

JUDICIAL REVIEW ACROSS THE COMMON LAW WORLD – SOME LESSONS FROM A COMPARATIVE SURVEY

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It is a great privilege to be invited to give this talk to the Attorney-General's chambers in Singapore. I have recently been in Hong Kong conducting a case before the Court of Final Appeal. You will be pleased (but perhaps not altogether surprised) to learn that everyone I spoke to there about Singapore had only the highest praise. In particular, your modern and forward-looking approach to law (including arbitration) was widely commented on.

It is, I believe, characteristic of a modern and forward-looking approach to law that it looks at how other jurisdictions cope with similar issues. Hopefully, therefore, my topic will not be inappropriate. It is *Judicial Review across the Common Law World – Some Lessons from a Comparative Survey*.

I think that it is easy for a lawyer in the United Kingdom to believe that the cases and principles that mark out the terrain of judicial review are the same throughout the common law world. We do not look for differences or changes. As Walter Bagehot – the great constitutional writer – once said of our unwritten constitution: *'[a]n ancient and ever-altering constitution, such as the British, is like an old man who still wears, with attached fondness, clothes in the fashion of his youth. What you see of him is the same; what you do not see is wholly altered.'*¹

That insularity of any kind is a great mistake was brought home to me when I spent a few months in the spring of 2008 researching, teaching and lecturing in Australia, New Zealand and Hong Kong. It soon became clear to me that these were all vibrant jurisdictions that did not by any means all share the same principles and where the judges were able frequently to distinguish the constitutional situation in their particular territory so as to produce a different outcome.

¹ Walter Bagehot *The English Constitution* (1867)

What is refreshing about looking at judicial review in other countries is that it can offer us lessons. We can pick up the best and discard the rest in a way that could never happen if we were starting from scratch. Some countries and supra-national institutions are very good at this; others are not so good. Neither the United Kingdom nor the United States are, I think, very good at borrowing from other jurisdictions. The United States is positively hostile to comparative law, and - thus far at least - the United Kingdom has rarely looked for assistance to the case-law of other common law countries.

In my view this is a mistake. Let me give you an example of how it can be done well. As you will know, the United Kingdom is one of the Member States of the European Union. Over the decades since it was first established the courts of the Union have developed a set of general principles of EU law which quite deliberately select the best of the principles in the different Member States. In this way, the EU has fashioned distinctive concepts which borrow from both civil law and common law jurisdictions. The EU courts can, of course, only do this by consciously studying the various legal systems throughout the countries of the Union and deciding how to incorporate the best of them into their own regime.

I want to start by looking at the foundational basis for judicial review. It is, of course, not the same as between countries, such as Singapore and Hong Kong which have a codified constitution and those of (uniquely in the common law world) the United Kingdom, New Zealand and Israel which lack one.

The difference ought to be, but is perhaps not always, obvious. In a jurisdiction with a codified constitution representing the supreme source of law, the institutions of the State are, invariably, subject to the provisions of the written law in the constitution. In a jurisdiction without a constitution there is no such subjection and a different constitutional doctrine is needed to explain the ultimate source of State power.

To those schooled in the tradition of written constitutions this may not seem a surprising proposition. Yet the fact that, if there is a written constitution, the legislature itself is subject to an even more fundamental law than that which it is empowered to create is significant. It means that to a material extent in Singapore and

Hong Kong the courts operate, at least in theory, by virtue of a doctrine of constitutional supremacy that provides the rationale for constitutional review. We shall have to explore, a little later, what this power of constitutional review means in practice, and whether it necessarily always means the same thing for countries with written constitutions. But, for the present, it is simply worth noting that it exists and that, once it is accepted that the courts possess the power of constitutional review it accords a theoretical power to strike down legislation.

In fact, very few written constitutions confer an express power to strike down legislation. But, at least where the constitution is the supreme source of law, the judges have always assumed such a power. There was no such provision in the US Constitution. It was the judges who interpreted the Constitution so as to fashion such a power in the early case of *Marbury v. Madison*.² In Hong Kong, the judges have used the Basic Law to derive the constitutional power of review. And in Singapore the judiciary infers such power from parallel provisions to those in Hong Kong. In similar fashion to Articles 8 and 11 of the Basic Law, Article 4 of the Constitution of Singapore provides for the supremacy of the Constitution and Article 93 (the parallel being Article 19 of the Basic Law) provides for the vesting of judicial power in the Supreme Court and the subordinate courts.

Now, if we compare the situation in theory in a country without a written constitution the review power of the courts is (in the absence of empowering legislation) rather different. Taking the model with which I am most familiar – that of the United Kingdom – the prevailing constitutional doctrine there is that of Parliamentary sovereignty. This is the doctrine (articulated most clearly by the eminent Victorian jurist A.V. Dicey in the nineteenth century) that Parliament is all-powerful; that it can make or unmake any law it wishes.

