A RIGHTS-BASED APPROACH TO JUDICIAL REVIEW? THE HIGH COURT IN *GRIFFITH UNIVERSITY V TANG* AND THE DANGERS OF DISMISSING ULTRA VIRES

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Introduction

The theoretical basis of judicial review of administrative decisions comes from the doctrine of ultra vires. The doctrine, based on upholding the rule of law, allows the courts to examine administrative decisions to ensure that they are within the scope of the power under which they were made. If decisions are made outside, or without, power, the court can hold them to be *ultra vires* and thus illegal. Such an exercise of judicial power does not threaten the separation of powers, as the court is merely ensuring that the will of Parliament is achieved by scrutinising the decisions of its delegates. Given that the judiciary is an unelected and unrepresentative arm of the government, and according to the doctrine of separation of powers, subordinate to the will of the people as expressed through the Parliament, the limitation that *ultra vires* places on review powers is consistent with the judiciary's position in the Government.

The post-World War II expansion of the administrative state has been accompanied by a willingness on the part of the judiciary in countries including the United Kingdom and Australia to take a broader approach to the question of legality of decisions. As well as looking at the express provisions of the legislation conferring power, courts routinely imply requirements of reasonableness and fairness into the limits placed on decision-makers. The use of *ultra vires* to justify the expansion of judicial review by judicial implication of Parliamentary intention has been described as a convenient fiction, or 'fig leaf' to cover the realities of increasing judicial influence, based on standards of conduct that are not drawn from any statute.

The limits of *ultra vires* as a basis for judicial review have prompted a search for an alternative source of authority for judicial scrutiny of public decision-making. In the United Kingdom, a theory of 'higher-order' law has emerged. According to common law constitutionalists, the common law provides a set of 'higher-order' rights that must be observed by Government. In this paper, I will examine the emergence of this new, rights-based approach to the exercise of judicial power in the United Kingdom. I will argue that its focus on the *effects* of the exercise of public power, rather than the limits governing the source of the power is an unstable basis for achieving meaningful accountability in public decision-making.

The recent decision of the Australian High Court in *Griffith University v Tang*[1] provides a compelling illustration of the limiting effect of a rights-based approach when applied in a conservative court, in a jurisdiction with very little statutory rights protection. While a rights-based approach was successfully used to hold government accountable in a series of

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decisions in the UK, the approach leaves much to judicial discretion and thereby threatens traditional notions of separation of power as well as casting doubt on the legitimacy of the judiciary. Without a legislative bill of rights making individual rights legally enforceable the adoption of a rights-based approach has the potential to significantly limit judicial review.

The doctrine of ultra vires as a justification for judicial review

The origins of judicial review lie in what Aronson calls review for 'simple ultra vires'[2]. The doctrine of *ultra vires* has been described as 'the central principle of administrative law.'[3] The following is a brief and simplified résumé of the doctrine. Because responsible government must act in accordance with the rule of law, the courts have a role in determining whether they have acted within the 'four corners of the law'. Administrative acts and decisions can therefore be reviewed by the courts and found invalid if they have breached the law, or are outside the scope of the power given to the decision maker by law.[4]

This justification for the exercise of judicial power is attractive for its consonance with traditional views of parliamentary sovereignty. In a review for 'simple' *ultra vires*, a court looks to the Act under which a decision is made and determines what limits are expressly contained in, or can be implied into, the exercise of power as authorised by the Act. In such a case, the court is not purporting to do anything more than ensuring that parliamentary intent is fulfilled by those to whom Parliament has delegated power.

Statements of this traditional role for the judiciary are numerous. In Australia, for example, Brennan J said in *Ainsworth v Criminal Justice Commission*[5] that administrative law:

> depends at base on the principle that any person who purports to exercise an authority conferred by a statute must act with the limits and in the manner which the statute prescribes.[6]

As Selway observes, this statement positions judicial review as one aspect of 'the proper role of the courts in both recognising and enforcing parliamentary sovereignty. The courts had jurisdiction to interfere because the relevant act was ultra vires and invalid.'[7] In performing judicial review, the courts are not trumping Parliament's authority, but working to ensure it is appropriately obeyed.

