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Peripheral Vision? Judicial Review in Australia

by

The Honourable Wayne Martin AC
Chief Justice of Western Australia¹

University Club of WA
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¹ I am indebted to Dr Jeannine Purdy for her very significant contribution to this paper. However, responsibility for the views expressed, and any errors, is mine.

Introduction and welcome

I am greatly honoured to have been invited by the Australian Institute of Administrative Law to deliver the 2014 National Lecture. Before going any further I would like to acknowledge the traditional owners of the lands on which we meet, the *Wadjuk* people, who form part of the great Noongar clan of south-western Australia, and pay my respects to their Elders past and present.

The land on which we meet is of particular significance to the *Wadjuk* people.² The nearby river, which is known to us as the Swan River, is known to the *Wadjuk* as *Derbarl Yerrigan*. *Derbarl Yerrigan* is one of the homes to the *Waugal*, which is a snake or rainbow serpent of great significance to the Noongar people, as it is associated with all sources of fresh water and therefore with the giving of life. It was the *Waugal* that made the Noongar people custodians of the land which they inhabit.

The hills which we know as the Darling Scarp and which can be seen to the east of this building represent the body of the *Waugal*, which created the curves and contours of the hills and gullies. The *Waugal* also carved out all the fresh waterways such as the rivers, swamps, lakes and waterholes, by scouring out the land with its body. At the foot of *Ga-ra-katta*, which we know as Mt Eliza, which forms part of King's Park, the *Waugal* formed the *Derbarl Yerrigan* and the ground at the foot of that hill, which is not far from here, is another site of particular significance to the *Wadjuk*.

This land has a more recent cultural significance as the home of the University of Western Australia and as a place of great learning. Perhaps less significant in contemporary culture is the hotel not far from here at which one of the famous graduates of this university, Mr R J Hawke, set a record for the rapid ingestion of alcohol.

I would also like to welcome participants in the 2014 National Administrative Law Conference, particularly those who have travelled significant distances to visit the delightful campus at the University of

² Information from Christopher Pease, available at Kaartdijin Noongar – Noongar Knowledge website, www.noongarculture.org.au/spirituality (accessed 11 July 2014).

Western Australia. I have many fond memories of my under-graduate days at this campus, but they do not include the study of administrative law. That is not because I did not like studying administrative law or because, worse still, I have no present recollection of studying administrative law due to the passage of the years, or my emulation of the feats of R J Hawke. It is because I chose not to study administrative law. When making my selection, I looked briefly at the prescribed text for the course which was *Judicial Review of Administrative Action* by Professor SA de Smith. When I saw that he described judicial review as 'inevitably sporadic and peripheral' I decided that my time could be better engaged on a more useful subject. So, in the field of administrative law I am entirely self-taught. I hope that does not become too apparent during the course of this lecture.

Judicial review and administrative justice

This paper is concerned with judicial review. Lawyers and judges often regard judicial review as the pre-eminent means of ensuring justice for individuals who have grievances against the state. Perhaps this is an illustration of the adage that if the only tool available is a hammer, everything starts to look like a nail. The reality is that in contemporary Australia and, I suspect, most other comparable jurisdictions, judicial review is but one mechanism by which administrative justice can be secured. Measured in statistical terms, judicial review comprises a very small part of a broad church. Its congregation is mainly made up of government officials engaged in merits review, both internal and external, ombudsmen, and various other agencies, including those loosely classed as the integrity branch of government.³ However, at the risk of torturing this metaphor, courts engaged in judicial review do occasionally make their way to the pulpit and announce tenets and principles to guide the broader congregation.

³ The views I expressed on the topic of the so-called integrity branch of government in the 2013 Whitmore Lecture have caused sufficient controversy to discourage my re-entry into that arena - for a little while at least. (See 'Forewarned and Four-Armed – Administrative Law Values and the Fourth Arm of Government', available at: www.supremecourt.wa.gov.au/files/Whitmore%20Lecture%202013%20Chief%20Justice%20Martin%201%20Aug%202013.pdf accessed 11 July 2014).

Nevertheless, it is true that the court is the last place to which most Australians would turn if they had an administrative grievance. The reasons for that are a topic for another day. But the many and varied barriers to access mean that only a minute number of administrative decisions and very few legislative initiatives are subject to judicial review. Those who think that any expansion of judicial review significantly undermines fundamental principles of democracy and accountability might keep that in mind.

Outline

Leaving to one side its effect on prospective administrative law students, Professor de Smith's famous description of judicial review as 'inevitably sporadic and peripheral'⁴ has been cited many times, including by Chief Justice Elias in last year's National Lecture.⁵ De Smith's disparaging description of judicial review was published 55 years ago, in the first edition of his seminal work. However the expression has fallen out of favour with more recent editors of that work who have favoured increasingly potent descriptions of the role of judicial review. The varying terminology in successive editions over the last 20 years or so provides a convenient montage of the development of judicial review in the United Kingdom. This development has culminated in a vigorous debate on whether judicial review in that country now undermines fundamental principles of democracy and accountability.

That montage provides a convenient contrast to developments in Australian administrative law over the same period, and in particular, the contemporary acknowledgement that Australian administrative law (at least at federal level) has an entrenched source in the Constitution of the Commonwealth. I consider whether the attribution of Australian administrative law to a source in a written constitution provides some answer to critics who assert that judicial review undermines the sovereignty of Parliament. I also examine whether the

⁴ Quoted in Maurice Sunkin, 'Conceptual issues in researching the impact of judicial review on government bureaucracies' in Marc Hertogh & Simon Halliday (eds) *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (2004) p 47.

⁵ The Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand 'National Lecture on Administrative Law' (Australian Institute of Administrative Law (AIAL) Conference, Canberra, 18 July 2013) p 7.

sourcing of judicial review within a written constitution has constrained Australian administrative law, taking it out of the 'main game' being played out in the courts of other countries. I address the question of whether judicial review in Australia has been debilitated by a kind of peripheral vision, capable of seeing only jurisdictional error and giving rise to what has been described as 'Australian exceptionalism'?⁶

The development of judicial review in the United Kingdom

'Sporadic and peripheral' origins

Professor de Smith was not the only learned commentator to regard judicial review as having limited impact. In 1980, Professor Donald Horowitz observed that 'judicial norms have generally only seeped into the cracks rather than, as courts might wish, flowed into the main channels of administrative life'.⁷ Fourteen years later, Professor Ross Cranston, now judge of the High Court of Justice (Queen's Bench Division), objected to:

the attention lawyers lavish on judicial review [which] diverts their gaze from more fundamental, if less glamorous, mechanisms to redress citizens' grievances and call government to account.⁸

When Professor Cranston described the proponents of modern judicial review as 'sedulous and lordly'⁹ I do not think it was meant as a compliment!

The 5th Edition of De Smith - from 'sporadic and peripheral' to 'constant and central'

Just a year after Professor Cranston's comments, the fifth edition of *De Smith* was published, in 1995. The authors, the Rt Hon the Lord Woolf and Professor Jeffrey Jowell QC, observed in the preface that:

⁶ Prof Michael Taggart, "'Australian Exceptionalism" in Judicial Review' (2008) 36 *Federal Law Review* 1.

⁷ DL Horowitz 'The courts as monitors of the bureaucracy' in CH Weiss and AH Barton (eds) *Making Bureaucracies Work* (1980) p 91 quoted in Marc Hertogh, 'Through the Eyes of Bureaucrats: How Front-Line Officials Understand Administrative Justice' (2009) pp 37, 38.

⁸ Ross Cranston, 'Reviewing judicial review', in Genevra Richardson & Hazel G Genn (eds), *Administrative Law and Government Action: The Courts and Alternative Mechanisms of Review* (1994) p 80.

⁹ Note 8.