The trouble with an unwritten constitution like this is that no-one really knows where they are. On one occasion, when the Queen visited the lawyers' stand at University College London she picked up one of their books called '*The Changing Constitution*'. It is reported that she asked the eminent public lawyer Professor Sir Jeffrey Jowell

² 5 US 137 (1803)

'Changing Professor Jowell. What changes? I haven't noticed any changes.' He replied *'Well, evolving Ma'am. Evolving'*. She said *'Yes, but in what direction'*. That, as you might expect from the venerable head of our unwritten Constitution in the UK, really says it all.

The most significant consequence of sovereignty of the Diceyan kind we have in the United Kingdom is that the courts are, at least in theory, left with very little power in terms of judicial review. Here, for example, is the traditional, extremely limited, judicial review language expressed in a case called *Chief Constable of North Wales Police v. Evans*:³

'It is important to remember in every case that the purpose [of judicial review] ... is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question'.

In looking at this theoretically limited judicial review power exercised by judges in the United Kingdom it will, as we shall see, become important to distinguish between the theory and the practice of Parliamentary sovereignty. However, the key point to note for the moment is that, consistent with that constitutional doctrine, any law passed by Parliament can be repealed at any stage by a simple majority vote in Parliament. No Parliament can bind another. For this reason, no constitutional rights can be entrenched and the judges can interpret and apply only the laws enacted by Parliament at any one time.

From the point of view of judicial power, the position is, thus, far more restrictive than in countries with a written constitution where the constitution rather than Parliament is the supreme source of authority and where, at least in effectively drafted constitutions, amending the constitution requires a high threshold majority vote in Parliament. Where there is a constitution of this kind the judges interpret and give effect to it and the laws that are passed must comply with the requirements of the constitution or they will be struck down by the courts.

³ [1982] 1 WLR 1155, 1160

What, in this brief outline, we have seen up to now is theory rather than practice. Importantly, the fact that judges are given, as in Singapore or Hong Kong, a widely framed power of constitutional review or, as in the United Kingdom, a narrowly framed power of constitutional review does not in itself necessarily tell us how such powers will be exercised or even what principles of review will be accepted by the judges in the different common law jurisdictions.

I think that it is probably fair to suggest that – despite its wide theoretical powers of constitutional judicial review to which I have made reference - there is a perception that Singapore operates a more restricted form of judicial review than much of the common law world, including Hong Kong and the United Kingdom. One might add to this other jurisdictions such as New Zealand (which are similar to, but possibly even more rights-centred than, the UK) and Canada.

This would be in contrast to, say, Australia which (like, I believe, Singapore) operates consistently with a ‘green light’ theory of administrative law. Green light theory is, as you may know, a theory of judicial review as being complementary to government and as existing more to help the government to achieve stated policy objectives. It is to be contrasted with ‘red light’ theory which views the courts’ role as being more to assist the citizen to defend himself or herself against the State and, where appropriate, to curb State activity. Australia has sometimes been branded as being ‘exceptional’ in nature. But all this really means is that the judges there approach judicial review with more circumspection than in most other common law jurisdictions. This is plainly a legitimate policy choice.

At the heart of any relevant comparison is this underlying question of the true purpose of judicial review, and the proper role of the judges in judicial review challenges; especially constitutional challenges. I should say at once that I do not think that there is any uniform true purpose or any necessarily uniform judicial role. These may legitimately vary as between jurisdictions.

There are, for example, a great many similarities between the constitutional structures of Singapore on the one hand and Hong Kong on the other. Both were, of course, former British colonies. Both have a common law system derived from that prevailing

in the United Kingdom. Both populations are, predominantly, Chinese. Both have a codified constitutional framework; Singapore has its Constitution, Hong Kong has its Basic Law. Both have an entrenched Bill of Rights. Both have a democratic government. Both adhere to the rule of law. Both possess an independent judiciary. You might, therefore, expect them to have the same level of judicial review.

Yet, despite these close formal similarities, judicial review in Hong Kong is unapologetically ‘red light’. It would take an observer much more familiar than I am with the situation there to understand why this is so. But I suspect that it has something to do with the power dynamic that exists in Hong Kong between (as an institution) the judiciary and the Mainland government. Universal suffrage in Hong Kong remains uncertain; the Basic Law contains a very clear demarcation of power as between the courts (to whom power is only delegated by the NPC) and the NPC Standing Committee which – under the Basic Law itself (see Article 158(1)) has ultimate, and full, power to interpret all provisions of that Law.

Article 158(3) of the Basic Law requires the Court of Final Appeal in Hong Kong to refer a case to the NPC Standing Committee in certain clearly defined situations. But it has become clear over the years since this provision was enacted in the Basic Law that, in a sensitive and delicate area where Mainland government interests are thought to be involved, a reference will be made one way or another (not necessarily by the courts but by the Government) even if the CFA considers that, applying common law principles, no reference is called for.

