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Introduction

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THE CONTRIBUTIONS TO this volume all originated as papers delivered at a major international conference that took place at the University of Cambridge in September 2014. The conference, entitled ‘Process and Substance in Public Law’, was the first in what is intended to be a series of international Public Law Conferences that will bring together common lawyers from a broad range of jurisdictions.

The intellectual case for such a series of conferences stems from the fact that common law systems are simultaneously similar to and different from one another. While those from common law jurisdictions thus all work from background understandings that have enough in common to facilitate fruitful engagement, significant differences between such systems open up opportunities for valuable exchanges of ideas and debate. These possibilities were realised at the conference; the exceptionally high quality of the papers was matched by the quality of the debate which they provoked, as participants grappled and engaged with points of contact and contrast between the many jurisdictions that were represented.

Our experience has been that there was significant demand for a conference concentrating on the academic study of public law. Following the issue of a call for papers, we received approximately 170 abstracts from scholars based across the common law world. The conference was attended by over 200 participants drawn from a wide variety of common law and other jurisdictions, including Australia, Canada, Hong Kong, Italy, Ireland, Japan, the Netherlands, New Zealand, Singapore, South Africa, the United Kingdom and the United States. The conference opened with an interview of Sir John Laws, a Lord Justice of Appeal in the England and Wales Court of Appeal, conducted by Cambridge’s Professor David Feldman; the keynote address was given by Professor Jerry Mashaw of Yale University; and almost 50 papers were delivered by public law scholars representing many of the world’s leading law schools.

The theme selected for the inaugural conference was intended to—and did—allow participants to contribute papers addressing a relatively broad range of cognate issues that are of both practical and theoretical importance to the study and development of contemporary public law. However, given the very large number of papers delivered at the conference itself, it was infeasible to produce an edited collection that included all or even most of the papers. Instead, in putting together this volume,

we have sought to assemble a collection of pieces that relate both to one another and to one of the principal sub-themes that emerged from the conference, namely, the way in which relationships and distinctions between the notions of ‘process’ and ‘substance’ play out in relation to and inform adjudication in public law cases.

It is worth noting that not only has there been a lack of a regular conference forum for discussion of public law topics among common lawyers from different jurisdictions but, perhaps causally connected to this, there are surprisingly few edited collections which bring together common lawyers from different jurisdictions to address topics in public law, particularly outside the subfield of constitutional law. There are, in contrast, a reasonable number of jurisdiction-specific collections on public law topics and, for example, a very large number of collections addressing topics in EU public law and, increasingly, global administrative law. The contrast with private law is also stark: there has been a proliferation of collections comprised of papers by common lawyers from a range of jurisdictions, such as those collections that have flowed from the ‘Obligations’ series of conferences, and which have proven so successful. It is to be hoped that this collection and those stemming from future Public Law Conferences go some way towards filling this lacuna. Such collections are important for much the same reasons that underpin the series of conferences.

I. THE CHAPTERS

The chapters collected herein are all either comparative, or consider one jurisdiction with a view to distilling more general insights. All, in one way or another, engage with the theme of process and substance within the province of public law adjudication. Some chapters offer more theoretical insights, such as Jerry Mashaw’s chapter exploring the trend towards conceptualising administrative law in terms of a ‘public reason’ rationale; Paul Daly’s chapter elaborating a values-based framework for analysing administrative law; and Jason Varuhas’ chapter, examining a public interest conception of public law, and charting its influence. The bulk of the chapters consider topical issues in judicial review, either on common law or human rights grounds, or both, such as the rise of substantive review, the interrelationship between ‘procedural’ and ‘substantive’ grounds, and remedies; this set includes chapters written by Mark Aronson, Christopher Forsyth, Matthew Groves and Greg Weeks, Andrew Edgar, Mary Liston, Justice Alan Robertson and Kent Roach. Two chapters—those by Philip Murray and Jason Varuhas—consider how procedure and substantive law have interacted historically in interesting ways in the field of judicial review. Two further chapters offer an important, wider contextual and empirical perspective, considering the impact of public law adjudication on government, and governmental responses to judicial decisions; these are written by Carol Harlow and Richard Rawlings, and Maurice Sunkin and Varda Bondy. We also asked Cheryl Saunders and David Feldman, both whom contributed to the closing sessions of the conference and who had served as members of its advisory board, to write shorter chapters, reflecting on the nature of contemporary public law scholarship in the light of the chapters collected herein and with particular reference to themes that had emerged during the conference.