In the period between the first and fourth editions, significant developments in the law relating to judicial review of administrative action took place. Since then, even greater developments have occurred. The last edition retained de Smith's oft quoted words that judicial review was 'sporadic and peripheral'. This statement may still be accurate in the context of administrative laws as a whole. However, the effect of judicial review on the practical exercise of power has now become constant and central.¹⁰

The 6th Edition of De Smith - no longer limited to review of administrative action

The sixth edition of *de Smith* was published in 2007. The authors of the fifth edition had by then been joined by Professor Andrew Le Sueur. The title of the work was changed from *Judicial Review of Administrative Action* to *De Smith's Judicial Review*. The authors explained the change on the basis that the previous title would now be 'partial and misleading'. Judicial review, under European Community law and in the interpretation of the rights conferred by the European Convention on Human Rights, now involved review not only of administrative action but also of primary legislation.¹¹

Interestingly, in light of developments in Australia,¹² the authors observed that the sixth edition engaged more specifically with the constitutional foundations of judicial review than earlier editions. Their position was that 'courts in judicial review enunciate not merely the will of the legislature but the fundamental principles of a democratic (albeit unwritten) constitution'.¹³

They went further:

In recent years, it is increasingly being realised that in a constitutional democracy the role of judicial review is to guard the rights of the individual against the abuse of official power. This does not mean that the courts should necessarily be impeded in their ability to determine the public interest, or to achieve efficiency. Whether or not these rights are as clearly articulated as in countries with written constitutions, we have

¹⁰ SA de Smith, Lord Woolf & Jeffrey Jowell, *Judicial Review of Administrative Action* (5th ed, 1995) p vii.

¹¹ Harry Woolf, Jeffrey Jowell & Andrew Le Sueur, *De Smith's Judicial Review* (6th ed, 2007) p vii.

¹² Referred to above - the sourcing of Australian administrative law in the Commonwealth Constitution.

¹³ Note 11.

arrived at a situation described in an address by Lord Diplock delivered at a meeting to pay tribute to the work of the late Professor de Smith. He said that our system of administrative law is 'in substance nearly as comprehensive in its scope as *droit administratif* in France and gives effect to principles which, though not derived from Gallic concepts of *légalité* and *détournement de pouvoir*, are capable of achieving the same practical results'. Shortcomings and lacunae no doubt remain, but English administrative law is now one of the most celebrated products of our common law, and doubtless the fastest developing over the past half-century.¹⁴

The authors attributed significant changes to the latest edition of *De Smith* to these developments.

These changes were driven, in particular, by the explicit recognition that individuals in a democracy possess rights against the state – as enunciated both by the common law as well as the Human Rights Act 1998 and in European Community law. In addition, the relationships between the courts and other branches of government have been clarified in important ways. The principle of the sovereignty of Parliament has been, if not fatally undermined, at least substantially weakened as a shield against either unlawful administrative action or legislation which offends the rule of law. Constitutional principles such as the rule of law and separation of powers have been explicitly articulated as such, and their status has been enhanced. Above all, it has become clear that judicial review is not merely about the way decisions are reached but also about the substance of those decisions themselves.¹⁵

The authors also discuss the clash between the 'ultra vires' and the 'common law' justification for judicial review: whether the role of the courts is simply to implement the legislature's intent or whether it extends to applying independent principles of good administration developed through common law reasoning.¹⁶ The authors refer to the attempt to reconcile these theories through the 'modified ultra vires' theory.¹⁷ This theory acknowledges that judges independently create principles of good administration but holds that these should only apply when consistent with a general intention attributed to Parliament, that any power it confers should be exercised in accordance with the rule of law. As the authors observe:

¹⁴ Note 11, p 8, para 1-010. As will be seen, it seems unlikely that Lord Sumption would agree with Lord Diplock's description of French administrative law as comprehensive.

¹⁵ Note 11, p vi.

¹⁶ Note 11, pp 8, 9.

¹⁷ Which the authors suggest could just as easily be called the 'modified common law' theory.

In other words, legislative silence or ambiguity is read in the context of a continuing consent by Parliament to be bound by the rule of law as interpreted by the courts...

To the extent that the modified ultra vires justification seeks to weave judicial law-making into a constitutional context (under the principle of the rule of law) it is surely right. However, to the extent that it seeks to assign a general intent to Parliament, it is scarcely less artificial than the pure ultra vires justification. We prefer to place the justification of judicial review on a normative and constitutional basis: In our view Parliament *ought* to abide by the necessary requirements of a modern European constitutional democracy (one of which is the rule of law). From that proposition follows a second: that courts *ought* to make the assumption that the rule of law (and other necessary requirements of constitutional democracy) are followed by the legislature. These two propositions are qualified only to the extent that the courts may submit to the authority of Parliament when it seeks clearly and unambiguously to exclude the rule of law or other constitutional fundamentals. Under what circumstances the courts are required so to submit depends upon the continuing validity of the sovereignty of Parliament as our governing constitutional principle.¹⁸

These words predicted an ominous future for a jurisdiction without a written constitution, at least to Australian eyes. The declaration in explicit terms that the courts need only submit to Parliament's authority so long as its sovereignty remained 'our governing constitutional principle' was unprecedented. Of course, in jurisdictions with written constitutions, like Australia, the United States and Canada, the capacity of the Parliament to exclude the rule of law or other 'constitutional fundamentals', and the circumstances in which the courts can set aside the express will of the Parliament, are derived from the terms of the written constitution, as construed by the courts. However because those constitutions are the product of a democratic process, the courts' disallowance of laws which exceed the legislative powers conferred by the Constitution does not involve any derogation of Parliamentary sovereignty, but rather the identification of the boundaries within which Parliament is sovereign.¹⁹

¹⁸ Note 11, p 10.

¹⁹ Moreover, there is a 'democratic legitimacy' associated with the role of the courts under the Australian Constitution which I examine later.

R (Jackson) v The Attorney-General

It seems likely that the authors of *De Smith* may have been emboldened by the approach taken by the House of Lords in 2005 in *R (Jackson) v The Attorney-General*.²⁰ The case concerned the validity of the *Hunting Act 2004* (UK), which prohibited the hunting of wild animals with dogs. The legislation was extremely controversial and did not receive the assent of the House of Lords, the members of which were presumably more enthusiastic about taking to the woods on horseback with a pack of baying dogs than the members of the House of Commons. However, the *Hunting Act 2004* had received royal assent without the consent of the House of Lords, in purported accordance with the *Parliament Act 1949* (UK).

The case turned upon statutory interpretation and was, in that respect, relatively uncontroversial. More controversial was Lord Steyn's observation that while the supremacy of Parliament was the general principle of the constitution of the United Kingdom, it was a construct of the common law created by judges who could, in exceptional circumstances, qualify the principle. Those exceptional circumstances would include an attempt to abolish judicial review or the ordinary role of the courts. Other members of the House made similar observations in varying terms.

Observers might have been forgiven for concluding that these observations in the House of Lords, reinforced by the distinguished authors of such a prominent text as *De Smith*, signalled a return to notions of natural law, promoted by Cicero and others, including Chief Justice Sir Edward Coke. In the Court of Common Pleas, Coke famously ruled that:

in many cases, the common law will controul acts of parliament, and sometimes adjudge them to be void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be

²⁰ *R (on the application of Jackson and others) v Attorney General* [2005] UKHL 56; [2005] All ER 136.

performed, the common law will controul it and adjudge such act to be void.²¹

Of course construing a statute so that it conforms to good sense and reason is a well-established principle of statutory construction (at least where the words of the statute allow). But adjudging a statute void because it fails to conform to the court's perception of good sense and reason smacks of an assault on parliamentary sovereignty bordering on treason, at least to those who are accustomed to find the source of a court's power to strike down a statute in a written constitution, rather than the potentially idiosyncratic views of the judiciary.²²

Peace in our time?

