THE FOUNDATIONS AND LIMITATIONS OF JUDICIAL REVIEW –A COMMENTARY

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My first contact with administrative law was in the 1970s in the period when the Commonwealth Parliament was establishing the comprehensive and integrated system for review of government decision-making that we now have in Australia. There was at that time a sense of satisfaction that the new Australian system was a break from the tradition of the law. Two innovations stood out: the antiquated procedures and concepts of the past, with their prerogative writ origins, were largely being submerged; and the dominant focus of administrative law on judicial review was being downplayed as alternative methods of review by tribunals and Ombudsman were established.

To borrow some time-worn phrases – the more things change the more they stay the same; what goes around, comes around. The contemporary resurrection of the past – prerogative writs, privative clauses, legal concepts of jurisdictional error and jurisdictional fact, multiple rules of standing – is the product of many factors. They include the awkward limitation of jurisdiction in the *Administrative Decisions (Judicial Review) Act 1977* (Cth),[1] the restrictions on Federal Court review in Part 8 of the *Migration Act 1958* (Cth),[2] the brooding presence of Constitution s 75 and – in the view of some – a constitutional resettlement between the judiciary, parliament and the executive.

There are, not surprisingly, many ways of interpreting the current trends, in both favourable and negative overtones. But, however, one views or interprets those trends, two things stand out, as emphasised in Sir Anthony Mason's address: greater attention is now being given, first, to the constitutional dimension and, secondly, to the jurisprudential foundations of judicial review. I shall comment briefly on both trends, not by way of disagreement with anything Sir Anthony has said, but with a different emphasis and, in consequence perhaps, a different opinion.

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[1] Eg, the Act is confined to review of a decision or conduct "made under an enactment" (ss 3, 5), which excludes review of decisions made pursuant to executive power or pursuant to a general statutory power to undertake activities conducive to achieving the objects of an Act: see *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164.

[2] The privative clause in s 474 of the Act is thought to permit review of errors that constitute a "narrow jurisdictional error" or "bad faith": see the Second Reading Speech of the Minister for Immigration and Multicultural Affairs to the *Migration Legislation Amendment (Judicial Review) Act 2001*.

We are possibly on the threshhold of a new era in which the significance of the "constitutional writs", as they are now termed,[3] will be explored. Very likely the restrictions on judicial review in Part 8 of the *Migration Act* will provide the context for the development of jurisprudence in this area.[4] It is unfortunate that this should be so, because migration litigation is in my view an area where, on the one hand, controls or restrictions on judicial review of some kind were required yet, on the other hand, a privative clause is a clumsy and inappropriate method of imposing that control. The tensions and themes in immigration litigation have for some time now dominated and arguably distorted the coherent development of administrative law doctrine in Australia, and it will be a pity if this trend now develops a constitutional dimension as well.

Some of the early signs are not encouraging. I refer, for example, to two recent decisions of the High Court in its constitutional jurisdiction – *Re Refugee Tribunal; Ex parte Aala*[5] and *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*[6]. In neither case was the Court applying a constitutional principle, yet both cases arose in the High Court's s 75(v) constitutional jurisdiction which was acknowledged to be part of the background to be considered. This is not the place to analyse both cases exhaustively, and I will indicate briefly only why in my view the majority of the Court in each case inappropriately applied the principles of natural justice. In *Aala* the Court required the Refugee Review Tribunal to hear the same claim for a third time, on the basis that Mr Aala was misled into thinking that the Tribunal had before it written submissions that he had made to another body and that were of uncertain relevance and evidentiary weight. In *Miah*, the Court held that a primary decision-maker in the Department of Immigration had to take extra steps to solicit comments from an applicant for refugee status, notwithstanding, first, that the applicant was ordinarily entitled to a de novo merit review of the claim by an independent tribunal, and secondly, that s 69 of the *Migration Act* declared that a decision-maker was not required to take any action apart from complying with the procedural steps outlined in the Act, which in this case had been observed by the decision-maker.

The decisions in *Aala* and *Miah* have inevitably given a fillip to litigation in the High Court's original jurisdiction: as at 15 February 2002 there were 124 immigration appeals and applications before the Court, 108 in refugee cases. The burden imposed on the Court by immigration litigation in the original jurisdiction is a matter that has attracted public criticism, including from members of the Court.[7] The target of that criticism is usually the restrictions imposed by Parliament on judicial review by the Federal Court, and the gap thereby arising between the scope of the jurisdiction

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3 See *Re Refugee Review Tribunal; Ex parte Aala* (2000) 176 ALR 219.

4 Two early cases point in this direction: see *Walton v Ruddock* [2001] FCA 1839 (discussing whether a breach of natural justice is protected by a privative clause; and *Wang v Minister for Immigration and Multicultural Affairs* [2002] FCA 167 (holding that breach of an essential precondition to the exercise of a power was not protected by the privative clause).

