

**LEGAL CULTURE, LEGALITY AND
THE DETERMINATION OF THE
GROUNDS OF JUDICIAL REVIEW OF
ADMINISTRATIVE ACTION IN
ENGLAND AND AUSTRALIA**

**VORAPHOL MALSUKHUM
CORPUS CHRISTI COLLEGE**

Michaelmas 2018

A thesis submitted in partial fulfilment for the degree of
Doctor of Philosophy in Law, University of Oxford

Approximately 100,000 words

THESIS ABSTRACT

This thesis studies the principle of legality in English and Australian administrative law relating to their legal systems' legal culture and the determination of the scope of judicial review of administrative action. It demonstrates that the distinctive constitutional orders that are embedded in legal culture of England and Australia, influence the courts' deep understanding of what legality means and covers. These different understandings result in the English and Australian courts applying different doctrinal approaches when determining the grounds of judicial review, namely, error of law, jurisdictional error, jurisdictional fact, rationality, proportionality and substantive legitimate expectations.

On the one hand, the English courts have flexibility to apply various justifications, doctrines and applications in their determination of the mentioned grounds of judicial review. These are products of the English legal culture based on the absence of a written constitution, the balancing process between parliamentary sovereignty and the rule of law, and the fluid separation of powers between court and executive. On the other hand, the Australian courts apply relatively fixed doctrinal approaches to determine these grounds under a central approach of jurisdictional error. This is because, whether empowered or limited, they rigidly follow the framework of separation of powers prescribed in the written constitution, discussed as distinctive elements of Australian legal culture.

Rather than supporting the way of one legal system over the other, this thesis upholds a comprehensive understanding of the English and Australian determination of the grounds of judicial review in the light of their deep understanding of legality and legal cultures. The implications of these methodological approaches constitute an in-depth

explanation of the way common law judicial reviews are embedded in different legal systems.

TABLE OF CONTENTS

THESIS ABSTRACT	i
Table of Contents.....	iii
Acknowledgements.....	vii
Table of Abbreviations	x
Table of Cases	xii
Table of Legislation.....	xxi
I. Chapter One	1
Comparative Doctrinal Analysis of Legal Reasoning in the Determination of the Grounds of Judicial Review in the Light of Deep Water Legality and Legal Culture: A Methodological Framework.....	1
1. Arc of Arguments	1
1.1 Legal Culture and the Determination of the Grounds of Judicial Review.....	3
1.2 Methodological Approaches of Surface and Deep-Water Legality	4
1.3 English and Australian Law as a Case Study.....	9
2 .Structure and Methodologies of the Two Main Parts.....	11
2.1 Comparative Analysis of English and Australian Legal Cultures	11
2.2 Comparative Analysis of the Grounds of Judicial Review in Case Law	12
2.2.1 Selection of the Examined Grounds of Judicial Review	12
2.2.2 Legal Reasoning of Leading Cases.....	14
2.2.3 Doctrinal Approaches	16
2.2.4 Grounds and Leading Cases for Chapters 3 to 6	17
2.3 Example of a Combination of the Two Parts.....	21
3. Why is the Comparative Exercise in this Thesis a Useful Exercise?	25
4. Scope and Caveats	30
5. Conclusion	35
II. Chapter Two	37
Differences between English and Australian Legal Cultures	37
1. Introduction	37
2. Concept of Legal Culture: A Navigating Methodology	39
2.1 Variations in Using Legal Culture	42
2.2 Judicial Review Constitutionalism.....	46
2.3 Elements of Legal Culture	50
2.3.1 Constitutional Framework	50
2.3.2 Constitutional Value	51
2.3.3 Way of Justification and Limitation of Judicial Review	53
2.4 Legal Mentality	54
2.5 Proposed Methodological Approaches	58
2.5.1 Evidence of Legal Culture	59

2.5.2 Unit of Legal Culture.....	60
2.5.3 An Outsider Perspective	61
2.5.4 Descriptive Approach	62
2.5.5 Non-Monolithic Nature	63
2.6 Summary	66
3. Flexible Legal Mentality of English Judicial Review Constitutionalism.....	67
3.1 English Constitutional Frameworks and Values	68
3.2 Justification for the English Courts to Conduct Judicial Review	77
3.3 Fluid Separation of Powers between Court and Executive.....	81
3.4 Integrating Influences from Interrelated Legal Cultures.....	91
3.5 Substantive Conclusion.....	98
4. Rigid Legal Mentality of Australian Judicial Review Constitutionalism.....	99
4.1 Australian Constitutional Frameworks	100
4.2 Australian Constitutional Values that Justify Judicial Review	105
4.3 Australian Constitutional Values that Limit Judicial Review.....	115
4.4 Rigidly Reading the Framework of Separation of Powers Prescribed in the Written Constitution.....	128
4.5 Unwelcoming Influences from Interrelated Legal Cultures	131
4.6 Substantive Conclusion.....	132
5. Snapshots of English and Australian Rivers.....	134
III. Chapter Three	136
Influence of the Legal Cultures on Error of Law and Jurisdictional Error	136
1. Introduction	136
2. Error of Law and Jurisdictional Error at Surface and Deep Levels.....	142
2.1 Two Complicated Factors Limiting Scope of Judicial Review	142
2.2 The Adjudicative Monopoly of the Courts	145
2.3 Understanding the Complications through Legal Culture	147
3. English Doctrinal Approaches.....	150
3.1 Prior to <i>Cart</i>	150
3.2 <i>Cart</i>	162
3.3 Products of the English Legal Culture	170
4. Australian Doctrinal Approaches	172
4.1 Prior to <i>Kirk</i>	173
4.2 <i>Kirk</i>	178
4.3 Products of the Australian Legal Culture.....	190
5. Conclusion	191
IV. Chapter Four	194
Influence of the Legal Cultures on Jurisdictional Fact.....	194
1. Introduction	194
2. Judicial Review of Factual Issues at Surface and Deep Levels.....	198
2.1 Distinction between Law and Fact.....	199
2.2 Courts' Reviews of Some Kinds of Fact.....	203
2.3 Understanding Jurisdictional Fact by means of Deep-water Legality	204
3. English Doctrinal Approaches.....	207

3.1 Prior to <i>E</i>	207
3.2 <i>E</i>	212
3.3 After <i>E</i>	216
3.3.1 <i>R (A) v Croydon</i>	218
3.3.2 <i>Jones</i>	222
3.4 Products of the English Legal Culture	225
4. Australian Doctrinal Approaches	227
4.1 <i>Timbarra</i>	228
4.2 <i>Enfield</i>	235
4.3 After <i>Timbarra</i> and <i>Enfield</i>	240
4.4 Products of the Australian Legal Culture.....	247
5. Conclusion	249
V. Chapter Five	252
Influence of the Legal Cultures on the Grounds relating to Substantive Exercise of Discretion	252
1. Introduction	252
2. Judicial Review of Administrative Discretion at Surface and Deep Levels.....	255
2.1 Discretion: Power to Choose.....	256
2.2 Courts Review Some Exercises of Discretion	259
2.3 Extent of Judicial Review of Administrative Discretion	261
3. English Doctrinal Approaches.....	266
3.1 Choices in English Law	267
3.2 <i>Kennedy</i>	273
3.3 <i>Pham</i>	283
3.4 Other Elements in the English Picture	288
3.5 Products of the English Legal Culture	290
4. Australian Doctrinal Approaches	292
4.1 <i>S20/2002</i>	295
4.2 <i>SZMDs</i>	301
4.3 <i>Li</i>	307
4.4 Other Elements in the Australian Picture.....	311
4.5 Products of the Australian Legal Culture.....	314
5. Conclusion	315
VI. Chapter Six	317
Influence of the Legal Cultures on Legitimate Expectations	317
1. Introduction	317
2. Legitimate Expectations at Surface and Deep Levels	321
2.1 General Concepts Supporting and Rejecting the Ground	321
2.2 Understanding Legitimate Expectations through Legal Culture.....	323
3. English Doctrinal Approaches.....	326
3.1 Prior to <i>Coughlan</i>	326
3.1.1 <i>Richmond-upon-Thames</i>	327
3.1.2 <i>Hamble Fisheries</i>	330
3.1.3 <i>Hargreaves</i>	334

3.2 <i>Coughlan</i>	335
3.3 After <i>Coughlan</i>	339
3.4 Products of the English Legal Culture	343
4. Australian Doctrinal Approaches	347
4.1 Prior to <i>Lam</i>	348
4.2 <i>Lam</i>	358
4.3 After <i>Lam</i>	364
4.4 Products of the Australian Legal Culture.....	365
5. Conclusion	367
VII. Chapter Seven	369
Conclusion	369
1. Mapping the Thesis in Administrative Law Scholarship	369
2. English Law Standing on the Edge of Two Boats.....	374
3. Australian Law’s Choice of One Boat for a Journey.....	377
4. Further Implications of Deep-water Legality and Legal Culture	378
5. Concluding Remarks	380
Bibliography	382

ACKNOWLEDGEMENTS

'Feeling gratitude and not expressing it is like wrapping a present and not giving it'

(William Arthur Ward, 1921-1994)

I would like to take this opportunity to unwrap my gratitude to all the people involved in the completion of this thesis.

The first is my supervisor, Professor Liz Fisher, who has given me unfailing support throughout the five years of my study at Oxford. She never deserted me in the most difficult times and this thesis would not have been finished without her. Therefore, I would like to thank her for being one of the best teachers in my life.

I am also thankful for the helpful comments to develop this thesis from the examiners, namely, Professor Rebecca Williams, Professor Alison Young, Professor Paul Craig and Professor John Bell, as well as from my senior law teachers in Thailand, Associate Professor Dr. Narongdech Srukhsosit and Assistant Professor Dr. Korrasut Khopuangklang. Without their suggestions, I would not be as happy as I am with this thesis.

As a non-native English speaker, it was necessary to have good advisors for language issues in writing this thesis. Therefore, I would like to express my gratitude for the great deal of advice I received from my dear native English friends, Frans and Margaret. Additionally, I would like to thank Byte and Arm Saisod, who helped me to find solutions to using Microsoft Word in order to meet the requirements of the format of the thesis. My grateful thanks must also go to all the teachers, advisors and staff at the Faculty of Law, University of Oxford and Corpus Christi College. Importantly, the administration

processes would not have run smoothly without helpful correspondence from Ms. Geraldine Malloy and Ms. Rachel Clifford.

Returning to the application process, I would like to thank Professor Lucia Zedner, Professor Dr. Sakda Thanitcul, Professor Vitit Muntarbhorn, Professor Dr. Somkit Lertpaithoon, Professor Dr. Visanu Krua-ngam, Associate Professor Noppanit Suriya, Associate Professor Dr. Pinai Nanakorn and Lecturer Dr. Junavit Chalidabhongse for providing letters of recommendation, which enabled me to be accepted to the Magister Juris and DPhil programmes. I also greatly appreciate receiving a scholarship from the Government of Thailand throughout the study.

My gratitude is also given to all my wonderful colleagues in my workplace, the Faculty of Law, Chulalongkorn University. Please allow me to mention the names of some of them, who helped me through the hard time of applying and completing this doctoral degree. They are Ajarn Sakda, Ajarn Vitit, Ajarn Chumphorn, Ajarn New, Ajarn Arm, Ajarn Yod and Ajarn Rawin.

Also importantly, I would not have been able to complete this degree without the knowledge and skills I learned from the teachers at my old schools, namely, Thammasat University, Saint Gabriel College and Thampirak Kindergarten. And the period of study would also have been almost unbearable without good friends at the University of Oxford, Thammasat University and Saint Gabriel College to share laughs and happy times.

My special thanks are given to the Dhamma teachings of the Lord Buddha, which were of immeasurable help to me in terms of mental support. I am particularly very

thankful to the great Dhamma masters of my family, namely Luang Phor Viriyang Sirintharo, Luang Phor Jarun Thitadhammo and Master Arnun Arnunthro.

Last, but never least, I would like to thank my family, my mother, my father, H'Cheng and O (as well as the staff at Roky Rubber Auto Parts Ltd.). You are everything to me and I dedicate this thesis to you. Especially to my parents, who had a limited opportunity to attend higher education as a result of the hardship they endured during their childhood. Yet, they have made it possible for me, their son, to graduate with an honourable degree from a world renown university. This achievement is therefore not mine, but theirs!