By 2010 Dr Thomas Poole expressed the view that critiques of the general legitimacy of judicial review in the United Kingdom now had 'an abstract, even antique feel'. He observed:

the intense ideological conflicts that fuelled debates on judicial review a generation or so ago are now a distant memory ... [this may relate in part] to the *normalization* of the practice of judicial review, which has established itself just about everywhere as a fixture of the political landscape... A return to a lost Eden – or, depending on your point of view, that 'place of utter darkness, fitliest called Chaos'²³ – where minimalistic ('sporadic and peripheral') judicial review grubbed around in the political undergrowth is no longer a realistic option... Judicial review has become normal or normalized, then, a basic accoutrement of the rule of law within a constitutional democracy.²⁴

The hostilities resume

However, the peace was short-lived. In 2011 hostilities resumed with an opening salvo from now Lord Jonathan Sumption in the FA Mann lecture, which was delivered after the announcement of his appointment to the Supreme Court of the United Kingdom but prior to him taking up that appointment. Although not cited by Lord

²¹ Sir Edward Coke, John Henry Thomas & John Farquhar Fraser, *The Reports of Sir Edward Coke* (Volume 4) (1826) 'Dr Bonham's Case' (Mich Jacobi 1 In the Common Pleas at [118a]) p 375.

²² A judiciary which, in discourse of this kind, is almost invariably described as unelected and unaccountable.

²³ Taken from Milton, *Paradise Lost* (1667) Book 1: The Argument.

²⁴ Thomas Poole, 'Judicial review at the margins: Law, power and prerogative' *LSE Law, Society and Economy Working Papers* 5/2010 (2010) p 2. Dr Poole noted that this did not mean judicial review had become uncontroversial: 'Public law being a form of politics, it could hardly be so'.

Sumption, the views he expressed were consistent with those previously expressed by Professor Ran Hirschl of the University of Toronto. In 2006, Professor Hirschl wrote:

Over the last few decades the world has witnessed a profound transfer of power from representative institutions to judiciaries, whether domestic or supranational... Even countries such as Canada, Israel, Britain, and New Zealand – not long ago described as the last bastions of Westminster-style parliamentary sovereignty – have gradually embarked on the global trend towards constitutionalization...

One of the main manifestations of this trend has been the judicialization of politics – the ever-accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies. Armed with newly acquired judicial review procedures, national high courts worldwide have been frequently asked to resolve a range of issues, from the scope of expression and religious liberties, equality rights, privacy, and reproductive freedoms, to public policies pertaining to criminal justice, property, trade and commerce, education, immigration, labor, and environmental protection.²⁵

Lord Sumption used a comparison between the scope of administrative law in France and in the United States to approach his topic which concerned the boundary between judicial and political decision-making. He asserted that judicial intervention in the workings of the state had been restricted in France, but enthusiastically embraced by the makers of the Constitution in the United States. He attributed the latter to an intent to 'contain the wishes of the sovereign people by a system of checks and balances which included entrenched judicial power'.²⁶ In the UK, Lord Sumption saw the seeds of a return to natural law germinating in the soil of judicial review, with similar effect. In his FA Mann lecture, he asserted that 'the decisions of the courts in this area have edged towards a concept of fundamental law trumping even parliamentary legislation'.²⁷ In his view, although nominally an exercise in interpretation, a process of statutory construction focused upon the

²⁵ Ran Hirschl, 'The New Constitutionalism and the Judicialization of Pure Politics Worldwide' (2006) 75 *Fordham Law Review* 721 at 721.

²⁶ Jonathan Sumption QC, 'Judicial and Political Decision-Making: The Uncertain Boundary' (The FA Mann Lecture, 2011) p 3.

²⁷ Note 26, p 7.

question 'what ought a good and wise Parliament to have wanted to achieve?' was in reality an inherently legislative exercise.²⁸ He stated:

the decisions of the courts on the abuse of discretionary powers are based, far more often than the courts have admitted, on a judgment about what it is thought right for Parliament to wish to do. Such judgments are by their nature political.²⁹

In Lord Sumption's view, the incorporation of the Human Rights Convention into English law significantly shifted the balance between political and legal decision-making in areas of major political controversy, such as immigration, penal policy, security and policing, privacy and freedom of expression. It also extended the scope of judicial review from executive decisions to primary legislation.³⁰ As is customary when criticising any perceived expansion of judicial power, Lord Sumption described the process as a transfer of power 'into the domain of judicial decision-making where public accountability has no place'.³¹ As is also customary in such discourse, his Lordship observed that judicial intrusion into government policy lacks 'any democratic legitimacy'.³²

Of course, Lord Sumption did not assert that all judicial review had these dire consequences. His attack focused on cases in which he considered that courts had in fact reviewed the merits of legislation or executive policy, and in those areas where 'Parliamentary scrutiny is generally perfectly adequate for the purpose of protecting the public interest'.³³ In his view, such judicial intrusion threatened the broader concept of legitimacy which underpins a democracy with an uncodified constitution and which depends upon public accountability.³⁴ This was likely to lead to politicisation of the judiciary as had occurred in the United States, and to processes of judicial selection of the kind adopted in that country.³⁵

²⁸ Note 26, p 7.

²⁹ Note 26, p 11.

³⁰ Note 26, p 11.

³¹ Note 26, p 11.

³² Note 26, p 19.

³³ Note 26, p 18.

³⁴ Note 26, pp 21, 22.

³⁵ Note 26, p 19.

Sir Stephen Sedley returned fire in an article entitled 'Judicial Politics'.³⁶ Some guide to the tenor of the response is provided by the opening paragraphs. Reference is made to the infrequency with which members of the Bar have been appointed directly to the highest court in the United Kingdom, and in which Lord Sumption is compared to Justice Scalia of the US Supreme Court. Criticisms of Lord Sumption's conflation of executive government with the legislature and misapprehension of the scope of judicial review in France follow.

In his detailed response, Sir Stephen Sedley analysed each of the cases relied upon by Lord Sumption and contested the conclusions drawn. In particular, Sir Stephen contested Lord Sumption's proposition that the cases demonstrated judicial interference in 'macro policy'; instead he suggested that the cases essentially turned upon the proper construction of the relevant statutes. Sir Stephen also countered that there were many examples of cases where the courts declined jurisdiction in areas which were essentially political and which did not involve the determination of legal rights and obligations. He made the further point that almost all judicial review cases were concerned with the purported exercise by the executive of powers conferred by the legislature. The executive is not to be treated as immunised from judicial review by democratic credentials in the same way as the legislature.

Sir Stephen Sedley suggested that Lord Sumption's observations would have a discernible impact upon the standing of the judiciary and confidence in the administration of justice - as he put it: 'Smoke, in the public mind, means fire'. He concluded:

One leaves [Sumption's] lecture reflecting that if we had parliamentary confirmation hearings for new judicial appointees (something Sumption rightly opposes), this is the kind of manifesto we would get and that politicians would probably applaud. What would happen to a candidate who stood up for the integrity of modern public law and for judicial independence within the separation of powers is anybody's guess.³⁷

This concluding observation was, perhaps, a little harsh - after all, Sumption's appointment to the Supreme Court had been announced

³⁶ Sir Stephen Sedley, 'Judicial Politics' *London Review of Books* (23 February 2012).

³⁷ Note 36.

and his legal and intellectual credentials for that appointment were not in doubt.

The sequel to the debate

It seems that Sir Stephen Sedley's prophecy of the possible consequences of Lord Sumption's address came to pass. In December 2012 the Ministry of Justice of the United Kingdom released a consultation paper proposing reforms to judicial review.³⁸ The general effect of the proposed reforms was to limit the scope for judicial review by reducing the time limits within which proceedings could be brought, tightening the procedures relating to the grant of leave and increasing the fees payable. These steps were justified by 'concerns that [judicial review] has developed far beyond the original intentions of this remedy' and backed by the statistical growth in the use of judicial review to challenge decisions of public authorities from 160 applications in 1974, to 4,250 applications in 2000, and to over 11,000 by 2011.³⁹

The 7th Edition of De Smith

The seventh edition of *De Smith* was published against this background. This edition contained a review of numerous occasions upon which senior ministers had 'thought it fit to encourage and engage in hostile public comment about particular judges, judgments or the role of judicial review in general'.⁴⁰ The authors observed:

While such tactics of confrontation and denunciation of judicial review may enable politicians to vent frustration and a handful of journalists to fill column inches, they cannot provide a stable basis for a relationship between executive and judiciary. That must be built upon mutual respect for the constitutional principles of the rule of law and separation of powers.⁴¹

The authors were also critical of a passage in the 2012 Ministry of Justice consultation paper which asserted that 'the threat of judicial review has an unduly negative effect on decision makers', leading

³⁸ Ministry of Justice (UK), *Judicial Review: Proposals for Reform* (December 2012).

