

PLANNING INSTITUTE OF AUSTRALIA
LAUNCH OF NSW CHAPTER – PLANNING LAW CHAPTER
“BRIDGING THE GAP – PLANNING AND THE LAW”

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My response to the theme of this launch has two aspects. Both involve planning and the rule of law.

Professor Epstein described the power of an administrative body to determine building rights associated with a particular parcel of land as “...making a judgment about the contribution, loosely defined, that [the] development will make toward the well-being of the community at large”. He considered the amount of discretion inherent within such a decision-making process “simply inconsistent with the rule of law”.¹

Chief Justice Gleeson said:²

The rule of law does not require that the entire apparatus of the judicial system be brought to bear upon all disputes, or even upon all disputes about legal rights and obligations.

...Town planning issues, which often involve balancing rights of private property and the public interest, can be dealt with politically, or administratively, or judicially. This is not inconsistent with the rule of law provided, of course, it conforms to the Constitution.

What do we mean by the rule of law?

Professor Epstein identified certain touchstones of the rule of law: - (i) individual cases are decided by reference to general rules, (ii) the general rules apply equally to all, including to the State, (iii) the general rules are sufficiently certain so, at the least, they apply in such a way that like cases are treated alike, (iv) the

¹ Richard A Epstein, *What Do We Mean by the Rule of Law?*, New Zealand Business Round Table, 2005, at 12.

² Gleeson, “Courts and the Rule of Law”, *The Rule of Law Series*, Melbourne University, 7 November 2001 at 10.

general rules are basically prospective and not retrospective, and (v) the decision-making procedures used are fair.³

Professor Cheryl Saunders and Katherine Le Roy described the “minimum core of principles and practice”⁴ of the rule of law as involving: - (i) governance by general rules laid down in advance, (ii) application and enforcement of these and no other rules, (iii) an effective and fair system for resolving disputes about the rules, and (iv) the same rules bind the government as well as citizens.⁵

Justice Hayne adopted MacCormick’s description:⁶

Where the rule of law is observed, people can have reasonable certainty in advance concerning the rules and standards by which their conduct will be judged, and the requirements they must satisfy to give legal validity to their transactions. ... This is possible, it is often said, provided there is a legal system composed principally of quite clearly enunciated rules that normally operate only in a prospective manner, that are expressed in terms of general categories, not particular indexical, commands to individuals or small groups singled out for special attention. The rules should set realistically achievable requirements to conduct, and should form overall some coherent pattern, not a chaos of arbitrarily conflicting demands.⁷

What does this have to do with planning and planning disputes?

To explain, I need to refer to another observation of the Chief Justice.⁸ The Chief Justice has described the concept of an ethos or culture of justification⁹ as “one of the most important aspects of modern public life” in Australia.¹⁰

³ Epstein Op.cit.

⁴ Cheryl Saunders and Katherine Le Roy, “Perspectives on the Rule of Law” in *The Rule of Law*, Cheryl Saunders and Katherine Le Roy (Eds.), The Federation Press, 2003, at 4.

⁵ Ibid at 5.

⁶ Hayne, “Dispute Resolution and the Rule of Law”, Sino-Australian Seminar, Beijing, 20 – 22 November 2002.

⁷ Ibid citing MacCormick, "Rhetoric and the Rule of Law", in Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order*, (1999) 163 at 165.

⁸ Gleeson, “Outcome, Process and The Rule of Law”, Administrative Appeals Tribunal 30th Anniversary, Canberra, 2 August 2006.

⁹ Ibid at 18.

¹⁰ Ibid at 19.

The Chief Justice of Canada, Chief Justice Beverley McLachlin, identified this culture as a characteristic of polities in which a “mature” rule of law exists, a rule of law under which¹¹:

...an exercise of public power is only appropriate where it can be justified to citizens in terms of *rationality and fairness*. Arbitrary decisions and rules are seen as illegitimate. Rule by fiat is unacceptable. But these standards do not just stand as abstract rules. Indeed, most importantly, the ability to call for such a justification as a precondition to the legitimate exercise of public power is regarded by citizens as their *right*, a right which only illegitimate institutions and laws venture to infringe.

