INDEPENDENT REVIEW OF ADMINISTRATIVE LAW IN THE UNITED KINGDOM

SUBMISSION BY BONAVERO INSTITUTE OF HUMAN RIGHTS, UNIVERSITY OF OXFORD

and

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1. Introduction

The United Kingdom government has appointed an independent panel to examine trends in judicial review of administrative action. The panel is instructed to bear in mind "how the legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts can be properly balanced with the role of the executive to govern effectively under law". The terms of reference require the panel to consider in particular:[1]

> "1. Whether the amenability of public law decisions to judicial review by the courts and the grounds of public law illegality should be codified in statute.
>
> 2. Whether the legal principle of non-justiciability requires clarification and, if so, the identity of subjects/areas where the issue of justiciability/non-justiciability of the exercise of a public law power and/or function could be considered by government.
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> 3. Whether, where the exercise of a public law power should be justiciable: (i) on which grounds the courts should be able to find a decision to be unlawful; (ii) whether those grounds should depend on the nature and subject matter of the power and (iii) the remedies available in respect of the various grounds on which a decision may be declared unlawful.
>
> 4. Whether procedure reforms to judicial review are necessary, in general to 'streamline the process', and, in particular: (a) on the burden and effect of disclosure in relation to 'policy decisions' in Government; (b) in relation to the duty of candour, particularly as it affects Government; (c) on possible amendments to the law of standing; (d) on time limits for bringing claims; (e) on the principles on which relief is granted in claims for judicial review; (f) on rights of appeal, including on the issue of permission to bring JR proceedings; and (g) on costs and interveners."

This submission addresses, in the main, the question of codification in administrative law. The terms of reference note that experience in other common-law jurisdictions outside the United Kingdom, and especially Australia, should be considered. This submission thus considers the question of codification in two jurisdictions, Australia and South Africa. In each case, the submission considers the

[1] The full terms of reference can be found here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915624/independent-review-admin-law-terms-of-reference.pdf and the Call for Evidence here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915905/IRAL-call-for-evidence.pdf

extent to which Australia and South Africa are useful comparators for the Panel, then considers briefly each jurisdiction's experience with codification of judicial review, and then concludes with insights that might be drawn from their experiences.

A note on a key premiss of the Terms of Reference and the Call for Evidence

We have noted above that the Call for Evidence emphasises that: "The panel is instructed to bear in mind 'how the legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts can be properly balanced with the role of the executive to govern effectively under law'." The premiss is that citizens' legitimate interests in challenging executive action necessarily conflict with the ability of the executive to govern effectively under law. This premiss is, in our view, misleading. One of the most important purposes of judicial review is to ensure that the executive is governing *under law,* consistently with the conception of the rule of law that subjects both citizens and public officials to law, on which the social contract depends. Judicial review by independent judges within a democracy not only serves to ensure that government acts lawfully but serves as a key mechanism that fosters public trust in the exercise of public power, enhances the legitimacy of the institutions of government and contributes to a public culture that values respect for the law and confidence in its equal application. *Effective* government under law is promoted by public decision-making that is characterised by the fairness and rationality that judicial review assumes as a corollary of parliamentary government. Judicial review is the primary mechanism of accountability to ensure the lawfulness of executive action. When judicial review concludes that executive action has been unlawful and declares it invalid, that order serves the purpose of ensuring effective government action under law, not only by invalidating action that has been unlawful, but also by providing guidance to the executive on what is lawful.

A note on terminology

It is worth considering what the terms of reference mean when they speak of codifying the amenability of public law decisions to judicial review and the grounds of judicial review. Codification can be understood in at least two ways: as a complete replacement of existing legal rules and procedures in a field, so that the Code will be "not one amongst other legal authorities, but that all others which have hitherto been in force, shall be in force no longer"[2] or as the consolidation or restatement of an area of law that has been developed by the judiciary, which does not exclude reliance on earlier jurisprudence or the development of new rules going forward.[3]

[2] F K Von Savigny, *Of the vocation of our age for legislation and jurisprudence* (New York, Arno Press, 1975) cited in T H Jones "Judicial Review and Codification" (2000) 20 *Legal Studies* 517, 518.

[3] Id. See also E Steiner, "Codification in England: The Need to Move from an Ideological to a Functional Approach – A Bridge too Far?" (2004) 25 *Statute Law Review* 209 – 222, 219 - 220, who identifies four forms of codification: compilations that bring together existing laws without alteration; consolidations which bring several statutes

In the context of judicial review, the former is impracticable. To a greater extent than, perhaps, any other area of the common law, judicial review has deep roots in the institutional relationships that characterise the British Constitution. What the terms of reference refer to as 'substantive public law' has evolved over centuries through case-law, in response to experience. The principles that govern amenability and the grounds of review are conceptually dependent on judge-made law. Whatever form codification took, it is inconceivable that this case law would not infuse the interpretation and application of the legislation.

We therefore assume for the purposes of this submission that the codification under consideration is a form of consolidation or restatement of the law, perhaps with some minor modifications. We note, however, that even this would be likely to be challenging, in ways that are demonstrated by the account of comparative experiences that follows. It is salutary in this regard that the United Kingdom Law Commissions, when they were established in 1995, were tasked with striving for codification of the laws in their respective jurisdictions, but their record in this regard has been described as "disastrous".[4] At least one reason for this outcome is the difficulty of producing a code across the English and Scottish legal systems. Another may be the magnitude of the conceptual and methodological changes required in moving from the flexibility of the common law to the relative rigidity of codification. Whatever the explanation, it offers a warning from the experience of the United Kingdom itself against too easy assumptions about the outcomes that might be achieved through codification.

Purported benefits of codification

The call for evidence issued by the panel[5] contained a questionnaire to be answered by government departments. In relation to the question of codification, that questionnaire asked government departments to consider the following questions:

"Section 2 – Codification and Clarity
3. Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?
4. Is it clear what decisions/powers are subject to judicial review and which are not? Should certain decisions not be subject to judicial review? If so, which?

together; restatement which in one statute sets out an existing branch of law; and codification which means producing a piece of legislation that reconsiders a field of law, often constituting a break with existing legal rules.
[4] See F Bennion, "Additional Comments" in G Zellick (ed), The Law Commission and Law Reform" (1988), 63 cited in J Bargenda and S Stark, "The Legal Holy Grail? German Lessons on Codification for a Fragmented Britain" (2018) 22 *The Edinburgh LR* 183 – 210, 193.
[5] A link to the call for evidence issued by the panel is provided in n 1, above.

5. Is the process of (i) making a judicial review claim, (ii) responding to a judicial review claim and/or (iii) appealing a judicial review decision to the Court of Appeal/Supreme Court clear?"

It appears from these questions that the Panel's concern is to determine whether codification would enhance clarity and certainty in relation to judicial review. A third possible benefit is improving accessibility to the rules of judicial review by citizens, and as importantly, by civil servants.[6] Another possible benefit of codification of judicial review identified by academic authors is democratic legitimacy (that the rules of judicial review are determined by the legislature, rather than the courts),[7] although whether this argument is as cogent in a parliamentary democracy rather than a presidential one is questioned.[8] A final possible benefit that could be achieved by codification is the reform or rationalisation of the law.[9] We consider the extent to which these benefits have been achieved by codification in Australia and South Africa in the final section of this submission, titled "Insights".