Thus, in one case,⁴ the CFA made a ruling that, amongst other things, appeared to give it authority to declare legislative acts or other decisions of the NPC or its standing committee to be unlawful. Not only did the regional government of the HKSAR (exercising an asserted implicit power) itself seek a reference over the specific issues in the case, but a degree of pressure was obviously exerted on the CFA to issue a ‘clarification’ of its judgment.

In its ‘clarification’ the CFA said this:

⁴ *Ng Ka Ling and Others v. Director of Immigration* (1999) 1 HKLRD 315

'The court's judgment ... did not question the authority of the Standing Committee to make an interpretation under article 158 which would have to be followed by the courts of the Region. The Court accepts that it cannot question that authority. Nor did the Court's judgment question, and the Court accepts that it cannot question, the authority of the National People's Congress or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein.'

The short point is that in Hong Kong an uneasy relationship still appears to subsist, unfortunately, between the courts of the HKSAR (or at least some of the judges of those courts) and the Mainland government. In the recent *Congo* case⁵ about whether Hong Kong had to follow China's version of absolute sovereign immunity or whether – given the autonomy of the HKSAR ('one country, two systems') – it was permitted to adopt its own restricted sovereign immunity, at least a minority of the CFA appeared to feel the rule of law itself to be in issue and the rumblings of a potential constitutional crisis to be imminent.

I will read (in reverse order) two paragraphs from one of the minority judgments.

At paragraph 125:

'It has been suggested that it would threaten Chinese sovereignty, embarrass China and result in prejudice to China if the Court were to pronounce in favour of restrictive immunity in the courts of Hong Kong. Not for one moment does the Court take any of these concerns lightly. But judicial independence and the rule of law are also to be taken seriously. The law never threatens, rather does it always serve'

And at paragraph 84:

'Even – and perhaps especially – in the face of a threatened constitutional crisis, it is essential to the survival of the rule of law in general and judicial independence in particular that when the Court decides whether or not to seek an interpretation under art.158(3), its decision is reached by a faithful application of the law. It is not a matter of discretion, whether for the purpose of avoiding controversy, however fierce, or for any other purpose'

⁵ *Democratic Republic of Congo v. F.G. Hemisphere Associates Ltd* (2010) FACV Nos 5, 6 and 7

The reality of the current power dynamic operating in Hong Kong seems to be that although the courts are, undoubtedly, free to apply common law principles, some judges feel the need to assert their independence in a way that would not obviously be necessary if judicial review were viewed as being complementary to the aims of the government rather than (sometimes at least) as being in tension with those aims. This is, perhaps, why constitutional review by the courts and the striking down of regional laws as being inconsistent with the Basic Law is very common in Hong Kong.

It seems that a rather different situation may prevail in Singapore where I understand the number of successful constitutional review cases to be extremely few. In this context, the present (until, I understand, November 6 2012) Chief Justice (Chan Sek Keong) gave a lecture, two years ago, to second year law students at Singapore Management University.⁶ He had received the impression that some of the students had what he called '*a sense of unease about the dormant state of judicial review in Singapore.*' He therefore devoted his lecture to a robust (and, to my mind, convincing) vision of judicial review in Singapore and to developing a version of judicial review in Singapore as being more in accord with 'green light' than with 'red light' theory.

For example, he made the point that the form that judicial review takes in a particular society is very much a product of the socio-political attitudes in that society. He contrasted the position in the United Kingdom and Singapore. In the United Kingdom (as in Hong Kong) there has been increased judicial activism in judicial review in the last few decades. I have sought to explain why this is the case in Hong Kong. In the United Kingdom the Chief Justice offered his own explanation. He suggested that the expanding welfare state has led to greater state intrusion and interference with individual fundamental liberties. He also said that there was a strong perception that the traditional political mechanisms for correcting executive excesses such as ministerial responsibility and Parliamentary oversight committees have proved to be ineffective. It was in that climate that the judges stepped into what the Chief Justice of Singapore termed '*the constitutional vacuum*'.

⁶ *Judicial Review – From Angst to Empathy* (2010) 22 SAcLJ 469

As I have said, I agree with the Chief Justice's analysis of the legitimate differences between 'red light' judicial review (as practised in the United Kingdom) and 'green light' judicial review (as practised in Singapore and Australia). However, my own explanation for the strong position taken by the courts of the United Kingdom, often in ostensible defiance of the wishes of Parliament, to the protection of individual rights is a simpler one. It stems from the contrast between the constitutional doctrine of Parliamentary sovereignty and the political developments that have occurred in the United Kingdom to weaken the effectiveness of that doctrine and, for the first time, to pave the way for the judges to inquire into the legality of laws passed by Parliament.

Now in Singapore, you have had a Constitution for many years which allows the judges to do precisely that. Because this is a tradition which is both continuous and familiar, it has caused no great debate about the proper function of the judiciary.