TABLE OF ABBREVIATIONS

Administrative Appeals Tribunal Act 1975	AAT
Administrative Decisions (Judicial Review) Act 1977	ADJR
British Nationality Act 1981	BNA
Charities Act 1993	CRA
Chief Justice	CJ
Commonwealth Court of Conciliation and Arbitration	CCCA
Court of Appeal	CA
Criminal Injuries Compensation Scheme 2001	CICS
District Court of South Australia	DCSA
Environmental Planning and Assessment Act 1979	EPA
European Convention on Human Rights	ECHR
European Union	EU
First Tier Tribunal	FTT
Freedom of Information Act 2000	FOIA
High Court of Australia	HCA
House of Lords	HL
Human Rights Act 1998	HRA
Immigration and Asylum Act 1999	IAA

Immigration Appeal Tribunal	IAT
Industrial Court of New South Wales	ICNSW
Industrial Relations Act 1996 (NSW)	IRA
Justice	J
Justices	JJ
Lord Justice	LJ
Migration Act 1958 (Cth)	MA
Migration Review Tribunal	MRT
New South Wales	NSW
Refugee Review Tribunal	RRT
Species Impact Statement	SIS
Tribunals, Courts and Enforcement Act 2007	TCEA
United Kingdom	UK
United Kingdom Supreme Court	UKSC
United States	US
Upper Tribunal	UT

TABLE OF CASES

UK Cases

<i>A v Secretary of State for the Home Department</i> [2013] EWHC 1272 (Admin)	169
<i>Anisminic Ltd v Foreign Compensation Commission</i> [1969] 2 AC 147 (HL)	16, 18, 137, 152, 155, 160
<i>Arlidge v Local Government Board</i> [1915] AC 120 (HL)	74, 160
<i>Associated Provincial Pictures Houses Ltd v Wednesbury Corporation</i> [1948] 1 KB 223 (CA)	80, 252, 256, 260
<i>Attorney General of Hong Kong v Ng Yuen Shiu</i> [1983] 2 AC 629	318, 326, 359
<i>Bank Mellat v HM Treasury (No 2)</i> [2013] UKSC 39	266
<i>Belfast City Council v Miss Behavin' Ltd</i> [2007] 1 WLR 1420	270
<i>Bugdaycay v Secretary of State for the Home Department</i> [1987] 1 AC 514	269, 279
<i>Bunbury v Fuller</i> (1853) 9 Ex 111	140, 152, 220
<i>Chief Constable of the North Wales Police v Evans</i> [1982] 1 WLR 1155	199
<i>Council of Civil Service Unions v Minister for the Civil Service</i> [1985] AC 374	4, 252, 269, 278
<i>Dowty Boulton Paul Ltd v Wolverhampton Corporation (No 2)</i> [1976] Ch13	180
<i>E v Secretary of State for the Home Department</i> [2004] EWCA Civ 49	19, 197, 212-216

<i>Findlay, Re</i> [1985] AC 318	327, 336
<i>Guardian News and Media</i> [2013] QB 618	276
<i>International Trader's Ferry</i> [1999] 2 AC 418 (HL)	93
<i>Kennedy v Charity Commission</i> [2014] UKSC 20	15, 19, 255, 273, 283, 288
<i>Keyu v Secretary of State for Foreign and Commonwealth Affairs</i> [2015] UKSC 69	288
<i>Kruse v Johnson</i> [1898] 2 QB 91	259
<i>Moyna v Secretary of State for Work and Pensions</i> [2003] 1 WLR 1929	224
<i>Nadarajah Abdi v The Secretary of State for the Home Department</i> [2005] EWCA Civ 1363	318, 320, 341, 346
<i>O'Reilly v Mackman</i> [1983] 2 AC 237 (HL)	160
<i>Pearlman v Keepers and Governors of Harrow School</i> [1979] QB 56 (CA)	160
<i>Pham v Secretary of State for the Home Department</i> [2015] UKSC 19	15,20, 255, 283-288
<i>Phillips v Upper Tribunal (Tax and Chancery Chamber)</i> [2013] EWHC 2934 (Admin)	169
<i>Piglowska v Piglowski</i> [1999] 1 WLR 1360	199
<i>Puhlhofer v Hillingdon London Borough Council</i> [1986] 1 AC 484	194, 211
<i>R (A) v Croydon LBC</i> [2009] UKSC 8	19, 207, 218-222
<i>R (Alconbury Developments Ltd) v Secretary of State for the Environment</i> [2001] 2 WLR 1389	270, 272

<i>R (Jones) v First-tier Tribunal</i> [2013] UKSC 19	15, 19, 26, 195, 197, 222- 224
<i>R (Moseley) v Haringey London Borough Council</i> [2014] UKSC 56	13
<i>R (Osborn) v Parole Board</i> [2013] UKSC 61	95
<i>R (Quila and another) v Secretary of State for the Home Department</i> [2011] UKSC 45	270
<i>R (Tran) v Secretary of State for the Home Department</i> [2005] EWCA Civ 982	216
<i>R (Ullah) v Special Adjudicator</i> [2004] UKHL 26	95
<i>R v Board of Education</i> [1910] 2 KB 165	160, 260
<i>R v Bolton</i> (1841) 1 QB 66	153
<i>R v Criminal Injuries Compensation Board, ex p A</i> [1999] 2 AC 330	214
<i>R v Fulham etc Rent Tribunal ex p Philippe</i> [1950] 2 All ER 211	152
<i>R v Fulham, Hammersmith and Kensington Rent Tribunal, ex parte Zerek</i> [1951] 2 KB	208, 220
<i>R v Higher Education Funding Council, ex p Institute of Dental Surgery</i> [1994] 1 WLR 242	13
<i>R v Home Secretary, Ex p Khan</i> [1984] 1 WLR 1337 CA (Civ Div)	317, 354
<i>R v Liverpool Corporation; Ex parte Liverpool Taxi Fleet Operators' Association</i> [1972] 2 QB 299	326
<i>R v Ministry of Defence, Ex p Smith</i> [1996] QB 517, CA (Civ Div)	268, 279

<i>R v North and East Devon Health Authority ex parte Coughlan</i> [2000] 3 All ER 850	2, 17, 20, 279, 317-320, 335-339
<i>R v Northumberland Compensation Appeal Tribunal, ex p Shaw</i> [1952] 1 KB 338	152
<i>R v Roberts, ex p Scurr</i> [1924] 1 KB 514	79
<i>R v Secretary of State for the Home Department, ex parte Fire Brigades Union</i> [1995] 2 AC 513	81
<i>R v Secretary for the Home Department; Ex parte Hargreaves</i> [1997] 1 WLR 906	320, 333-335
<i>R v Secretary for the Home Department; Ex parte Zamir</i> [1980] AC 930	209
<i>R v Secretary of State for Education and Employment; ex parte Begbie</i> [2000] ELR 445	253, 318-320, 339-342
<i>R v Secretary of State for the Home Department, ex p Daly</i> [2001] 2 AC 532	270
<i>R v Secretary of State for the Home Department; Ex parte Ruddock</i> (1987) 1 WLR 1482	354
<i>R v Secretary of State for Transport, ex parte Richmond upon Thames London Borough Council and others</i> [1994] 1 WLR 74	20,320, 326-330
<i>R v Monopolies and Mergers Commission Ex p South Yorkshire Transport Ltd</i> [1993] 1 WLR 23	226
<i>R v Secretary of State for the Home Department, Ex p Khawaja</i> [1984] AC 74 (HL)	19,197, 207-211
<i>Racal Communications Ltd, Re</i> [1981] AC 374 (HL)	160, 199
<i>Re Preston</i> [1984] UKHL 5	327

<i>Regina (Bibi) v Newham London Borough Council</i> [2001] EWCA Civ 607	320, 340-341
<i>Regina (Cart) v Upper Tribunal</i> [2009] EWHC 3052 (Admin); [2010] EWCA Civ 859 (CA); [2011] UKSC 28	15, 80, 141, 162-169
<i>Regina (Miller) v Secretary of State for Exiting the European Union</i> [2017] UKSC 5	93
<i>Regina (on the Application of Animal Defenders International) v Secretary of State for Culture, Media and Sport</i> [2008] 1 AC 1312	270
<i>Regina v Lord President of the Privy Council, Ex parte Page</i> [1993] AC 682 (HL)	5, 136-137, 160, 199
<i>Schmidt and Another v Secretary of State for Home Affairs</i> [1969] 2 WLR 337	326
<i>Secretary of State for Education and Science v Tameside MBC</i> [1977] AC 1014 (HL)	214, 289
<i>Short v Poole Corporation</i> [1926] Ch 66	267
<i>Terry v Huntington</i> (1679) Hardr 480	204
<i>Thoburn v Sunderland City Council</i> [2002] EWHC 195 (Admin)	69, 92
<i>United Policyholders Group and others v Attorney General of Trinidad and Tobago</i> [2016] UKPC 17	317-320, 341-342
<i>White and Collins v Minister of Health</i> [1939] 2 KB 838	208
<i>Williams v Giddy</i> [1911] AC 381	260
<i>X Ltd v Morgan-Grampian Ltd</i> [1991] 1 AC 1	76

Australian Cases

<i>Anor and Gedeon v Commissioner of the New South Wales Crime Commission</i> (2008) 236 CLR 120	246
<i>Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources</i> [2007] FCA 1480; [2008] FCAFC 3	19, 197, 240-242
<i>Attorney-General (NSW) v Quin</i> (1990) 170 CLR 1	20, 236, 258, 263, 320, 330, 351-355
<i>Australian Broadcasting Tribunal v Bond</i> (1990) 170 CLR 321	200, 204
<i>Australian Communist Party v Commonwealth</i> (1951) 83 CLR 1	107
<i>Australian Heritage Commission v Mount Isa Mines Ltd</i> (1997) 187 CLR 297	228
<i>Barrick Australian v Williams</i> (2009) 74 NSWLR 733	15, 246
<i>Caterpillar of Australian Pty Ltd v Industrial Court of New South Wales</i> (2009) 78 NSWLR 43	246
<i>Church of Scientology v Woodward</i> 154 CLR 25	113
<i>Corporation of the City of Enfield v Development Assessment Commission</i> (2000) 199 CLR 135	19, 197, 235-240, 251
<i>Dietrich v The Queen</i> (1992) 177 CLR 292	175
<i>FAI Insurances Ltd v Winneke</i> (1982) 151 CLR 342	310
<i>Fiorentino v Companies Auditors and Liquidators Disciplinary Board</i> [2014] FCA 641	312
<i>Griffiths v Rose</i> (2011) 192 FCR 130	293
<i>House v The King</i> (1936) 55 CLR 499	260

<i>Jackson v Sterling Industries Ltd</i> (1987) 162 CLR 612	123
<i>Kaur v Minister for Immigration and Citizenship</i> (2012) 290 ALR 616	320, 364
<i>Kioa v West</i> (1985) 159 CLR 550	20, 320, 347-350
<i>Kirk v Industrial Court (NSW)</i> (2010) 239 CLR 531	15, 18, 22, 141-142, 147, 149, 172, 175, 178, 182-190
<i>Kruger v Commonwealth</i> (1997) 190 CLR 1	261
<i>Londish v Knox Grammar School</i> (1997) 97 LGERA 1	228, 232
<i>McWilliam v Civil Aviation Safety Authority</i> [2004] FCA 1701	364
<i>Minister for Aboriginal Affairs v Peko-Wallsend Ltd</i> (1986) 162 CLR 24	258, 292
<i>Minister for Immigration and Border Protection v Singh</i> (2014) 139 ALD 50	261, 312
<i>Minister for Immigration and Citizenship v SZMDs</i> [2010] HCA 16	20, 255, 293, 301-307
<i>Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh</i> [1995] HCA 20	21, 132, 320, 355-358, 361
<i>Murrumbidgee Groundwater Preservation Association Inc v Minister for Natural Resources</i> (2005) 138 LGERA 11	254
<i>NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs</i> (2004) 221 CLR 1	364
<i>NAIS v Minister for Immigration and Multicultural Affairs</i> (2005) 228 CLR 470	259
<i>Parisienne Basket Shoes Pty Ltd v Whyte</i> (1938) 59 CLR 369	104, 228, 232

<i>Plaintiff M70/2011 v Minister for Immigration and Citizenship</i> [2011] HCA 32	240, 242-246
<i>Plaintiff S157/2002 v Commonwealth of Australia</i> (2003) 211 CLR 476	110, 114, 179, 191, 307
<i>PT Garuda Indonesia v Australian Competition and Consumer Commission</i> [2012] HCA 33	123
<i>R v Anderson; Ex parte Ipec-Air Pty Ltd</i> [1965] HCA 27	308
<i>R v Hickman Ex parte Fox and Clinton</i> (1945) 70 CLR 598	140, 173-174
<i>R v Kirby, Ex parte Boilermakers' Society of Australia</i> (1956) 94 CLR 254	104, 109, 174
<i>R v The District Court; Ex parte White</i> (1966) 116 CLR 644	200
<i>Re Minister for Immigration and Multicultural Affairs; Ex p Applicant S20/2002</i> (2003) 198 ALR 59	20, 255, 264, 293-301, 313
<i>Re Minister for Immigration and Multicultural Affairs; Ex parte Lam</i> (2003) 214 CLR 1	2, 21, 294, 317, 320, 358-363
<i>Sharp v Wakefield</i> [1891] AC 173	308
<i>Shrimpton v The Commonwealth</i> [1945] HCA 4	310-311
<i>The Commonwealth v Mewett</i> (1997) 191 CLR 471	362
<i>The Queen v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd</i> (1953) 88 CLR 100	205
<i>Timbarra Protection Coalition Inc v Ross Mining NL & Ors</i> (1999) 46 NSW LR 55	19, 197, 228-235
<i>Waterford v The Commonwealth</i> (1987) 163 CLR 54	200
<i>Wilson v Minister for Aboriginal & Torres Strait Islander Affairs</i> [1996] HCA 18	102
<i>Woolworths v Pallas Newco</i> (2004) 61 NSWLR 707	246

Other Jurisdiction

Marbury v Madison 5 US 137

106, 236

TABLE OF LEGISLATION

English Law

British Nationality Act 1981	283-284
Charities Act 1993	274-275, 277-278
Child Care Act 1980	220-221
Children Act 1948	220
Criminal Injuries Compensation Scheme 2001	222-223
European Communities Act 1972	92
Freedom of Information Act 2000	273-275
Human Rights Act 1998	92, 94-98, 122, 208, 269, 272-273, 275-276, 278, 293, 313, 338, 375, 380
Immigration Act 1971	208
Immigration and Asylum Act 1999	212
Inquiries Act 2005	86, 274
Person Act 1861	223
Tribunals and Inquiries Act 1958	86
Tribunals, Courts and Enforcement Act 2007	87, 141, 148, 162, 165-168, 223

Australian Law

Administrative Appeals Tribunal Act 1975	121, 149
Administrative Decisions (Judicial Review) Act 1977	16, 121-122, 241, 293, 303, 311, 315-316, 380

Environmental Planning and Assessment Act 1979 (NSW)	229, 232-233
Industrial Relations Act 1996 (NSW)	141
Justices Act 1902 (NSW)	351
Local Courts Act 1982 (NSW)	351
Migration Act 1958 (Cth)	243, 294
Threatened Species Conservation Act 1995 (NSW)	233

I. CHAPTER ONE

COMPARATIVE DOCTRINAL ANALYSIS OF LEGAL REASONING IN THE DETERMINATION OF THE GROUNDS OF JUDICIAL REVIEW IN THE LIGHT OF DEEP WATER LEGALITY AND LEGAL CULTURE: A METHODOLOGICAL FRAMEWORK

1. Arc of Arguments

In recent years, a number of works in comparative administrative law have become increasingly focused on the different doctrinal approaches applied between legal systems to determine the grounds of judicial review.¹ Among these works, Paul Craig argues that *‘In administrative law, they [legal systems] will have to elaborate tests for review of law, fact and discretion’*.² It is difficult to disagree with this simple, but powerful statement. It has become generally accepted that the courts in different countries take different approaches through various grounds of judicial review in deciding whether a question in administrative action is reviewable or not.³ For example, Lord Carnwath of the United

¹ Eg John Bell, ‘Administrative Law in a Comparative Perspective’ in Özüoğlu E and David Nelken (eds), *Comparative Law: A Handbook* (Hart Publishing 2007); Paul Craig, ‘Judicial Review of Questions of Law: A Comparative Perspective’ in Susan R Ackerman and Peter L Lindseth (eds), *Comparative Administrative Law* (Edward Elgar 2011).