2. Australia

This part of the submission draws attention to the relevance of Australia as a comparator for the Panel to consider and outlines the experience with codification at the Commonwealth level of government.[10] Some of the individual Australian States and territories have codified aspects of judicial review as well.[11] These experiences are not detailed here, but yield broadly similar insights.

Australia and the United Kingdom: Similarities and differences

There are many points of similarity between Australia and the United Kingdom that make Australian experience with codification useful for the Panel. Like the United Kingdom, Australia has a common law legal system, manifested in legal principles, procedures, values and the modalities of judicial reasoning. Other shared

[6] See C Hoexter, "Administrative Justice and Codification", in M Hertogh, R Kirkham, R Thomas & J Tomlinson (eds) *Oxford Handbook of Administrative Justice* (forthcoming); C Hoexter, "The Constitutionalisation and Codification of Judicial Review in South Africa" in C Forsyth, M Elliott, S Jhaveri, M Ramsden & A Scully-Hill (eds) *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford, 2010); and C Saunders "Constitutions, Codes and Administrative Law: The Australian Experience" in C Forsyth, M Elliott, S Jhaveri, M Ramsden & A Scully-Hill (eds) *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford, 2010).

[7] See C Hoexter, "Administrative Justice and Codification", cited above n 6; C Saunders "Constitutions, Codes and Administrative Law: The Australian Experience" cited above n 6; TH Jones, "Judicial Review and codification", cited above n 2, 520 – 521 and P Verkuil "Cross-currents in Anglo-American Administrative Law" (1986) 27 William and Mary LR 685, 708.

[8] See TH Jones, cited above n 2. and C Hoexter, "Administrative Justice and Codification", cited above n 6.

[9] See C Hoexter, "Administrative Justice and Codification", cited above n 6, and TH Jones, cited above n 2.

[10] Other sources for this purpose include Administrative Review Council, *Federal Judicial Review in Australia,* Report No. 50, 2012; C Saunders, 'Constitutions, Codes and Administrative Law: The Australian Experience', cited above n 6.

[11] Administrative Law Act 1977 (Vic); Administrative Decisions (Judicial Review) Act 1989 (ACT); Judicial Review Act 1991 (Qld); Judicial Review Act 2000 (Tas).

characteristics of the common law that are relevant for present purposes include the porous border between public and private law, reinforced by reliance on generalist courts; acceptance of the value of incremental development of the law, in the light of experience, through decisions of independent courts in concrete cases; and an understanding of executive power as deriving from both statutory and non-statutory sources.[12]

The institutional structure of government also is broadly the same in relevant respects: an elected Parliament, to which the government is responsible; a chain of public decision-making authority that links public service actors, Ministers and Parliament; and a head of state whose role has become entirely formal over time but in whose name some decisions are taken. Both states share a commitment to the rule of law, as originally sourced in British constitutional experience.[13] And both also share acceptance of judicial review of the lawfulness of executive action as a core feature of the rule of law, which helps to make good on the claim that government is subject to law and tempers the concentration of power in the executive branch.

There are also important points of relevant difference between Australia and the United Kingdom as well, which need to be taken into account in evaluating Australian experience. The principal one, from which others flow, is the written, entrenched, Constitution of the Commonwealth of Australia, which is interpreted and applied by the Australian courts, with the High Court of Australia (HCA) at their apex. The Constitution is fundamental law, overriding all action inconsistent with it, including legislation. The Constitution confers jurisdiction on the HCA to deal with matters in which the Commonwealth is a party and to issue listed remedies against an 'officer of the Commonwealth' (sec 75 (iii), (v)). This section provides a backstop for a judicial review application, if no other jurisdiction is available, in ways that are explained below. The Constitution also provides the framework for a three-way constitutional separation of powers that protects judicial power, while confining its ambit.[14] Finally, as an aspect of the design of the Australian federation, the Constitution draws a distinction between federal and state jurisdiction, as a result of which judicial review of decisions of Commonwealth and State governments may take different forms, although the position of the HCA as a final appellate court unifies the common law, in the absence of codification.[15]

While these differences are significant, they should not be overstated. Although the Constitution of the United Kingdom is not codified in the Australian sense, it comprises principles, norms and practices with deep roots that give it an enduring effect of a constitutional kind. Although the judicial power of the Commonwealth

[12] At the Commonwealth level, both statutory and non-statutory executive power are sourced to Constitution section 61.
[13] On the current Australian understanding, including 'universal subjection to law', see K Hayne, 'Rule of Law' in C Saunders and A Stone, *The Oxford Handbook of the Australian Constitution* (Oxford, OUP, 2018), 167, 169.
[14] M Foster, 'The Separation of Judicial Power' in Saunders and Stone, cited above n 15, 617.
[15] W Gummow, 'Common Law' in Saunders and Stone, cited above n 13, 190, 197.

is constitutionally precluded from extending to 'merits' review its contours are determined by the courts themselves and it extends, for example, to reasonableness review.[16] It might also be noted that Australia has a highly developed system of Commonwealth tribunals, institutionally located outside the judicial branch, that provides full 'merits' review of most administrative decisions under statute.[17]

Finally, while Australia is a federation and the United Kingdom is not, some of the issues presented for judicial review by the system of multi-level government in Australia are likely to be raised by devolution in the United Kingdom as well.

Codification of judicial review in Australia

It is not clear from the panel's call for evidence which 'legislative changes' in Australia are of particular interest to it. The most significant codification of judicial review at the Commonwealth level in Australia is the Administrative Decisions (Judicial Review) Act 1977 (Cth). Other measures with codifying effect require attention as well, however. Section 75(v) and, in more general terms, section 75(iii) of the Constitution protect judicial review by the HCA, section 39B of the Judiciary Act 1903 (Cth) confers much of the section 75(v) jurisdiction on the Federal Court of Australia (FCA) and, now, the Federal Circuit Court and successive amendments to the Migration Act 1958 (Cth) have sought to codify the grounds and other aspects of judicial review, broadly along the lines of Judiciary Act section 39B.[18] These measures are interconnected in ways that are explained in the chronological account below.

The constitutional jurisdiction

The only Australian courts with inherent jurisdiction are the Supreme Courts of the States, established along English lines during colonial times. The Commonwealth Constitution, which came into effect in 1901, created a new Australian apex court, the High Court of Australia (HCA), a new species of 'federal jurisdiction', and the potential for a new hierarchy of federal courts, which has been realised over time.[19] All the federal courts, including the HCA, exercise jurisdiction conferred either by the Constitution or by statute.