Expansion of the doctrine

In both the UK and Australia there has been a progressive expansion in the grounds for which a court will find an action *ultra vires*. Courts have considered, under the banner of ultra vires, questions of affording natural justice, improper purposes, legitimate expectations and unreasonableness in decision-making. While this development can certainly be applauded for strengthening scrutiny over the increasingly powerful administrative arm of government, it poses a threat to the cogency of the *ultra vires* doctrine.

The courts have sought to minimise the implications of this expansion, continuing to assert that such principles can be implied into the intent of legislators conferring power. The expansion by implication does not, according to judicial orthodoxy, threaten the principle of parliamentary supremacy over the judiciary:

> The fundamental principle [of judicial review] is that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully…this intervention is based on the proposition that such powers have been conferred on the decision-maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in a *Wednesbury* sense, reasonably. If the decision maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is *Wednesbury* unreasonable, he is acting ultra vires his powers and therefore unlawfully.[8]

The attempt to incorporate new grounds into traditional ideas of *ultra vires* has been met with cynicism by some commentators. Wade, for example, argues that the courts 'can make the doctrine mean almost anything they wish by finding implied limitations in Acts of Parliament…'[9]. Commentators and the judiciary have argued that *ultra vires* is simply too narrow to form a justification for the current scope of judicial intervention in administrative decision-making. Perhaps the most famous statement comes from Sir John Laws, in his article 'Law and Democracy'[10]. Laws argued in that article that while illegality as a ground of judicial review can be easily traced to the imperative of ensuring that decision makers act within the limits prescribed by a proper construction of the Act that confers power, *Wednesbury* unreasonableness and procedural unfairness cannot. In fact, according to Laws, 'their roots have grown from another seed altogether.'[11] Laws argued that these principles:

> …are, categorically, judicial creations. They owe neither their existence nor their acceptance to the will of the legislature. They have nothing to do with the intention of Parliament, save as a fig-leaf to cover their true origins.[12]

As Laws points out, by 'creating' principles like *Wednesbury* unreasonableness and procedural fairness, "the courts have imposed and enforced judicially created standards of public behaviour."[13] If authorisation for such principles does not come from the legislature, where does it come from?

It could be said that through 'judicial creations' such as those described above, the courts have effectively extended judicial control over the legislature, reversing the traditional position of Parliamentary supremacy over the judiciary. Such a reversal is manifestly undemocratic, as it allows judges to invalidate decisions made by elected representatives and as such threatens traditional understandings of the separation of powers.

Common law constitutionalism

The threat of the expansion of judicial influence identified by critics like Wade has prompted a search for another basis on which judges can justify their increased participation in public decision making. In 'Law and Democracy', Laws argued that there was no need to rely on the 'fig leaf' of parliamentary intention and *ultra vires* because judges could instead rely on a 'higher order law': 'a law which cannot be abrogated as other law can, by the passage of a statute promoted by a government with the necessary majority in Parliament.'[14] Laws challenged traditional arguments about the need for Parliamentary supremacy by arguing that democratic power should not, in fact, be absolute. To function properly, according to Laws, there are some 'limits which…[democratic governments] should not overstep.' These limits were the substance of the 'higher-order' law that Laws advocated. Laws' theory has been reflected in the writing of other commentators, including Dawn Oliver, Trevor Allan, Paul Craig and Jeffrey Jowell. Thomas Poole refers to the theories of this group of writers as 'Common Law Constitutionalism'. Poole has pointed out that the theory re-positions the court in the hierarchy of government. Rather that its traditional role as the enforcer of Parliament's will, the court emerges as the guardian of rights and values:

> The essence of the theory of common law constitutionalism is the reconfiguration of public law as a species of constitutional politics centred on the common law court. The court, acting as primary guardian of a society's fundamental values and rights, assumes, on this account, a pivotal role within the polity.[15]

Importantly for the purposes of this paper, Poole argues that the key difference between this justification for judicial action and that provided by the *ultra vires* principle is that according to common law constitutionalists, 'unlawfulness…becomes a function of rights: a decision of a public body is unlawful if it violates (unjustifiably) the claimants rights.'[16]

It is worth noting at this point that common law constitutionalism in the UK is still generally an academic, extra-judicial phenomenon. Most judges still profess to be working within the general framework of the *ultra vires* doctrine, though some theorists and judges have gone as far as arguing that the judiciary could respond to unjustifiable infringement of 'higher order' or 'constitutional' rights by overturning an offending statute.[17] There are also some cases in the United Kingdom that evince an approach by the judiciary that shifts the focus of inquiry from the power source of the decision in question to the effect of the decision on the exercise of rights, namely those rights set out in international human rights instruments.