² He makes it in the context of examining different doctrines for judicial review concerning error of law in the United States (‘US’), English, Canadian and European Union (‘EU’) administrative law (Craig (n 1) 449).

³ It is worth noting that there is a close relationship between the determination of error of law, the scope of judicial review and the jurisdiction of the court, as exemplified in subsequent chapters.

Kingdom Supreme Court ('UKSC') refers to the adjustable degree of intensity in the English determination of the scope of judicial review when he says that,

*'In 19 years as a judge, ...my approach I suspect has been much closer to the characteristically pragmatic approach suggested by Lord Donaldson in 1988, by way of a rider to what Lord Diplock had said in CCSU: "The ultimate question would be whether something had gone wrong of a nature and degree which required the intervention of the court, and what form that intervention should take".'*⁴

This is completely opposite to the approach taken by the Australian courts. For example, Justice Hayne of the High Court of Australia ('HCA') rejects the notion of deference, which allows the courts to enhance or lessen the degree of their intervention.⁵

Frequently, a similar situation ends with dissimilar outcomes in different legal systems because of these different doctrinal approaches.⁶ One area that will be examined in a later chapter of this thesis is substantive legitimate expectations. The claimant can argue it as valid ground of judicial review in the English⁷ and EU courts,⁸ but not under Australian law.⁹

⁴ Lord Carnwath, 'From Judicial Outrage to Sliding Scales: Where Next for *Wednesbury*' (the ALBA Annual Lecture, 12 November 2013).

⁵ K M Hayne, 'Deference: An Australian Perspective' [2010] PL 75.

⁶ There are also situations that end with a similar result in different legal systems. Despite this fact, the courts in different legal systems still apply different doctrinal approaches in reaching such results, for example, the case of error of law and jurisdictional error in England and Australia, which will be examined in Chapter 3.

⁷ *R v North and East Devon Health Authority ex parte Coughlan* [2000] 3 All ER 850. This will be discussed in Chapter 6.

⁸ Paul Craig, *EU Administrative Law* (2nd edn, OUP 2012) Chapter 18.

⁹ *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1. This will be discussed in comparison to *Coughlan* (n 7) in Chapter 6.

1.1 Legal Culture and the Determination of the Grounds of Judicial Review

Various explanations are applied in the literature to describe these doctrinal variations as products of '*normative divergences*' between legal systems.¹⁰ For example, Cane explores the particularities of the English, American and Australian legal systems through a proposed comparative historical methodology called '*control regimes*' and points out the influence on various areas of administrative law doctrines, namely the scope of judicial review, interpretation of law, policy-making, rule-making and controlling information.¹¹ Krygier explains this through the '*socio-legal aspects of the rule of law*'.¹² Based on the differences within societies, histories, practices, traditions and institutions between legal systems, the pursuit of legality involves the practical work of developing institutions and systems.¹³ Atiyah and Summers describe the difference between English and US legal reasoning and institutions in terms of '*legal theories*'.¹⁴

However, this thesis will explore the differences between legal systems through a concept of legal culture, which describes the '*continuous patterns of legal actions and attitudes in each legal system*'.¹⁵ Specifically, it will apply the 'legal mentality of judicial

¹⁰ A descriptive explanation applied by Craig, 'Judicial Review of Questions of Law: A Comparative Perspective' (n 1).

¹¹ Peter Cane, *Controlling Administrative Power: An Historical Comparison* (CUP 2016).

¹² Martin Krygier, 'The Hart-Fuller Debate: Transitional Societies and the Rule of Law' in Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-first Century* (Hart Publishing 2010) 130-132.

¹³ *ibid.*

¹⁴ P S Atiyah and R S Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press 1996).

¹⁵ David Nelken, 'Using the Concept of Legal Culture' (2004) 29 *Austl J Leg Phil* 1.

review constitutionalism’ as an adapted form of legal culture, to explain the different doctrinal approaches between legal systems.¹⁶ The application of legal mentality of judicial review constitutionalism will be exemplified in detail in the Chapter 2. However, what important to introduce here is the connection between legal culture, as a kind of descriptive explanation, and the determination of the scope of judicial review. The diverse ways in which the courts in different legal systems determine the grounds of judicial review are influenced by different understandings of their role in conducting judicial review based on their legal system’s distinctive constitutional orders.¹⁷

1.2 Methodological Approaches of Surface and Deep-Water Legality

Next, this thesis adds that ‘the principle of legality’ can be applied as a general methodological approach to facilitate a comprehensive understanding of the connection between the determination of the grounds of judicial review and legal culture. In general, the term ‘legality’ has many uses in administrative law doctrine. For example, its antonym, illegality, was used by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* to describe one of the three main grounds for an English

¹⁶ It is further adapted from administrative constitutionalism (See Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart Publishing 2007) 35).

¹⁷ Different scholars define the term ‘*constitutional order*’ differently to serve their particular purpose. For example, Tushnet connotes constitutional order as ‘*a reasonably stable set of institutions through which a nation’s fundamental decisions are made over a sustained period, and the principles that guide those decisions*’. He clearly indicates that this is his own definition to particularly contrast different sets of institutions and principles in the US (Mark Tushnet, *The New Constitutional Order* (Princeton University Press 2009) 9-10). This thesis also has its own particular understanding of what constitutional order refers to, which will be gradually explained through the concept of legal culture in the next chapter.

judicial review.¹⁸ This ground contains two sub-grounds relating to the compatibility of administrative action with the statute, namely improper purpose and relevant and irrelevant considerations. Alternatively, it is used as a principle of non-abrogation that prohibits Parliament from overriding fundamental rights.¹⁹ In addition, it is explained as a philosophical concept, discussing the rule of recognition, the making of a legal system or question like what is law.²⁰

However, at the heart of administrative law, the principle of legality functions as the minimum requirement of the rule of law, namely that administrative actions must be lawful.²¹ In the name of protecting legality, the courts play a constitutional role to deal with legal questions in administrative actions in order to ensure this compliance, and this underpins their conduct of judicial review. This requirement of legality is commonly accepted in the administrative law of most legal systems, particularly those committed to democracy. For example, Lady Hale of the UKSC states that '*Judicial review is a critical check on the power of the state... to ensure that they are lawful*'.²² Lord Browne-Wilkinson also asserts in *Regina v Lord President of the Privy Court, Ex parte Page* that '*The fundamental principle (of judicial review) is that the courts will intervene to ensure*

¹⁸ [1985] AC 374 (HL) 410C-G.

¹⁹ Michael Fordham, *Judicial Review Handbook* (6th edn, Hart Publishing 2012) [P35.1]; Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (6th edn, Thomson Reuters Australia 2017) [3.380].

²⁰ Eg Scott Shapiro, *Legality* (Belknap Press of Harvard University Press 2011); Ronald Dworkin, 'Hart's Postscript and the Character of Political Philosophical' (2004) 24 OJLS 23.

²¹ It is generally treated as a primary requirement for a formal and substantive rule of law (see Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] PL 467).

²² Lady Hale, 'Who Guards the Guardians?' (Public Law Project Conference, 14 October 2013).

that the powers of public decision-making bodies are exercised lawfully'.²³ This is similar to the following statement made by Chief Justice Gleeson of the HCA;

*'All public power must be based on law...This is the essence of the principle of legality...the establishment of overriding legal limitations upon the power governments and parliaments, declared and enforced if necessary by the judiciary...'*²⁴

Apart from the judges, this requirement of the principle of legality is generally recognised by scholars in different countries. For example, Wade and Forsyth argue that the principle of legality, ensuring that the actions of public authorities remain within legal boundaries, is the court's main concern.²⁵ Aronson, Groves and Weeks also regard legality as the main ideal of judicial review.²⁶ Sackville also states that '*judicial review involves a vindication of the legality of the administrative decision-making process*'.²⁷ This concept of legality, which is commonly applied to underpin judicial review in all legal systems, is defined in this thesis as 'Surface-Water Legality', analogous to the fact that all rivers look the same on the surface.

Rather than stopping here, this thesis proposes that diving deeper into the underwater perspective of the principle of legality is necessary in order to better

²³ [1993] AC 682 (HL) 701C-D.

²⁴ Chief Justice Gleeson, 'Legality: Spirit and Principle' (The Second Magna Carta Lecture, New South Wales Parliament House, Sydney, 20 November 2003).

²⁵ William Wade and Christopher Forsyth, *Administrative Law* (11th edn, OUP 2014) 4-5, 15-16.

²⁶ Aronson, Groves and Weeks (n 19) [1.10]. See also Anthony J Connolly, *The Foundations of Australian Public Law: State, Power, Accountability* (CUP 2017) 275.

²⁷ Sackville, 'The Limits of Judicial Review of Executive Action - Some Comparisons between Australia and the US' (2000) 28 *Federal Law Review* 315, 321.

understand the unknown contours of what lies beneath the surface water. It points out that different determinations of the scope of judicial review in different legal systems are products of how the courts in those legal systems understand and perceive ‘what legality should cover and whether the issue in a disputed administrative action is one of which they have a proper role in protecting it or not’.

This logic can be recognised from the judges’ perception in the way that judicial review raises tension in terms of whether the role to decide the issue should belong to the court or the executive. For example, Lord Phillips of the UKSC asserts that *‘Perhaps the most important and most difficult role of the Supreme Court is to maintain a proper balance between executive and judicial decision making’*.²⁸ Sir Brennan of the HCA also stated that *‘the subjection of executive action to judicial review has given rise to some tension between these two branches of government’*.²⁹ In the same vein, Chief Justice Gleeson of HCA made the following statement;

*‘In addition, both constitutional and common law cases have elaborated the scope for judicial review and the principles according to which it is undertaken. Inevitably, this has created tension between the executive and judicial branches...’*³⁰

This tension about whether or not it is the role of the court to conduct judicial review is indeed a consideration of legality. If the issue is within the scope of legality, the

²⁸ Lord Phillips, ‘Judicial Independence and Accountability: A View from the Supreme Court’ (The Politics of Judicial Independence, 8 February 2011).

²⁹ Sir Brennan, ‘The Parliament, the Executive and the Courts: Roles and Immunities’ (School of Law, Bond University, 21 February 1998).

³⁰ Chief Justice Gleeson, ‘The Role of a Judge in a Representative Democracy’ (Judiciary of the Commonwealth of the Bahamas, 4 January 2008).

court then has a role to conduct judicial review; if it is not, the authority to decide should be left to the executive. The point is that the determination of the question of legality is influenced by the distinctive constitutional orders between legal systems, represented in this thesis through the concept of legal culture. For example, the particular understanding of the rule of law and the separation of powers in a legal system influence the deep understanding of legality and hence, the role of the court in conducting judicial review in such legal system to be different from the others. Bell provides the following example;

*'In many legal systems, there is no code or statute that authorises the courts to control the legality of administrative action or defines the grounds on which this is done. Accordingly, there is much debate in various countries about the constitutional foundation of judicial review of the administration. For some, it is simply a matter of enforcing the wishes of the legislature. For others, there are more fundamental values that justify a restrictive interpretation of the powers of the administration. The debate on the foundations of judicial review turns around concepts of the rule of law.'*³¹

This section proposes that this way of seeing legality in depth, which is complicated by different legal cultures between legal systems, is explained as 'Deep-Water Legality'. It is analogous to the fact that different rivers contain different underwater geographies. This deep-water concept of legality has been expressed by other scholars, but in different terms. For example, Poole points to the characteristic entanglement of local conditions, which functionally interacts with the framework of the legal system.³² Chief Justice Gleeson of the HCA also adopts this logic, asserting that

³¹ John Bell, 'Comparative Administrative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 1280.

³² Thomas Poole, 'Between the Devil and the Deep Blue Sea' in Linda Pearson, Michael Taggart and Carol Harlow (eds), *Administrative Law in A Changing State: Essays in Honour of Mark Aronson* (Hart Publishing 2008) 22.