Section 75 of the Constitution directly confers 5 heads of federal jurisdiction on the HCA; section 76 identifies another 4 heads of federal jurisdiction that could be so conferred by the Parliament. All can be conferred on other federal courts as well (sec 77(i)) and effectively removed from State courts (sec 77(iii)). Two of the heads of jurisdiction in section 75 are particularly relevant for present purposes, giving the HCA original jurisdiction in matters:

[16] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.
[17] Administrative Appeals Tribunal Act 1975 (Cth).
[18] See now, in particular, parts 5 – 8.
[19] Commonwealth Constitution, chapter III.

(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party; and
(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

Like any codification, these provisions apply within specified parameters, which in Australia sometimes are described as the 'ambit' of review. In the case of section 75(v), for example, the ambit is prescribed by the need for a 'matter', for action by an 'officer of the Commonwealth' and for circumstances that would attract one or more of the three listed remedies of mandamus, prohibition and the injunction.[20] As parts of the Constitution, these terms fall for interpretation by the High Court, in the context of the Constitution as a whole, although inevitably their meaning is informed by their origins in the general law.[21]

Administrative Decisions (Judicial Review) Act 1977 (Cth)

Until 1980, judicial review of Commonwealth executive action depended on the jurisdiction vested in the High Court by these provisions. Between 1968 and 1973, however, successive Commonwealth governments put in place three inquiries that would radically reform Commonwealth administrative law.[22] The new measure most relevant for present purposes was the codification of judicial review in the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act), which came into force in 1980. Other complementary measures introduced at the same time included the establishment of a generalist appellate tribunal, the Administrative Appeals Tribunal, to deal with appeals from administrative decisions 'on the merits' and of an Ombudsman, to investigate maladministration.[23]

One of the principal architects of these new arrangements, Sir Anthony Mason, subsequently described the purposes of the ADJR Act as to 'simplify and clarify the grounds and remedies for judicial review, thereby facilitating access to the courts…'.[24] Consistently with these goals, the Act was written in relatively clear, straightforward language and removed many of the technicalities then associated with judicial review. Specifically, the Act provided a one-step procedure to apply for an 'order of review' (sec 5, 11); itemised the ultra vires grounds for review, as then understood, with some additional clauses to provide flexibility (secs 5, 6, 7); restated the effect of the key judicial review remedies, with some technicalities removed (sec 16); conferred standing on a person 'aggrieved' by a decision or conduct to which

[20] Certiorari and the declaration may be issued as well as ancillary remedies.
[21] D Mortimer, 'The Constitutionalization of Administrative Law', Saunders and Stone, cited above n 13, 696.
[22] The two that were significant for judicial review were Commonwealth Administrative Review Committee, *Report*, (1971) (the Kerr Report) and the Committee of Review, *Report of Prerogative Writ Procedure*, (1973) (the Ellicott Report).
[23] Administrative Appeals Tribunal Act 1975 (Cth); Commonwealth Ombudsman Act 1976 (Cth).
[24] Sir Anthony Mason, 'Administrative review, the experience of the first twelve years', (1989) 18 *Federal Law Review* 122, 123.

the Act applied (sec 3(4)); overrode any existing privative clauses (sec 4); and conferred a right to reasons (sec 13).

The application of the Act was shaped by patterns of judicial review that were familiar at the time, which in turn reflected the then typical modalities of government decision-making that affected individuals directly. The Act applied to both decisions and to conduct leading to decisions (secs 5,6). As originally enacted, the defining elements of a 'decision to which the Act applies' were the requirements for a 'decision' itself, for the decision to be 'administrative' in character, for it to be taken 'under an enactment' and for the decision-maker to be other than the Governor-General (sec 3). Even before the Act came into effect, however, it was further amended to add a further requirement, to exclude decisions in classes of decisions listed in a new first schedule to the Act.[25] A companion amendment excluded other classes of decisions from the obligation to provide reasons, in a new schedule 2.

The original schedule excluded 13 categories of decisions from review, dealing with arbitration, taxation, security and military law and decisions of specified intergovernmental bodies, amongst others. By 2020, however, the list of excluded decisions in schedule 1 is much longer, comprising over 50 categories of decisions, including most decisions under the Migration Act 1958 (Cth). A further 10 classes of decisions are excluded from review by regulation, under a procedure introduced into the ADJR Act by a later amendment.[26]

As interpreted by the courts, the grounds, remedies and standing requirements under the ADJR Act did not depart significantly from the underlying common law, evolving with it over time.[27] In this way, substantive judicial review under the ADJR Act was kept in line with judicial review at common law, as it applied in the Australian States. The two may have constrained each other. The list of ultra vires grounds in the ADJR Act, reflecting what then were also understood to be the grounds of review at State level, effectively precluded any new conceptual packaging of grounds in Australia, as occurred in the *CCSU* case five years after the ADJR Act came into effect.[28] Conversely, the paragraphs deliberately inserted in the ADJR Act to allow new grounds to emerge led to no significant innovation.[29]

Within a short period of time, the ambit of the Act proved seriously constraining. One early judicial decision interpreted the requirement that a decision be 'administrative' in character broadly, to exclude only decisions that were legislative or judicial in character, as befitted the remedial character of the Act.[30] As time went

[25] Administrative Decisions (Judicial Review) Amendment Act 1980 (Cth).
[26] Administrative Decisions (Judicial Review) Regulations 2017.
[27] *Kioa v West* (1985) 159 CLR 550, 576, Mason CJ, observing that the Act was to be 'read in the light of the common law'.
[28] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.
[29] ADJR Act, section 5(1)(j), section 5(2)(j).
[30] *Evans v Friemann* (1981) 35 ALR 428.

on, however, judicial interpretation of all aspects of the definition of the ambit of the Act, including the concept of a 'decision',[31] the circumstances in which a decision was made 'under' an enactment,[32] and the sometimes fine line between 'administrative' and 'legislative' decisions[33] added to the complexity of using it. In any event, these features of the definition, coupled with the exclusion of classes of decisions from the ambit of the Act, meant that there was a growing range of executive action that fell outside the codifying legislation but required judicial review, on even a minimalist understanding of the rule of law, for which a solution needed to be found.

Resurgence of the constitutional jurisdiction

The limitation of the scope of codified judicial review inevitably prompted recourse to the constitutional jurisdiction in section 75. The undesirability of the apex court dealing with large numbers of sometimes straightforward cases of judicial review at first instance led, in 1983, to the conferral of the constitutional jurisdiction on the Federal Court of Australia, under Judiciary Act 1903 (Cth) section 39B. This course apparently was chosen, rather than an amendment to the ADJR Act, because of the difficulties of combining two such conceptually different approaches to the ambit of review, involving different grounds and different remedies, in the same statute. Both conferred jurisdiction on the same court, nevertheless. Appeals under both statutes lay from the Federal Court to the HCA. Applicants who were uncertain about which avenue of review to use were able to apply under both.

The differences in the conceptual framework of the ADJR Act and section 75(v) of the Constitution became accentuated as the usefulness of the former diminished and reliance on the latter grew, further encouraged by its adaptation for decisions under the migration legislation.[34] The remedies-driven avenue of review encouraged recourse to the concept of jurisdictional error as the principal trigger for the 'constitutional' writs of mandamus, prohibition and, by extension, certiorari. Successive amendments of the migration legislation from 1990, to restrict judicial review of migration decisions in the Federal Court, forced litigation into the HCA where such restrictions were inconsistent with section 75(v), and provided an additional catalyst for the doctrinal development of jurisdictional error and of the reach of the protected remedies in constitutional context.[35]

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[31] *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

[32] *Griffith University v Tang* (2005) 221 CLR 91.