But in the United Kingdom the doctrine of Parliamentary sovereignty – which is not underpinned by any written Constitution – has, in terms of its constitutional legitimacy, been progressively weakened for many years. Left to itself, it leads (as I have explained) to a weak form of judicial review. But once it is eroded it is a little like opening Pandora's box. You never know what might fly out.

The judges now wield a greater judicial review power in the United Kingdom than Parliamentary sovereignty would seem to allow. Given what I have said about the very limited judicial review power suggested by Parliamentary sovereignty it is, perhaps, instructive for lawyers in Singapore to see how things have gradually altered.

The traditional view of Parliamentary sovereignty as the bedrock principle of administrative law, was first to be shaken by a heated debate following one particular court decision. It arose by what seemed to be a purely logical extension to the parameters of judicial review. In *R v. Panel on Take-overs and Mergers, ex p. Datafin*⁷ the Court of Appeal held that the Take-over Panel a non-statutory body (but one wielding immense public power) was amenable to judicial review.

⁷ [1987] QB 815

It is doubtful whether that Court and, in particular, Lord Donaldson MR who gave the leading judgment would ever have seen this as a constitutional case in which, from the reasoning of the Court of Appeal in a commercial judicial review dispute, the respective functions of Parliament and the Courts would come to be questioned. Yet this is exactly what occurred.

It was precisely because the Take-over Panel was not a statutory body that it was argued by some leading academics and judges that judicial review could not be premised upon the doctrine of Parliamentary sovereignty at all. Rather than analysing the 'non statutory' cases as an exception to the general rule, the argument was voiced that if non-statutory bodies were equally subject to judicial review it followed that some different principle to sovereignty must underpin public law. This was constitutionally significant because if sovereignty was the basis for judicial review then, consistently with Parliamentary sovereignty, the courts had to follow the will of Parliament. But if some new principle lay at the core of judicial review then this must be one fashioned by and (importantly) controlled by the judges.

The arguments were articulated graphically in the memorable phrase of Sir John Laws (writing extra-judicially) who said that it should now be openly accepted that many rule of law principles such as natural justice were imposed by the judges applying common law in the face of legislative silence and that it was a '*fig leaf*' or a '*fairy tale*' to suggest that Parliament had, in such cases, impliedly legislated for fair procedures to be followed.

Moreover, at about the same time, EU law reared its head and raised a further difficulty for Parliamentary sovereignty as an all-encompassing source of constitutional power. In theory (though it was not appreciated at the time) as soon as the United Kingdom joined the European Community in 1972 there had been the scope for domestic judicial power to increase. Throughout the 70s and 80s the doctrine of the supremacy of EU law was developed and the EU also developed its own parallel fundamental rights jurisdiction. By the late 1980s the scene was set for a confrontation between the courts (albeit the EU court) and the Executive.

In *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)*⁸ (a case about Spanish fisherman and national controls on fishing said to be in breach of EU law) the European Court of Justice held that the English domestic legal rules preventing the grant of interim injunctive relief against the Crown were incompatible with EU law as impairing its effectiveness in terms of the protection of asserted EU Treaty rights.

The ECJ ruled that interim relief must be available, and the domestic prohibition set aside, even where—according to the logic of the court’s judgment—that involved suspending the operation of an Act of Parliament. As the Court stated:

The full effectiveness of Community law would be ... impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.

Although the case was about the supremacy of EU law, the *Factortame* litigation made constitutional review far easier. For the first time it became possible for judges to act in a way that made the doctrine of Parliamentary supremacy seem counter-intuitive. How could Parliament be supreme, at least within the scope of EU law, if Parliament was subject both to the control of the EU courts and, through those courts, to the control of the United Kingdom domestic courts?

But the real trigger for increased judicial power was still to come. Within a decade of *Factortame* the Human Rights Act 1998 had been enacted (though it did not come into force until 1 October 2000). This Act effectively incorporated the European Convention on Human Rights into UK domestic law.

The Parliamentary draftsman (no doubt mindful of *Factortame*) was careful to draw back from a remedial solution that encroached on the sovereignty of Parliament. In the United Kingdom, unlike Singapore or Hong Kong, if a law violates the European Convention on Human Rights the courts cannot strike it down. There is only the statutory remedy of a declaration of incompatibility. But, under the Human Rights Act, such a declaration is expressed to have no legal effect upon the validity of the statute that the court has declared to be incompatible with the European Convention.

⁸ Case C-213/89 [1991] AC 603

Both the incompatible law, and actions taken to give it effect, retain full legal validity under the Act even after the Court has granted its declaration.

Yet, life is rarely as straightforward as law. In practice the declaration of incompatibility has proved to be as good as a constitutional review power of striking down. If a declaration of incompatibility is made in respect of laws that violate the European Convention on Human Rights, the appropriate Minister must consider making what is called a 'remedial order' to bring the law into line with the requirements of the Convention. Almost every declaration of incompatibility granted by the courts in the 12 years that the Human Rights Act has been in force has resulted in a change in the legislation where it fails to comply with the Convention.