The 'anxious scrutiny' standard

R v Secretary of State for the Home Department; Ex Parte Budgaycay[18] is an interesting example of the way rights-based discourse has crept into judicial review in the United Kingdom. *Bugdaycay* concerned several applications for judicial review of decisions to deport asylum seekers from the United Kingdom after their applications for refugee status had been refused. The relevant application to this paper was that of Mr Musisi, a Ugandan who had arrived in the UK seeking asylum from Kenya. Mr Musisi was challenging the Home Department's decision to return him to Kenya (rather than the decision not to grant refugee status). The court held that the decision to return Mr Musisi to Kenya was *Wednesbury* unreasonable[19], because the Home Department had failed to take Kenya's breaches of Article 33 of the *Refugees Convention* into account in determining whether Kenya was a safe third country for the return of a failed applicant for asylum. The House of Lords saw fit to apply a high standard of scrutiny to the decision in question *because of the rights at stake*. Lord Bridge of Harwich acknowledged the limits of the scope of judicial review of administrative decisions, but went on to say that:

> Within those limitations, the court must, I think, be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and, when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.[20]

Lord Templeman also took this approach

> In my opinion where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision making process.[21]

Similar sentiments have been expressed in other UK cases. In *R v Ministry of Defence, Ex Parte Smith*[22], the Court of Appeal (Civil Division) agreed with the following statement by counsel for the appellant:

> The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.[23]

To determine the appropriateness of the decision in question in theses cases, rather than focussing solely on the source of the power of the decision maker, the courts looked as well to the gravity of the effect of the decision.

The debate in the UK has been complicated by the enactment of the *Human Rights Act 1998*, which explicitly authorises judicial reference to the existence of rights contained in the *European Convention on Human Rights* when reviewing the action of government or public authority. While this by no means settles the debate about *constitutional* rights advanced by some common law constitutionalists, it does provide a basis in the United Kingdom for

scrutinising administrative decisions with reference to their effect on rights, or at least the rights legally protected by the *Human Rights Act.* The decisions discussed above were made before the *Human Rights Act* came into force.

Ultra vires in Australia

Australian administrative law has seen a similar expansion of grounds and influence as the English system. Australian courts have not, however, gone as far as their English counterparts in broadening the scope of judicial review, even before the enactment of the *Human Rights Act* in the United Kingdom. Additionally, in Australia, there is a statutory basis for judicial review. The *Administrative Decisions (Judicial Review) Act*[24](ADJR*)* (and its state counterparts) and the *Judiciary Act* exist alongside the common law of judicial review.

The ADJR Act has been credited with increasing the number of judicial review applications made in Australian courts. Its benefit, according to Aronson, Dyer and Groves, is that while the ADJR Act can generally be seen as simply a restatement of common law grounds of review, the Act 'made the review grounds more accessible by collecting and restating them.'[25] Parliament did not use the enactment of the ADJR Act to clarify any underlying principles of judicial review under the Act.[26] As Aronson points out:

> ADJR's eighteen grounds say nothing about the rule of law, the separation of powers, fundamental rights and freedoms, principles of good government or … good administration, transparency of government, fairness, participation, accountability, consistency of administrative standards, rationality, legality, impartiality, political neutrality or legitimate expectations…ADJR's grounds are totally silent on the relatively recent discovery of universal human rights to autonomy, dignity, respect, status and security. Nowhere does ADJR commit to liberal democratic principles, pluralism, or civic republicanism.[27]

Australian administrative law is faced, therefore, with the same questions of legitimacy of judicial action as those explored by English judges and academics. Until recently, it appeared that the High Court continued to see the basis of judicial review as a question of *ultra vires*, despite the theoretical problems thrown up by the expansion of grounds of judicial review discussed above.

The classic statement of the basis and purpose of common law judicial review in Australia comes from Brennan J in *Attorney-General (NSW) v Quin*[28]:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power…*The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise*[29].