[33] *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee* (2007) 163 FCR 451.

[34] From 1992, Part 8 of the Migration Act provided a separate system of review for major categories of decisions, modelled on section 39B of the Judiciary Act 1903, but with additional restrictions, the effects of which varied over time by further amendment and through judicial interpretation.

[35] M. Aronson, "Process, Quality and Variable Standards: Responding to an *Agent Provocateur*" in D. Dyzenhaus, M. Hunt and G. Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, 2009) 5.

This development reached a peak in 2003, after the Parliament amended the migration legislation to oust the jurisdiction of the Federal Court altogether over 'privative clause decisions'. Relying on a somewhat ambiguous HCA decision from 1945, the government's apparent expectation was that, while the amendment could not oust the section 75(v) jurisdiction, the Court would treat the privative clause as an indication that it should not intervene if a decision was a 'bona fide attempt' to exercise a power, 'relates to the subject matter of the legislation' and was 'reasonably capable of reference to' the power.[36] In a challenge to the validity of the amendment in the context of a case claiming breach of procedural fairness, the HCA rejected this understanding of *Hickman* and made it clear that section 75(v) entrenched its jurisdiction to review for jurisdictional error, understood to encompass most of the specific grounds of review but to exclude error of law on the face of the record.[37] In the instant case, the validity of the section was read down to allow review for jurisdictional error; an outcome that also restored the jurisdiction of the Federal Court, by affecting the meaning of 'privative clause decision'. Within ten years, review for jurisdictional error was entrenched at the State level as well, by an interpretation of the reference to State Supreme Courts in the Commonwealth Constitution as requiring courts with the authority to review State executive action.[38]

As it has developed in Australia, jurisdictional error is interdependent with statutory interpretation. Unusually, no decision of the HCA yet deals directly with the issues that arise in relation to judicial review of non-statutory executive power. In one notable case, the issue was avoided by construing action taken by contractors assessing protection claims as steps taken under the Migration Act, where the Minister ultimately would consider exercising statutory powers.[39] Reliance on the penumbra of a statute in this way will not always be a possibility. Nevertheless, in Australia as elsewhere, significant decisions affecting peoples' lives and raising problems of lawfulness are taken by governments in the exercise of non-statutory executive power. The constitutional jurisdiction will provide a vehicle for review of such decisions when they reach the HCA, while the ADJR Act would not. Notably, in *M61,* a unanimous HCA left open the question of whether contractors might, in some circumstances, be 'officers of the Commonwealth', observing that such cases in any event would be actions in which the Commonwealth was a party, over which the Court also had entrenched jurisdiction, under section 75(iii).[40]

In summary, therefore, despite statutory codification, judicial review at the Commonwealth level in Australia is now largely dependent on section 75 of the Constitution. It is shaped by the concept of jurisdictional error, understood broadly to include most of the ultra vires grounds and any others suggested by the statutory

[36] *R v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598, 614, Dixon J.
[37] *S157/2002 v Commonwealth* (2003) 211 CLR 476
[38] *Kirk v Industrial Relations Commission* (2010) 239 CLR 531.
[39] *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319.
[40] Ibid, [51].

task of the decision-maker.[41] It offers the traditional remedies, now somewhat rationalised in the constitutional setting. The entrenched section 75(v) jurisdiction is considered an essential element of the rule of law in Australia.[42] Judicial review is not open-ended, however. Quite apart from separation of powers considerations, the courts themselves are alive to the need for judicial review to co-exist with effective public administration in a parliamentary democracy. The insistence that procedural fairness requires 'practical unfairness' is an example;[43] the recent focus on 'materiality' may be another.[44] Both also are examples of the nuance that judicial doctrine can provide, as it evolves in response to concrete cases.

The ADJR Act remains in effect. It continues to be used, not least because it provides a statutory right to reasons, but its significance is much diminished. In 2012 the Administrative Review Council observed that nearly half the applications for judicial review to the Federal Court over the period 2007-2011 were under section 39B of the Judiciary Act: statistics that excluded migration cases and filings in the Federal Magistrates Court.[45] Noting that a 'jurisdiction that was designed to supplement the ADJR Act is increasingly overtaking it in importance', the Council recommended amendment of the ADJR Act to encompass the Judiciary Act avenue as well and rationalisation of the exclusions in Schedule 1 of the Act, although still leaving migration decisions outside it.[46] The solution was cumbersome and has not been implemented; the Council itself has since ceased to exist. The ambit of the Act continues to be eroded, by additions to schedule 1 and regulations under section 19, despite the growth in discretionary decisions exercised under statute.[47] In its current form, in any event, it cannot adequately accommodate new modes of government decision-making, which the ARC also noted, including the 'development of hybrid mechanisms that are part-legislative, part-administrative in nature'; increasing reliance on soft law; and mechanisms associated with corporatisation and privatisation, including contracting-out.[48] Meanwhile, quite apart from the evident problems with the ambit of the Act, its early clarity and simplicity has been eroded by successive amendments, by the proliferation of other specialist avenues for judicial review or appeal, including under the Migration Act and by the conferral of jurisdiction under the Act on what is now the Federal Circuit Court, as well as on the Federal Court.

This description of developments in legal control of the lawfulness of government action so far has focussed only on judicial review. Legal action against government

[41] Mortimer, cited above n 21.
[42] Hayne, cited above n 13.
[43] *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1.
[44] *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34.
[45] Administrative Review Council, cited above n 10, para. 4.3.
[46] Ibid.
[47] Ibid, 2.19-2.20
[48] Ibid, 2.21-2.23.

also can draw on private law, however: contract,[49] trespass,[50] negligence[51] and misfeasance in public office,[52] to name only the most obvious claims that might be made. Anecdotally, cases of this kind are increasing. The entrenched constitutional jurisdiction in section 75 provides a vehicle for these too. A codified judicial review statute would not.

3. South Africa

The United Kingdom and South Africa: similarities and differences

There are some obvious reasons why South Africa is not a straightforward comparator for the United Kingdom when considering judicial review of administrative action. South Africa is a constitutional democracy, based on the principle of constitutional supremacy which confers on the courts, and particularly the Constitutional Court, the duty to declare any law or conduct inconsistent with the Constitution to be invalid.[53] The role of the courts under South Africa's Constitution is therefore different from the role of courts under the British Constitution. Secondly, the Constitution explicitly forms the basis for judicial review of administrative action, through an entrenched right to administrative justice.[54] The legal and constitutional basis for judicial review is therefore straightforward and forecloses debates about the constitutional foundations of judicial review, debates that continue in the United Kingdom.