In his chapter Jerry Mashaw argues that public reason is essential to a properly functioning democracy. But in a pluralist society, how do we give adequately reasoned justifications? One approach is to narrow the scope substantively of what might be considered 'reasonable' decisions. The other is to simply insist on procedural requirements and anything which results from a procedurally correct process is deemed to be legitimate. In administrative rationality, participation rights are secured through a requirement that the agency demonstrates that it has considered all relevant factors in coming to its determination and has provided justifications in a way that can be understood by participants. Mashaw identifies this approach both in US and EU approaches to decision-making. The justification for this approach is that it 'treats persons as rational moral agents who are entitled to evaluate and participate in the dialogue about official policies on the basis of reasoned discussion'. But there is a danger that this emphasis on giving reasons can slow down decision-making and the public good that results. Furthermore, the rejection of an applicant's claims are still liable to disappoint, however well reasoned and explained. Bureaucratic rationality may not be intended as a value statement on the applicant's worth to society, but is perceived as such. But that should not lead us to reject the benefits of administrative rationality, but continue to seek to make decisions that are both 'reasonable' and 'rational'.

Paul Daly's aim is to further our understanding of the field of administrative law as a whole, over time and across jurisdictions. To do this he develops a values-based framework for understanding administrative law. He argues that four values are immanent in core features of administrative law doctrine, and underpin judicial decision-making in the field. These values are the rule of law, good administration, democracy and the separation of powers. Daly also argues that we must take account of institutional considerations to ensure a full understanding of the field. Daly proceeds to examine how these stated values are reflected in and interact in the context of different administrative law doctrines, including bias, procedural fairness, substantive review and remedial discretion, concluding that 'judicial review of administrative action is a values-based enterprise'.

Jason Varuhas argues that in the wake of the procedural reforms of the late 1970s which established the judicial review procedure in English law, English courts sought to forge a distinctive system of public law based in the unifying idea that 'public law' is concerned with ensuring that public power is exercised for the common good and in accordance with axiomatic principles of good administration. This 'public interest' approach marked out public law's concerns as distinct from private law's concerns with promoting and protecting individual self-interested rights and interests. Since this formative era the public interest conception has been relied upon to guide legal development across various legal contexts, including emergent fields of public law such as human rights law. However, this has proven problematic. The public interest conception of public law was forged by reference to only one branch of contemporary public law, the common law of judicial review; this body of law formed the basis of the vast bulk of applications made via the public law procedure in the period during which the public interest conception was articulated. But public law has moved on. Contemporary public law is increasingly pluralistic in nature, addressing a range of issues and comprising a number of different subfields each marked by

their own distinctive concerns. For example, while common law review continues to bear the hallmarks of the public interest approach, human rights law is, in contrast, necessarily concerned with protecting private rights and individual interests. Where the public interest conception has intruded beyond common law judicial review, into newer fields such as human rights law and review on EU grounds, it has often served to undermine the coherence of these branches of law and their distinctive functions. In Varuhas's view, contemporary public law has no inherent functional unity and it is a grave error to try to focus on protecting the public interest in all its branches to the detriment of other valuable functions.