'Legality involves courts in the exercise of a capacity to declare and enforce limits on governmental and legislative authority. The nature of that responsibility varies between common law jurisdictions'.³³

Subsequently, this deep-water legality explains how the courts apply different doctrinal approaches in determining the grounds of judicial review, particularly ones that have been understood to be controversial, whether the courts should regard them as legal questions or not. For example, as mentioned above, the English courts perceive an issue on the ground of substantive legitimate expectations as a legal question on which they can conduct judicial review of. However, the Australian court rejects its jurisdiction to intervene in such an issue, as they do not regard it as a jurisdictional error.

1.3 English and Australian Law as a Case Study

Although it is difficult to present the arc of arguments precisely here as it will emerge throughout the thesis, what is important to appreciate is the main framework that the courts in different legal systems take diverse ways in determining the scope of judicial review, based on their deep understanding of legality, which is embedded in the legal system's legal culture. This thesis will explore these three themes, namely, legal culture, deep-water legality and the determination of the grounds of judicial review through a comparative methodology between English and Australian law.

Since Australia was once a British colony, its development of its administrative law is based on English background. For example, the Australian courts have made much

³³ Gleeson, 'Legality: Spirit and Principle' (n 24).

use of English legal features and relevant English case law.³⁴ Importantly, Australia adopted the English approach that the ordinary courts were put at the centre of control of administrative power.³⁵ However, the Australian legal system has become increasingly different from the English system. For example, some legal frameworks have been adopted from the US, namely a federal state system, and a written Constitution.³⁶ Therefore, it is important to examine how these developments have moved the courts' deep understanding of deep-water legality, and different determination of the grounds of judicial review in Australia from those in England. In brief, the English and Australian legal systems are chosen for a comparison between the three aforementioned themes because they share some similarities and differences in relation to their legal cultures.³⁷

As Chief Justice French of the HCA stated,

*'Australia and the United Kingdom, in many respects sharing similar legal cultures and methodologies and a common legal heritage, nevertheless differ in important areas of the common law, differences not directly explicable by reference to constitutional arrangements although they sometimes reflect a particular view of the extent to which the Court should go in changing the law.'*³⁸

³⁴ Peter Cane, 'The Making of Australian Administrative Law' (2003) 24 Australian Bar Review 114; Gerard Brennan, 'Courts, Democracy and the Law' (1991) 17 Commonwealth Law Bulletin 696, 701.

³⁵ *ibid.*

³⁶ Matthew Groves and Hoong Phun Lee, 'Australian Administrative Law: The Constitutional and Legal Matrix' in Matthew Groves and Hoong Phun Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (CUP 2007) 4; Chief Justice French, 'Courts in a Representative Democracy' (University of Southern Queensland, Toowoomba, 25 June 2010).

³⁷ Gerhard Dannemann, 'Comparative Law: Study of Similarities or Differences?' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 384, 409-411.

³⁸ Chief Justice French, 'The Globalisation of Public Law: A Quilting of Legalities' (Public Law Conference, Cambridge, 12 September 2016).

2 .Structure and Methodologies of the Two Main Parts

The three themes, namely legal culture, legality and the determination of the grounds of judicial review and their connection introduced above will be explored in detail throughout this thesis, divided into two main parts. The first part, which will contain an examination of the differences between the English and Australian legal cultures, will be arranged as Chapter 2 of the thesis. The second part will consist of an examination of how those differences between the English and Australian legal cultures result in the English and Australian courts having a different understanding of deep-water legality and the determination of the grounds of judicial review. This part will be divided into chapters 3 to 6 of the thesis based on the various grounds of judicial review. The structure and methodologies applied in these two parts are discussed below.

2.1 Comparative Analysis of English and Australian Legal Cultures

Chapter 2 begins with the definition and general application of the concept of legal culture, before narrowing the scope to the proposal of methodological approaches of legal mentality of judicial review constitutionalism as a particular form of legal culture applied in this thesis. For example, constitutional frameworks, constitutional values and ways of justification and limitation the courts rely on when conducting judicial review will be regarded as elements of legal culture, which will be identified through various materials such as judgments, speeches and judges' secondary works, considered as evidence of legal culture. Legal mentality of the judiciary, who play a leading role in determining the scope of judicial review of administrative action, will also be indicated as another subject of the analysis. This methodology will be argued as representing a dynamic picture of how

judges perceive their role in conducting judicial review. Since these methodological approaches contain a number of subjects and complexities, they will be fully expanded in the next chapter. The differences between English and Australian legal cultures will subsequently be examined in detail based on those approaches.

According to the river metaphor, the legal cultures of English and Australian judicial review are equivalent to the geography of the rivers. The elements such as the constitutional framework, constitutional value and justification and limitation of judicial review are compared to natural underwater features such as stones. The chapter begins by describing the specific methodology used to examine such geography in the exploration, namely, what kinds of stones we are interested in. Then, this methodology is applied to reveal an overall underwater picture of English and Australian rivers, which will function as the navigating methodology to understand different English and Australian deep-water legality and the determination of the grounds of judicial review in all subsequent chapters.

2.2 Comparative Analysis of the Grounds of Judicial Review in Case Law

While the methodological approaches in the part related to legal culture will be examined in the next chapter, three important aspects in examining the determination of the grounds of judicial review are proposed below.

2.2.1 Selection of the Examined Grounds of Judicial Review

When considering all the grounds of judicial review, three different areas of court intervention can be seen.³⁹ The grounds related to the provisions in legislation, namely

³⁹ As inspired by Jowell's analysis of different intensities of review for the grounds of judicial review in English law (See Jeffrey Jowell, 'Of Vires and Vacuums: The Constitutional Context of Judicial

improper purpose, relevant and irrelevant considerations and procedural impropriety can be seen on the far left of the spectrum. According to the discussed general principle regarding the scope of judicial review, the grounds in this area are justified as a legal question without ‘difficulty’ because it is directly related to the requirement in the statute, as law from the legislature.⁴⁰ Therefore, the courts feel that they are playing ‘their rightful role’ when they intervene in an administrative decision on these grounds, because it is compatible with their main function based on the separation of powers. These issues are certainly included in the meaning of legality, which the courts understand as their role to protect.⁴¹

Conversely, the grounds on the right side of the spectrum are relatively technical and need the expertise of administrative agents, for example, grounds concerning intrinsic polycentric issues, such as the decision of the Education Funding Council to allocate research grants to universities.⁴² Therefore, the courts usually ‘hesitate’ to intervene in the decisions in these areas of appreciation of the administrative agent,⁴³ because they are not their main functions; rather, they are the duties of executives who are experts in their

Review’ in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing 2000) 329-336).

⁴⁰ Jowell (n 39) 329-332.

⁴¹ Some cases in determining grounds like procedural impropriety are also contestable and need legal culture to understand; for example, *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56. However, in general, procedural impropriety, improper purpose and relevancy are less contestable than the other grounds. They will not be examined in this thesis due to space constraints.

⁴² *R v Higher Education Funding Council, ex p Institute of Dental Surgery* [1994] 1 WLR 242.

⁴³ It should be noted that, although the courts leave this area to the discretion of the executive, they still conduct judicial review of it on procedural grounds, such as the duty to give reason.

field and whose powers are conferred by Parliament to manage the public administration.⁴⁴

The grounds on these left and right sides of the spectrum are relatively similar in English and Australian law. They are not controversial in whether the courts have a role to conduct judicial review or not, and therefore are not the focus of this thesis.⁴⁵ Instead, the focus is on the grounds located in the middle area of the spectrum, which are controversial in terms of whether they are legal questions or not. The ones selected by this thesis are jurisdictional error, jurisdictional fact, and the grounds relating to substantive exercise of discretion, namely rationality, proportionality and substantive legitimate expectations. These grounds are perceived as a matter of law by the courts in some legal systems, but not in others, or there are different approaches in reaching a conclusion. Chapters 3 to 6 of this thesis will demonstrate that the courts' determination of these grounds is influenced by their deep-water legality and legal culture.

2.2.2 Legal Reasoning of Leading Cases

Secondly, while various materials, namely judgments, speeches and judges' secondary works, will be examined in the discussion of English and Australian legal cultures in Chapter 2, the determination of the grounds of judicial review will focus in-depth on the legal reasoning given in the judgments and transcripts of legal argument of English and

⁴⁴ Jowell (n 39) 332.

⁴⁵ Except the ground of procedural legitimate expectations, which has some connection to deep-water legality, as discussed in Chapter 6.

Australian cases,⁴⁶ because these can best represent the practice of the determination of judicial review. Importantly, it demonstrates the profundity of how such determinations are influenced by the legal mentality of judicial review constitutionalism. As Atiyah and Summers state, '*reasoning reflects a deep difference in legal style, legal culture, and more generally, the visions of law which prevail in the countries*'.⁴⁷

However, legal reasoning in every case will not be examined in Chapters 3 to 6 as it is in textbooks. Instead, the focus will be on the leading cases in each ground cited as precedent and authoritative by judges and scholars in subsequent cases, textbooks and articles. The main idea is to compare the judgments of the House of Lord ('HL') and the UKSC with that of the HCA and some other Australian courts in order to demonstrate the depth of how the doctrinal approaches applied by the highest courts of the legal systems are influenced by their legal culture. For Australian law, this thesis studies the determination of the grounds of judicial review at federal level rather than state level,⁴⁸ because the thesis focuses on the overall picture rather than the small parts of it. Although contemporary law will be the primary focus, some important past cases will also be

⁴⁶ While transcripts of the HCA can be accessed from its website, the transcripts of the UKSC are unpublished. However, with the cooperation of Professor Fisher, the author would like to thank Lord Carnwath and Mr. Ben Wilson of the UKSC for providing footage of the cases, namely *Regina (Cart) v Upper Tribunal* [2011] UKSC 28; *R (Jones) v First-tier Tribunal* [2013] UKSC 19; *Kennedy v Charity Commission* [2014] UKSC 20; *Pham v Secretary of State for the Home Department* [2015] UKSC 19 for the personal use of this thesis.

⁴⁷ Atiyah and Summers (n 14) 1.

⁴⁸ Although the analysis of *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 in Chapter 3 relates to the scope of judicial review at the state level, it connects to the federal level in the way that the HCA as having supervisory jurisdiction in conducting judicial review of the administrative actions and judgments of state courts. Additionally, the legal reasoning in some cases at the state level, for example, *Barrick Australian v Williams* (2009) 74 NSWLR 733, are also included in Chapter 4 in order to demonstrate the continuous adherence of jurisdictional fact as a ground of judicial review in Australia.

analysed at various points, to demonstrate the continuity of how legal culture of a legal system influences the determination of the grounds of judicial review.⁴⁹ Also noteworthy is that this thesis focuses on a common law judicial review rather than cases related to specific statutes that govern judicial review. It will not focus on the codification of the grounds of judicial review in the statute, like the Administrative Decisions (Judicial Review) Act 1977 ('ADJR') in Australian law, because there are no parallel factors in the two countries selected for this study.

2.2.3 Doctrinal Approaches

Thirdly, there are many aspects of the determination of the grounds of judicial review that can be demonstrated as being influenced by legal culture. This thesis calls them 'doctrinal approaches' in the determination of the grounds of judicial review, and categorises them into five 'points', namely the status of the ground of judicial review (whether it is valid in the legal system or not), the justifications and doctrines the courts apply in determining whether they have jurisdiction to conduct judicial review or not, the application in considering each doctrine, and the integration of international treaties into their consideration.⁵⁰

It is acknowledged that these points overlap and contain some inconsistencies. For example, proportionality was introduced to the English law as a general 'principle' from

⁴⁹ For example, the choice between the collateral fact doctrine and the theory of limited review under the distinction between jurisdictional error and non-jurisdictional error, which the English courts applied as an approach before *Anisminic* [1969] 2 AC 147 (HL), will also be analysed as part of the flow of flexibility of English law in Chapter 3.

⁵⁰ This approach will be considered based on specific terminology 'interrelated legal culture', which will be explained in the next chapter.

EU law and the European Convention on Human Rights ('ECHR').⁵¹ At the same time, it is recognised either as 'doctrine' or 'concept' applied to determine other grounds of judicial review, for example, substantive legitimate expectations.⁵² Additionally, it is debatable whether proportionality should be a general 'ground' for judicial review or not. In the same way, jurisdictional error is a ground of judicial review in Australian law,⁵³ at the same time, it is a central doctrinal approach that covers the overall grounds of judicial review. Additionally, there are also variations between the terms doctrine, standard, approach⁵⁴ or even outcome⁵⁵ referring to the rule the courts apply to determine whether they have the jurisdiction to conduct judicial review of the disputed administrative action or not. In reality, these points of the determination of the grounds of judicial review merged and become a package of legal reasoning given by the judgments. This thesis proposes a process to unpack them with the recognition that they are not fixed. Not all of these five points will be discussed in each subsequent chapter, but the only those that are obviously influenced by the different English and Australian legal cultures.

2.2.4 Grounds and Leading Cases for Chapters 3 to 6

Up to this point, this section has proposed methodological approaches to 'unpack' different 'doctrinal approaches', namely the validity, justification, doctrines, application

⁵¹ See Chapter 2 and 5.

⁵² See Chapter 6.

⁵³ See Chapter 3.

⁵⁴ Applied by the judgments in *Cart* (n 46).

