JUDICIAL REVIEW – A PROCESS IN SEARCH OF A PRINCIPLE

*B M Selway**

Paper presented to an AIAL seminar, Adelaide, 28 October, 1998.

Marbury v Madison 5 US 137 (1803) is a pivotal case in US jurisprudence. In that case the US Supreme Court identified judicial review as an essential aspect of the judicial function, notwithstanding the principle of separation of powers. It was by no means self evident that this was a proper function of the courts. Under the United States constitution where there are separate and co-equal branches of government there was a real question as to whether one branch, the judiciary, had the authority to determine the validity of the acts of another branch.

The principle of separation of powers operates quite differently within the Australian constitutional framework. For example, at the state level there is no principle of separation of powers.[1] Even under the Commonwealth constitution the principle of separation of powers operates differently than it does under the US constitution. In the Australian constitutional framework, the judiciary are appointed by the crown to dispense justice in accordance with the law, and the executive are appointed by the crown to execute and administer the laws. The relationship between the executive and the courts was largely determined in the 17th century. In particular, the courts then determined, and the crown accepted, that the executive could not exercise judicial power without express statutory authority.[2] It was also established that the executive was subject to the law as interpreted by the judges and that the executive crown had no power to dispense with the law.[3]

Consequently, judicial review has a different, or at least, a more obvious constitutional basis in Australia than it has in the United States. The parliament of the federated Commonwealth established in 1901 was a subsidiary legislature, as were the parliaments of the pre-existing colonies. The courts of the colonies and of Australia clearly had the power to declare that purported laws of that subsidiary legislature were beyond power and invalid.[4] Covering clause 5 of the Commonwealth constitution was merely declaratory of the common law that the Commonwealth constitution was binding upon the courts and judges of the new states. The principle of separation of powers could not limit judicial review where the legislature was a subsidiary legislature. Furthermore, since at least the 17th century the executive had always been subject to the supremacy of the parliament. Its prerogative powers had always been limited. There was no doubt that the executive (or at least, its officers) could act unlawfully and that the courts could determine that they had done so. Consequently, there was and is simply no reason to rely upon the reasoning in *Marbury v Madison* in order to justify the power of Australian courts to review invalid laws and executive acts.[5] In particular,

---

* *B M Selway QC is South Australian Solicitor-General.*

1 *Kable v DPP (NSW)* (1996) 138 ALR 577, 583-584, 587-594, 602-604, 612, 622-624. It is possible that a "manner and form" provision of a state constitution could entrench the principle of separation of powers in that constitution. On one view this may have occurred, at least to an extent, in Victoria: see *BHP v Dagi* [1996] 2 VR 117, 153-157, 191-192, 207.

2 *Prohibitions det Roi* (1607) 77 ER 1342; *Baslog v ICAC* (1990) 169 CLR 625, 636; *Herald & Weekly Times v Woodward* [1995] 1 VR 156, 158.

3 *Case of Monopolies* (1602) 77 CR 1260; *Case of Proclamations* (1612) 77 ER 1352.

4 See eg *R v Burrah* (1878) 3 App Cas 889, 904-905; *Engineers* Case (1920) 2B CLR 129, 149.

5 See Lindell in Zines (ed) *Commentaries on the Australian Constitution* (1977) at 160-186; Lane *The Australian Federal System* (2nd Ed, 1979) at 1143-1144; Lindell in Lee & Winterton (eds) *Australian*

in Australia there has been no suggestion that the functions of the judiciary are limited because the executive has a proper role and responsibility in interpreting the law.[6]

Historically, the constitutional basis for the supervisory jurisdiction of the superior courts was the prevention of *ultra vires* acts, that is, acts which had no legal effect because they were nullities. This constitutional basis was clear enough when judicial review was largely limited to what might be called illegality, for example, to issues such as exercising powers of compulsion without any power to do so. However, from the late 19th century the courts accepted that they could also review the exercise of statutory powers by reason of the failure to comply with natural justice. The justification for this approach was the presumption[7] of statutory interpretation that there was implied into the statutory grant of the relevant power a statutory requirement so to comply. On this basis the requirement to comply with the rules concerning natural justice could still be justified on the basis of *ultra vires*, that is, the failure to comply with the implied statutory requirement.

However, starting in 1967 in England the rules of natural justice have been applied to the exercise of prerogative powers.[8] This development was confirmed by the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service*[9] and is clearly now the accepted law in England. In England the question whether a person exercising a power is required to comply with natural justice does not depend upon the source of the power but upon the nature of that power.[10] I should say that this development has received almost universal academic support, almost to the level of barracking.

This same development has subsequently been recognised and followed in Australia[11] although some judges, particularly Brennan CJ, have not welcomed it.

Of course, once judicial review is not founded upon statutory interpretation or upon some traditional limitation upon prerogative powers then it can only be founded upon some autonomous development of the common law. The cases do not identify any such development. Instead the courts seem to have been content to develop specific rules to be complied with by those subject to administrative law, without bothering with the basic principles to explain those rules.[12]

In the absence of any such basic principles, there is no constitutional or jurisprudential theory which justifies the current processes of judicial review. Whatever may be said of this as a matter of jurisprudence, on a practical level I have previously made the point that:

Constitutional perspectives (1992) at 218-219; contrast Galligan, "Judicial Review in the Federal System: Its Origin and Function" (1979) 10 FL Rev 367 who seems to view the US reasoning as directly applicable (see at 368).