With the enactment of the Human Rights Act (a piece of legislation that gives a new name to the law of unintended consequences) came, in fact, one of the fastest constitutional catalysts in the United Kingdom for a change in the balance of power since the 1688 glorious revolution. The time-span between the drafting of the USA Constitution in 1787 and the striking down of the first Act of Congress in 1803 was 16 years. It took almost the same length of time from the formation in France of the Conseil Constitutionnel in 1958 to the establishment of its powers in the mid 1970s.

But in the UK it took less than a year before the judges were regularly granting declarations of incompatibility under the Human Rights Act. By 2006, less than 6 years after the Human Rights Act came in, Tony Blair (then Prime Minister) was saying that it should be amended to curb the powers of the courts. David Cameron (our current Prime Minister) has set up a domestic commission on human rights whose rationale, at least in conception, seems to have been to weaken the effect of the Act if not to scrap it.

What has happened in the United Kingdom over the last decade (since the passing of the Human Rights Act) has been a surge of constitutional review by the courts. Although (save for the recondite area of EU law) it had not happened before the new millennium, judges now routinely examine legislation with a view to determining its legality. True it is that the judges cannot (yet) strike down legislation (even in an EU case they - perhaps euphemistically - only 'dis-apply' it in its EU context) but the

difference between a constitution that permits the striking down of legislation and a constitution that does not is, I believe, often more apparent than real.

Some judges in the United Kingdom (perhaps emboldened by their newly-gained experience of declaring primary legislation to be incompatible with the European Convention on Human Rights) have now gone as far as to argue that Parliamentary sovereignty is itself but a construct of the common law. In *Jackson v. Attorney General*⁹ different views were expressed as to the constitutional status of Parliamentary sovereignty. However, Lord Steyn said this:

'The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish. It is not necessary to explore the ramifications of this question in this opinion. No such issues arise on the present appeal.'

There is a dawning recognition that the doctrine of Parliamentary sovereignty may not completely work in the real world. For example, if (as is the case) European Union law is supreme and binds national courts then the judges have no option but to dis-apply offending legislation. They are as powerless as the supposedly omnipotent Parliament that enacted the law in the first place.

Professor Vernon Bogdanor (at King's College London) has always been a principled opponent of the doctrine of Parliamentary sovereignty. Some, who have criticised his views in print, such as Professor Jeffrey Goldsworthy and the late Lord Bingham of Cornhill have accused him of confusing the practical with the legal. The fact that Parliament cannot do something in a practical sense, so it is observed, does not mean that it cannot do so in a legal sense. Thus, for example, no matter that in practice judicial review operates to prevent Parliament from ousting the jurisdiction of the courts; in such cases it is suggested by adherents of sovereignty that the judges follow

⁹ [2005] UKHL 56

what Goldsworthy terms the '*noble lie*' so that '*the fact that a lie is felt to be required indicates that the judges themselves realise that their disobedience is, legally speaking, illicit.*'

But when the divorce between constitutional theory and real life becomes as stark as this, the constitutional theory itself may need to be qualified.

These particular developments are, I should emphasise, specific to the United Kingdom. What they suggest, however, is that whatever constitutional theory may have to say about the judicial review powers the courts should possess, it may say little about the way in which judges exercise their review powers in practice. In theory, judges do not possess a constitutional review power in the United Kingdom. In practice the judges operate a 'red light' system of judicial review every bit as intrusive on the executive as if there were a written constitution such as those in, say, the USA or Hong Kong.

With the enactment of the Human Rights Act, in particular, has come argument that one side or the other (judges or government) is breaking the constitution. Judges say that the executive is breaking the constitution because it is assuming power unlawfully that the Human Rights Act has taken away. The best example lies in the terrorism cases where the House of Lords and Supreme Court have regularly declared State measures to be Convention-incompatible that sanction evidence through torture or the imposition of inhuman or degrading treatment on alleged terrorists. For its part, the executive maintains that an un-elected judiciary is thwarting the will of Parliament and defying the doctrine of Parliamentary sovereignty.

We have now looked (in the most general terms) at theory and practice. I have suggested that theory and practice do not necessarily converge and that changes in the way that judicial review power is exercised may spring from unintended consequences (whether from new laws or from new court rulings) as well as from the general political relationship subsisting between the government, its citizens and its courts.

Against these considerations, I want to spend the remaining time outlining the way in which some public law concepts have evolved in different jurisdictions and assessing their treatment (and, sometimes, possible potential for development) in Singapore.

I will start with proportionality. This, as developed in most jurisdictions, focuses on fundamental rights protection. It requires administrative action to be rationally connected to stated objectives and to impair rights no more than is reasonably necessary in order to accomplish those objectives. As a legal doctrine it allows judges a more expanded role in evaluating whether fundamental rights have been infringed. Proportionality has been accepted in the UK, Canada and New Zealand in the context of Bills or Charters of rights. Over time it may spill over into the common law but has not yet done so.