But there are also good reasons why South Africa may provide a useful comparator for the United Kingdom. Although the basis of the legal system in South Africa rests on Roman Dutch law and African customary law, the principles of English common law have had significant impact on South African public law, and on judicial review in particular. Secondly, the South African Constitution shares explicitly many of the values that inform the British constitutional framework: it entrenches multi-party democracy, universal adult suffrage and the rule of law as founding values;[55] establishes accountability of the exercise of public power as a core value,[56] and courts are considered an important mechanism for accountability. Thirdly, the South African judicial system, its modes of legal argument and reasoning and many of its procedures are very similar to those in the United Kingdom. Indeed,

[49] *Hughes Aircraft Systems International v Air Services Australia* (1997) 146 ALR 1.
[50] *Smethurst v Commissioner of Police* [2020] HCA 14.
[51] Actions against the Commonwealth in negligence are often settled: for example, H. Davidson, 'Australia to compensate Iranian girl's family for "negligence" while she was held on Nauru', *The Guardian,* 16 June 2017.
[52] *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732.
[53] S 2 of the Constitution of the Republic of South Africa, 1996.
[54] S 33 of the Constitution: "(1) Everyone has the right to administrative actino that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons."
[55] S 1 of the Constitution.
[56] Ibid.

the establishment of the judicial system in its current form dates back to 1828, when the Cape was a British colony with the founding of the Supreme Court.

The historical context

An assessment of South Africa's experience of the codification of judicial review and its relevance to the work of the Panel requires an understanding of the history of judicial review in South Africa. The Cape became a colony of the British Empire in the first decade of the nineteenth century, and it was followed by Natal in the mid-1840s. Following the second Anglo-Boer War of 1899 – 1902, the Orange River colony and the Transvaal also became separate colonies of the Empire. In 1910, the four colonies became the Union of South Africa and South Africa's contemporary territorial boundaries date back to Union.

The system of law in South Africa is both pluralist and mixed, with the legal system being founded on both Roman-Dutch law and African customary law. In addition, the influence of English common law has been important, and nowhere more important, arguably, than in relation to public law and judicial review. Government administration has always been subject to the supervision of the ordinary courts through judicial review, which was, it is widely (though not unanimously) agreed until the advent of the democratic era in 1994, to rest on the doctrine of *ultra vires*.

From 1910 – 1994, successive South African constitutions were based on the doctrine of parliamentary sovereignty, also drawn from English law, with the result that courts could not, by and large, review legislation enacted by Parliament. This period too, of course, saw the entrenchment of the policy of *apartheid* in a range of legislative enactments that were explicitly founded on racial discrimination, enactments that were beyond review by the courts. From 1948 till 1994, South Africa was governed by one political party, the National Party, and government was concentrated in the Executive. As Baxter, the author of the leading South African administrative law text in this period, wrote: "Together these factors indicate the utility of the South African Parliament as a device for *conferring* wide powers on the executive, as well as its ineffectiveness as an institution for *controlling* those powers."[57] In addition, given that Parliament was elected by white voters only, its democratic credentials were fundamentally flawed, and the courts served as one of the only mechanisms of accountability. Another was of course the press, although its freedom was often sharply limited.

The record of the courts in holding the government to account through the mechanisms of judicial review during the *apartheid* era was poor.[58] Writers described

[57] L Baxter, *Administrative Law* (Juta, 1984), 33.

[58] See the assessment in K O'Regan, "Breaking Ground: Some Thoughts on the Seismic Shift in our Administrative Law" (2004) 121 *South African LJ* 424, 424 – 427. See also E Mureinik "Pursuing Principle: The Appellate Division and review under the State of Emergency" (1989) 5 *South African Journal on Human Rights* 60; and H Corder,

the state of administrative law as "somewhat depressing",[59] "stagnated in a time warp",[60] and lacking "coherence and consistency".[61] There were exceptions: the 1980s saw successful challenges to the cornerstone of *apartheid* urbanisation policy, the pass laws[62] and the establishment of due process rights for civil servants.[63] But in the field of state security, and in particular, during the successive states of emergency declared in the 1980s in response to sustained protest and opposition to the policies of *apartheid,* the Appellate Division failed to hold the executive to account.

The states of emergency were declared under the Public Order Act, 1953,[64] which permitted the State President to declare a state of emergency[65] and to make regulations "as appear to him to be necessary or expedient for the providing for the safety of the public, or the maintenance of public order…".[66] The Act also provided that "no court shall be competent to enquire into or give judgment on the validity of any … proclamation made under section 3 of this Act". Initially the dominant legal view was that any regulation made *ultra vires* the empowering provision in the Act would not be made under the Act with the consequence that the ouster clause would not prevent courts from declaring the regulation to be invalid.[67]

As Etienne Mureinik observed this approach "entails construing the ouster as a nonsense: it reads the ouster as excluding review only when the regulation is not otherwise reviewable; and that makes the ouster pointless". However, he continues: "... beneath this formal argument there is a very cogent argument of substance … if you accept the orthodox technique, you are rendering the ouster nugatory, and conflicts with a very important canon of construction. But if you reject the orthodox technique, you are bound to exclude review altogether. And that means that you are rendering nugatory every control on the exercise of power postulated in the remainder of the statute: you are rendering unenforceable every condition that it imposes upon the power that it confers. To minimize the damage … we adopt the orthodox technique, *faute de mieux*."[68]

"Crowbars and Cobwebs: executive autocracy and the law in South Africa" (1989) 5 *South African Journal of Human Rights* 1 - 25.

[59] W Dean, "Our administrative law: a dismal science?" (1986) 2 *South African Journal on Human Rights* 164.

[60] H Corder, "Introduction: Administrative Law Reform" 1993 *Acta Juridica* 1, 1.

[61] K O'Regan, "Breaking Ground: Some Thoughts on the Seismic Shift in our Administrative Law", cited above n 58, at 428.

[62] See *Komani NO v Bantu Affairs Administration Board, Peninsula Area* 1980 (4) SA 448 (A) and *Oos-Randse Administrasieraad v Rikhoto* 1983 (3) SA 595 (A).

[63] See *Administrator Transvaal v Traub* 1989 (4) SA 730 (A); *Administrator, Transvaal v Zenzile* (1991) 1 SA 21 (A) and *Administrator, Natal v Sibiya* 1992 (4) SA 532 (A).

[64] Act 3 of 1953.

[65] S 2.

[66] S 3(1)(a).

[67] See Etienne Mureinik "Pursuing Principle: The Appellate Division and review under the state of emergency', cited above n 58, 70.

[68] Id.