Philip Murray's chapter continues the theme of the necessity of considering process and substance together in historical analysis of English law. His study of error of law shows the way in which we need to understand the procedural context in which substantive rules of law were developed. To focus on general principles of substantive administrative law, such as the reviewability of all errors of law, without understanding the procedural context in which judicial statements to this effect were pronounced potentially leads to an over-broad scope for judicial review. At the same time, argues Murray, the modern law is not constrained by earlier rules of procedure and we do need to develop substantive rules of law which are justified in their own right. Building modern administrative law on an apparent fidelity to judicial precedent is therefore, says Murray, disingenuous. Murray goes on to argue that the history of the distinction between jurisdictional and non-jurisdictional errors of law shows that the modern law has tried to use this device to expand judicial review when it was originally a device for limiting it. Murray concludes that doctrinal rules that have developed in one particular context can and do go on to have a separate life of their own outside that context, and that it is important that the new rules are properly grounded in principle, rather than simply based on an appeal to continuity of a precedent which is now operating outside its original context.

From history our focus moves to trends in contemporary public law adjudication across common law jurisdictions. Mark Aronson considers the growth of substantive review in Australia, contrasting and comparing these developments with concomitant changes in English judicial review. He charts the changes; new grounds have emerged, some explicitly substantive, others presented as procedural but substantive in nature. He considers how the changes reflect a changing sense of judicial review's 'mission', the change in orientation of review being less radical in Australia than England, given the influence of a constitutionally-entrenched separation of powers in the former. The chapter examines the underlying causes of these changes, including the impact of theory in a system traditionally sceptical of top-down thinking, legislative attempts to clamp down on review which backfired, judicialisation of tribunals, and the role of expanded reason-giving. Lastly, the chapter explores the possible consequences of this expansionist trend, including growth in judicial deference and discretion, the possibility that specific grounds of review might be swallowed by generalised grounds, as well as political and institutional ramifications.

Christopher Forsyth examines the relationship between process and substance in public law adjudication from a somewhat different perspective, and in the context of English law. His focus is on the process of reasoning by which judges decide public law cases, with particular reference to the recent (and, in Forsyth's view, alarming)

tendency of the UK Supreme Court to elevate substantive but instinctive notions of fairness and justice above reliance on doctrine and conceptual reasoning. In particular, Forsyth draws attention to the way in which the distinction between jurisdictional and non-jurisdictional errors has, in English administrative law, been largely emptied of content, to be replaced, on the one hand, by judicial preparedness to intervene in certain matters by reference to ill-defined notions such as ‘proportionate dispute resolution’, and on the other hand, by the nakedly manipulated distinction between questions of fact and law. This, argues Forsyth, amounts to ‘blasphemy against basics’, robbing administrative law of its conceptual coherence, compromising legal certainty and risking the reduction of administrative law to a Tennysonian ‘wilderness of single instances’.

As Matthew Groves and Greg Weeks note in their chapter, it is increasingly ‘trite’ to observe that Australia and England are embarked upon divergent paths in a number of crucial areas within the public law sphere. However, be that as it may, exploring the nature of those differences can be both illuminating in itself and also a way into better understanding the institutional distinctions that account for such differences in the first place. In this vein, Groves and Weeks consider, by reference to the relationship between process and substance in respect of the doctrine of legitimate expectation, the distinct ways in which the law has developed in this area in Australia and England. They note that the approaches adopted in those two jurisdictions differ from one another in striking ways, Australian courts having rejected the substantive notion of fairness upon which (some) English courts have fastened in developing the English variant of the legitimate expectation doctrine. Groves and Weeks go on to consider what might account for these contrasts, noting that while underlying differences of constitutional architecture and approach might go a long way towards understanding the contrasting jurisprudence of the Australian and English courts, those courts remain—helpfully and importantly, it is argued—in dialogue with one another.

Although Andrew Edgar’s focus is more squarely on Australian law, his chapter also reflects a key difference between modern administrative law in England and Australia. The aim of Edgar’s chapter is to explicate and examine the reasons that might animate Australian administrative law’s ostensibly curious approach to judicial review of delegated legislation. He notes that while, in general, Australian courts (placing them increasingly at odds with their English counterparts) eschew relatively intrusive substantive review tools such as proportionality, that doctrine is to the fore when it comes to review in Australia of the lawfulness of secondary legislation. In contrast, notes Edgar, review of delegated legislation on procedural grounds is uncommon. In examining this apparent inversion of received (Australian) wisdom, Edgar argues (*inter alia*) that Australian courts’ embrace of proportionality in this context can be accounted for by a combination of the perceived inaptness of process-oriented review of secondary legislation and the existence of constitutional concerns resulting from broad delegations of legislative authority to administrative bodies. Judging the status quo unsatisfactory, Edgar concludes by examining possible ways forward in this area.