In the United Kingdom, prior to the enactment of the Human Rights Act, the UK courts had introduced a spectrum of irrationality review with human rights cases receiving the most '*anxious scrutiny*' by the judicial review judges. Even this '*variable intensity*' review was not recognised by the European Court of Human Rights in Strasbourg which held in a case in 1997 that a higher standard, that of proportionality, was required. With the coming into force of the Human Rights Act 1998 proportionality in its standard Strasbourg form became part of domestic law in fundamental rights cases to which it applied. Strasbourg proportionality looks not merely at whether there is a law in force but at the *quality* of the law. A law that lacks clarity, or foreseeability or accessibility will fail the proportionality requirements altogether.

Proportionality has not been generally accepted in Australia. It should, though, be appreciated that Australia's Constitution makes no mention of fundamental rights at all and that it is left to the various States to introduce such Charters as they see fit; if and when States so legislate then it will apply to the statutory rights so created.

It can scarcely be denied that proportionality derives from a continental European legal model and raises issues about the tension between legislative supremacy and judicial review. Australian legal commentators, in particular, have observed that a

different conception of constitutionalism and administrative law prevails in continental Europe.

What is the position in Singapore? My understanding is that, along similar lines to Australia, the courts have rejected comparison with the concept of proportionality as articulated by the European Court of Human Rights in Strasbourg and as applied throughout many common law jurisdictions in protecting fundamental rights. The basis for Singapore's rejection of the doctrine in this form stems, at least in part, from the different meaning attached to the wording of the rights provisions in the Constitution of Singapore from the concept as deployed in the Strasbourg case-law.

Part IV of Singapore's Constitution makes express provision to the effect that the fundamental rights there guaranteed are to be exercised '*in accordance with law*' or subject to restriction by '*law*.' The term '*law*' has, in this context, been held to include any enactment regardless of its content. It was held in a Court of Appeal case in 1998 (see *PP v. Taw Cheng Kong*¹⁰) that: '*[t]here is a strong presumption of constitutional validity of written law*' and that the applicant challenging unconstitutionality bears '*the burden of placing all relevant materials before the court to show that a statutory provision or the exercise of power under it is arbitrary and unsupported*'. Thus, unlike Strasbourg, the fact of a law in Singapore goes a long way to support proof of its constitutional validity.

If I take off my UK hat for a moment and consider the general approach to proportionality taken by (say) Singapore and Australia to that taken by most of the other common law review jurisdictions it seems to me defensible. Legal concepts have a habit of spreading, like a virus, between the different jurisdictions and the danger is always that a mistake made early on will simply be adopted uncritically by the next jurisdiction to which the virus attaches. Comparative public law is not, to my mind, at all the same thing as simply transposing a particular juridical concept from one jurisdiction to a different jurisdiction which may have different values and a different constitutional settlement.

¹⁰ [1998] 2 SLR 410 [60]

There are at least two relevant points. The first point is that the Constitution of Singapore states (see Article 14(2)) that Parliament may enact laws to impose ‘*such restrictions as it considers necessary or expedient in the interests of...*’. Thus, there is a legislative subjectivity woven into the terms of the Constitution itself in terms of what is a legitimate restriction on fundamental rights. This is very important because in the United Kingdom at least the courts have held that the test for whether a State measure is proportionate is ultimately one for the courts and not for the decision-maker (including the government). It is not immediately easy to see how such a ruling could be made in the courts of Singapore.

Secondly, proportionality involves a considerable measure of judicial intervention on the exercise of executive power which may be considered at odds with a ‘green light’ theory of judicial review and, therefore, antithetical to Singapore’s approach to judicial review.

The potential for impermissible judicial encroachment on executive power was recognised many years ago by the House of Lords in a case called *R v HS, ex p. Brind*¹¹ (a case about the legitimacy of a broadcasting ban on terrorist organisations) in which proportionality was rejected as a head of judicial review.

In *Brind*, Lord Roskill stated that it was ‘*not a case in which the first step can be taken*’ and that in his view, proportionality would force the court ‘*into substituting its own judgment of what was needed to achieve a particular objective for the judgment of the Secretary of State upon whom that duty has been laid by Parliament*’. Lord Roskill plainly saw the use of proportionality as necessitating an unlawful imposition into executive power. Judicial review would become an appeal against a decision, rather than an assessment of that decision’s legality and legitimacy. This had never been the objective of review and it was beyond the courts authority to grant such an extended power. Lord Lowry agreed observing that ‘*there can be very little room for judges to operate the proportionality doctrine in the space which is left*’ between ‘*conventional judicial review*’ and ‘*the forbidden appellate jurisdiction*’. He felt the courts were ‘*not well equipped by training or experience*’ to balance factors in an

¹¹ (1991) UKHL 4

administrative decisions, and that introducing proportionality would increase the number of applicants for judicial review, with a consequential increase in costs and court time.