⁵⁵ Applied by Lord Woolf in *Coughlan* (n 7).

and integration of international treaties into consideration, applied by the English and Australian courts in determining the grounds of judicial review, from ‘legal reasoning’ of the leading cases in Chapters 3 to 6. These doctrinal approaches in the courts’ determination of the grounds of judicial review will be connected to legal mentality of English and Australian judicial review constitutionalism. The grounds of judicial review and leading cases in Chapters 3 to 6 are briefly outlined below.

Chapter 3 will contain an analysis of the influence of English and Australian legal cultures on the grounds of error of law and jurisdictional error, particularly judicial review of the decision of tribunal or inferior court, a body with a privative clause according to the legislature. The section devoted to the English law part will begin with an examination of the flexibility accorded to courts when applying the jurisdictional fact doctrine, before turning to the contemporary approaches in *Anisminic* and *Cart*.⁵⁶ It will be shown that the courts determined the grounds of judicial review based on the flexible application of various justifications and doctrines. This was different from the doctrinal approach applied in *Craig v The State of South Australia* and *Kirk*,⁵⁷ in which the boundary of the court’s power to conduct judicial review of the inferior court was confined to jurisdictional error based on the framework of separation of powers prescribed in the written Australian Constitution.

Next, although jurisdictional fact is a ground of judicial review in both England and Australia, its doctrinal approaches are different in these legal systems, as will be

⁵⁶ n 49 and n 46.

⁵⁷ (1995) 184 CLR 163 and n 48.

demonstrated in Chapter 4. In English law, the status and application of the ground have been shown to fluctuate in the legal reasoning of modern cases such as *R v Secretary of State for the Home Department, Ex p Khawaja*,⁵⁸ *E v Secretary of State for the Home Department*,⁵⁹ *R (A) v Croydon LBC*⁶⁰ and *Jones*.⁶¹ Conversely, the ground is far more entrenched with clear applications in defining an issue as jurisdictional error in Australia. This was demonstrated by the legal reasoning in *Timbarra Protection Coalition Inc v Ross Mining NL & Ors*⁶² and *Corporation of the City of Enfield v Development Assessment Commission*,⁶³ and continuously in some later cases, namely, *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources*⁶⁴ and *Plaintiff M 70/2011 v Minister for Immigration and Citizenship*.⁶⁵

As will be illustrated in Chapter 5, English and Australian legal systems started with a similar approach in reviewing the substantive exercise of discretion of public administrators, namely, the *Wednesbury* doctrine, but the doctrinal approaches in this area have been developed differently in both countries. The legal reasoning in *Kennedy*⁶⁶ and

⁵⁸ [1984] AC 74 (HL).

⁵⁹ [2004] EWCA Civ 49.

⁶⁰ [2009] UKSC 8.

⁶¹ n 46.

⁶² (1999) 46 NSW LR 55.

⁶³ (2000) 199 CLR 135.

⁶⁴ [2007] FCA 1480; [2008] FCAFC 3.

⁶⁵ [2011] HCA 32.

⁶⁶ n 46.

*Pham*⁶⁷ demonstrates flexibility of the English courts in developing new doctrinal approaches like anxious scrutiny and modified rationality, and adopting grounds from EU law and the ECHR like proportionality in determining their scope of judicial review. Conversely, the constitutional orders in the Australian legal culture reduce the speed of development in this area. For example, new grounds of illogicality and irrationality have not been flexibly accepted in Australia and proportionality has been rejected. This is evident from analysing cases like *Re Minister for Immigration and Multicultural Affairs; Ex p Applicant S20/2002*,⁶⁸ *Re Minister for Immigration and Citizenship v SZMDs*⁶⁹ and *Re Minister for Immigration and Citizenship v Li*.⁷⁰

Chapter 6 contains a comparative analysis of the legal reasoning of English cases in the area of legitimate expectations; for example, *R v Secretary of State for Transport, ex parte Richmond-Upon-Thames*,⁷¹ *R v Ministry of Agriculture, Fisheries and Food, ex parte Hamble Fisheries Ltd*⁷² and *Coughlan*⁷³ and Australian cases namely, *Kioa v West*,⁷⁴ *Attorney-General (NSW) v Quin*,⁷⁵ *Minister of State for Immigration & Ethnic Affairs v*

⁶⁷ n 46.

⁶⁸ (2003) 198 ALR 59.

⁶⁹ [2010] HCA 16.

⁷⁰ [2013] HCA 18.

⁷¹ [1994] 1 WLR 74.

⁷² [1995] 2 All E R 714.

⁷³ n 7.

⁷⁴ (1985) 159 CLR 550.

⁷⁵ (1990) 170 CLR 1.

*Ah Hin Teoh*⁷⁶ and *Lam*.⁷⁷ While the English courts use flexibility in determining the ground of substantive legitimate expectations, the Australian courts have firmly rejected it as a valid ground of judicial review.

Apart from these doctrinal approaches and legal reasoning, discussions and debates on academic concepts related to the scope of judicial review, will be examined in Chapters 3 to 6 as an ‘additional indicator’ of the influence of English and Australian legal culture. For example, deference is an academic concept, which runs throughout the determination of the grounds of judicial review analysed in Chapters 3 to 6. Generally, it connotes an idea that the courts would necessarily defer to the decision-maker’s view in some particular areas of decision-making.⁷⁸ However, the concept of deference is referred to and applied diversely in different legal systems. For example, it is variously debated in English law, but has been firmly rejected in Australian law. Although not a main focus of this thesis, this difference is also a product of the different legal cultures.

2.3 Example of a Combination of the Two Parts

It should be clarified that the methodologies of the aforementioned two parts and the connection between them are newly proposed in this thesis. Therefore, this section will contain an example to make sense of how they work in the following chapters. As mentioned, the doctrinal approaches in the legal reasoning of *Cart* of English law will be

⁷⁶ [1995] HCA 20.

⁷⁷ n 9.

⁷⁸ Mark Elliott, *Administrative Law: Text and Materials* (Mark Elliott and Jason Varuhas eds, 5th edn, OUP 2017) 284-288.

compared with that in *Kirk* of Australian law in Chapter 3.⁷⁹ On the one hand, the courts in *Kirk* rigidly applied jurisdictional error in determining that they did not have jurisdiction to conduct judicial review of the decision of the Industrial Court. On the other hand, the courts in *Cart* flexibly applied various doctrinal approaches to confirm that they did not have jurisdiction to conduct judicial review of the decision of the Upper Tribunal ('UT').

It is pointed out in this section that these differences in *Kirk* and *Cart* are based on the different constitutional orders of English and Australian legal systems. The question that immediately follows is, what kind of different 'constitutional order' does this statement refer to? The comparison between the discussion of the rule of law by the UKSC and HCA judges serves as perfect introductory example. For the former, Lady Hale, a UKSC judge in *Cart*, concluded in a speech that Dicey's concept regarding the English courts' conduct of judicial review contained two major strands as follows;

*'(1) that Parliamentary is sovereign and can make or unmake any law, and (2) that everyone is subject to the same rule of law; this includes the Government and public officials, who must act within the powers which the law has given them.'*⁸⁰

It will be demonstrated in Chapter 2 that these two concepts are intertwined as the foundation of the English courts in conducting judicial review. On the one hand, the courts have a role to protect the rule of law by conducting judicial review of administrative action. On the other hand, they must respect the decision because the powers of

⁷⁹ n 46 and n 48.

⁸⁰ Lady Hale, 'The Supreme Court in the United Kingdom Constitution' (The Bryce Lecture 2015, Oxford, 5 February 2015).

administrative agents are conferred by Parliament, which has supreme power. Lady Hale further demonstrated her thinking that these concepts generally influence current English administrative law in that *'Dicey is the better known to [English] law students today... In many respects, the Constitution which we have today would be easily recognisable as the same constitution which...Dicey knew'*.⁸¹

On the other hand, the following oral pleading of Mr. Gageler, an Australian barrister,⁸² to the HCA judges in *Kirk* illustrates a different understanding of the rule of law;

'Mr Gageler: ... the sense being that within our constitutional system, any repository of governmental power is constrained by legal limits on that power and that the processes of the courts must be available to discern and enforce those legal limits on power.

Justice Heydon: A Diceyan idea?

Mr Gageler: A Diceyan idea, yes. Of course, not confined to him, but it does seem to be, your Honour, just really - - -

Justice Heydon: No, it is a classical integer according to A.V. Dicey of the rule of law...

*Mr Gageler: ...What we are concerned about is a constitutional principle, which says that the rule of law as embodied in the Constitution means that a duty imposed by law must always be practically capable of compliance...'*⁸³

In the conversation, Gageler attempts to claim that the court has jurisdiction to conduct judicial review in this case because it has the role to enforce the legal limits on executive power. This is a reference to the surface-water of legality, requiring administrative action

⁸¹ *ibid.*

⁸² Stephen John Gageler has been appointed to the HCA since October 2012.

⁸³ The Transcript of legal argument in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

to be lawful. A discussion of deep-water legality begins when Justice Heydon asks if whether Gageler is referring to Dicey's idea. Gageler answers that he is, but his comments are not confined to Dicey. This means that the Australian law starts with Dicey's concept, placing the courts as the main institution to protect the rule of law by conducting judicial review. However, the concept to explain the courts' role in conducting judicial review is not limited, but further adapted in the Australian legal system. Gageler mentions that the courts shall consider constitutional principles, which in this case is the rule of law that '*is embodied in [the written] Constitution*'. He also connects this to legality by saying that '*a duty [of administrator and court] is imposed by law in Australia must always be practically capable of compliance*'. The implication of these sentences is that the consideration of whether the court has role to conduct judicial review in a particular case needs to be concerned with the rule of law as the constitutional value that operates with the written Constitution.

This way of thinking about the role of the courts in conducting judicial review based on the particular understanding of the rule of law is an example of constitutional order that this thesis attempts to examine through the concept of legal culture in Chapter 2. The doctrinal approaches of jurisdictional error are then unpacked in Chapter 3 from the legal reasoning in *Kirk*, and are demonstrated to be influenced by the mentioned understanding of the rule of law being operated with the written Constitution. Conversely, the flexibility of the doctrines applied by the English courts in *Cart* is an example of how the rule of law cooperates with parliamentary sovereignty. This illustrates how the methodological framework of this thesis works.

Since the aim of this thesis is to simplify the comprehensive understanding of the determination of the scope of judicial review, the structure of Chapters 3 to 6 will be similar. Each chapter will start with an explanation of how the role of the courts in conducting judicial review through the ground is controversial; hence deep-water legality and legal culture are needed to understand them. After that, the English and Australian doctrinal approaches will be comparatively unpacked from the legal reasoning in the mentioned leading cases, and then connected to the English and Australian legal cultures.

All the analyses will eventually be concluded in the final chapter to reflect the overall picture of the English and Australian determination of the scope of judicial review. Additionally, further implications of the deep-water concept of legality and legal culture as useful methodological approaches to understand other administrative law doctrines and grounds of judicial review in legal systems apart from England and Australia, will also be briefly pointed out in this chapter.

3. Why is the Comparative Exercise in this Thesis a Useful Exercise?

As described above, it may appear that the main areas of inquiry in this thesis, namely the connection between doctrinal approaches in conducting judicial review and the distinctive constitutional orders of the legal system, are obvious to administrative law scholars. This point is not contested by this thesis. Its aim is not to change the world, but simply to propose new ways to better understand our world. Inspired by Feldman,⁸⁴ the aim of this

⁸⁴ *'Scholarship is...guided by certain ideals,...include: the desire to publish the work for the illumination of students, fellow scholars or the general public...'* (David Feldman, 'The Nature of Legal Scholarship' (1989) 52 MLR 498, 503).

thesis is to illuminate that the determination of the grounds of judicial review in England and Australia can be comprehensively understood through the comparative methodological approaches of legal culture, deep-water legality and the unpacking of the legal reasoning of the cases. This substantial contribution will gradually become tangible in the analysis of each chapter. However, four points are briefly made below.

Firstly, some scholars describe the English and Australian judicial review processes using the labels of pragmatism and formalism respectively.⁸⁵ On the one hand, pragmatism is primarily referring to English judicial review as flexible. For example, Elliott and Thomas also describe the approach of the court in *Cart* to decide its jurisdiction as pragmatic.⁸⁶ In *Jones*, Lord Hope clearly stated the following;

*'a pragmatic approach should be taken to the dividing line between law and fact, so that the expertise of tribunals at the first tier and that of the Upper Tribunal can be used to best effect. An appeal court should not venture too readily into this area by classifying issues as issues of law which are really best left for determination by the specialist appellate tribunals.'*⁸⁷

On the other hand, Fisher describes formalism in regards to Australia as a tautological term that refers to *'a style of legal reasoning that gives authority to formal legal concepts'*.⁸⁸ In the context of administrative law, the idea is that *'public administration is*

⁸⁵ The literature applying these conclusory labels to describe the determination of the grounds of judicial review.

⁸⁶ Mark Elliott and Robert Thomas, 'Tribunal Justice and Proportionate Dispute Resolution' (2012) 71 CLJ 297, 309.

⁸⁷ n 46 [16].

⁸⁸ Elizabeth Fisher, '"Jurisdictional" Facts and "Hot" Facts: Legal Formalism, Legal Pluralism, and the Nature of Australian Administrative Law' (2015) 38 Melbourne University Law Review 968, 971-972.

capable of operating within clearly identifiable legal boundaries'.⁸⁹ Furthermore, she mentions three of the five features of formalistic reasoning referred to by Poole, namely, *an emphasis of rules and the avoidance of principles, de- contextualising decisions under review, and adherence to strict canons of statutory construction*,⁹⁰ as a result of the approach of the court to adhere to certain legal boundaries.⁹¹

However, it is argued in this thesis that these terms should neither be applied to refer to the entire distinction between English and Australian judicial review, nor the conclusion of the English and Australian approaches on the particular ground. This is because they are merely labels without any deep substance. In other words, their supporting elements and evidence have not been fully discussed. Additionally, both systems reach similar results in practice, that the court is the final arbitrator to decide whether the decision of the public administrator is reviewable or not. On this aspect, it could be said that the Australian system also contains an element of pragmatism. There are also studies that analyse other aspects of the Australian way of pragmatism, for example, the pragmatic distinction between the duty of a tribunal and court to review the substance of administrative actions.⁹² Likewise, there is a suggestion to apply formalistic

⁸⁹ *ibid* 976.

