteria for the applicability and suitability of those ideas in another place, is how far they conduce to the welfare and good government of the people.

Such welfare is the touchstone for the new administrative law and practice, both in India and Australia. It was the objective that moved Rajiv Gandhi to institute his great reforms in 1985 and specifically to create the CAT. A political leader, and especially a head of government, who embraces the cause of improving public administration; increasing true accountability; affording better access to public information; and enhancing the responsiveness of our institutions to the people that they serve, is worthy of honour, praise and appreciation. I am grateful for the opportunity that has fallen to me to offer these words in tribute to Rajiv Gandhi, and to the Parliament, officials and people of India who implemented his reforms with faithfulness and enthusiasm. I avail myself of this opportunity also to pay respects to those who pioneered the great national administrative law reforms in Australia. The greatest tribute we can pay to those reformers is to maintain the momentum and not to regard the past reforms as having spoken the last word.