Nevertheless, in a notorious decision the Appellate Division abandoned the orthodox position and held that a challenge to regulations on the basis that they were vague, on the grounds that vagueness does not render a regulation ultra vires.[69] Ismail Mahomed , who later became Chief Justice, wrote of this decision that "What … call[s] for urgent reform is the apparently unrestricted right of a delegated authority to make regulations which cannot be understood by the citizen but are nevertheless binding on the citizen and immune from judicial scrutiny. No society … should be compelled to endure the obligation to obey regulations which they cannot understand and which the courts cannot understand with all their skill and experience."[70]

The failure of administrative law and judicial review to protect citizens from autocratic, racist and invasive regulations coupled with the recurrent practice of ousting the courts' oversight of executive action in the late *apartheid* period played a significant role in the decision to entrench a right to just administrative action in the Constitution, as well as the constitutionally mandated codification of administrative law. Entrenching a right to just administrative action substantially limits Parliament's ability to oust judicial scrutiny of administrative action.[71]

Codification of judicial review in South Africa

Origins

Section 33 of the South African Constitution, as mentioned above, provides a right to just administrative action, and requires Parliament to enact legislation to give effect to the right. Section 33 thus constitutes a firm rejection of the narrow approach to judicial review in the *apartheid* era and imposes an obligation that administrative action must be lawful, procedurally fair and reasonable (a triad of obligations that echoes Lord Diplock's approach in *CCSU v Minister for the Civil Service* (the GCHQ case)).[72] According to the transitional provisions of the Constitution, the legislation to give effect to the right had to be enacted within three years of the commencement of the Constitution. The result was the Promotion of Administrative Justice Act, 3 of 2000 (PAJA).

Purpose

The Preamble to PAJA states that it was enacted, amongst other things, in order to "promote an efficient administration and good governance; and to create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect

[69] See *Staatspresident v United Democratic Front* 1988 (4) SA 224 (A).
[70] See I Mahomed "Disciplining Administrative Power – Some South African Prospects, Impediments and Needs" (1989) 5 *South African Journal on Human Rights* 345 – 354, 353.
[71] The Bill of Rights in the South African Constitution provides that rights may be limited if it is reasonable and justifiable to do so. See s 36 of the Constitution.
[72] [1985] 1 AC 374 (HLE).

to the right to just administrative action". The Preamble thus makes plain that Parliament enacted the Act not only to promote efficiency and good governance but also to foster a culture of accountability. What is not explicit in PAJA, is the relationship between s 33, PAJA and the existing grounds of judicial review. The Constitutional Court has sought to clarify the relationship by holding on several occasions that judicial review should be based on PAJA, and not directly on s 33 or on the common law.[73] Nevertheless, in practice, litigants continue at times to base their claims on the common law or directly on s 33 of the Constitution, and the courts are not consistent in insisting on litigants basing their claims in PAJA.

Constitutional "backstop"

Because PAJA is enacted to give effect to an entrenched constitutional right to just administrative action, it may be challenged on constitutional grounds on the basis that it does not protect the right in some manner. The consequence is that PAJA may not reduce the scope of protection afforded by s 33 unless it is justifiable to do so under the general limitations clause of the Constitution.[74] In addition, the courts seek to interpret PAJA in a manner that is consistent with s 33.[75] The Constitution thus provides a "backstop" and in this sense South Africa's codification may be different to any codification in the United Kingdom where there is no explicit constitutional backstop.

Application throughout South Africa – one judicial system

PAJA applies throughout South Africa. Although South Africa has a tiered system of government, with legislative areas allocated to national, provincial and local spheres of government, its judicial system is unitary.

Key elements of PAJA

PAJA contains a definition of administrative action,[76] provides procedures for public inquiries,[77] regulates the procedure for reason-giving,[78] codifies the grounds of judicial review,[79] imposes a time limit for the launch of judicial review proceedings,[80] as well as a duty to exhaust internal remedies prior to launching a judicial review,[81] and provides remedies for judicial review.[82]

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[73] See, for example, *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15 and *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* [2005] ZACC 14, paras 95 – 96.
[74] See s 36 of the Constitution (the general limitations clause).
[75] See, for example, *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15.
[76] S 1 of PAJA.
[77] S 4 of PAJA.
[78] S 5 of PAJA, which is further regulated by regulations promulgated under the Act.
[79] S 6 of PAJA.
[80] 180 days from the date when internal remedies were exhausted, or if none, from the date the decision was communicated to the grievant. S 7 of PAJA.
[81] S 7(2) of PAJA.
[82] S 8 of PAJA.

The least successful aspect of PAJA is its definition of 'administrative action'. Section 33 of the Constitution confers a right to just administrative action and so the concept of 'administrative action' is the gateway to the right. PAJA attempts to define the concept, but its definition has been widely criticised. The Supreme Court of Appeal, for example, has described the definition as "cumbersome", and one which "serves not so much to attribute meaning to the term as to limit its meaning by surrounding it within a palisade of qualifications."[83] The drafters appear to have drawn both from Australian law (in focussing the definition on a "decision", as does the Australian ADJR) and German law in the adoption of the requirement that the decision "has direct, external legal effect[84] but generally the courts have held that this borrowing has not been helpful and there has not been extensive resort to the jurisprudence in Germany or Australia. The definition contains seven exclusions, some of which draw on early jurisprudence of the Constitutional Court that drew distinctions between 'administrative action', on the one hand, and 'legislative action',[85] 'executive action',[86] and 'judicial action',[87] on the other. The definition is unsatisfactory, particularly because of its technical character which means, as a leading author says, "that users … are more likely to be flummoxed than guided by its definition".[88] The result has been confusion and uncertainty as courts grapple with the complexity of the definition.

The constitutional principle of "legality"

Even before PAJA was adopted, the Constitutional Court had found that certain forms of government conduct did not constitute administrative action, and therefore did not attract the obligations that flowed from the right to just administrative action.[89] However, the Court held that even where the exercise of public power is not subject to section 33, it will be governed by the principle of legality, which is founded on the constitutional principle of the rule of law, and requires all exercises of public power to be lawful and neither arbitrary or irrational.[90] The precise ambit of the principle of legality remains unclear: there have been a handful of cases that suggest the principle requires government to act in a procedurally fair manner as well.[91]

The principle of legality finds application, in particular, to the exercise of what in the United Kingdom would be prerogative powers – for example, the constitutional

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[83] *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* [2005] ZASCA 43, para 21.

[84] See discussion in C Hoexter *Administrative Law in South Africa* 2nd ed, ch 4.3, and *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* [2005] ZACC 14, para 142.

[85] See, in particular, *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17.

[86] See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11.

[87] See *Bernstein and Others v Bester NO and Others* [1996] ZACC 2.

[88] See C Hoexter, *Administrative Law in South Africa* 2nd ed, cited above n 82, 249.

[89] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17.

[90] See *Fedsure*, cited above n 87, and *Pharmaceutical Manufacturers Association of South Africa and Another: in re Ex Parte President of the RSA and Others* [2000] ZACC 1.

[91] See *Albutt v Centrefor the Study of Violence and Reconciliation and Others* [2010] ZACC 4.

power to bring legislation into force[92] and the constitutional power to appoint commissions of inquiry[93]– which have been held not to constitute administrative action. These powers are nevertheless subject to review for lawfulness and rationality.

The principle has thus been described to act as "a safety net"[94] and as allowing the court "to defer to the government at the margins without relinquishing its supervisory role completely".[95] The doctrine is widely used, sometimes even when PAJA would be available, in part, perhaps because it permits a litigant to avoid the obligation to institute judicial review within 180 days, or to exhaust internal remedies. Somewhat perplexingly, the Constitutional Court has held that where government seeks to set aside administrative action on the ground that it was unlawful, it may only rely on the principle of legality and not PAJA.[96] It is difficult to predict whether the principle of legality may come to be the dominant form of judicial review in South Africa in future.