Explaining the expansion of the scope of judicial review, Brennan J went onto state:

> In Australia, the modern development and expansion of the law of judicial review of administrative action have been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power, but those limitations are not calculated to secure judicial scrutiny of the merits of a particular case.30

Justice Brennan's comments support the proposition that, in Australia, according to the courts at least, judges get the authority for their review powers from implied statutory limitations on the exercise of power by government and its organs. Justice Brennan takes a traditional view of the danger to the separation of powers posed by letting courts stray into merits review:

> If the courts were to assume a jurisdiction to review administrative acts or decisions which are "unfair" in the opinion of the court – not the product of procedural unfairness, but unfair on the merits – the courts would be assuming a jurisdiction to do the very thing which is to be done by the repository of an administrative power, namely, choosing among the course of action upon which reasonable minds might differ.[31]

The opinion of Australian judges like Brennan J seems to be an express disavowal of taking an approach to review based on the effect of decisions on an individual and as such is consonant with traditional views of the role of judicial review. Looking at the effect of a decision on individuals would necessarily mean abandoning the traditional Australian approach to judicial review, as exemplified in *Attorney-General (NSW) v Quin*.

While the stretching of the *ultra vires* principle can be challenged for its threat to the integrity to the theoretical underpinning of judicial review, it retains its status as the orthodox justification for judicial scrutiny of public decision-making and is attractive for its consistency with the foundational principles of Australian law.

The decision in Griffith University v Tang

The recent decision of the High Court in *Griffith University v Tang*[32] seems to mark a departure from the orthodox position set out in *Attorney General (NSW) v Quin*. The case concerned an application for judicial review of a decision made by Griffith University. The University's Appeals Committee upheld an Assessment Board decision to expel Ms Tang from her PhD program at the University on the grounds of academic misconduct. Ms Tang brought proceedings in the Queensland Supreme Court under the *Judicial Review Act 1991* (Qld). She argued that the s 4(a) of the Act applied to the decision in question. Section 4 relevantly provides that:

> (4) In this Act--
>
> decision to which this Act applies means--
>
> (a) a decision of an administrative character made, proposed to be made, or required to be made, under an enactment (whether or not in the exercise of a discretion); …

Ms Tang contended that the decision taken to expel her was invalid for:

> …breaches of the rules of natural justice, failure to observe procedures required by various clauses of the policy, errors of law, absence of evidence or other material to justify the decision, and the "improper exercise of the power conferred by the enactment" under which the action against her purportedly had been taken...[33]

At first instance[34] and on appeal the Queensland Court of Appeal[35], Ms Tang was successful in arguing that the University's decision was 'a decision under an enactment' for the purposes of s 4(a) of the *Judicial Review Act 1991* (Qld).[36] In the Queensland Supreme Court, Mackenzie J came to the following conclusion:

> [24] It is plainly necessary, as discussion of authority above indicates, that care must be taken not to assume that a generally expressed power in an act provides a sufficient basis for finding that the decision is one "under an enactment". However, as the authorities also indicate, a question of degree is involved in that the connection between the text of the enactment and the decision has to be considered. This involves examination of the legislation to determine whether the enactment gives the operational or substantial source of power to make the decision, or, whether the decision is properly characterised as deriving from an incidental source of power. This involves a judgment concerning the particular act in the context of the legislation and drawing a conclusion whether it can properly be said to be made under the enactment because the statute requires or authorises it or the decision is one for which provision is made by or under it.
>
> [25] I have come to the conclusion that the tightly structured nature of the devolution of authority by delegation in relation to the maintenance of proper standards of scholarship and, consequently, the intrinsic worth of research higher degrees leads to the conclusion that, even though the Council's powers are expressed in a general (but plenary) way, the decision to exclude Ms Tang from the PhD

> program is an administrative decision made under an enactment for the purposes of the Judicial Review Act. I do not accept that because the processes immediately used for the purpose of making the decisions were provided for in documents described as "policy" precludes this conclusion. …37

Griffith University appealed as far as the High Court, where the majority of judges sitting on the case[38] reversed the Queensland Court of Appeal's decision, finding instead that the decision was not a 'decision under an enactment', thus not open to judicial scrutiny under s 4(a) of the *Judicial Review Act.*

The Court's reasoning

The wide-ranging and dense judgments of the majority in *Tang* are open to a number of different readings.