6 Indeed, the very opposite may be true. The history of the development of the Westminster system, and the different role of the various arms of government under that system, may suggest that there should be a greater role for judicial review in Australia than has even yet occurred. See Brennan, "Courts, Democracy and the Law" (1991) 65 ALJ 32.

7 Which was limited initially only to those persons required to act "judicially", but subsequently extended to all persons required to exercise statutory functions giving rise to a "legitimate expectation".

8 See *R v Criminal Injuries Board ex p Lain* [1967] 2 QB 864.

9 [1985] AC 374.

10 Ibid at 407.

11 See Bayne, "The common law basis of judicial review" (1993) 67 ALJ 781 and Aronson & Dyer, *Judicial Review of Administrative Action* (1996) at 115-116, 202-221.

12 Indeed, some judges have welcomed the opportunity to develop those rules: see Toohey, "A Government of Laws, and not Men" (1993) 4 PLR 158 and see Brennan, "Courts, Democracy and the Law" (1991) 65 ALJ 32 at 39-40.

> The nature and scope of the jurisdiction of the superior courts to grant judicial review can only be defined by reference to the courts' own perceptions of what standards of public decision making they need to impose and on whom they need to impose them. This is based, in part, upon an increased judicial scepticism about the role of the executive vis-a-vis parliament and the increased readiness to use public law remedies to redress the balance. The jurisdiction continues to expand.[13]

It follows that there can be no certainty that the legal principles applicable to judicial review today, will necessarily be those that are applicable tomorrow. Developments of the law in this area may proceed at differing speeds in different jurisdictions. Changes in the personnel of different courts may affect such developments.

One result of this lack of any identifiable principle justifying judicial review is the current confusion about the consequences of a breach of administrative law. This confusion is highlighted by the question of whether the consequence of a breach of administrative law is that the relevant act is void or merely voidable and by the related issue of whether the relevant act can be challenged in "collateral" proceedings.[14] Historically, the accepted position seems to have been that an administrative decision that was "illegal" was void *ab initio* and could be challenged in collateral proceedings, at least so long as the vitiating defect was patent.[15] However, acts and decisions that were in breach of administrative law by reason of irrationality or procedural impropriety were not void *ab initio*, but were merely voidable. They continued to be effective until set aside by a superior court in judicial review proceedings.[16] Although there are still some judgements which seem to support that approach,[17] it no longer enjoys general acceptance.[18] Although there have been some other attempts to develop completely new approaches to the issues,[19] it would seem that currently there are two approaches which have relatively broad acceptance. The first is that the question is one of statutory interpretation,[20] the second is that all acts and decisions in breach of administrative law are invalid *ab initio* at least in the absence of a legislative direction to the contrary.[21] Both of these tests have some difficulties in both justification and in application.

The fact that judicial review now extends to the prerogative means that any explanation of the consequences of a breach of administrative law which relies upon some principle of parliamentary sovereignty must be an incomplete explanation. The lack of any over-riding principle to explain the current processes of judicial review means that issues such as collateral challenge, the void/voidable distinction and, indeed, the proper role for the exercise of discretion in judicial review proceedings will continue to present logical difficulties.

---

13 Selway, *The Constitution of South Australia* (1997) at 235.

14 I have considered this matter in some greater depth in Selway, "The Rule of Law, Invalidity and the Executive" (1998) 9 PLR 196, 201-203.

15 *Posner v Collector for Interstate Destitute Persons (Vic)* (1946) 74 CLR 461, 483; *Murphy v R* (1989) 167 CLR 94, 106.

16 See eg *Calvin v Carr* [1980] AC 574; *Ainsworth v CJC* (1992) 175 CLR 564; 579ff, 594ff.

17 *Ousley v R* (1997) 148 ALR 510, 514-515 (Toohey J), 520-521 (Gaudron J).

18 It could not still apply in the UK because of the rejection in that country of the distinction between jurisdictional and other errors: see *Boddington v British Transport Police* [1998] 2 WLR 639, 645-646, 650. Of course, that distinction is still recognised in Australian law: see *Craig v South Australia* (1995) 184 CLR 163, 178-179.

19 See eg *Bugg v DPP* [1993] QB 473, 491-500; *Leung v Minister for Immigration & Multicultural Affairs* (1997) 150 ALR 76, 86-90.

20 *R v Wicks* [1998] AC 92, 117; *Blue Sky v Australian Broadcasting Authority* (1998) 153 ALR 490, 512-518; *Ousley v R* (1997) 148 ALR 510, 552; *Darling Casino Ltd v NSW Casino Control Authority*(1997) 143 ALR 55, 72-76.

21 *Ousley v R* (1997) 148 ALR 510, 531-534; *Boddington v British Transport Police* [1998] 2 WLR 639, 649-650; 655, 656, 664-666.

My own view is that the courts were wrong in extending judicial review to acts done pursuant to the prerogative in the absence of some constitutional justification for doing so. Some justification must now be found. Constitutionally, such a justification cannot be an enhanced role for the courts in supervising the executive. Such an enhanced role would be inconsistent with the principles of separation of powers and the independence of the judiciary. If a justification is to be found it must be found in the substantive law. This does not preclude a lateral approach. After all, the justification for requiring that those exercising statutory powers should comply with the principles of procedural fairness rested in a presumption of statutory interpretation which, at least when first identified, must have been very difficult to justify. In respect of prerogative powers the justification could be a development of the common law so as to limit some of the common law prerogatives of the crown, for example, that such prerogatives must be exercised fairly and impartially. Whether such a development of the common law is consistent with the usual principles for such development by the courts raises further interesting questions which will need to be dealt with on another occasion.