Administrative action and delict

South Africa too has seen a number of cases brought seeking relief in delict (the law of tort) for unlawful administrative action that has caused harm. A significant number have been in the field of public procurement, and where the basis for the claim is negligence have not been successful.[97] However, where the claim has been based on fraud in the award of the tender, the situation is different, and delictual liability has been held to arise.[98] Private law thus does provide causes of action in some circumstances for those harmed by unlawful action. The precise ambit of such causes of action is constantly being explored in litigation.

4. Insights

A. Benefits

Clarity

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[92] See *Pharmaceutical Manufacturers Association of South Africa and Another: in re Ex Parte President of the RSA and Others* [2000] ZACC 1.
[93] See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11.
[94] See C Hoexter, *Administrative Law in South Africa* 2nd ed, cited above n 84, 124.
[95] See C Hoexter "The Future of Judicial Review in South African Administrative Law" (2000) 117 *South African Law Journal* 484, 507.
[96] See *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40.
[97] See, for example, *Olitzki Property Holdings v State Tender Board and another* [2001] ZASCA 51; *Premier, Western Cape v Fair Cape Property Developers* [2003] ZASCA 42 and *Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16.
[98] See, for example, *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* [2004] ZASCA 24; *Minister of Finance and Others v Gore NO* [2006] ZASCA 98.

Although an examination of both Australia and South Africa suggests that clarity may well be gained from the codification of the grounds of review, those gains should not be overstated as they may prove ephemeral.

In Australia, while the ADJR, did initially improve clarity, over time that changed. For various reasons as we have noted above, the availability of underlying constitutional remedies increasingly resulted in litigants relying on constitutional remedies rather than the ADJR.

In South Africa, the greatest gains in clarity have arguably come from the entrenchment of a right to just administrative action in the Constitution itself. The constitutional right stipulates the grounds of judicial review to be lawfulness, procedural fairness and reasonableness and it establishes a right for those affected adversely by administrative action to be provided with written reasons. Any attempt to oust the jurisdiction of the court to review administrative action on the stipulated grounds must be justifiable in terms of s 36 of the Constitution. In our view, this provision of the South African Constitution is a development of global importance in the formulation of bills of rights, and it is to be found in several constitutions that have been adopted since 1996.[99]

However, the codification undertaken in PAJA has had a less salutary effect in relation to clarity, particularly because of the difficulties of interpreting some of its key provisions, notably, the definition of "administrative action". Courts have sought to avoid the difficulties created by the legislative drafting by seeking to interpret the provisions of PAJA consistently with the Constitution, sometimes with the consequence that the textual provisions of PAJA have had to be stretched to ensure constitutional compliance. Such interpretive techniques, while understandable, do not promote clarity.

Certainty

We are less convinced that a codification produces certainty, particularly in the short term. Both the Australian and South African examples illustrate that the early years of codification require courts to interpret and apply the new rules that have been formulated. It may be that codification will never result in greater certainty than judge-made law for, as scholars have noted, it may be that "[t]he certainty argument … suggests a childlike faith in the determinacy of statutory provisions – a faith that is seldom justified by the judicial interpretation of the legislation in practice".[100]

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[99] See, for example, s 43 of the Kenyan Constitution, 2010 and Kenya's Fair Administrative Action Act, 4 of 2015.
[100] C Hoexter, "Administrative Justice and Codification", cited above n 6, 7, citing TH Jones, above n 2. Hoexter also points to the fact that interpretations of the United States Administrative Procedure Act, 1946, "changed radically" in the period between 1960 and 1970 although the statute remained unchanged. In this regard, she cites M Shapiro "Codification of Administrative Law: The US and the Union" (1996) 2 *European LJ* 26 – 47, 40.

Accessibility

One of the challenges of a common law system is the fact that its rules are nowhere written down and accessible. Codification undoubtedly therefore improves accessibility to the law not only by citizens but also by civil servants.[101] However, as noted above, the code is likely quickly to accrete judicial interpretations that will be less readily accessible, which will impair the accessibility of the law. As Hoexter has noted, "[p]recisely how the courts understand and apply the grounds in practice is not and can never be apparent from the legislation itself: the only way to establish such nuances is by delving into judicial decisions".[102] In South Africa, the need for courts to adopt constitutionally compliant interpretations of PAJA have meant that it is less accessible. In addition, legislation may be amended by the legislature, as has happened in Australia, where successive amendments to the legislation have rendered the statute more complex.

Democratic Legitimacy

It seems intuitively correct that when Parliament acts to codify the principles of judicial review, the code may promote the democratic legitimacy of judicial review. However, we caution that the extent of that legitimacy may depend on the purpose sought to be achieved by codification, and the actual manner of the codification itself. In both Australia and South Africa, the codification of administrative law was founded on an acceptance of the constitutional legitimacy of judicial review. In Australia, one of the key purposes of the ADJR was to make the law clearer and more accessible, not to limit or restrict judicial review. In South Africa, too, following the experience of judicial review during the *apartheid* era, and the legislative attempts, often successful, to oust the jurisdiction of courts, the purpose of entrenching a constitutional right to just administrative action was to ensure that judicial review would not be limited unjustifiably by future governments. The enactment of PAJA was, its Preamble makes plain, to further this constitutional purpose.

Were a legislature to seek to codify judicial review in a manner that undermined the rule of law, the situation may be different. In a parliamentary democracy, parliamentary supremacy coupled with the rule of law, in which the executive is subject to the law, are essential interdependent elements of the social compact. Other than *apartheid* South Africa, we have no ready, reasonably contemporary examples to offer of a broad and sustained attempt to undermine the use of judicial review to assure lawful action by the executive in a common-law jurisdiction. The absence of such examples reinforces our view that judicial review is a core element of a modern democracy based on the principle of the rule of law.

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[101] See C Hoexter, "Administrative Justice and Codification", cited above n 6.
[102] Id. Also quoting TH Jones, cited above n 2.

Reform

Codification does present an opportunity for reform, as both the ADJR and the adoption of s 33 in the South African Constitution, together with PAJA illustrate. In both jurisdictions, the legislative introduction of a right to reasons has been an important reform. However, in Australia, other aspects of the reform have not proved as enduring as the drafters probably hoped. As we describe below, one of the problems with codification is the risk of ossification, which makes it harder for the law to develop as circumstances change. It may well be that codification is inferior to the long-standing methods of reform that are characteristic of the common law.

We also note that, both in Australia and South Africa, lawyers and judges trained and expert in the common law rules and practices of judicial review do not adopt reforms introduced by codification easily. In both systems, existing principles and practices of administrative law have continued to be drawn on and applied in the post-codification period. To the extent that the codification does not seek to challenge or restrict the longstanding principles and practices of judicial review, and is therefore not primarily aimed at reform but rather at clarity and accessibility, it may play a constructive role, but should codification seek a fundamental reform of the law incompatible with the current law of judicial review, it will run considerable risks.