Mary Liston provides an important Canadian perspective on the interrelationship between process and substance in contemporary public law, arguing that there

has been a 'fusion' between procedure and substance in recent years in Canada. Accepting the importance of substantive conceptions of fairness as part of judicial review is an appropriate response to the 'real questions' which are being asked of administrators and on which the courts have to adjudicate. 'A political community committed to both democracy and legality will provide multiple routes for those affected by public power to demand fairness, to have input into the decision-making process, and to have quality reasons for those decisions', she argues. She identifies the way in which procedural requirements in aboriginal administrative law have not only enabled better participation, but also ensured respect for substantive fairness. Judicial decision-making established an institutional dialogue between judges and administrators which will encourage more reasonable decisions by the latter. Liston argues that legal frameworks make more transparent values of rights, social goods and social justice which are then taken on board in administrative frameworks. The emphasis is therefore on cooperation between the different fora for individual participation in the service of the public as a whole, rather than an antagonism between judiciary and the administrators.

Alan Robertson undertakes a detailed assessment of the nature of contemporary judicial review in Australia and England considering, as Liston has done for Canada, the interrelationship between process and substance across the field. Like a number of contributors in this volume, Robertson is firm in rejecting any bright line distinction between process and substance in public law. Through a thorough analysis of different aspects of judicial review (error of law review, procedural fairness, mandatory considerations and unreasonableness, amongst others), Robertson shows the distinction between procedure and substance to be an artificial mask, obfuscating the true qualitative nature of judicial review. At the same time, Robertson maintains that this qualitative review is not to be confused with merits review. While some distinctions drawn by administrative lawyers, like that between process and substance, might seem overly artificial, others, like the distinction between merits and legality, have a much deeper, constitutional significance.

Following on from chapters focused on trends in the substantive law of judicial review, Kent Roach's contribution reminds us of the dangers of paying inadequate attention to remedies when studying public law. He offers a thoughtful study of how different common law legal systems design remedies for the protection of human rights, ranging from the judicial strike-down of rights-infringing legislation, like in the United States, to the apparently weaker form of human rights protection under sections 3 and 4 of the UK Human Rights Act 1998. Roach's chapter illustrates that broad procedural categories, like the distinctions that are drawn between different human rights remedies, can hide the substantive reality of public law litigation. So supposedly strong forms of review, like that which occurs in the US Supreme Court under the auspices of the Bill of Rights, are shown to be substantively weaker when it is realised, for example, that many of the US Supreme Court's strike-downs are limited to the particular application of legislation in the particular case that comes before the Court. Contrariwise, apparently weaker forms of human rights protection, like the non-binding declaration of incompatibility used by British courts, are shown to be substantively stronger once it is appreciated that these remedies are used in a context of strong obedience by Parliament to the United Kingdom's

international obligations, breach of which is implied by a declaration of incompatibility. At the same time as showing us that procedure can obfuscate substance, however, Roach highlights the necessary relationship that exists between process and substance. It is only with recourse to substantive constitutional norms that we can determine the most desirable form of procedure for protecting human rights—something Roach attempts admirably in the latter part of his chapter.