⁹⁰ Poole (n 32) 25.

⁹¹ Fisher (n 16) 4-5. See also Taggart Michael Taggart, 'Australian Exceptionalism in Judicial Review' (2008) 36 *Federal Law Review* 1, 6-7.

⁹² Mark Aronson, 'The Growth of Substantive Review' in John Bell and others (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing 2016).

categorisation to the distinction between an error of law and fact in English law.⁹³ Therefore, since both legal systems contain elements of pragmatism and formalism, it should not be concluded that they use either of these terms.

Instead, this thesis will represent the difference between English and Australian judicial review with the methodology of legal mentality of English and Australian judicial review constitutionalism, which is claimed to be a further comprehensive, detailed and substantive concept to represent the entire geography of English and Australian judicial review. This particular form of legal culture, which will be discussed in detail in the next chapter, is an aggregation of judges' shared legal thinking about their role in conducting judicial review. Therefore, this novel way to explore differences between English and Australian judicial review is claimed to be the first contribution of this thesis.

A second contribution is claimed in terms of the determination of the grounds of judicial review on a similar approach as that of the first point. Rather than concluding that the courts' approach as pragmatic or formalistic without substance, or only focusing on the outcomes of the English and Australian legal systems' acceptance or rejection of the grounds, Chapters 3 to 6 contain a deeper examination by unpacking a full detailed analysis of the doctrinal approaches used to determine of the grounds of judicial review in the legal reasoning of 'a few' leading cases. This methodological approach allows us to see the depth of how legal culture has influence on the judgment's engagement with the principle of legality in the determination of each ground of judicial review.

⁹³ Rebecca Williams, 'When is an Error not an Error? Reform of Jurisdictional Review of Error of Law and Fact' [2007] PL 793.

Particularly, the examination will become obvious through a comparison between English and Australian law. This kind of analysis, demonstrating legal mentality in the legal reasoning and doctrinal approaches of the judgments, has not been applied as a catalyst to develop an understanding of the determination of the scope of judicial review before.

The third contribution is based on the way these parts of legal culture and the determination of the grounds of judicial review in English and Australian law are combined. As will be shown throughout Chapters 3 to 6, a number of academic works in the field of comparative administrative law focus on advantages and disadvantages when comparing the different doctrinal approaches between legal systems, for example, the aforementioned question whether or not to adopt substantive legitimate expectations as a ground of judicial review.⁹⁴ Instead, this thesis is exploring ‘the bigger picture’ of English and Australian judicial review by understanding the determination of the grounds of judicial review in the light of their legal culture. This methodological approach underpinning an analysis of the influence of normative settings on particular areas of law,⁹⁵ will be gradually demonstrated throughout the thesis as a significant navigation for any doctrinal analysis. For example, it facilitates tangible process on how and why proportionality and substantive legitimate expectations are debatable in English law, while they are completely rejected in Australia. Therefore, rather than chastising the flexibility of the English law or the rigidity of the Australian law as problematic, this thesis regards them as different but valid ways in determining the scope of judicial review

⁹⁴ See examples on each ground in Chapters 3 to 6.

⁹⁵ As being inspired by some academic works, for example, Paul Craig, *The Hamlyn Lectures: UK, EU and Global Administrative Law* (CUP 2015).

based on their contexts. This kind of holistic understanding will be necessary in any research of the development of administrative law in the legal system.

Next, an additional contribution in comparing English and Australian law comes from my starting position as an outsider of these legal systems. It will be discussed in the next chapter that some lawyers may be too familiar with some of the concepts in their legal system and feel uncomfortable with other concepts in other legal systems. For example, an English administrative law scholar may be familiar with the theme that various constitutional values can underpin a body of legal doctrine. Variance across cases may be an indication that judges prioritise different values in the same context.⁹⁶ This may be uncomfortable for Australian lawyers, who refer the question of jurisdiction of the courts to the rigid framework of separation of powers, rather than diverse values. Conversely, it may sound strange when English scholars hear Australian judges saying that Australia does not have the concept of deference.⁹⁷ The benefit of this thesis is claimed to be that I have fresh eyes in comparing the differences between English and Australian legal cultures and the determination of judicial review.

4. Scope and Caveats

Since a number of new methodological aspects are applied in this thesis, its scope and caveats need to be clarified. Six main points are introduced here and others will follow with each chapter.

⁹⁶ Eg Rebecca Williams, 'The Multiple Doctrines of Legitimate Expectations' (2016) 132 LQR 639.

⁹⁷ Eg Hayne (n 5).

Firstly, it was revealed in the discussion of the two-part structure of this thesis that the relationship between legal culture and the determination of the grounds of judicial review is similar to the ‘chicken and egg’ dilemma. The overall argument will be incomplete without considering both parts in unity. Therefore, English and Australian judicial review constitutionalism, as analysed in Chapter 2, will be frequently referred to in Chapters 3 to 6.

The second caveat is that the categorisation of the grounds of judicial review is inconsistent, both within and between these legal systems. It is acknowledged that the grounds analysed in chapters 3 to 6 overlap. The division of these grounds into different chapters is not fixed. For example, the ground of jurisdictional fact in Chapter 4 and the ground of substantive legitimate expectations in Chapter 6 can be regarded as a subset of the grounds for substantive control of discretion in Chapter 5. Alternatively, error of law and error of fact are usually discussed in the same chapter in textbooks, especially in English law, in which the terminologies of jurisdictional error and jurisdictional fact have fluctuated from the origin of judicial review in the 17th century to the abandonment in *Anisminic* in the 1970s and the exception of the courts to intervene in factual issue in contemporary cases.⁹⁸ This is why Gellhorn and Robinson describe the scope of judicial review as a seedless grape.⁹⁹

However, it is still necessary to separate them because this facilitates an insight into the in-depth legal reasoning between the different grounds of judicial review. The

⁹⁸ This will be examined in Chapter 3 and 4.

⁹⁹ E Gellhorn and G Robinson, ‘Perspectives on Administrative Law’ (1975) 75 Columbia Law Review 771, 780-781.

subsequent chapters will demonstrate that the relationship between the grounds will reflect some different themes between the legal systems, which will be regarded as another product of the different legal cultures. For example, the argument of Gellhorn and Robinson that the scope of judicial review resembles a seedless grape may be unreasonable in Australia, where the grounds of judicial review including jurisdictional fact, *Wednesbury* Unreasonableness, illogicality and irrationality and legitimate expectations are systematically categorised under the central approach of jurisdictional error.

The third caveat concerns the scope of application of legal culture. There are two important points to be introduced here before being exemplified in the next chapter. Firstly, since the focus of this thesis is the contemporary legal mentality of judges in England and Australia pertaining to their role in conducting judicial review, legal history is not the main research methodology. Where some historical context is described, it is only to demonstrate the growth of the legal thinking in the different legal systems.¹⁰⁰ Secondly, it is important to point out here that legal culture is non-monolithic in nature. Variations can be found in many aspects, namely, how legal culture is formed and identified. Additionally, there are usually disagreements on the elements of legal culture between lawyers within the same legal culture. For example, there are many different ways to explain the rule of law within one legal culture,¹⁰¹ as well as a choice between *ultra vires* and common law models to justify judicial review in English law. The role of

¹⁰⁰ This will be exemplified in Section 2.4 of Chapter 2.

¹⁰¹ Chief Justice French, ‘The Rule of Law as a Many Coloured Dream Coat’ (20th Annual Lecture Singapore Academy of Law, 18 September 2013, Singapore.

legal culture as a concept to express disagreement and uniformity in and between legal system(s) will be exemplified in the next chapter

Another caveat pointed out here is that there are various terminologies in this thesis both across and between the legal systems. For example, various terms have been applied by English and Australian judges to imply what the courts do according to the principle of legality, namely function,¹⁰² role,¹⁰³ job,¹⁰⁴ and duty. It should be noted that this thesis sticks with the term ‘role’ because it refers to what the courts do in the sense of how they see themselves, which is compatible to the methodology of legal mentality, explained in the next chapter. Also, it will be seen that some terminologies are applied in England and Australia, such as ultra vires, deference, jurisdictional error and jurisdictional fact, but they refer to different meanings. As demonstrated in the following chapters, these differences can also be understood in the light of legal culture, through the deep-water concept of legality. Apart from these, other terminologies will be clarified alongside the arguments in the following chapters.

Fifthly, it should be noted here that the river metaphor is not aimed to play a central role in the argument in this thesis; rather, it is applied, particularly in the first two chapters, for two reasons. Firstly, it is believed to be functional in illustrating the general statement of the thesis, particularly in terms of comparing legality as a general concept (surface-

¹⁰² Stewart C, ‘The Doctrine of Substantive Unfairness and the Review of Substantive Legitimate Expectations’ in Groves M and Lee HP (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (CUP 2007) 281.

¹⁰³ Justice McHugh, ‘Tensions between the Executive and the Judiciary’ (Australian Bar Association Conference, Paris, 10 July 2002).

¹⁰⁴ Stephen Sedley, *Ashes and Sparks: Essays on Law and Justice* (CUP 2011) 261.

water) and as substantive concept (deep-water) in different legal systems. Secondly, the analogy of elements of legal culture to the geography and depth under water is compatible to metaphors applied by other scholars when normatively describing its influence on the administrative law doctrine. For example, Taggart raises a question to point out the exceptionalism of the Australian administrative law, namely, '*what are the distinctive features of the Australian public law landscape that might be thought singly or collectively to be distinctive or exceptional?*'¹⁰⁵ In addition, Poole analogously describes the UK jurisprudence of rights, related to judicial review as '*the deep blue sea*'.¹⁰⁶ Furthermore, legality is discussed by Harlow as an example of a shallow theory, which is affected by a deep theory, which entails an explanation of the function of law in general, namely the rule of law.¹⁰⁷ These Harlow's shallow and deep theories match the metaphor of the surface and deep-water concepts of legality applied in this thesis.

The last caveat is to clarify that judicial review in a broad sense can refer to both a review of administrative action and legislature, which is called a constitutional review or constitutional adjudication. Although the general methodological approaches of legal culture may be able to be applied to the area of constitutional review,¹⁰⁸ it should be clear

¹⁰⁵ Taggart (n 91).

¹⁰⁶ Poole (n 32).

¹⁰⁷ Carol Harlow, 'Changing the Mindset: The Place of Theory in English Administrative Law' (1994) 14 OJLS 419, 421-424.

¹⁰⁸ There are some shared elements of legal culture that influence both judicial review and constitutional review, for example the balance between parliamentary sovereignty in England (See Lady Hale, 'The Supreme Court in the United Kingdom Constitution' (n 80)) and the written constitution and federal system in Australia (See Chief Justice French, 'The Courts and the Parliament' (Queensland Supreme Court Seminar, Brisbane, 4 August 2012).

that the focus of this thesis is only judicial review of administrative action, as demonstrated in its title.

5. Conclusion

The discussion of the test for review of law, fact and discretion discussed by Craig stated at the beginning of the chapter, is entwined with the question of the courts' jurisdiction and the scope of judicial review of administrative action.¹⁰⁹ These are important questions in the administrative law of most legal systems. It is postulated in this chapter that they are all asking whether the disputed administrative action is within the scope of legality or not. Beyond the surface-water concept of legality, it is proposed in this thesis that the deep-water legality, which is distinctive between legal systems, is complicated by their particular legal culture. Therefore, this different in-depth understanding of legality influences the different determinations of the grounds of judicial review between legal systems, particularly the controversial grounds, namely jurisdictional error, error of law, jurisdictional fact, rationality, proportionality and substantive legitimate expectations.

The connections between these three themes of legal culture, legality and the determination of the grounds of judicial review are the core of this thesis. The legal mentality of English and Australian judicial review constitutionalism will be explored in Chapter 2 and treated as a reference to explain the different determinations of the grounds of judicial review in Chapters 3 to 6, in which the doctrinal approaches of the validity of the grounds, justification, doctrine, application and integration of international obligation

¹⁰⁹ Leeming connotes general meaning of jurisdiction as 'authority to decide' (Mark Leeming, *Authority to Decide: the Law of Jurisdiction in Australia* (The Federation Press 2012) Chapter 1).

into consideration will be unpacked from the legal reasoning of the leading English and Australian cases. It will be demonstrated that all these doctrinal approaches are the products of the legal mentality of English and Australian judicial review constitutionalism. The final chapter will be concluded with a reflection of some notions of the comparison of English and Australian law and some further implications of the general methodology of deep-water legality to other administrative law doctrines and other legal systems. The methodological approaches of legal mentality of judicial review constitutionalism and the process of unpacking the legal reasoning in the leading cases applied for a more in-depth understanding of English and Australian judicial review are proposed to be substantial contributions of this thesis.

II. CHAPTER TWO

DIFFERENCES BETWEEN ENGLISH AND AUSTRALIAN LEGAL CULTURES

1. Introduction

‘Change in the laws of any country can be a complex function of history, culture, economy, social conditions and the nature and distribution of public and private power within the society...