A conservative reading of Griffith v Tang

It is possible, of course, to take a conservative reading of the *Tang* decision. In his article discussing the case[39], Cassimatis concedes that the majority's approach was a legally consistent progression from the authorities of *Chittick*[40]*, Telstra*[41] and *Lewins*[42]. This decision endorses that limiting approach to the 'under an enactment' limb of the statutory formulation.

In a broader sense it could be argued that the majority in *Tang* were taking an approach that was entirely consistent with Brennan J's characterisation of judicial review in *Attorney-General v Quin* and the analysis in subsequent cases examining the meaning of 'under an enactment'.

In their decision, Gummow, Callinan and Heydon JJ held that the source of a decision's 'capacity to bind'[43] was part of the test that determined whether it was 'made under an enactment'. They used *Lewins* as an explanation of how a decision made within the power conferred by an enactment can be construed as not having been 'made under' that enactment. In *Lewins*, the decision in question was to enter into a contract.

> If the decision derives its capacity to bind from contract or some other private law source, then the decision is not "made under" the enactment in question. The determination of whether a decision is "made … under an enactment" involves two criteria: first, the decision must be expressly or impliedly required or authorised by the enactment

Their Honours said of *Lewins,* which they purported to follow, that:

> …a statutory grant of a bare capacity to contract does not suffice to endow subsequent contracts with the character of having been made under that enactment. A legislative grant of capacity to contract to a statutory body will not, without more, be sufficient to empower that body unilaterally to affect the rights or liabilities of any other party. The power to affect the other party's rights and obligations will be derived not from the enactment but from such agreement as has been made between the parties. A decision to enter into a contract would have no legal effect without the consent of the other party; the agreement between the parties is the origin of the rights and liabilities as between the parties.44

In *Tang*, the relationship between Ms Tang and the University was, according to the Court 'voluntary' [45], and there was no legal framework around a decision to terminate it. Gleeson CJ saw this as the primary test of whether the decision was 'made under' an enactment:

> The question in the present case turns upon the characterisation of the decision in question, and of its legal force or effect. That question is answered in terms of the termination of the relationship between the appellant and the respondent. That termination occurred under the general law and under the terms and conditions on which the appellant was willing to enter a relationship with the respondent. The power to formulate those terms and conditions, to decide to enter the relationship, and to decide to end it, was conferred in general terms by the Griffith University Act, but the decision to end the relationship was not given legal force or effect by that Act.[46]

While it was conducted in the setting of an empowering act, the relationship was not *governed* by that act. According to this view, judicial review of this decision was not available. This approach is an uncontroversial continuation of the orthodox view espoused in *Attorney-General v Quin* and cases like *Lewins* that as judicial review is about enforcing legal limits, where there is no legal limit, the court has no role.

An alternative reading

On a more detailed examination of the reasoning behind the decision, the conservative approach discussed above is difficult to maintain. Gleeson CJ argued that the question to be asked when determining whether a decision was one under an enactment was whether the decision '…took its legal force or effect from statute…'[47]. The remainder of the majority (Gummow, Callinan and Heydon JJ) formulated a more complete test:

> The determination of whether a decision is made…"under an enactment" involves two criteria: first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment. A decision will only be made under an enactment if both these criteria are met.[48]

Interestingly, in formulating the test, Gummow, Callinan and Heydon JJ looked, as well as to other considerations, to the justification of granting review. Their Honours asked:

> What is it, in the course of administration, that flows from or arises out of the decision taken so as to give that significance *which has merited the legislative conferral of a right of judicial review upon those aggrieved…*the answer in general terms is the affecting of legal rights and obligations.[49]

The majority's decision, while formally consistent with the relevant authority, appears to be a significant departure from the evolution of the common law of judicial review in Australia, both in scope, and in underlying principle. The majority's focus on legal rights and obligations directly contradicts the traditional common law approach as stated in cases like *Ainsworth v Criminal Justice Commission*[50]. *Ainsworth* was a case decided outside the context of statutory judicial review. In his judgment, Brennan J canvassed the issue of the position of legal rights[51], in relation to the opportunity to be heard where a body acting on statutory authority damaged a reputation (there was no effect on any *legal* right or obligation):