Let me turn, next, to a concept with which I have some anecdotal advocacy experience, that of substantive legitimate expectation. I was counsel in *R v. North & East Devon Health Authority, ex p. Coughlan*¹² in which the doctrine was first accepted in the common law world by the English Court of Appeal.

Expressed shortly, it is the idea that a public body may be constrained in certain circumstances to honour an unequivocal promise that it has given. The undeniably radical nature of the doctrine is that it may compel the authority in question to provide a substantive (as opposed to a merely procedural) benefit even where it has changed its particular policy.

You can, perhaps, easily see why it is a highly controversial issue in every common law jurisdiction. Applied to executive action, it is capable of operating as a severe constraint on policy-making. Indeed, in its human rights form as applied by the European Court of Human Rights in Strasbourg it goes even further; it has been held consistently that a substantive legitimate expectation may be a property right under Article 1 Protocol 1 of the European Convention and even that the requirements imposed by a substantive legitimate expectation may mandate that a public authority (including a government department) act outside the powers otherwise conferred on it by domestic law.

As in the case of proportionality, it is (as I may already have implied) an idea emanating from European administrative law. It has been roundly rejected in Australia. The Supreme Court of Canada has also rejected it. When I taught in New Zealand the New Zealand courts had not yet decided whether it applied there. On the other hand, the CFA in Hong Kong has upheld *Coughlan* in a right of abode case. I recall an amicable but intense discussion with several members of the Department of

¹² [2001] 1 QB 213

Justice in Hong Kong as to why they considered that *Coughlan* had been wrongly decided!

The circumstances of *Coughlan's* case were, of course, highly unusual. If ever there was going to be a ruling that brought in substantive legitimate expectation it was her case. Pam Coughlan, a young school-teacher, was run over by a car and rendered tetraplegic. She had spent most of her life in a long-stay hospital. She was given a firm promise of a home for life at an institution called Mardon House if she left her long-stay hospital. In reliance on that promise she agreed to move. No sooner had she done so than the Health Authority stated that it wished to close Mardon House because of changes in legislation that were said to render the health-care that Ms Coughlan had been receiving a new form of social care for which payment was required. She was told that she would not, in fact, be charged for her new accommodation but that it could no longer be at Mardon House which was an NHS hospital and not a social care residence.

It is difficult to think of a more heart-rending case. The Court of Appeal held that in the circumstances of her case she had a substantive legitimate expectation. It held that whether her expectation could be breached was not a matter for the Health Authority but was, rather, one for the court. This was because the relevant test was one of fairness and not rationality.

As the winning advocate in that case it is hardly for me to denigrate the doctrine of substantive legitimate expectation. But it is, perhaps, worth bringing to your attention that not only have very few countries yet been persuaded to accept it, but when I used the same argument in a case that came before *Coughlan - R v. Secretary of State for Transport, ex p. Richmond-upon-Thames LBC*¹³ - Laws J dismissed my argument as 'barren'. When I put in an article by his former pupil Professor Christopher Forsyth – now a leading academic at Cambridge – who strongly supported the concept of substantive legitimate expectation, Laws J told me that he had persuaded Professor Forsyth to change his mind!

¹³ [1994] 1 WLR 74

Singapore has yet to make up its mind as to whether to embrace substantive legitimate expectation. There are respectable arguments for and against (though in the United Kingdom it would not be possible to reverse the concept in either an EU or a Strasbourg setting because legitimate expectation is firmly established in each of these European jurisdictions). However, what I would say, is that substantive expectation is very much a product of ‘red light theory’ rather than ‘green light theory’.

The last topic I will deal with before making some concluding remarks is not so much a concept as an approach to judicial review. It is the subject of statutory interpretation. It bears a relationship both to proportionality and to legitimate expectation in that just as those concepts depend on the degree of trust placed by the courts in executive action so, too, the more a ‘red light’ approach is adopted, the more liberal and purposive will be the fashion in which statutes are construed by the courts; on the other hand, a ‘green light’ stance is more literal; more syntax-driven.

Purposive interpretation is now extremely popular in most common law jurisdictions, especially in the arena of fundamental rights protection. In the United Kingdom, for example, we have the idea of the ‘*always speaking*’ statute. This recognises that the original Parliamentary intent may be of limited value where the original language of the statute is no longer adequate completely to reflect Parliament’s supposed underlying rationale in enacting the legislation. So, the House of Lords was, for example, willing in *R v. Ireland*¹⁴ to interpret the offence of assault occasioning actual bodily harm under an Act of Parliament passed in 1861 as encompassing a silent telephone call where psychological damage resulted.