5 (2000) 176 ALR 219

6 (2001) 179 ALR 238.

7 Eg, *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 per McHugh J; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 176 ALR 219 at [133] per Kirby J; *Re Minister for Immigration and Multicultural Affairs; Ex parte Prosecutors 1, 2, 3 & 4* [2001] HCA; *Re Minister for Immigration and Multicultural Affairs; Ex parte A* [2001].

respectively of the Federal Court and the High Court. However, as *Aala* and *Miah* illustrate, the size of the gap can be influenced as well by the jurisprudence developed by the High Court.

There is a danger that the importance of the High Court's s 75(v) jurisdiction will be overstated and that in time it will provide a constitutional anchor for principles – such as natural justice – which have adequately developed for a century or more without any constitutional penumbra. I refer, for example, to the observation of Justice Kirby in *Aala* that the s 75(v) remedies, once recognised as constitutional remedies, are "set free from the constraints of nineteenth century appreciation" and must be "construed in a way appropriate to a constitutional charter for the government of a nation".[8] His Honour has similarly observed that 75(v) is "the means by which the rule of law is upheld throughout the Commonwealth"[9] – an observation, I rather think, that understates the active role that other courts, tribunals, Ombudsman, law schools, the legal profession, Parliament, the media and much else besides play in nurturing the rule of law.

The danger of overstating the importance of constitutional principles is demonstrated already by litigation concerning Ch III and the separation of judicial power. I refer, firstly, to the chequered history of the Superannuation Complaints Tribunal in 1998-99. Early in the life of the Tribunal the Federal Court ruled that the powers conferred on the Tribunal were constitutionally invalid as they infringed the separation of judicial power.[10] Though, 18 months later, the High Court unanimously reversed the view of the Federal Court,[11] in the intervening period the Tribunal was virtually in suspension – its existing determinations for the previous four years were regarded as invalid; the two hundred matters currently before it could not be acted upon; new matters could not be received; and considerable executive and parliamentary time was devoted to exploring the consequences and the options. Surprisingly, this dispute hinged on a constitutional principle, the separation of powers, that is said to exist in part to protect individual liberty in an independent system of adjudication. Yet, in an area so vital to many members of the community as superannuation, it is the creation of tribunals that realistically provides the greatest assurance of administrative justice for individuals who are in dispute about their superannuation entitlements.

Secondly, on the same point, I think it worth recalling that the success of the tribunal system in Australia hinged on the outcome of the *Brian Lawlor* case[12] in 1979, in which a majority of the Federal Court held that a federal tribunal could decide issues of law as well as issues of fact. Had the more limited role for tribunals envisaged by Justice Deane[13] - a great exponent of constitutional guarantees – held sway, then it seems to me that our system of administrative tribunals would have been undermined and our system of law and justice would have been much the poorer.

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8 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 176 ALR 219 at [135].

9 *Re Carmody; Ex parte Glennan* (2000) 173 ALR 145 at 147.

10 *Wilkinson v CARE* (1998) 152 ALR 332; *Breckler v Leshem* [1998] 57 FCA.

11 *Attorney-General (Cth) v Breckler* (1999) 163 ALR 576; see C A Foley, 'The Role of the Superannuation Complaints Tribunal' in S Kneebone (ed), *Administrative Law and the Rule of Law: Still Part of the Same Package* (AIAL, Canberra, 1999) 109.

12 *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1980) 2 ALD 1.

13 Deane J took a restricted view of the province of an administrative tribunal to deal with issues of law, referring to Ch III considerations. His Honour's view was that a tribunal could correct a colourable exercise of power by a decision-maker but not a usurpation of power.

The other theme mentioned by Sir Anthony on which I will briefly touch has to do with the jurisprudential foundations for judicial review. As Sir Anthony has acknowledged, there is presently an outpouring of academic literature on this topic in England and Australia, as commentators explore whether it is the constitution, the common law or legislation that provides the foundation for judicial review. Sir Anthony has perceptively explained that every theory seems to lead back to the same point, namely, that foundation principles of administrative review such as ultra vires and natural justice will be affected in a like manner by presumptions as to how the judiciary should discharge its role. On one approach those presumptions are treated as presumptions of statutory interpretation, in the other approach as presumptions arising from the common law, but on either approach the presumptions are similar and produce a similar outcome.

The theories are, to that extent, unhelpful. But are they also inconsequential? There are distinct signs in English jurisprudence of the risky path that this line of inquiry can lead down. The English jurisprudence[14] is leading increasingly to the position that there are rights – variously thought of as fundamental rights, human rights, or common law assumptions – that inhere in the constitutional structure. It is therefore said to be part of the judicial role to identify, articulate and safeguard those values as constitutional or legal rules. Notions of "fairness", "proportionality" and "equality" quickly emerge as legally enforceable conditions on the exercise of executive power.