³⁹ Note 38, p 9.

⁴⁰ Harry Woolf, Jeffrey Jowell, Andrew Le Sueur, Catherine Donnelly & Ivan Hare, *De Smith's Judicial Review* (7th ed, 2013) pp 32, 33.

⁴¹ Note 40, pp 33, 34.

'public authorities to be overly cautious in the way they make decisions, making them too concerned about minimising, or eliminating, the risk of a legal challenge'.⁴²

The UK government's response

It seems that the Lord Chancellor, who is also Secretary of State for Justice, was not daunted by these observations. After implementing the 2012 proposals, a second consultation paper was published in September 2013 proposing another round of reforms to judicial review. Responding to that consultation paper, the Lord Chancellor observed:

In my view judicial review has extended far beyond its original concept, and too often cases are pursued as a campaigning tool, or simply to delay legitimate proposals. That is bad for the economy and the taxpayer, and also bad for public confidence in the justice system... Having considered [responses to the second consultation paper] with care I am satisfied both that there is a compelling case for reform and that it should proceed at pace.⁴³

The Human Rights Parliamentary Committee

However, this was not the last word on the subject. In a report by the joint parliamentary committee on Human Rights (UK) published shortly afterwards, the committee rejected each of the further proposals for reform advanced by government. It found that the basis for each was flawed and furthermore illustrated the conflict inherent in combining the role of Lord Chancellor with the role of Secretary of State for Justice.⁴⁴

The committee reported that, as the government acknowledged, the increase in applications for judicial review had been almost exclusively driven by immigration matters (much like recent experience in Australia), but had argued that the increase of approximately 21% in the number of non-immigration and asylum

⁴² Note 40, p 32.

⁴³ Ministry of Justice (UK), *Judicial Review – proposals for further reform: the Government response* (February 2014) p 3.

⁴⁴ Joint Committee on Human Rights (UK), *The Implications for Access to Justice of the Government's Proposals to Reform Judicial Review* (April 2014).

judicial reviews between 2000 and 2012 was significant.⁴⁵ The committee noted that others queried whether a total increase of 366 applications over a 12 year period was 'significant'.⁴⁶

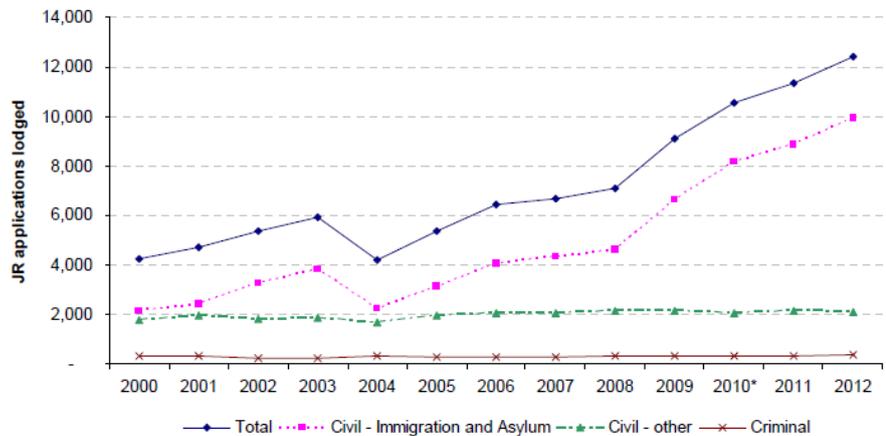


Diagram 1: UK judicial and court statistics on applications for judicial review 2000-12⁴⁷

The committee also noted the government's concern at 'the use of unmeritorious judicial reviews to cause delay, generate publicity and frustrate proper decision-making'.⁴⁸ Official data indicates that successful challenges to government action were few and far between (which also accords with Australian experience). Taking 2011 as an example, in the UK 174 applicants out of a little under 12,000 were successful - that is, a rate of about 1.6%.

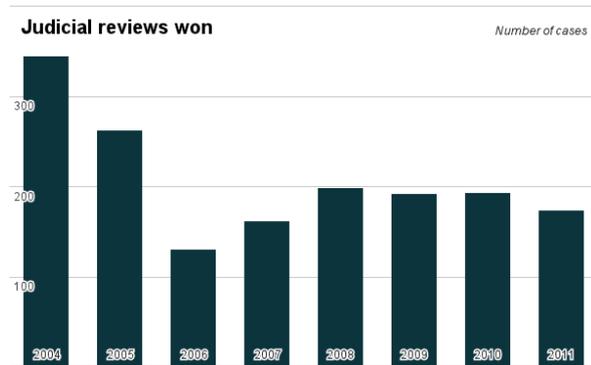


Diagram 2: UK judicial and court statistics on successful applications for judicial review 2004-11⁴⁹

⁴⁵ Note 44, p 13.

⁴⁶ Note 44, p 13.

⁴⁷ Ministry of Justice (UK), *Statistical Notice: Revision of Judicial Review figures* (29 November 2013) p 3.

⁴⁸ Ministry of Justice (UK), *Judicial Review—Proposals for further reform* (September 2013) para [1] quoted in Note 44, p 13.

⁴⁹ Simon Rodgers, 'Judicial review statistics: how many cases are there and what are they about?' in *The Guardian*, 20 November 2012 (data available at:

However, as the committee has noted, it should not be inferred that 'unsuccessful applications' lack merit or are abusive. Cases may settle and may be withdrawn because the respondent conceded the merits of the case against them.⁵⁰ The committee concluded that official statistics 'cannot tell us anything reliable about the scale of abuse of judicial review' because data on the reasons why judicial review applications are withdrawn are not recorded.⁵¹

Similar observations may be made with respect to the numerous applications made against the UK in the European Court of Human Rights. Over 80% of the applications made between 1959 and 2012 were declared inadmissible or struck out. By 2012, just over 1% of those applications had resulted in a judgment finding violation. During 2012, only 0.5% of the cases brought against the UK led to a finding of violation.⁵²

Applications against the UK allocated to judicial formation

1959–1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	Total
6197	442	625	479	986	687	744	1003	843	886	1253	1133	2766	1547	1734	21325

Applications against the UK declared inadmissible or struck out

1959–1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	Total
5213	223	466	529	737	863	721	732	963	403	1240	764	1175	1028	2047	17104

Applications against the UK resulting in judgment (judgment finding violation)

1959 – 2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	Total
189 (103)	40 (30)	25 (20)	23 (19)	18 (15)	23 (10)	50 (19)	36 (27)	18 (14)	21 (14)	19 (8)	24 (10)	486 (289) (59%)

Tables 1-3: Applications made against the UK at the European Court of Human Rights between 1959 and 2012⁵³

Furthermore since the *Human Rights Act 1998* (UK) came into force, only 28 declarations of incompatibility of legislation with a right

docs.google.com/spreadsheets/ccc?key=0AonYZs4MzlZbdC1Ta3dCTG1saDhzWFBGElwd2EyRIE#gid=0 accessed 5 June 2014).

⁵⁰ Note 44, pp 13, 14.

⁵¹ Note 44, p 14.

⁵² Ministry of Justice (UK), *Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government Response to Human Rights Judgments 2012–13* (October 2013), pp 18, 19.

⁵³ Note 52, p 18.

created by the European Convention on Human Rights have been made.⁵⁴ Such declarations neither invalidate the legislation nor are they binding on parties to proceedings.⁵⁵

While the official UK data may not be conclusive as to the merits or otherwise of the applications for the various forms of judicial review being sought, one thing is clear. And that is that the outcome rarely results in judicial officers directing government as to what is to be done. Viewed from a statistical perspective it would be very hard to sustain the proposition that the courts have usurped the roles of either the legislative or executive branches of government.

