

BOOK REVIEWS

Controlling Administrative Power: An Historical Comparison. By PETER CANE
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978-1-107-14635-8.]

The constitutional systems of the UK, the US and Australia have much that is in common. The US system splintered in conflict from that of the UK at the end of the eighteenth century, yet borrowed and adapted the essential institutional forms of eighteenth century government in the UK as those forms had been replicated in the North American colonies in the preceding decades: a bicameral legislature, a distinct executive and a separated judiciary. The Australian system emerged consensually from that of the UK at the beginning of the twentieth century, combining elements of the constitutional system of the US with the institutional form of Westminster government as it had developed in the UK during the nineteenth century and as it had come to be replicated in the Australian colonies in the second half of that century.

The founding myth of the written Constitution of the US is that it derived immediate force in 1789 as paramount law from the will of the people. The founding reality of the written Constitution of the Commonwealth of Australia is that its text was approved in referenda by the electors of the Australian colonies before being enacted into paramount law by the UK Parliament in 1900. Australian constitutional autonomy was from then achieved by degrees, severance of residual constitutional ties with the UK finally occurring in 1986 with the enactment and simultaneous commencement of complementary legislation by the UK Parliament and the Australian Parliament.

From the beginning of the twentieth century, the UK, the US and Australia each experienced the rise of the administrative state. Towards the middle of the twentieth century, each struggled to accommodate administrative power within pre-existing conceptions of legislative, executive and judicial power. Towards the end of the twentieth century, each implemented reforms of public administration which involved new emphasis on managing the performance of administrative agencies and on outsourcing administrative functions.

Each of the constitutional systems of the UK, the US and Australia is premised on the notion that administrative power is limited by law as ultimately declared and enforced by the judiciary. In the US, that notion has historically been associated with the early nineteenth century decision of the Supreme Court in *Marbury v Madison* 5 U.S. (1 Cranch) 137 (1803). In the UK, it has historically been associated with the late nineteenth century writings of Albert Venn Dicey. In Australia, it has never been doubted.

Each constitutional system provides also for political control over the exercise of administrative power by elected members of the executive and by the houses of the bicameral legislature. Complementing mechanisms of political control, within each constitutional system, legislation has for some time now provided for bureaucratic investigation of and reporting on the exercise of administrative power. Beginning in the last quarter of the twentieth century, bureaucratic oversight has increased through the expansion of the roles of independent auditors to include the auditing of performance and the establishment of offices of ombudsmen (more prolifically occurring and more neutrally termed “ombuds” in the US) having functions of investigating and reporting on maladministration.

Those are the very broad similarities between the systems. But significant differences exist. Beyond the obvious differences in the mechanisms for political control arising from the difference between presidential government in the US and parliamentary government in the UK and Australia, the importance, and even the existence, of some of those differences can be perplexingly obscure to a scholar or practitioner within one system who seeks to gain insight into another.

Just how, at the beginning of the twenty-first century, administrative power has come in practice to be controlled within the UK (specifically England), the US and Australia is the subject of detailed and sophisticated historical and comparative analysis in this book by a scholar whose knowledge and experience transcends all three. Were it to be read merely for its explanation of the history of each of the three constitutional systems, for its explanation of the development and institutional structure within each system of various and subtly diverse mechanisms of legal, political and bureaucratic control over administrative action, and for its explanation of the distinct approaches that have come to be taken to the judicial review of administrative action on topics identified in terms of administrative interpretation, administrative fact-finding and policy-making and administrative rule-making, the book would have value as a rich repository of information. At the cost of an element of repetition, the utility of the book in that respect is assisted by the historical and comparative accounts being arranged discretely.

What is immediately apparent from the explanations given is that understanding the different regimes that have come to exist for the control of administrative power is enhanced by an appreciation of the systems of government of which those specific control regimes form part. Portrayal of the specific institutions, norms and practices that have come to exist for the control of administrative power as subsystems within the broader sets of institutions, norms and practices which make up the systems of government within the framework of each of the three constitutional systems is the central theme of the book.

What also emerges from the detail of the comparative descriptions is that the particular differences that have come to exist in the approaches taken to judicial review of administrative action cannot readily be understood without reference to differences in constitutional structure and also to differences in the structure and terminology of key legislation in each of the three systems. Once that structure and terminology have been explained, an approach which seems foreign becomes accessible and can in some respects seem even vaguely familiar.

Especially is that so of judicial review of administrative action in the US, where the pervasive and continuing effect of the Administrative Procedure Act 1946 has been to divide the administrative action of agencies into two mutually exclusive categories: administrative rule-making (perceived essentially as an exercise of legislative power and comprehending what would be understood in England and Australia as the making of subordinate legislation), and administrative adjudication (perceived essentially as an exercise of judicial power and comprehending what would be understood in England and Australia as administrative decision-making). The Administrative Procedure Act has gone on to subject each of those forms of administrative action to distinct procedural rules. The procedural rules governing administrative rule-making have been and remain largely concerned to promote direct democratic participation in agency rule-making by ensuring that the agency provides to interested persons an opportunity for participation in the rule-making process. Those governing administrative adjudication have been and remain largely concerned with the conduct of officials within agencies (originally known as hearing examiners but since 1972 known as administrative law judges) whose required function is to hold a hearing, to create a record on the basis of that hearing, to produce a

decision that is supported by reliable, probative and substantial evidence, and to prepare as part of the record a statement of reasons explaining the official's findings and conclusions on all issues of fact, law or discretion presented on the record. The highly prescriptive procedures provide a critical part of the context for understanding the emergence in the US of what might be seen superficially from the outside to be an inexplicably bifurcated and inverted approach to judicial review of administrative action. A court engaged in judicial review will apply "*Chevron* deference" (after *Chevron USA Inc. v Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984)) to accept that an agency has rule-making discretion to state the law within bounds set by the range of reasonable interpretations of open-ended statutory language but will take a "hard look" at an adjudication, including at the reasons for making findings of fact.