> The report…did not affect the appellants' legal rights or liabilities and it did not subject their rights or liabilities to any new hazard. There has been no exercise of a statutory power the setting aside of which would change the appellants' legal rights or liabilities. The only, though significant, way in which the Report affected the interests of the appellants was by damaging their reputations.…if a statutory authority, in purported performance of its statutory functions, prepares a report damaging to the reputation of Richard Roe without giving him an opportunity to be heard and publishes the report, does Richard Roe have a remedy in judicial review? …The answer to this question depends at base on the principle that any person who purports to exercise an authority conferred by statute must act within the limits and in the manner which the statute prescribes and it is the duty of the court, so far as it can, to enforce the statutory prescription…I see no reason to confine the jurisdiction in judicial review more narrowly than this principle would acknowledge, though the armoury of remedies available to the court in particular cases may impose some limitations and judicial discretion in exercising the jurisdiction may further restrict the use of the available remedies…But the *broad purpose of judicial review is to ensure that statutory authority, which carries with it the weight of State-approved action and the supremacy of the law, is not claimed for or attributed to decisions or acts that lie outside the statute*. … *conduct in which a person or body of persons engages in purported exercise of statutory authority must be amenable to judicial review if effect is to be given to the limits of the authority and the manner of its performance as prescribed by the statute*. It is immaterial that the statute defines a mere function that requires no grant of power to enable its performance: *what is material to jurisdiction in judicial review is that the function is conferred by the statute*.[52]

Brennan J expressly dismissed the idea that the decision under review must affect legal rights or obligations, as it was inconsistent with the traditional principle of *ultra vires*, which looks to the source of the power or function exercised, not the effect. The two limbed approach advocated in *Tang* to determine whether a decision was made under an enactment and thus open to judicial review appears to contradict Brennan J's reluctance to restrict judicial review to decisions affecting legal rights.

Implications

For the moment, the effect of the *Tang* decision is limited to applications for judicial review under the ADJR Act or its state counterparts. However, as Kirby J pointed out in his strong dissent, the statutory judicial review scheme was adopted 'to enhance and supplement the remedies available under the general law, not to cut them back.'[53]

Additionally, and perhaps more importantly for the purposes of this essay, the decision seems to mark a strong indication by the High Court of a change in the theoretical basis of the exercise of judicial review. In *Tang,* the court looked explicitly at the effect of the decision on the applicant. While Ms Tang's academic career had been stopped in its tracks, an undoubtedly serious outcome[54], because there was no legal right or obligation at stake, she was denied the possibility of judicial enforcement of the natural justice, procedural and reasonableness obligations that have otherwise been routinely implied by the courts into statutes conferring public power. As Brennan J pointed out in *Ainsworth,* the purpose of judicial review is to give effect to the (express and implied) limitations on power contained in the statute conferring power. According to that formulation of the principle, the legal status of the decisions in question should not be at issue.

The High Court's approach in *Tang* is interesting for its echoes of the approach taken to British judicial review by common law constitutionalists, as described by Thomas Poole. It will be interesting to see how, and if, *Tang* will be addressed in any proceedings discussing the *ultra vires* basis of judicial review. Has the High Court, like British common law constitutionalists, expressed a preference for delimiting judicial review on the basis of rights? Given that the Federal government has refused to legislate to define a Bill of Rights according to international human rights norms, it appears that such a change in governing principle could substantially narrow the scope of judicial review at common law as well as under State and Commonwealth judicial review legislation.

Conclusion

The decision in *Tang* highlights the weakness of the rights-based approach taken in the UK. In the United Kingdom, the judiciary's willingness to look to rights, particularly human rights, when analysing public decision making has generally worked well for minority rights, and been supported by the public, particularly the political left.[55] Judicial activism in this sphere before the enactment of the Human Rights Act can, as discussed above, be criticised for threatening the separation of powers and increasing the power of an undemocratic and unrepresentative judiciary.[56] It is also an unreliable approach.

Tang shows what a rights-based analysis of the basis of judicial review can produce when used by a cautious court like the Australian High Court, and highlights the importance of maintaining the *ultra vires* 'fiction', at least until Australia's Parliament sees fit to legally entrench a wider range of community sanctioned 'fundamental' or human rights.