It is necessary to focus on the reality of legal diversity generally, and particularly in the area of public law given its intimate connection with domestic constitutional frameworks, statutory regimes and local legal cultures.’¹

The core of this thesis examines how the distinctive constitutional orders of England and Australia influence the courts’ deep understanding of legality, and therefore the different doctrinal approaches applied in the determination of the grounds of judicial review. As described, full details of the differences between English and Australian constitutional orders will be provided in this chapter through the systematic methodology of legal culture. The above quotation of Chief Justice French of the HCA demonstrates the chapter’s spirit that it is ‘necessary’ to unpack ‘what’s really going on’ in the English and Australian courts’ deep understanding of their role in conducting judicial review according to ‘the distinctive constitutional orders’ of their legal systems namely constitutional frameworks, constitutional values and way of justification and limitation of judicial review. The results of the exploration in this chapter will ‘navigate’ a

¹ Chief Justice French, ‘The Globalisation of Public Law: A Quilting of Legalities’ (Public Law Conference, Cambridge, 12 September 2016).

‘comprehensive understanding’ of how the doctrinal approaches in the determination of the grounds of judicial review have been applied and developed by the English and Australian courts, discussed in the following chapters.

In terms of structure, the general definitions and benefits of the concept of legal culture in representing the differences between English and Australian constitutional orders will be described in the next section. It will discuss the ‘slippery’ nature of legal culture, which leads to a variation in its use. Then, legal mentality of judicial review constitutionalism will be introduced as a particular form of legal culture applied to explore the differences between English and Australian judicial review.² Following, Section 3 and 4 will be a comprehensive exploration on the differences between legal mentality of English and Australian judicial review constitutionalism, according to the proposed methodologies. Apart from the different substantive views on the rule of law,³ how the English and Australian courts explain their role in conducting judicial review according to distinctive constitutional frameworks and other constitutional values will also be discussed. For example, Section 3 will contain a discussion of how the English courts particularly understand their role and scope of judicial review as being flexible based on the absence of a written constitution, the nature of the balancing process between the rule of law and parliamentary sovereignty, as well as the fluid relationship between the court and the executive. This is to compare with Section 4, deliberating how the federal system

² Noteworthy, constitutional law scholars give various meanings to ‘constitutionalism’. In the same way with ‘constitutional order’ (See n 17 of Chapter 1), this thesis has a specific connotation and methodology in referring constitutionalism, which will be exemplified in Section 2.2 and 2.3 below.

³ Mentioned as example in Section 2.3 of Chapter 1.

and written Constitution influence the Australian courts' understanding of the rule of law, the separation of powers, the concept of jurisdiction and thereby their role in conducting judicial review as relatively rigid. Eventually, snapshots⁴ of the geography⁵ of English and Australian legal cultures will be concluded in the final section.

2. Concept of Legal Culture: A Navigating Methodology

The concept of legal culture has been increasingly applied in a number of works in the field of comparative law.⁶ The most basic way to consider its definition is to divide the words into 'legal' and 'culture'. While the former simply refers to law, the latter connotes particular patterns of behaviour, opinions, thinking or ideas.⁷ Therefore, in the most general sense, legal culture is a way to describe '*relatively stable patterns of legally oriented social behaviour and attitudes*'.⁸ Nelken asserts that this way of considering '*law as a cultural artefact*' can bring together aspects of socio-legal studies and comparative law by requiring studies on surrounding elements such as history, international relations,

⁴ The use of this methodology will be described in Section 2.4 below.

⁵ See the metaphor how English and Australian legal cultures are analogous to geographical features under deep-water in Chapter 1.

⁶ Lawrence Friedman, 'The Place of Legal Culture in the Sociology of Law' in M Freeman (ed), *Law and Sociology* (OUP 2006); Roger Cotterrell, 'Comparative Law and Legal Culture' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 711.

⁷ David Nelken, 'Defining and Using the Concept of Legal Culture' in Örüçü Esin and David Nelken (eds), *Comparative Law: A Handbook* (Hart Publishing 2007) 111.

⁸ David Nelken, 'Using the Concept of Legal Culture' (2004) 29 *Austl J Leg Phil* 1. Friedman gives various definitions of legal culture, but all of them are in this same way (See Lawrence Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation 1975) 193; Lawrence Friedman, 'Is there a Modern Legal Culture?' (1994) 7 *Ratio Juris* 117, 118).

political science, psychology and economics.⁹ In other words, it comparatively studies the way laws are applied and developed with wider social elements,¹⁰ reflecting that law is embedded in larger frameworks of different social contexts.¹¹

The general benefits in using the concept of legal culture for exploring the laws are discussed and divided into three main points. First, the nature of legal culture considering '*law inside culture*'¹² helps us '*line up relevant phenomena concerning the relationship between law and culture*'.¹³ Thereby it allows us '*to gather more substance in particular about public attitudes towards the law and legal institutions*'.¹⁴ The use of legal culture therefore can aggregate interrelated phenomena into a whole picture of legal life rather than in isolation.¹⁵ Webber called such aggregation as '*webs of interaction*', representing overall content of law.¹⁶ Apart from that, legal culture also reflects deepness

⁹ Nelken 'Defining and Using the Concept of Legal Culture' (n 7) 109, 111; David Nelken, 'Disclosing/ Invoking Legal Culture: An Introduction' (1995) 4 *Social & Legal Studies* 435, 445; Roger Cotterrell, 'The Concept of Legal Culture' in David Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 13.

¹⁰ David Nelken, 'Comparative Sociology of Law' in Reza Benakar and Max Travers (eds), *Introduction to Law and Social Theory* (Hart Publishing 2002) 342.

¹¹ *ibid* 343-345.

¹² Cotterrell, 'Comparative Law and Legal Culture' (n 6) 711.

¹³ Lawrence Friedman, 'The Concept of Legal Culture: A Reply' in David Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 33.

¹⁴ *ibid*.

¹⁵ Cotterrell, 'The Concept of Legal Culture' (n 9) 28.

¹⁶ Jeremy Webber, 'Culture, Legal Culture, and Legal Reasoning: A Comment on Nelken' (2004) 29 *Austl J Leg Phil* 27, 28, 32, 36.

and sophistication of the examined account.¹⁷ Webber discusses that *'As a lens through which the elements are recognised and formulated...legal culture offers a richer and ultimately more accurate account of the content of legal principle'*.¹⁸ Legal culture is not a categorisation or collection of doctrines, rules, legislations, jurisprudence, static ideal or legal order described in textbooks.¹⁹ Instead, it is a way to *'look more deeply the common-sense assumptions and shared understandings that do not need to be expressed in legal rules but colour all understanding of them'*.²⁰ In essence, thinking about legal culture adds thickness to the issues referring to *'substantive, complex and dynamic nature'* of the account at the point of *'contact between sociological description and normative assessment'*.²¹ The third benefit in using the concept of legal culture is that it *'thinks about law in the breath as culture'*.²² This methodology alerts us to recognise similarities and differences, particularly disagreements, in the way law is conceived and lived.²³ It stresses that different cultural settings can influence similar rules to be understood differently.²⁴

¹⁷ Culture is regarded as a reflexive phenomenon (John Bell, *French Legal Cultures* (2nd edn, CUP 2008) 4-5). See also Nelken, 'Comparative Sociology of Law' (n 10) 350.

¹⁸ Webber (n 16) 31, 35.

¹⁹ Bell (n 17) 1, 14. Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart Publishing 2007) 36.

²⁰ Cotterrell, 'Comparative Law and Legal Culture' (n 6) 726.

²¹ Fisher (n 19) 36.

²² Nelken, 'Defining and Using the Concept of Legal Culture' (n 7) 127.

²³ Nelken, 'Using the Concept of Legal Culture' (n 8) 2.

²⁴ Cotterrell, 'Comparative Law and Legal Culture' (n 6) 713.

Cotterrell asserts that such differences are very important for the comparatists to detect, understand, value, and cherish.²⁵

In summary, the concept of legal culture can reflect thickness of what really happens in a legal community, by aggregating elements from the larger social frameworks and forming an overall picture, which express differences within and among the legal system(s). As discussed in Chapter 1, this is compatible to the aim of this thesis, exploring the overall deep and substantive pictures of differences between English and Australian constitutional orders, and demonstrate their connections with the different determinations of the scope of judicial review in the legal systems. This is the reason this thesis selects the concept of legal culture as methodology in discussing differences between English and Australian judicial review. These benefits in using legal culture will become more obvious in relation to the discussion of legal mentality of judicial review constitutionalism as a particular form of legal culture below.

2.1 Variations in Using Legal Culture

Like other overarching social science concepts,²⁶ there are unsolved questions about how to use the concept of legal culture.²⁷ Nelken states clearly that the meaning and using of legal culture is far from settled.²⁸ This is because of its abstract and slippery nature of both

²⁵ *ibid* 712-713.

²⁶ Similar to most of the basic conceptual building-blocks of social science, legal culture is '*general or hard to define or delimit*' (Friedman, 'The Concept of Legal Culture: A Reply' (n 13) 33).

²⁷ David Nelken, 'Towards a Sociology of Legal Adaption' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing 2001) 26.

²⁸ Nelken, 'Disclosing/ Invoking Legal Culture: An Introduction' (n 9) 437.

the terms 'legal' and 'culture'.²⁹ In talking about law, we can refer to either rule, doctrine, legal practice, legislation, jurisprudence or institution.³⁰ As Nelken notes, law is a word '*whose interpretation and definition have illocutionary effects*'.³¹ Likewise, culture can mean various things namely historical memory, tradition, practice, attitude, expectation or way of thinking.³² According to Nelken, culture is '*particularly difficult to define and easy to abuse*'.³³ When these words are combined, legal culture therefore covers a variety of examinations on social influences towards legal subjects. This leads Friedman to conclude that '*one can speak of legal culture at many levels of abstraction*'.³⁴

There are two main ways, in which scholars respond to this unsettlement. First, some scholars argue against the use of the concept of legal culture, requesting for changing its definition and application into other terms. For example, Cotterrell suggests '*legal ideology*' instead of legal culture as a concept focusing on '*the ideas of legal*

²⁹ Friedman, 'The Place of Legal Culture in the Sociology of Law' (n 6) 191.

³⁰ Cotterrell, 'Comparative Law and Legal Culture' (n 6) 710.

³¹ Nelken, 'Defining and Using the Concept of Legal Culture' (n 7) 111. See also Carlo Pennisi, 'Sociological Uses of the Concept of Legal Culture' in David Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 106.

³² Nelken, 'Defining and Using the Concept of Legal Culture' (n 7) 120. It can be regarded as praxis connoting a pattern of behaviour or set of ideas and values towards the activity (See Zygmunt Bauman, *Culture as Praxis* (Sage 1999); C Geertz, *The Interpretation of Cultures* (2nd edn, Basic Books 1993) 5).

³³ Nelken, 'Using the Concept of Legal Culture' (n 8) 6. Critiques of legal culture on the inconsistent or misleading referents often come with a wide variety of meanings of the term 'culture'. (See Nelken, 'Defining and Using the Concept of Legal Culture' (n 7) 114-115; Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (Basic Books 1973)).

³⁴ Friedman, *The Legal System: A Social Science Perspective* (n 8) 204.

professionals and jurists and their influence over popular consciousness'.³⁵ The examples of other terms do the same job with legal culture are living law, law in action, legal consciousness,³⁶ law and its environment,³⁷ legal traditions³⁸ and legal styles.³⁹ Alternatively, some scholars attempt to integrate the various aspects of legal culture into one. For example, Blankenburg and Bruinsma argue that legal culture should be treated as

*'...a multi-layered concept which includes legal norms, salient features of legal institutions and their infrastructure, social behaviour in creating, using and not using law, as well as legal consciousness in the legal professions and amongst the public.'*⁴⁰

The second way to solve the abstract nature of legal culture is to conclude that the variation on the use of legal culture are valid for the different purposes of works. As Nelken points out, legal culture is considered as having various meanings, according to its use in a variety of ways.⁴¹ It opens to all of those mentioned subjects namely professional practice, thinking, wish, idea, mentality, attitude, consciousness, tradition,

³⁵ Cotterrell, 'The Concept of Legal Culture' (n 9) 21-22; Nelken, 'Defining and Using the Concept of Legal Culture' (n 7) 116.

³⁶ E Blankenburg and F Bruinsma, *Dutch Legal Culture* (2nd edn, Kluwer Law International 1995).

³⁷ Michael King, 'Comparing Legal Cultures in the Quest for Law's Identity' in David Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 127.

³⁸ Bell (n 17) 6.

³⁹ Zweigert and Kotz in *ibid* preface vi.

⁴⁰ Blankenburg and Bruinsma (n 36) in Nelken, 'Disclosing/ Invoking Legal Culture: An Introduction' (n 9) 438. See also Cotterrell, 'The Concept of Legal Culture' (n 9) 16-17.

⁴¹ Nelken, 'Using the Concept of Legal Culture' (n 8) 2. See also Friedman, 'Is there a Modern Legal Culture?' (n 8) 118-119.

opinion, expectation, ideology of legal doctrine, principle, legislation, jurisprudence and concept.⁴² All different definitions and subjects of study are dependent on the purpose of the analysis,⁴³ which the concept of legal culture is particularly intended to serve.⁴⁴ Therefore, a preliminary question to be asked in the use of the concept of legal culture is *'what we mean by...term [legal culture] we adopt, and why we think that it could best serve the purpose of our particular enquiry.'*⁴⁵

This thesis reaches an agreement with the second solution. Although the generality of the concept of legal culture covers a wide range of phenomena, the particular purpose, subject and scope have to be clarified in the work. As discussed in Chapter 1, the subject of study in this thesis is the 'legal mentality of judicial review constitutionalism', which connotes the way judges in England and Australia think about the distinctive constitutional orders of their legal systems, which they rely on in perceiving their role in conducting judicial review. The next sub-sections will discuss this form into 'legal mentality' and 'judicial review constitutionalism', before combining them into one.