Australian insistence that judicial review of administrative action is concerned exclusively with "legality" as distinct from "merits" needs similarly to be understood against the background of the distinction legislatively drawn between "merits review" under the Administrative Appeals Tribunal Act 1975 (Cth) and "judicial review" under the Administrative Decisions (Judicial Review) Act 1977 (Cth). More generally, the Australian approach to the judicial review of administrative action, characterised in the book as proceeding on an "ultra vires model" as distinct from the "appellate model" adopted in the US in relation to administrative adjudication, cannot be understood otherwise than against the background of the constitutionally entrenched original jurisdiction of the High Court in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth and without reference to the rigid separation of judicial power under the Australian Constitution which has been seen to mandate the maintenance of a distinction between judicial power on the one hand and administrative or arbitral power on the other, confining the exercise of judicial power to courts and excluding courts from the exercise of powers of administration or arbitration. Those constitutional rigidities do not exist under the Constitution of the US where, at least since *Crowell v Benson*, 285 U.S. 22 (1932), administrative agencies have been understood to be capable of exercising a measure of judicial power. They have never existed in the UK. Far from maintaining a hard-edged distinction between judicial power and administrative power, the regime for controlling administrative power in England has come of late to include the creation of a two-tier structure of administrative tribunals integrated into the judicial system under the Tribunals, Courts and Enforcement Act 2007.

Protagonists within each system might well find reasons to quibble with some descriptions. The author has nevertheless been astute to remain aloof from current controversies and has for the most part avoided criticism of current doctrines. The ambition of the book transcends them.

Whether it is appropriate to describe the conception of the role of courts within the Australian system of government as that of a "subordinate judiciary" as distinct from a "coordinate judiciary", for example, might well be questioned. But to take issue with that terminology would be to miss the point of the higher level explanation to which those contrasting labels are directed. The explanation is that, unlike the Australian system in which judicial power is seen to be concentrated in courts standing apart from the political arms of government and in which courts use judicial power to control administrative power within the limits set by the legislature, within the US system judicial power like other forms of governmental power is conceived of as being to some extent shared between the three traditional branches of government, each acting as a delegate of the people, each in that way laying claim to a measure of democratic legitimacy and each acting in competition with the others

to achieve an overall balance. Administrative agencies within the US system, according to the explanation, effectively constitute a fourth branch of government, whose claim to legitimacy lies not in their democratic legitimacy but in their supposed expertise, who themselves exercise forms of power recognisable within each of the three traditional branches, and who are kept in check by a combination of each of the three traditional branches of government.

Potentially of wider and more enduring significance than any of the explanations that are given is the framework for comparative analysis on which it is based. Inspired in part by the description given by Richard Neustadt in *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan* (1990) of the constitutional system of the US as that of “separated institutions sharing powers”, the framework draws a basic distinction between two methods of distributing public power within a system of government and correspondingly distinguishes between two methods of controlling the public power that is distributed. One method of distribution, epitomised by the US system, involves the diffusion of power by dividing it between institutions in a manner which requires some measure of cooperation between them in order for the power to be exercised. The corresponding method of controlling the power so distributed is described as one of checks and balances. The other method of distributing public power, epitomised by the UK to which the Australian system is in this respect more closely aligned, involves the concentration of power by dividing power between institutions in a manner which permits each institution to exercise the power vested in it unilaterally. The corresponding method of control is appropriately described as one of accountability.

Propounded as having the potential to provide a partial explanation for the observable similarities and differences in the methods of controlling administrative power across the three systems, the framework is shown by the analysis also to provide a partial explanation for the observable similarities and differences in more general perceptions of the role of courts within each system.

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Rechtserkenntnis durch Richtermehrheiten: “Group choice” in europäischen Justiztraditionen. By WOLFGANG ERNST [Tübingen: Mohr Siebeck Verlag, 2016. xx + 362 pp. Hardback €109. ISBN 978-3-16-154361-6.]

Friedrichs v California Teachers Association, 136 S.Ct. 2545 (2016), was a recent decision in which the decision of the lower court stood in the face of a tied Supreme Court of the United States. The problem in reaching that decision is very ancient. Professor Ernst in his prize-winning book *Rechtserkenntnis durch Richtermehrheiten* charts the juristic debate over the last two millennia on the question of what to do when judges within a single court disagree. It is a very careful work covering Roman law, canon law, French law, German law and English law.

The structure of the work is to present the approaches of the different legal systems to the issue of divided courts. The predominant approach in each chapter is chronological. This allows the course of debates among jurists over time to appear. The presentation of the views of each author is given through a succinct narrative supplemented by quotations (often left in the original language). The emphasis is on letting the original sources speak for themselves.