The debate with respect to the proposals to further restrict judicial review in the UK is continuing. It would be presumptuous of me to adjudicate upon the debate between Sumption and Sedley. Like most vigorous debates, each side advanced strong and weak points. Generally debate about the respective roles of the branches of government enhances public understanding of the systems of government. However it is not clear that this particular debate had that effect. Its impact upon the future of judicial review in the United Kingdom remains unclear.⁵⁶

Judicial review in Australia

Judicial review has not been immune to controversy in Australia. At times the controversy has been couched in terms of 'judicial activism' and has come from senior government ministers and officials. The controversy following the decision of the High Court in the 'Malaysian solution' case⁵⁷ provides a recent example. Some commentators expressed the view that government criticism of the High Court on that occasion exceeded appropriate bounds, including the then Prime Minister's reference to an earlier decision of Chief Justice French,

⁵⁴ Note 52, p 5.

⁵⁵ *Human Rights Act 1998* (UK), s 4(6).

⁵⁶ I note that Lord Sumption has recently given another lecture on a similar theme to his FA Mann Lecture, 'The Limits of Law' (27th Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013).

⁵⁷ *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106/2011 v Minister for Immigration and Citizenship* [2011] HCA 32.

when sitting as a judge of the Federal Court, which was said to be inconsistent with his later decision in the High Court.⁵⁸

However, it seems to me that public controversy over the ambit of judicial review in Australia has been on a rather different scale, several magnitudes lower than the controversy recently experienced in the United Kingdom. It seems likely that a key reason for this is the democratic legitimacy associated with Australian judicial review because its primary source is the Constitution of the Commonwealth. Moreover, constitutional entrenchment of the judicial review jurisdiction of the courts has enhanced public appreciation of the proposition that in order for a system of government to conform to the 'rule of law' not only must officials act in accordance with the law and within the scope of powers conferred by law, but the courts must be able to determine when those powers have been exceeded. I examine these suggestions in more detail below.

Australian structures of government - A child of mixed parentage

Professor Peter Cane has characterised the Australian system of government as a child of mixed parentage:

on the one side, the British unitary constitutional monarchy, a product of 800 years of largely evolutionary institutional development; and on the other, the American federal republic, forged at a great constitutional moment in the revolutionary cauldron of the late eighteenth century.⁵⁹

The resultant hybrid consists of a Westminster-style political system operating under a US-style written constitution.⁶⁰ That written constitution not only embodies 'a formal, triadic, separation of powers'⁶¹ but also distributes legislative, executive and judicial powers between the Commonwealth and State polities which together comprise the federation. The High Court has ultimate responsibility

⁵⁸ See for example, Judicial Conference of Australia, 'The Prime Minister's criticism of the High Court' [undated].

⁵⁹ Peter Cane, 'The making of Australian administrative law' (2003) 24 *Australian Bar Review* 114, p 114.

⁶⁰ Peter Cane, 'Understanding judicial review and its impact' in in Marc Hertogh & Simon Halliday, *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (2004) p 23.

⁶¹ Note 60, p 23.

for the interpretation of the Constitution and supervises the exercise of the powers distributed by the Constitution.

The constitutional source of Australian administrative law

Over the last 20 years or so the profound effect which this structure has had upon the development and content of Australian administrative law has come to be recognised, and publicly acknowledged many times. For example, in the 2012 National Lecture in this series, Justice William Gummow AC observed:

for too long, in Australian law schools insufficient attention was paid to the consideration that, at least at the federal level, public administration essentially concerns the execution and maintenance of the *Constitution* and the laws of the Commonwealth. Section 61 places this within the executive branch. It is the superintendence, within the constitutional structure, of this executive activity which generates what we may call administrative law. But administrative law, so understood, is a subset of constitutional law.⁶²

When the New South Wales Bar Association commissioned a portrait of the Honourable Mary Gaudron AC upon her retirement from the High Court she insisted that the text of section 75(v) of the Constitution be stencilled across the top of the portrait. Justice Virginia Bell AC noted that:

As Mary Gaudron acknowledged in her speech at the unveiling of the portrait, the text is hardly Jeffersonian: it is the 'technical language of lawyers'. Her fondness for it is because it provides a signal guarantee of protection under the rule of law. It is a protection that is not found in the constitutions of other liberal democracies. The jurisdiction of the High Court to restrain an officer of the Commonwealth from exceeding his or her legal duty or, conversely, to compel an officer of the Commonwealth to perform his or her legal duty, cannot be ousted.⁶³

At the risk of pedantry, her Honour's observations should be read as presuming the continued existence of the Constitution in its present form - that is, unaltered by popular referendum. Given the infrequency with which a majority of voters in a majority of States

⁶² The Hon WMC Gummow AC, 'A Fourth Branch of Government' (AIAL National Administrative Law Conference, Adelaide, 19 July 2012) p 20.

⁶³ Justice Virginia Bell AC, 'The Legal Content of the "Fair Go"' (Redfern Town Hall, 20 April 2011) p 9.

have agreed that the Constitution should be altered, that is a reasonable assumption to make.

So, while Australian administrative law has, of course, drawn heavily upon the development of administrative law in the United Kingdom, the jurisprudential sources of the law in each country fundamentally differ. In Australia the primary source of that law (at least at federal level) is embedded in the Constitution of the Commonwealth. By contrast, administrative law in the UK is sourced from the common law developed by the courts of that country, augmented by statutes passed by the Parliament, including those which have incorporated aspects of European law into the domestic law of the United Kingdom, including the European Charter of Human Rights.

The consequences of the constitutional source of judicial review in Australia

Entrenched judicial review jurisdiction

There are a number of important consequences which flow from this fundamental distinction. First, unless and until a majority of voters in a majority of States agree to change the Constitution, the administrative law jurisdiction of the High Court cannot be validly constrained either by legislation passed by the Parliament or by administrative action taken by the executive. Furthermore, since the decision in *Kirk v Industrial Court of New South Wales*,⁶⁴ it is clear that the legislative and executive powers of the States are similarly constrained. The jurisdiction of State Supreme Courts to determine when administrative or legislative jurisdiction has been exceeded is a defining characteristic of those courts, required under Chapter III of the Constitution, and cannot be eroded by State legislative or executive action.

Opinions may differ with respect to the desirability of extending the entrenched judicial review jurisdiction from the High Court to the State Supreme Courts. On the one hand it might be said that Chapter III of the Constitution, which is concerned with the judicial power of the Commonwealth, is an unlikely place to find a limitation upon the

⁶⁴ *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531.

legislative powers of the States. On the other hand, if the judicial review jurisdiction of State Supreme Courts was not protected by the Commonwealth Constitution, it could be argued, with some force, that there is no protection for the rule of law in the governance structures applicable to the States, which is not consistent with a fundamental assumption of our federal structure.

However, whatever the views expressed at State level, it is now beyond argument that the Constitution of the Commonwealth gives the High Court jurisdiction to determine the proper boundaries and legitimate exercise of the powers conferred upon the other branches of government created by the Constitution. That jurisdiction includes, but is not limited to, the remedies to which reference is made in section 75 of the Constitution.

Democratic legitimacy

Another significant consequence of the Australian law of judicial review having its primary source in the Constitution is that it diminishes any assertion that the exercise of that jurisdiction somehow lacks democratic legitimacy. The Constitution was the outcome of a protracted process of public debate and referenda. Although the democratic processes of the late 19th century were not those we would expect today, and the extent of public participation in that process has been doubted,⁶⁵ as Elias CJ noted in last year's National Lecture, 'In jurisdictions without a formal constitutional distribution of powers, such as mine, the role of the courts is vulnerable'.⁶⁶

The prospect that a court might rule legislation passed by the Parliament invalid excited great controversy when it was countenanced by some members of the House of Lords in the fox

⁶⁵ As Tom Spencer summarised the original Constitutional referenda (in 'An Australian rule of law' (2014) 21 *Australian Journal of Administrative Law* 98 at 105):

George Williams remarks that only 52% of persons eligible to vote across Australia did so. Moreover, although 72% of those voters supported federation, 28% did not. State-by-State (there were no Territories) the figure is even less, with 56% of voters supporting federation in New South Wales for instance. Nor were most women or indigenous Australians allowed to vote, although Helen Irving remarks that women lobbied and contributed to the political process by which Federation occurred.