Chief Justice McLachlin said the existence of this ethos or culture:¹²

...shifts the analysis from the institutions themselves to, more subtly, what those institutions are capable of doing for the rational advancement of civil society. The Rule of Law, in short, can speak in several voices so long as the resulting chorus echoes its underlying values of fairness and rationality.

When planning speaks it directly impinges on some people’s private proprietary rights and other people’s enjoyment and perception of their environment.

Recognising these characteristics against our culture of justification means that we should expect people to subject planning to particular scrutiny. We should expect people to demand that planning processes and planning decisions be capable of justification as fair and rational. In other words, we should expect people to test planning against the assumption of the rule of law and the values that rule embodies. In short, planning fails if it does not measure up to these values.

Is an exercise of public power in which discretionary considerations play a role inherently inconsistent with the rule of law and the values that rule embodies or can it be part of the chorus enhancing the rule of law? This question raises anterior issues. What is planning? Further, where does planning end and planning law begin?

¹¹ McLachlin, “The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law”, 12 CJALP 171 at 174.

¹² Ibid at 174.

Non-planners (and I'm one of them) approach the first question (what is planning?) assuming that planning is readily capable of definition. Brendan Gleeson and Nicholas Low said planning cannot be "pinned down, in a unique, perfectly encompassing definition".¹³ Their approach focused on planning as an activity of governance. They characterised urban planning as governance activities directed towards ensuring "that all the services people need in a city are provided when and where the need occurs".¹⁴ They characterised environmental planning in an even more all-embracing way, adopting Evans' formulation of "...an integrated and holistic approach to the environment that transcends traditional departmental and professional boundaries, and is directed towards the long term goal of environmental sustainability".¹⁵

The second question (where does planning end and planning law begin?) forces acceptance of a basic proposition that makes good Gleeson and Low's approach to the idea of planning. That is, planning and planning law are not wholly independent spheres of discourse. The structures through which the activity of planning is expressed are legal. Ultimately "planning" is what "planning law" says it is. The same cannot be said of other, even related, disciplines.

Many legal standards involve discretionary elements. This suggests discretion is not inherently inconsistent with the rule of law. A discretionary decision need not be an arbitrary decision. But looked at through a culture of justification, the issue of discretion means that planning's legitimacy, and hence the contribution it makes to the rule of law, is particularly dependent on continuing acceptance that its fair and rational objects are leading to fair and rational results through fair and rational procedures. In this sense, planning (as Justice McLachlin would put it) is one of the "front-line embodiments" of the rule of law.¹⁶

Recognising our culture of justification provides us with an important tool for understanding and explaining certain attributes of planning and planning law.

¹³ Gleeson and Low, *Australian Urban Planning, New Challenges, New Agendas*, Allen and Unwin, 2000 at 12.

¹⁴ *Ibid.*

¹⁵ *Ibid* at p 188 citing B. Evans, 1997, "From town planning to environmental planning", *Town Planning into the 21st Century*, (eds.) A Blowers and B. Evans, Routledge, London, at p 5

¹⁶ McLachlin, *Op.cit.* at 189.

Our culture of justification indicates certain attributes of planning that make it suited for front-line action in supporting the rule of law.

- Planning is directed at making communities better places to live and human activity sustainable. At a general level, therefore, planning's objects are inherently fair and rational.
- Planning is directed towards identifying in advance the rules that will govern certain aspects of future conduct.

Our culture of justification also suggests certain markers of legitimacy against which planning processes are likely to be measured. It assists in explaining why those things we instinctively feel are important really do matter. For example:

- All other things being equal, the greater the reach of general rules laid down in advance the more likely is satisfaction of the cultural imperative.
- Because any general rules in planning inevitably involve adjusting potentially competing rights and interests, public participation in the creation of the general rules is likely to make them more workable and will almost certainly make them more readily accepted.
- Because an important function of general rules in planning is to provide people with a basis upon which they can organise their future conduct, general rules that are reasonably prospective are likely to be more readily accepted than otherwise.
- As MacCormick indicated, the general rules need to form a coherent pattern overall. This pattern need not eliminate all elements of discretion to be effective, which leads me to my next points.
- If any of the general rules really are capable of and appropriate for expression in a manner that does not call for the exercise of discretion then building in discretionary overrides might involve disproportionate harm to the legitimacy of the planning activity.