In relation to actual bodily harm, Lord Steyn observed that the Parliamentary draftsman in 1861 would, doubtless, not have contemplated psychiatric harm. But, he went on to suggest that ‘*the correct approach is simply to consider whether the words of the Act of 1861 considered in the light of contemporary knowledge cover a recognisable psychiatric injury.*’

¹⁴ [1998] A.C. 147

In a human rights context (again in the UK) the need for the courts to re-write a statute in order to render it compatible with the European Convention is now provided for in the Human Rights Act itself. HRA s. 3 provides that *'[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'* This replicates in substantial part the EU law requirement that so far as is possible all domestic law must be interpreted in order to render legislation compatible with EU law (see: the *Marleasing* case.¹⁵ In Hong Kong it is well established that in a constitutional challenge a strong, purposive approach must be taken to statutory construction (see *Ng Ka Ling*, fn 4 above).

Singapore, it should not be forgotten, has introduced s. 9A into its Interpretation Act. This states that *'[i]n the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose of object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose of object.'*

However, it would not, I think, be unfair to suggest that for the most part the courts of Singapore prefer an approach to interpretation that looks primarily to the language of the statute.

Again, there is a sound constitutional reason for this which, before the advent of purposive construction, was uniformly preferred by the common law courts. It is that there is a thin borderline between judges being judges and judges becoming legislators.

It is sometimes said that in the United Kingdom Parliament enacted the Human Rights Act and so have legislated consistently with Parliamentary sovereignty to give judges increased review powers. The judges are therefore simply acting in accordance with the will of Parliament. But it is perhaps doubtful whether Parliament really envisaged that the courts would embrace their review powers with such enthusiasm or

¹⁵ *Marleasing SA v. La Comercial Internacional de Alimentacion SA* (1990) C-106/89 [1990] ECR I-4135)

comprehensiveness. Where Parliament enacts legislation to which it has given a certificate of Convention compatibility and been through a detailed Parliamentary process involving legislative scrutiny committees it is, surely, a fiction to suggest that Parliament really intended the courts to be in a position to strike the legislation down for unconstitutionality.

I have been examining an exemplary selection of common law concepts. I could, to make the same point, have chosen others such as the principles of natural justice, a duty to give reasons, error of law on the face of the record and so forth. The essential point is that underlying each of these concepts (and the concepts/approaches I have discussed in more detail) and the way in which they are developed by the courts is a basic dichotomy of opinion and a deliberate choice. At the heart of that dichotomy of opinion and deliberate choice is a view of the proper role of judicial review in a particular society.

Is judicial review, or should judicial review be, a mechanism for the courts curbing the activities of a government that is mistrusted, or a mechanism for complementing governance?

There is no single (or simple) answer to this. In her authoritative 2002 BBC Reith lectures entitled '*A Question of Trust*'¹⁶ Baroness Onora O'Neill explored the limitations of a society that either does not have, or has lost, trust in its rulers. Trust (or lack of trust) in government is, I believe, an important touchstone for the quality of judicial review in a particular society.

Lack of trust is not something you can see or touch or feel. It is not an especially dramatic idea either; in many societies there is perennial lack of trust between government and the governed and yet no-one believes that they are living in an unusually dysfunctional community. It is, perhaps, a little like courage. If you spend too much courage, there may not be a great deal left to use when the need arises. Once trust is lost and there is a culture of complaint, a domino effect can take over and the

¹⁶ Published as *A Question of Trust* (2002) Cambridge University Press

rule of law becomes conflated with the imperative of curbing government rather than working with government.

Consider, for example, an extract from an email that I received here in Singapore just two days ago. It came from Hong Kong where I have also visited recently. The sender said this:

'I attended the farewell sitting for [a retiring judge] yesterday and he was visibly emotional in his speech. The key message was that he saw 'storm clouds' ahead for the rule of law in Hong Kong. There is a Chinese saying that you don't know it hurts until the pin pricks the skin. I know some people don't think much of this constant 'carping' about the threat to rule of law and to these people there is every sign that judges are independent and all is well. But the rule of law or indeed any kind of trust or confidence is actually quite fragile, it takes a long time to build up but can be eroded quite quickly, before you even realize it. Constant carping is an important safeguard and probably the best defence by the weak against the strong'

Note the reference to the erosion of trust which, I think, explains some of why judicial review in Hong Kong is focused on curbing the legislature and not complementing it. My impression (and I speak very much as an outsider and first-time visitor) is that in Singapore authority is trusted.

You are, of course, likely to have to confront similar issues in judicial review cases to those in other jurisdictions; I am aware that already the same types of constitutional challenges are surfacing here that have hit the United Kingdom courts in recent years.

Yet, I believe you will face them successfully and in your own way. There is in Singapore a broadly collective belief (you might call it a 'social compact') that authority will protect you and that in a well regulated society you need strong and effective government. That higher level of trust is reflected in a less intrusive form of judicial review by the courts.

I do not think that this is a bad thing.