⁶⁶ Note 5, p 19.

hunting case. However, that prospect is the inevitable consequence of a written constitution which confers limited powers upon State and Federal legislatures. No serious commentator would question the power of the Australian courts to declare legislation invalid because it exceeds the powers conferred upon the relevant legislature under the Constitution. Sometimes the exercise of the power has caused great political controversy - for example, in the Bank Nationalisation case,⁶⁷ the Communist Party case,⁶⁸ or the Tasmanian Dams case.⁶⁹ It often provokes an understandable adverse reaction from the government responsible for the legislation invalidated, not uncommonly characterised by allegations of 'judicial activism'. However, the power of the court to declare legislation invalid is seldom, if ever, doubted. Furthermore, when a longer term perspective provided by history is taken, many would accept that the existence and exercise of the power has been beneficial. The three cases I have mentioned provide support for that view.

The ambit of judicial review

The constitutional source of Australian administrative law also has an impact upon the ambit of the courts' judicial review jurisdiction. In particular, the courts are at pains to distinguish between review for error of law which has the character of taking a purported exercise of power beyond jurisdiction, and review on the merits. Justice Brennan's observations in *Attorney-General (NSW) v Quin* are commonly cited to reinforce that distinction:

The duty and jurisdiction of the Court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power ... the Court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.⁷⁰

⁶⁷ *Bank of NSW v Commonwealth* [1948] HCA 7; (1948) 76 CLR 1.

⁶⁸ *Australian Communist Party v Commonwealth* [1951] HCA 5; (1951) 83 CLR 1.

⁶⁹ *Commonwealth v Tasmania* [1983] HCA 21; (1983) 158 CLR 1.

⁷⁰ *Attorney-General (NSW) v Quin* [1990] HCA 21; (1990) 170 CLR 1 at 35, 36.

In last year's National Lecture, Elias CJ described this view as providing the 'rather unattractive indication ... that the courts must be indifferent to "administrative injustice"'.⁷¹

The same criticism can be directed at the use of the term 'jurisdictional error' to delineate the boundaries of the courts' jurisdiction. No doubt the term has a worthy provenance, and its use reinforces the constitutional source of the court's jurisdiction and evokes the fundamental rule of law values which underpin the exercise of that jurisdiction. It also highlights the limited role of the court in ensuring that the legislature remains within the jurisdiction granted to it under the Constitution or, in the case of executive action, within the jurisdiction conferred upon the executive by the legislature. However, one difficulty with the term is that it appears to deny the court any power to remedy injustice or error of law if it occurs within the exercise of the jurisdiction conferred. Put more bluntly, if the court can only intervene if the error is 'jurisdictional', it necessarily follows that there must be errors, including errors of law, which the court is powerless to remedy. From the perspective of the rule of law, this is not such a good look.

I suspect that the issue may be more semantic than substantive. Although the High Court has described what is meant by 'jurisdictional error' in general terms,⁷² it has resolutely resisted any attempt to specify the particular qualities or characteristics which define it. Those qualities, like beauty, lie in the eye of the beholder - relevantly in this discourse, the High Court. Indeed it seems that the expression 'jurisdictional error', which has become such a pervasive feature of Australian administrative law, is now acknowledged as nothing more than a label to distinguish cases in which the court concludes that judicial intervention is appropriate from those in which it is not.⁷³ While the label conforms to the constitutional source of the

⁷¹ Note 5, p 12. Although Elias CJ added that it 'must be read with the important qualification Sir Gerard makes that it is only where "merits" can be distinguished from "legality" that the courts cannot intervene'.

⁷² For example, the High Court suggested, non-exhaustively, the categories to which 'jurisdictional error' might apply in *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163, 177-180.

⁷³ JK Kirk SC, 'The Concept of Jurisdictional Error' in Neil Williams SC (ed), *Key Issues in Judicial Review* (2014) 11, p 13; *Kirk v Industrial Court (NSW)* (2010) [56] - [57], [64] - [65],

court's jurisdiction, in substance the process may not be dissimilar to more overtly nuanced terminology used in other jurisdictions to describe the basis for judicial intervention, such as 'variable intensity unreasonableness review' or 'proportionality' analysis. And if this is so, criticism of Australian administrative law as 'exceptionalist' may be unjustified to that extent.

The question can be addressed another way. Professor Michael Taggart is one of those who has described Australian judicial review as exceptionalist. He has suggested that with reference to the deference to be shown to the executive, Australian courts draw a sharp distinction between questions of law and the exercise of discretionary power. While no deference is shown in relation to the former, for example the correct interpretation of statutory text, 'the courts could not defer more, in theory at least' in relation to the exercise of discretion.⁷⁴ Professor Taggart uses Ronald Dworkin's analogy of the doughnut to describe this theoretical version of judicial review in Australia:

[D]iscretion is the hole in the middle of the doughnut filled with policy and politics, and into which the courts will not enter.⁷⁵

This analogy, of course, does not accord with reality. One can easily see and feel the edge of a doughnut, and you can taste the difference between the doughnut and the hole. However, the boundaries between law and discretion (or merits) are much more elusive. The flexibility of the concept of 'jurisdictional error' recognises that the boundaries between the two are not drawn by bright lines and are often blurred. This flexibility allows for Australian courts to take into account the same types of considerations as the courts in other jurisdictions which purport to have more flexible boundaries.

Another difficulty that I have with the doughnut analogy is that Australian courts review the exercise of discretion on the ground of an error of law even if that error is not 'discernable' provided the outcome

[71]. See also Mark Aronson & Matthew Groves, *Judicial Review of Administration Action* (5th ed) (2013) at [1.140].

⁷⁴ Note 6, p 13.

⁷⁵ Note 6, p 13.

of the exercise is 'unreasonable or plainly unjust'. This famous dictum of Dixon, Evatt and McTiernan JJ in *House v R*⁷⁶ expressed almost 80 years ago has been applied in many areas of the law, not least in the appellate review of the exercise of the sentencing discretion which occurs every day in courts all around Australia. The now controversial ambit of review on the ground of unreasonableness is a topic to which I will return.

How 'exceptionalist' is Australian administrative law?

In the remainder of this paper I will attempt to address the question of how 'exceptionalist' is Australian administrative law by reference to an admittedly unrepresentative sample of decisions. These have been chosen on the basis that some are said to represent a narrow or 'exceptionalist' approach to the ambit of judicial review, and others which appear to me to suggest a rather broader view. Of course it is also relevant to this debate that Australia does not have a legislated bill of rights. Other than those rights which can be implied from the terms of the Constitution, and which continue to cause controversy, this will of necessity distinguish judicial review in Australia from elsewhere, although perhaps not to the extent often assumed.

A narrow view?

The boundaries of public power

The decision of the High Court in *Griffith University v Tang*⁷⁷ attracted widespread and vociferous criticism. Professor Mark Aronson was characteristically direct when he described the decision as 'nothing short of breath-taking'.⁷⁸ The decision has been aligned with the earlier decision in *Neat Domestic Trading Pty Ltd v AWB*

⁷⁶ *House v R* [1936] HCA 40; (1936) 55 CLR 499 at 505:

It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

⁷⁷ *Griffith University v Tang* [2005] HCA 7; (2005) 221 CLR 99.

⁷⁸ Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1 at 23.

*Ltd.*⁷⁹ Each was concerned with the ambit of review when powers which arguably have the characteristic of powers exercised for public benefit are exercised by non-public bodies. Although these cases concerned the proper construction of the *Administrative Decisions Judicial Review Act* (Cth) and its Queensland equivalent, critics suggest that they reflect an outmoded approach to the notion of administrative powers and duties, which fails to take account of the contemporary enthusiasm of government for outsourcing the exercise of those powers to non-public entities and organisations.