As they often have, Carol Harlow and Richard Rawlings offer us a wider perspective on public law adjudication often neglected in the generally court-focused literature on judicial review. Challenging the common view that courts control government and secure rights of citizens, but also arguably challenging characterisations of government as vulnerable or helpless in the face of an increasingly active domestic and supranational judiciary, they document numerous instances of government and Parliament responding to judgments or the prospect of unwelcome judgments through deliberately negative practices. Such practices may fall into one of two categories: ‘striking back’—removing or minimising a judgment’s effects after the event; or ‘clamping down’—taking pre-emptive steps to protect governmental or public interests against future judicial interference by changing the rules of the public law game in restrictive fashion. They show these phenomena to be fundamental features of the working constitution, that they have been so for some time, and that there has been a high degree of continuity in the techniques adopted by government, even as the sources of the legal threats faced at Westminster have become more varied.

Similarly focused on the empirical realities of public law adjudication, Maurice Sunkin and Varda Bondy, with particular reference to recent initiatives to circumscribe access to judicial review in England, consider the extent to which judicial review aids—or, conversely, hinders—good government. They do so by challenging, through reliance upon detailed empirical studies, three assumptions which arguably underlie administrative antipathy to judicial review in England. Sunkin and Bondy argue that those assumptions—that there has been significant growth in the use of judicial review driven by claimants abusing the system; that judicial review necessarily impedes good administration; and that judicial review litigation is unlikely to provide effective redress to claimants—are ill-founded, and that the recent debate about judicial review in England has, as a result, been unfortunately skewed.

In her chapter, Cheryl Saunders reflects on the conference, the papers collected herein and trends in public law scholarship more generally from a comparative perspective. She notes that while neither this volume nor the conference from which it stems was explicitly comparative—in the sense that contributors were not required to adopt any systematic comparative approach—comparativism is nevertheless advanced and facilitated by the papers collected in this book. In this spirit, Saunders seeks to identify such points of public law related commonality as exist within the principal jurisdictions covered in this collection by examining the ways in which public law in those jurisdictions diverge. She goes on to note that such divergences notwithstanding, the common law remains more ‘cohesive’, and its constituent jurisdictions more ‘interdependent’, than might be supposed. Saunders concludes by arguing that these phenomena may be accounted for by broadly comparable trajectories of legal and political development in several key common law jurisdictions; the

willingness of common law courts to facilitate jurisdictional cross-fertilisations; and an innate tendency of the common law towards what Saunders terms ‘equilibrium’.

David Feldman offers three reflections on the directions of contemporary public law scholarship in the light of the conference and the papers collected in this volume. First, he argues some legal scholars have ‘gone beyond rules, beyond rights, beyond even principles’ and claimed that public law does or should require officials to give effect to ‘values’. In his view this is a recipe for unconstrained moralism, a threat to legal predictability, and can render rigorous legal analysis impossible, thus squandering the distinctively valuable contribution that public lawyers can make in the study of public institutions. Secondly, there has been a shift of focus away from studying the important question of what public institutions should be allowed to do towards the second-order question of who should decide what institutions should be allowed to do. If we allow ourselves to become distracted in this way we may diminish our ability to limit the capacity of public actors to cause serious harm through unlawful acts, which is the principal goal of public law. Thirdly, Feldman offers a timely reminder that we ought to resist the temptation to allow our normative commitments to shape our approach to empirical analysis. In the province of comparative work this means acknowledging significant variations among different systems and ‘not pretending that our preferred normative structure has some illusory universal normative force’.

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our aim that the Public Law Series will quickly establish itself as a leading forum for debate and discussion of public law issues in the common law world. The enormously positive response to and feedback on the first Public Law Conference, and to the larger intellectual endeavour of which the inaugural conference forms only the starting-point, suggests that this aim is well on its way to being realised. It is hoped that this book conveys a sense of the richness and diversity of the papers delivered at the inaugural Public Law Conference, as well as a sense of the vibrancy of public law as an academic discipline today, of the fruitfulness of interjurisdictional dialogue within the common law world, and of what lies ahead as the Public Law Series of Conferences continues over the coming years. In this regard, we very much look forward to the second Public Law Conference, to be held in Cambridge in September 2016.

More information on the Public Law Conference, including video-recordings of the plenary sessions at the 2014 Conference, can be found at the conference website: www.publiclawconference.law.cam.ac.uk