- Where discretionary elements are required in the general rules, then the discretion should both be and appear to be warranted. A clear statement of the outcomes the discretion is intended to achieve is one obvious response. If such an outcome cannot be identified at the time the general rule is formulated, then query whether the planning process is really complete.
- All planning is dynamic. It has to move with the times. But general rules need periods of stability in which to function. Planning that requires constant change to the general rules is presumably not planning or is bad planning.

Recognising the hallmarks of a culture of justification can also be useful in identifying or explaining the prominence of certain markers against which the legitimacy of planning decisions are likely to be measured:

- It might seem obvious, but planning decisions subject to the general rules should in fact be made under and in accordance with those general rules and no other rules.
- Where application of the general rules involves discretionary elements, participation by at least those potentially directly affected by the decision is likely to assist in its justification as fair and rational.
- Where application of the general rules involves discretionary elements, a decision consistent with the outcomes the discretion is intended to achieve will be more likely to be seen as one that is just and rational than a decision inconsistent with the objectives or, perhaps more importantly, made in the absence of objectives.
- Like cases should be treated alike.
- People should have access to information to enable them to ascertain whether their case is like other cases and the outcomes of those cases. Outcomes have to be made public and be accessible so that people can best assess how to apply their own resources.

These last points bring me to two of the most significant changes introduced by the Land and Environment Court over the last five years – the publication of

Commissioner's decisions on the Court's website and the articulation of planning principles by the Commissioners.

In practice, Commissioners decide the overwhelming majority of planning appeals. Commissioners are bound by the same general rules as the original decision-maker and are subject to judicial review by reason of the capacity for appeals on errors of law. Like planning decision-makers, the Commissioners routinely decide questions of law as part and parcel of the planning decision-making function.

What is the significance of publication of the decisions of Commissioners on the Court's website and articulation by the Commissioners, where appropriate, of the principles that guided their exercise of discretion in the particular case?

Recognising our culture of justification suggests an answer. Together, these steps assist in achieving two of the matters fundamental to planning's contribution to the rule of law – namely, (i) like cases should be treated alike, and (ii) people should have access to information to enable them to ascertain whether their case is like other cases and the outcomes of those cases.

The two steps (publishing decisions and articulating planning principles) are linked and enhance the overall legitimacy of the planning decision-making process. The steps are linked because it is not enough for a decision-maker in fact to treat like cases alike. That is only part of the equation. People interested in the decision (the applicant, the consent authority, objectors and others) have to be able to determine whether their case is like another case and the range of available outcomes in order to guide their allocation of resources. Unless decisions are published, people will not be able to do so. Further, unless decisions take the opportunity to articulate a principled basis for exercising discretion, where appropriate, all decisions will be seen as ad hoc and, consequently, no foundations of likeness or distinction will be apparent. Characterising or dismissing planning decisions as necessarily ad hoc is unsustainable in a culture of justification.

The growth of principles or guidelines through the making of individual planning decisions is the only fair and rational response to planning rules that authorise

discretionary considerations. It ensures that planning rules result in a coherent – that is, rational – pattern and, just as importantly, that the pattern is obvious to all who care to look. This obligation should be seen as common to all planning decision-makers. Indeed, if this obligation were not embraced by planning decision-makers then it would be naïve to assume that discretion is not in play. Discretion would be in play. It would just be less exposed to scrutiny by both the decision-maker and the public. Insofar as planning and the rule of law are concerned, this is not a good thing.

I congratulate the Institute on its new NSW Planning Law Chapter and wish it great success in meeting its objects.

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