B. Risks

Experience with codification in both Australia and South Africa shows that it carries risks as well, which may undermine whatever benefits it secures in the short term. The risks are categorised here under the headings of rigidity, ossification and vulnerability to amendment.

Rigidity

By definition, codification reduces legal principles and practices to fixed general rules with the status of legislation. These rules prescribe the circumstances in which the code applies and the principles and practices to be followed in such cases. The rigidity of codification is useful in some contexts and can be softened by provision for discretion. In the context of judicial review, however, the variety of ways in which questions of amenability and lawfulness present themselves make the generalised rigidity of codification a risk.

In both Australia and South Africa, the risk is demonstrated most clearly by the challenge of codifying amenability to review in a way that covers the field and does

not extend beyond it. In both cases, the codification fell short of covering the field in significant respects, requiring recourse to other avenues for testing the lawfulness of government action.

This development also added to the complexity of review, countering one of the claimed advantages for codification. In both cases also, judicial decisions about the meaning of the conditions on which codified review depended added further to the complexity of review without being able adequately to ameliorate the problems created by reducing amenability to a codified, generalist prescription. By contrast, judicial decisions applying the common law of judicial review in concrete cases can offer a nuanced approach to the circumstances in which amenability is appropriate.

Ossification

The experience of Australia and South Africa shows that the rigidity that is inherent in codification presents a further risk, in the form of ossification over time. The history of judicial review shows that amenability to review, grounds, remedies and other aspects of the system have evolved in response to circumstances. This is not adventurism on the part of courts, but the common law method in action in jurisdictions committed to the understanding of the rule of law that emanated from British constitutional experience. Drivers of change have included new modalities of government decision-making, shifting relationships within the executive branch, different techniques of legislative drafting, evolving expectations of governance in a democracy and advances in conceptual understanding.

However adequately a code captures the contours of judicial review at the outset, it will quickly become incapable of keeping up with the need for change, which the common law method naturally accommodates. Formal textual amendment, responding to reconceptualization of aspects of the code, is unlikely, once the code is in place.

Two examples from Australian experience make the point. The exclusion of decisions of the Governor-General from the ambit of the ADJR Act reflected judicial review as then understood in 1977, when the Act was passed. Within five years, it was held by the HCA that at least some decisions of the personal representative of the Crown were reviewable, in a context in which legislation conferred authority on the Governor-in-Council to issue licenses for workers compensation insurance.[103] The Act was never changed to reflect this or any other restrictions on the ambit of the Act, despite clear evidence of their inadequacy and repeated reports of the Administrative Review Council.[104] Secondly, the grounds of review included in the ADJR Act in 1977 include 'natural justice' (sec 5(1)(a); sec

[103] *FAI Insurances v Winneke* (1982) 151 CLR 342. The same conclusion, in a different context, was reached in *R v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170

[104] Administrative Review Council, cited above n 10, 1.3-1.11

6(1)(a)). By 1985, however, this ground of review had evolved to become 'procedural fairness', reflecting the wider range of decisions for which fairness was required and the wider range of practices by which it might be satisfied.[105] This particular problem was overcome by courts notionally substituting one for the other, at some cost to the intelligibility of the ADJR Act, but with benefit to judicial review. A more radical conceptual shift, of the kind that occurred in the *CCSU* case, could not have been accomplished within the confines of the ADJR Act.

In South Africa, difficulties with the text of PAJA have often been addressed by the courts seeking an interpretation that conforms to the Constitution, under the principle that where reasonably possible, courts should adopt interpretations of legislative text that are constitutionally compliant.[106] A clear example of this was the interpretation of one of the grounds of review in PAJA: that a decision must not be "so unreasonable that no reasonable person" could have reached it.[107] The Court held the provision must be read consistently with s 33 of the Constitution to mean that a decision will be reviewable if it is one that a reasonable decision-maker could not reach.[108] This approach may reduce the risk of ossification, but in so doing it undermines the goals of clarity and accessibility.

Vulnerability to amendment

Given the risks of rigidity and ossification, it may be ironic to identify vulnerability to amendment as another risk of codification. The reference here, however, is not to carefully calibrated change to bring a code up to date, which is rare, but to expedient change, seizing legislative opportunity, detracting from the integrity of the code. This risk is manifested by Australian experience, where the ADJR Act first was amended to provide mechanisms to exclude decisions from amenability to review, an obligation to provide reasons or both and then frequently changed to exclude new classes of decision from ADJR Act review. This practice exacerbated already existing problems with the scope of the Act, adding further to the complexity and inaccessibility of review. South Africa has not seen regular amendments to PAJA, although many commentators suggest that revision of its cumbersome definition of "administrative action" is overdue. That it has not happened may, in part, be as a result of the fact that the courts have sought to interpret and apply the definition in a coherent way that overlooks some of the textual difficulties.[109]

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[105] *Kioa v West* (1985) 159 CLR 550.

[106] See *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motors Distributors (Pty) Ltd and others in re: Hyundai Motor Distributors (Pty) Ltd and others v Smith NO and Others* [2000] ZACC 12, para 23.

[107] S 6(2)(h) of PAJA.

[108] See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* [2004] ZACC 15, para 44. In reaching this conclusion, Lord Cooke's reasoning in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1998] UKHL 40 was cited with approval.

[109] But a recent divided decision of the Supreme Court of Appeal illustrates the ongoing difficulties with the definition: see *South African National Park v MTO Forestry (Pty) Ltd and another* [2018] ZASCA 59, where the dissenting judgment was based on one of the perceived difficulties of the definition of "administrative action".

Beyond the code: the role of a Constitution

In both Australia and South Africa, the inadequacy of the ambit of the codifying legislation prompted a fallback on other sources of redress to test the lawfulness of government action. These included both other avenues to judicial review and causes of action in private law, including the torts of negligence, trespass, breach of statutory duty and misfeasance in public office.[110] In both jurisdictions, recourse to such avenues was assisted by constitutional protection of the jurisdiction of the courts. The experience of both Australia and South Africa suggests that a judicial review code in the United Kingdom would not adequately cover this complex and shifting field, at the outset or in the longer term. In this situation, also, applicants would seek alternative avenues, in either public or private law. It is relevant in this regard that the United Kingdom lacks an entrenched Constitution to protect judicial intervention from legislative ouster. Given the centrality of the rule of law to the British Constitution, however, it is inconceivable that alternative means of recourse to the courts would not be found. To say this is not to take sides in the long-running debate about whether judicial review is sourced in statute, the common law or elsewhere. It might be noted, nevertheless, that developments of this kind might prompt that debate finally to be resolved.

5. Conclusion

Our examination of the Australian and South African experience of the codification of judicial review indicates that while some benefits may result, there are risks as well. We agree with Professor Hoexter's recent assessment that "the reasons for even a modest exercise in codification would need to be quite compelling to make the exercise worthwhile".[111] It will be for the Panel to consider whether such reasons exist in the United Kingdom.

[110] Administrative Review Council, cited above n 10, 2.58-2.59.
[111] See C Hoexter, "Administrative Justice and Codification", cited above n 6.