This trend should be eschewed in Australia, as one that is at odds with other fundamental constitutional assumptions. The separation of powers – a foundation principle of public law - acknowledges that particular functions fall within the province of each arm of government and that the usurpation of any such function by another arm of government is inappropriate. The discharge of judicial power, embracing the conclusive determination of issues of law, is within the judicial province. Likewise, the formulation of public policy and the resolution of the merits of administrative decision-making is a function that falls within the executive province of government. The broad criteria for judicial review that are being developed in England undermine that constitutional separation of powers. Notions of "fairness", "proportionality" and the like inescapably merge with the merits of public policy determination. The notion of legality then becomes inherently vague, governed only by the sense of restraint or forbearance of the individual judge.

There are many voices in England and Australia which warn of that risk. But how effective are they? My concern is that unintentionally they are often complicit in the problem. Why? Because all participants in the debate about the role and the limits of judicial review are focusing only on that topic – the role of the judiciary. The only theory that is presented is one of more or less judicial review. In time, by the processes of incremental growth of the common law, the inevitable result is more judicial review.

A different way of looking at the theoretical foundations of administrative law and judicial review is available. Any definition of the foundations of administrative law

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[14] Eg, see *R (Mahmood) v Secretary of State for Home Environment* [2001] 1 WLR 840; and *R v North and East Devon Housing Authority; Ex parte Coughlan* [2001] QB 213.

in Australia, even if it begins with Constitution s 75(v), the English common law tradition and the ultra vires principle, should move quickly to an appreciation of the extraordinary phase of executive and parliamentary leadership in developing administrative law over the last three decades.[15] That activity has created an entirely new framework for the control and accountability of state power. I refer here not just to the creation of the Federal Court and the enactment of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), but to numerous other foundation stones – the creation of a great many general and special jurisdiction administrative tribunals that federally receive as many as 40,000 applications each year; the creation of many general and special jurisdiction Ombudsman that investigate as many complaints; the enactment of new public sector control legislation such as the *Freedom of Information Act 1982* (Cth), *Financial Management and Accountability Act 1997* (Cth) and the *Commonwealth Authorities and Companies Act 1997* (Cth); the development of a far more active parliamentary scrutiny system; and the greater elaboration of decision-making principles and procedures in legislation and a vastly-expanded quantity of official publications that are publicly available.

My point is not that those developments are faultless, nor that they supplant more traditional forms of accountability such as judicial review. Rather, my point is that they are a large and essential part of the context for analysing control and accountability. This context is barely or never mentioned in newly-emerging theories that purport to define the foundations of judicial review and, inferentially, administrative law.

I will bring the threads of this analysis together. The thrust of my commentary is that the focus nowadays given to the constitutional dimension and the jurisprudential foundations of judicial review - a focus admittedly of great importance – nevertheless poses a risk of overstating the contextual importance of the role played by courts in upholding the rule of law and delivering administrative justice. An aspect of this trend which bemuses but concerns me is the now popular view that judicial assertiveness and activism is a form of progressivism or radicalism, that can be justified accordingly. By contrast, those who preach restraint about the role of courts in scrutinising legislative and executive action are likely to be portrayed as the prophets of conservatism.

Doubtless in some instances those labels are appropriate. But if we stand back and look at the history and the dynamics of our public law system, it is indeed the parliament that is the radical concept. In English history it was, of course, the courts that first came into existence, as an extension of royal power in settling disputes. The notion that a tribunal of specially-selected, learned members of society should adjudicate and resolve disputes, after being addressed by learned practitioners, is inherently conservative. It is a "top-down" theory of how society should be managed. The radical overtone to judicial power came in the added concept that the judiciary should be independent of political coercion.

Even so, the truly radical concept in our history of ideas is the notion of parliament itself. It incorporates many radical features – among them, that we institutionalise

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[15] This issue is developed at greater length in J McMillan, "Parliament and Administrative Law" in G Lindell and R Bennett, *Parliament: The Vision in Hindsight* (The Federation Press, 2001) 340-350.

conflict in a forum of the people; that policy decisions are made in an open and public forum, in which all can participate, either by voice or through representatives; and that those who exercise the power of the state should acknowledge and accord rights to those who oppose them, including the ultimate right of the opponent to assume government. But the most radical of all notions, and the one most relevant to this discussion, is the belief which underpins parliamentary democracy that wisdom is randomly distributed throughout the community, and that the competing, divided and fractious strands of that wisdom can best be distilled in the parliamentary forum.

There are, of course, more orthodox ways of expressing the same point. Chief among them is that the separation of powers is as much about recognising the province and independence of *each* of the three arms of government, as it is about recognising the province and independence of any one of those three arms. We should not define a jurisprudence or a path of development for administrative law that imperils that balance.