Detailed analysis of that criticism would further prolong this paper. It is sufficient to observe that Justice Keane provided a reasoned and coherent answer to those criticisms in the 2011 National Lecture.⁸⁰ There is a cogent argument that the distinguishing feature of those decisions was not the identity of the repository of the power (being a university and a private corporation respectively), but rather the nature of the power exercised. Put another way, the decisions demonstrate the capacity of Australian courts to delineate the appropriate boundary for judicial review by reference to particular facts and circumstances. Because the distinction between law and policy is inherently imprecise, and given the great variety of ways in which public power is exercised under contemporary systems of government, the lines drawn in any individual case will almost always be contestable. However, this does not mean that the process evident in these cases is different in principle to the processes undertaken in similar circumstances in other comparable jurisdictions.

Indefinite detention

In *Al-Kateb v Godwin*⁸¹ the High Court upheld the validity of a decision to detain a person who had arrived in Australia without a visa even though it found, as a fact, that there was no real prospect of removing him from Australia in the reasonably foreseeable future. The outcome of the decision has been criticised. It is said to provide

⁷⁹ *Neat Domestic Trading Pty Ltd v AWB Ltd* [2003] HCA 35; (2003) 216 CLR 277.

⁸⁰ The Hon PA Keane, 'Democracy, Participation and Administrative Law' (AIAL National Administrative Law Conference, Canberra, 21 July 2011).

⁸¹ *Al-Kateb v Godwin* [2004] HCA 37; (2004) 219 CLR 562.

an example of excessive 'legalism'.⁸² However, there were essentially two issues in the case. The first was the proper construction of the relevant provisions of the *Migration Act 1958* (Cth). The second was the question of whether the Act was within the legislative power conferred upon the Parliament by the Constitution. Both of those questions were addressed by the court as questions of statutory construction.

If the court had departed from that conventional process because its outcome was repugnant to the sensitivities of some, the rule of law would have been significantly undermined. It seems likely that Lord Sumption would take the view that if a majority of Australians are offended by persons being detained indefinitely if they are in Australia without lawful authority, then the democratic process enables them to elect representatives who would change the law. As Gleeson CJ pointed out, comparison with dissimilar outcomes in other jurisdictions such as the United Kingdom, the United States and Hong Kong was invidious because the constitutional and statutory contexts were different. In particular, in each of those jurisdictions detention was discretionary rather than mandatory and His Honour noted that in systems of discretionary detention, issues of reasonableness in the exercise of the discretion provide an opportunity for judicial intervention.⁸³ Put another way, the outcome in *Al-Kateb*, for the majority at least, was dictated by the legality of the exercise of the power to legislate conferred upon the Parliament by the Constitution, not by the ambit of judicial review.⁸⁴

Reasons for decision

In *Public Service Board of NSW v Osmond*⁸⁵ the High Court decided that an administrative decision was not invalidated because the decision-maker failed to provide reasons in circumstances in which there was no statutory duty to do so. The decision has been criticised

⁸² See for example, Juliet Curtin 'Never say Never: *Al Kateb v Goodwin*' [2005] 27 *Sydney Law Review* 355.

⁸³ *Al-Kateb v Godwin* (2004) 219 CLR 562 at [3].

⁸⁴ Gleeson CJ dissented, on the basis that the legislation did not evince a clear intent to authorise indefinite detention in the appellant's circumstances.

⁸⁵ *Public Service Board v Osmond* [1986] HCA 7; (1986) 159 CLR 565.

vociferously by many, notably the Hon Michael Kirby AC.⁸⁶ It has been suggested that the decision fails to reflect the significance of providing reasons justifying an administrative decision. That significance was put neatly in last year's National Lecture when Chief Justice Elias observed:

It is an aspect of human dignity that people know why official action is taken which affects them. If people are given the dignity of reasons, they want them to justify the outcome. If they do not, the decision is appropriately characterised as unreasonable and reviewable.⁸⁷

However, in New Zealand the right to reasons for administrative decisions is conferred by the *Official Information Act 1982* (NZ). In Australia, most jurisdictions⁸⁸ have enacted legislation conferring a general right to reasons for administrative decisions. The question which the High Court addressed in *Osmond* was not whether administrative justice is enhanced by the provision of adequate reasons for the decision, but whether the common law required the provision of reasons as a condition of the valid exercise of the power conferred. Lying beneath that was another question: should a right to reasons be a matter for the relevant legislature or for the court, in the enunciation of the common law. It is difficult to fault the conclusion that these are matters for the legislature, not the courts, if regard is had to:

- the vastly differing circumstances in which administrative decisions are made;
- the recognition in most statutory systems for the provision of reasons that some classes of decisions must be exempted; and
- the implications for public resources which would flow from the creation of a general right to reasons.

Any different view would arguably have justified a complaint from the legislature that the court had usurped its responsibility.

However, respect for the differential responsibilities of the legislature and the court cuts both ways. This is a proposition which was recently

⁸⁶ The Hon Michael Kirby AC CMG, 'The Reason for Administrative Decisions – *Osmond* Revisited' (Council of Australasian Tribunals, Whitmore Lecture 2012).

⁸⁷ Note 5, p 10.

⁸⁸ Other than Western Australia, New South Wales and the Northern Territory.

lost on the Parliament of Western Australia. Last year the Parliament voted to disallow rules of court promulgated by the judges of the Supreme Court which included a simplified procedure for the making of an order that an administrative decision-maker provide reasons for a decision the subject of judicial review proceedings. Significantly, the rules did not create any right to such an order and, of course, only potentially applied to those few cases challenging an administrative decision brought to the Supreme Court. Because no right to an order for reasons was created, it was clearly implicit in the rules that the discretion to make such an order would only be exercised if the provision of reasons was relevant to the resolution of the issues in the case. The procedure proposed in the rules was far from novel and was derived from practices adopted in the Supreme Court of New South Wales more than 13 years ago.⁸⁹ The procedure could hardly be described as radical. As Heydon J observed in *Zentai*:

A decision-maker can be compelled to produce documents revealing the reasons for a given decision, whether by a subpoena *duces tecum* or a notice to produce. That decision-maker can be compelled by interrogatories to reveal those reasons in writing, and by a subpoena *ad testificandum* to reveal those reasons in the witness box.⁹⁰

Nevertheless, the Parliament disallowed the relevant rules because of a view that they overrode the decision in *Osmond* and usurped its function.⁹¹ That view is, with respect, plainly wrong. *Osmond* was concerned with the question of whether the provision of reasons was a condition of the validity of an administrative decision. The rules of court were concerned with the procedures to be followed in the court and by which material necessary for the administration of justice could be obtained by the court. The rules of court could not reasonably be characterised as conferring a general right to reasons for administrative decisions, or as usurping the function of the legislature. The legislature had, after all, expressly conferred upon the court the power to make rules for the procedure and the practice to be followed in the court, by the *Supreme Court Act 1935* (WA).

⁸⁹ The first New South Wales Practice Note was Supreme Court Practice Note 119. It came into effect on 2 May 2001. The current Practice Note is Supreme Court Practice Note SC CL 3.

⁹⁰ *Minister for Home Affairs of the Commonwealth v Zentai* [2012] HCA 28 at [94].

⁹¹ Joint Standing Committee on Delegated Legislation, *Report 66 – Supreme Court Rules 2013* (October 2013).

However, for present purposes my point is not that the court was right and the Parliament was wrong. In practical terms, the disallowance of the relevant rule can be easily overcome by the exercise of the general case management powers conferred by other rules of court. The more important point is that while the legislature can reasonably and properly expect the court to respect its responsibility to determine when and whether substantive laws should be altered, the legislature must give corresponding and equivalent respect to the long-established power of the court to determine the practices and procedures to be applied in the court.

Not that exceptional after all?