In Australia, at least at a Federal level, there has been marked reluctance to enact any bill or charter of individual rights and thus create a legislatively sanctioned recourse to rights as defined by international human rights instruments in the courts system[57]. While English courts were willing to take human rights norms into consideration without legislative sanction

in decisions like *Bugdaycay*, there is no guarantee that Australian courts would do the same. *Tang* illustrates why a shift to a rights-based approach could limit the ability of applicants for judicial review to force accountability in public decision-making. The *ultra vires* principle, while theoretically flawed, is a more reliable and structurally consistent means of justifying judicial review.

Endnotes

1 (2005) 213 ALR 724.
2 Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (2004), 87.
3 Sir William Wade, quoted in Craig Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review'(1996) 55(1) *Cambridge Law Journal* 122, 122.
4 Bradley Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action – the Search Continues', (2002) 30(2) *Federal Law Review* 217, 218.
5 (1992) 106 ALR 11.
6 Ibid at 24.
7 Selway, n4 above, 218.
8 *R v President of the Privy Council* [1993] AC 682 per Lord Browne-Wilkinson , quoted in Forsyth, above n3, 123.
9 quoted in Aronson et al, above n2, 103.
10 John Laws, "Law and Democracy" (1995) *Public Law* 72.
11 Ibid, 78.
12 Ibid 79.
13 Ibid 78.
14 Ibid 84.
15 Thomas Poole, 'Back to the Future? Unearthing the Theory of Common Law Constitutionalism' (2003) 23(3) *Oxford Journal of Legal Studies* 435, 439.
16 Thomas Poole 'Legitimacy, Rights and Judicial Review' (2005) 25(4) *Oxford Journal of Legal Studies* 697, 697.
17 See, for example, Lord Steyn in *Jackson v Attorney General* [2005] UKHL 56 at 102 (obiter).
18 [1987] 1 All ER 940.
19 see Lord Bridge of Harwich at 953, Lord Templeman at 956-7.
20 at 952.
21 at 956.
22 [1996] 1 All ER 257.
23 Per Thorpe LJ at 263.
24 1977 (Cth). Henceforth referred to as the 'ADJR Act'.
25 Aronson et al, above n2, 45.
26 See Mark Aronson, "Is the ADJR Act Hampering the Development of Australian Administrative Law?" (2005) 15 Public Law Review 202.
27 Ibid, 216-7.
28 (1990) 93 ALR 1.
29 Ibid at 25 (emphasis added).
30 at 25.
31 at 26.
32 (2005) 213 ALR 724.
33 at 737 per Gummow, Callinan and Heydon JJ.
34 *Tang v Griffith University* [2003] QSC 22
35 *Tang v Griffith University* [2003] QCA 571
36 Section 4(a) is in the same terms as the *ADJR Act,* and thus the Hight Court's finding will apply to the *ADJR Act's* analogous provision.
37 *Tang v Griffith University* [2003] QSC 22 per Mackenzie J at [24] – [25].
38 Gleeson CJ (sole judgment) and Gummow, Callinan and Heydon JJ (joint judgment).
39 Anthony Cassimatis, 'Statutory Judicial Review and the Requirement of a Statutory Effect on Rights or Obligations' (2004) 13 Australian Journal of Administrative Law 169, 179.
40 *Chittick v Ackland* (1984) 1 FCR 254
41 *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164
42 *Australian National University v Lewins* (1886) 68 FCR 87
43 at 744.
44 at 744.
45 per Gleeson CJ at 729.
46 per Gleeson CJ at 730
47 Per Gleeson CJ at 729.
48 at 745.

49 at 743-4.
50 (1992) 106 ALR 11.
51 Cassimatis, above n35, 181-2.
52 per Brennan J at 22-5 (emphasis added).
53 at 757.
54 see Kirby's discussion at 748.
55 Kate Malleson, *The New Judiciary: the Effects of Expansion and Activism* (1999), 31.
56 Ibid, 30.
57 see, for example, Cheryl Saunders, 'Protecting Rights in the Australian Federation' (2004) 25(2) *Adelaide Law Review* 177, 177.