

Chapter 11

Unifying Principles in Administrative and Criminal Law

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Introduction

This paper examines leading cases in administrative and criminal law over the past 15 years in order to demonstrate that they share a number of common principles. These principles can be stated as normative propositions reflecting the nature of courts and our system of justice, and have what might be called a contested, constitutional aspect.

In order to understand the unity of these principles, and their possible constitutional dimension, it is necessary first to consider three leading constitutional-administrative law cases of the past two decades (two of which emerged from the criminal law space). Each of these cases concerns asserted legislative overreach of one form or another. *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (*Kable No 1*) concerns pre-emptive imprisonment. *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 (*Plaintiff S157*) involves an attempt to extend the validity of erroneous executive decisions and put them beyond judicial scrutiny. *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 (*Kirk*) concerns a purported attempt to exclude judicial oversight of the decisions of an inferior court. Although emerging from different contexts, each case on its face involves a legislature (whether State or Commonwealth) attempting to undermine judicial processes and safeguards that reside within the oversight functions of the judicial branch of government. Such legislative attempts at undermining the judiciary's ability and responsibility to oversee the exercise of power are rejected on the basis of principles rooted in the single common law of Australia and the Constitution.

The precise content of these shared principles is then observed in the symmetry between jurisdictional error in administrative law and miscarriage of justice in appellate criminal law. The remedy of a permanent stay, which is best understood as an administrative remedy operating within the criminal law, provides an illuminating bridge between these areas.

Symmetry can also be observed in the other direction, by examining the rejection of a proposed fundamental principle (finality) on both the criminal law and administrative law sides of a problem facing the courts: what to do with out of time sentence appeals and prisoners whose statutory appeals rights have been exhausted in circumstances in which a High Court ruling indicates that potentially all affected sentences were imposed in error (*Muldrock v The Queen* (2011) 244 CLR 120 (*Muldrock*)).

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