Turning to the other side of the coin, it seems to me that there are a number of cases which suggest that judicial review has not been unduly shackled by excessive legalism, nor does it have such a narrow ambit as to be properly characterised as 'exceptional' by reference to other comparable jurisdictions.

No deference

As I noted, Lord Sumption chose the United States as his exemplar of a jurisdiction in which the judicial function had expanded to jointly occupy at least part of the space occupied by executive government and legislature. However, the doctrine of deference enunciated by the Supreme Court of the United States in *Chevron USA v Natural Resources Defence Council Inc*,⁹² has been steadfastly resisted in Australia. Under that doctrine the courts defer to an administrative agency's legal interpretation of its statutory charter so long as that interpretation reflects a reasonable appreciation of the intent of the Congress. To the contrary, the High Court of Australia has made it clear that questions of statutory interpretation are legal questions which can only be resolved by the judicial branch of government in accordance with Chapter III of the Constitution.⁹³

⁹² *Chevron USA Inc v Natural Resources Defense Council Inc* (1984) 467 US 837.

⁹³ See for example, Gleeson CJ, Gummow, Kirby And Hayne JJ in *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135 at [42] - [43].

The judicial emasculation of privative clauses

The constitutional source of administrative law in Australia has facilitated the judicial emasculation of privative clauses. The process which commenced in *R v Hickman*⁹⁴ was advanced significantly in *Plaintiff S157*⁹⁵ and largely completed in *Kirk*.⁹⁶ The approach taken in *Hickman* and *Plaintiff S157* was essentially a process of statutory construction which relied upon an apparently insoluble conundrum. That is, the legislature might confer power in terms which are so unconstrained as to significantly limit the scope of judicial review. However, the legislature has to stay within the scope of the relevant head of legislative power conferred by the Constitution. If the power is entirely unconstrained it will not properly be referable to the relevant head of power and therefore will be invalid; to the degree it is constrained it will be subject to judicial review.

In *Kirk*, the process was taken a significant step further by reference to Chapter III of the Constitution. The court held that any attempt by a Commonwealth or State Parliament to exclude the jurisdiction of the courts to review administrative action for jurisdictional error would infringe Chapter III of the Constitution. This is because it would deprive the court of a characteristic which is essential to its recognition as an appropriate repository of the judicial power of the Commonwealth. This construction of the Constitution entrenches the judicial review jurisdiction of the courts of Australia to a significantly greater extent than in other comparable jurisdictions.

Jurisdictional fact

Recent cases have seen the High Court take an expansive view of the 'jurisdictional facts' which must be satisfied to enliven the jurisdiction conferred upon the relevant decision-maker. Because these facts are conditions of the valid exercise of jurisdiction, the court can, indeed must, decide for itself whether the facts exist. So, a more expansive view of jurisdictional fact enlarges the ambit for judicial review.

Legislative provisions allowing for an administrative action to be taken if a designated official is 'satisfied' of something are

⁹⁴ *R v Hickman; ex parte Fox and Clinton* [1945] HCA 53; (1945) 70 CLR 598.

⁹⁵ *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; (2003) 211 CLR 476.

⁹⁶ *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531.

commonplace.⁹⁷ The proper construction of such a provision is always a question to be determined in the context of the particular statute. However, there is a propensity in recent High Court decisions to construe such provisions as not merely referring to the relevant official's state of mind, but as requiring that the stipulated facts exist as a matter of objective fact.⁹⁸ Even if the jurisdictional fact is the formation of a view by a designated official, the court has power to inquire as to whether the view was vitiated by jurisdictional error, such as a misapprehension of the view which had to be formed, or of the process by which the view was to be formed.⁹⁹

Unreasonableness - Wednesbury revisited

A full consideration of the impact of the decision of the High Court in *Minister for Immigration and Citizenship v Li*¹⁰⁰ is a topic for a paper in itself.¹⁰¹ In any event, as Zhou Enlai apocryphally observed of the French Revolution in the early 1970s, it may be too soon to tell what its impact will be.¹⁰² At least one well-informed commentator has described the decision as a large step in the reformulation of Australian public law.¹⁰³ In that case, the High Court set aside the Migration Review Tribunal's refusal to grant an applicant for a visa a further adjournment when she had been endeavouring to demonstrate her entitlement to a visa for three years, on the ground that the decision was so unreasonable as to be invalid. On any view, the case does not bespeak a narrow or timid view of the ambit of judicial review.

The joint reasons of Hayne, Kiefel and Bell JJ move from the more constrained language usually used to describe unreasonableness in the

⁹⁷ See the examples given by James Hutton, 'Satisfaction is a jurisdictional fact - a consideration of the implications of SZMDS' in Neil Williams SC (ed) *Key Issues in Judicial Review* (2014), p 50.

⁹⁸ *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611; *Plaintiff M70/2011 and Plaintiff M106/2011 v Minister for Immigration and Citizenship* [2011] HCA 32.

⁹⁹ Per French CJ in *Plaintiff M70/2011 and Plaintiff M106/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 at [59].

¹⁰⁰ *Minister for Immigration and Citizenship v Li* [2013] HCA 18.

¹⁰¹ See for example the Hon John Basten, 'Judicial Review of Executive Action: Tears of Scrutiny or Tears of Frustration?' in Neil Williams SC (ed) *Key Issues in Judicial Review* (2014) p 35.

¹⁰² Richard McGregor, 'Zhou's cryptic caution lost in translation', *Financial Times*, (10 June 2011); it is now thought Zhou may have been referring to the 1968 student riots in Paris.

¹⁰³ Note 101, p 35.

*Wednesbury*¹⁰⁴ sense to the broader language of 'the legal standard of unreasonableness'. They suggest that the more specific instances of jurisdictional error recognised in the prior cases can be encompassed within this broader notion.¹⁰⁵ This broader notion appears to me at least, to be consistent with concepts relating to the ambit of judicial review developed in countries without written constitutions, such as the United Kingdom and New Zealand. If this is so, it suggests that the perception that Australian judicial review is shackled to, and constrained by, excessive legalism is illusory, and that the differences between judicial review in Australia and other comparable jurisdictions may be more semantic than substantive.

There is perhaps another point conveniently made by reference to the *Li* decision. Delineating the ambit of judicial review in Australia by reference to jurisdictional error is now well entrenched. However, as I noted, any attempt to define 'jurisdictional error' in anything but the most general terms has been resisted. It follows that the court has scope to develop the common law of Australia on judicial review, and perhaps the proper interpretation of statutes dealing with that subject, by redeveloping and reformulating the ambit of the grounds which will establish jurisdictional error, such as unreasonableness. This again suggests that any perception that the Australian law of judicial review is unreasonably shackled or constrained by its constitutional source or by the language of 'jurisdictional error' is an illusion, perhaps derived from the language used, rather than its substance.

Conclusion

Critics of Australian judicial review have described it as 'exceptionalist' by reference to other comparable jurisdictions. They assert that its derivation from a written constitution leads to an unhealthy focus upon the separation of powers and a legalistic approach to statutory construction which has been to the detriment of broader notions of administrative justice. However, for the reasons I

¹⁰⁴ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223

¹⁰⁵ *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at [72].

have endeavoured to develop in this paper, the structure of administrative law in Australia has entrenched the judicial review jurisdiction of the courts, now recognised as a vital aspect of the rule of law, and provided a democratic legitimacy to the exercise of that jurisdiction. This has been achieved without unduly constraining the proper development of a coherent and principled body of law which appropriately reflects and recognises the differing roles and responsibilities of the different branches of government.

Comparison with recent experience in the United Kingdom suggests that the structure of administrative review in Australia, and the approach taken by the High Court within that structure, has minimised perhaps inevitable controversy and tensions between the branches of government, at least by comparison to the apparent tensions and controversy which have emerged in the United Kingdom. If this is the consequence of being 'exceptional', to paraphrase Justice Patrick Keane,¹⁰⁶ it does not seem to me to be an accidental error that is awaiting correction by a sufficiently robust judiciary.

¹⁰⁶ Note 80, p 16.