⁴² See Friedman, 'The Concept of Legal Culture: A Reply' (n 13) 35-38.

⁴³ For example, in applying the concept to European legal culture, while Gessner focuses on the degree of legalisation of state activities and the frequency of corrupt behaviour of public officials to illustrate the impact on legal preferences and practices between legal systems, Gibson and Caldeira emphasise a survey of popular attitudes toward law of European citizens to compare the implementation of EU law in each member state (See nn 14-16, 22 in Cotterrell, 'Comparative Law and Legal Culture' (n 6)).

⁴⁴ Bell (n 17) 1-2; Nelken, 'Comparative Sociology of Law' (n 10) 346.

⁴⁵ Nelken, 'Defining and Using the Concept of Legal Culture' (n 7) 116. Noteworthy, within this openness, a boundary in the use of the concept of legal culture is still needed to be set distinctively from other concepts. For example, legal culture does not focus on empirical aspect as the way sociology of law does. As Nelken points out, *'sociology of law has not been in the forefront of those seeking to understand differences between legal cultures or the possible implications of these various trends'* (Nelken, 'Disclosing/ Invoking Legal Culture: An Introduction' (n 9) 435).

2.2 Judicial Review Constitutionalism

A wide range of literature shows that the concept of legal culture can be applied to understand law inside a culture in various fields. For example, Lazarus applies the concept to contrast the impact of legal culture on prisoners' rights between the English and German legal systems⁴⁶ and Johnson utilises it to understand the Japanese way of prosecution.⁴⁷ The first clarification of the subject of legal culture in this thesis is that it applies legal culture in the area of public law. The work mentioned as example here is Bell's examination of French legal culture. He discusses legal culture in the core activities, institutional setting, norms, concepts, legal reasoning and legal personnel of French administrative law.⁴⁸ In another section of the same book, Bell examines legal culture in constitution making, interpretation, institutional setting, procedure and method and consequence in French constitutional law.⁴⁹

Instead of analysing legal culture in administrative law and legal culture in constitutional law separately, this chapter focuses on public law legal culture in the aspect that constitutional law and administrative law have influences on each other. This is obviously discussed by a number of works in general. For example, Poole argues that

⁴⁶ Liora Lazarus, *Contrasting Prisoners' Rights: A Comparative Examination of Germany and England* (OUP 2004).

⁴⁷ David Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (OUP 2002) 161-165.

⁴⁸ Bell (n 17) 153.

⁴⁹ *ibid* 199.

'administrative law is entwined with constitutional law'.⁵⁰ Metzger asserts that *'constitutional law and ordinary administrative law are inextricably linked'*.⁵¹ The administrative agencies need to take constitutional concerns seriously in their decision-making because they underlie administrative law doctrines.⁵² Some literature regard this relationship as a specific form of public law legal culture called *'Administrative Constitutionalism'*, connoting a way to display *'how ideas, aspirations and mentalities in constitutional order shape understandings of the administrative world'*.⁵³

According to the nature of legal culture described above, there are variations of purposes and subjects in applying administrative constitutionalism.⁵⁴ Metzger points out that *'understanding administrative world'* can mean either *'how agencies make decisions, the substance of those decisions, or judicial review of agency decision-making'*.⁵⁵ In one paper, she applied administrative constitutionalism to examine how well-established constitutional requirements in the US are engaged in the administrative state and actions

⁵⁰ Thomas Poole, 'Between the Devil and the Deep Blue Sea' in Linda Pearson, Michael Taggart and Carol Harlow (eds), *Administrative Law in A Changing State: Essays in Honour of Mark Aronson* (Hart Publishing 2008) 22.

⁵¹ Gillian Metzger, 'Administrative Law as the New Federalism' [2008] *Duke Law Journal* 2023, 2026.

⁵² *ibid.*

⁵³ Fisher (n 19) 35-37.

⁵⁴ Gillian Metzger, 'Administrative Constitutionalism' (2012) 91 *Texas Law Review* 1897 1903; Metzger categories three main modes which constitutional law manifests in administrative contexts; Ordinary Administrative Law as Constitutionally Mandated, Ordinary Administrative Law as Constitutionally Inspired and Encouraging Administrative Constitutionalism (See Metzger, 'Administrative Law as the New Federalism' (n 51) 2028).

⁵⁵ Metzger, 'Administrative Law as the New Federalism' (n 51) 2027, 2061.

of administrative agencies.⁵⁶ In another article, she applied it to argue that administrative law has important task in reinforcing and securing federalism.⁵⁷ Alternatively, Fisher applies administrative constitutionalism as looking through a lens in order to understand the different models of explaining the legitimacy of public administration in the area of risk regulation.⁵⁸ She begins by explaining that there is a deficit of legitimacy in public administration because of its unelectable nature.⁵⁹ In this situation, there are diverse ways to explain the justification of public administration in different legal cultures.⁶⁰ For example, the concept of an administrative state in the US is highly legalised, while the substantive context of public law in the UK is a result of the blurring of law, policy, political theory, ideology and convention. On the other hand, the Australian constitutional order is analysed as having a rule-bound nature, holding administration to account on merits review.⁶¹ These differences between legal concepts influence how public administration, in particular in the area of risk regulation, is constituted and limited in the legal systems.⁶²

⁵⁶ Metzger, 'Administrative Constitutionalism' (n 54).

⁵⁷ Metzger, 'Administrative Law as the New Federalism' (n 51).

⁵⁸ Fisher (n 19) 35-39, 51-52.

⁵⁹ Elizabeth Fisher, 'Food Safety Crises as Crises in Administrative Constitutionalism' (2010) 20 *Health Matrix* 55, 60- 61; Sidney Shapiro, Elizabeth Fisher and Wendy Wagner, 'The Enlightenment of Administrative Law: Looking inside the Agency for Legitimacy' (2012) 47 *Wake Forest Law Review* 463, 466.

⁶⁰ Fisher, *Risk Regulation and Administrative Constitutionalism* (n 19) 39.

⁶¹ *ibid* 52-55.

⁶² *ibid* 57-58.

While Fisher mainly focuses on public administration, the flip side is the question of how the courts control public administrators.⁶³ This is adapted into the subject of this thesis and regarded as ‘judicial review constitutionalism’, focusing on ‘the courts’ roles in conducting judicial review, as being constituted or limited, in the line of distinctive constitutional orders in the legal system’.

It should be noted that the term ‘constitutionalism’ has been widely recognised in constitutional law referring to the use of society’s basic laws to establish and form a framework for organising the government, namely procedures, institutions and rights, as well as legally limited government’ powers.⁶⁴ The term has been adapted by a number of works to discuss the subject matter by considering its bigger framework. For example, Chief Justice French of the HCA applies ‘*Common Law Constitutionalism*’ as ‘*the authority of the courts in their relationship with the other branches of government and the extent to which it can be defined by the courts themselves*’.⁶⁵ Metzger also calls the explanation on judicial legitimacy and authority as ‘*judicial constitutionalism*’.⁶⁶

This thesis’ proposal of judicial review constitutionalism shares a similar logic with these connotations. The word ‘-ism’ in constitutionalism, as a suffix connoting ‘*the*

⁶³ Indeed, Fisher also touch on the courts’ duty to review administrative action. However, the focuses are still on the side of public administration (Fisher, ‘Food Safety Crises as Crises in Administrative Constitutionalism’ (n 59) 65-88).

⁶⁴ Wil Waluchow, ‘Constitutionalism’ The Stanford Encyclopedia of Philosophy <<https://plato.stanford.edu/archives/spr2014/entries/constitutionalism/>> accessed 2 March 2018.

⁶⁵ Chief Justice French, ‘Common Law Constitutionalism’ (Robin Cooke Lecture, Wellington, New Zealand, 27 November 2014).

⁶⁶ See Metzger, ‘Administrative Constitutionalism’ (n 54) 1902.

system of,⁶⁷ upholds this methodology exploring the courts' role in conducting judicial review in the light of 'the system of constitutional orders' of the legal systems. Particularly, Chief Justice French refers to similar set of constitutional orders namely the written Constitution, the separation of powers and the federal system as influencing the function of the courts in Australia.⁶⁸ However, while French emphasises on the legitimacy of the courts in conducting constitutional review over legislature, this thesis specifically studies the role of the courts in conducting judicial review of administrative action.

2.3 Elements of Legal Culture

As legal culture can be formed from diffused sources,⁶⁹ a further step is to point out what the important elements are in relation to the subject of judicial review constitutionalism.⁷⁰

This section proposes three main ones.

2.3.1 Constitutional Framework

The first of which is a 'constitutional framework' in the law. One needs to appreciate that this term is relatively slippery, and can refer to various things according to different

⁶⁷ *Oxford Advance Learner's Dictionary* (9th edn, OUP 2015).

⁶⁸ French, 'Common Law Constitutionalism' (n 65).

⁶⁹ They can range from '*facts about institutions such as the number and role of lawyers or the ways judges are appointed and controlled, to various forms of behaviour such as litigation or prison rates...*' (Nelken, 'Using the Concept of Legal Culture' (n 8) 1); '*Culture becomes the vision of the whole, which includes all these elements as parts*' (Webber (n 16) 2).

⁷⁰ This can be regarded in other various terms namely, component (Cotterrell, 'Comparative Law and Legal Culture' (n 6) 715), boundary, parameter (ibid 717-718) and indicators (Bell (n 17) 17). However, for consistency, this thesis will stick with the term 'element of legal culture'.

purposes.⁷¹ However, this thesis particularly refers to a constitutional framework as a construction of each legal system, such as the existence of a written constitution or the governmental arrangement of a unitary or federal state. Some constitutional frameworks are the result of the historical contexts in a legal system.⁷² For example, it will be pointed out in a later section that the federal system and written constitution of Australia are constructed based on its huge expanse of territory and its history as a range of different colonies. Apart from these national constitutional frameworks, the influences of some international treaties will also be categorised in this point, since they are also a construction, which reflects a distinctive understanding of the role of the courts in conducting judicial review.⁷³ For example, it will be demonstrated in the next section that EU law and the ECHR are significant to English judicial review because they have gradually become part of the English legal culture since the 1970s and do have influence on the courts' legal reasoning in the determination of the scope of judicial review.⁷⁴

2.3.2 Constitutional Value

The constitutional frameworks described above are focusing on the first element because they ground influences on the next element, which is the view of the courts on constitutional values. Once again, it is notable that the definition of 'constitutional value'

⁷¹ In the same way with 'constitutional order' (see n 17 of chapter 1) and 'constitutionalism' above.

⁷² Chief Justice French also applies the terminology of 'framework' in this sense (See Chief Justice French, 'Australia's Constitutional Evolution' (John Fordham Law School Constitutional Law Master Class, 20 January 2010).

⁷³ This will be perceived based on the methodological approach of 'interrelated legal cultures', and exemplified in Section 2.5 below.

⁷⁴ This will be deliberated in more detail in Section 3.4 below.

is unclear and can refer to various meanings. Additionally, it frequently overlaps and is confused with other terms namely theory,⁷⁵ morality⁷⁶ or principle. This thesis will stick with the term ‘value’, considered to be more substantial than others because it contains the dimension of legal mentality, discussed below, in its connotation.

It should be clarified that this thesis does not regard constitutional value in the philosophical sense,⁷⁷ but as value that is commonly accepted by the courts in each legal system and held as a starting point when they conduct judicial review. For example, as mentioned in Chapter 1, each legal system has its own particular understanding of the rule of law. As Bell states, *‘although the term rule of law is frequently used to express a fundamental value of any liberal political system, there are different understandings of this idea among different legal systems’*.⁷⁸ Literature refers to these differences as a substantive meaning of the rule of law.⁷⁹ This is the example of constitutional value emphasised in this thesis because the courts rely on it when perceiving their role in conducting judicial review to protect legality. Apart from the rule of law, other distinctive constitutional values in a legal system, such as parliamentary sovereignty, the separation

⁷⁵ See Harlow’s categorisation of the theory of public law into shallow and deep, and foreground and background in Section 2 of Chapter 1.

⁷⁶ For example, Connolly applies the term morality to refer to *‘... the rule of law, legality, democracy, accountability, legitimacy and others’* in Australian public law (Anthony J Connolly, *The Foundations of Australian Public Law: State, Power, Accountability* (CUP 2017) Chapter 4).

⁷⁷ Eg Joseph Raz, ‘The Rule of Law and its Virtue’ (1977) 93 LQR 195.

⁷⁸ John Bell, ‘Comparative Administrative Law’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 1271-1272; Chief Justice Gleeson, ‘Courts and the Rule of Law’ (The Rule of Law Series, Melbourne University, 7 November 2001).

⁷⁹ Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ [1997] PL 467.

of powers and the concept of jurisdiction are also important elements in the formation of judicial review constitutionalism. The particular understanding of these constitutional values in England and Australia will be unpacked and regarded as the back-drop of the contrast between the English and Australian legal cultures.

2.3.3 Way of Justification and Limitation of Judicial Review

The third element focused on is the way of justification and limitation, in which the scholars and judges explain the constitutional values to support or confine their role in conducting judicial review. For example, while the Australian courts mainly justify and limit their jurisdiction by referring to the separation of powers and the written Constitution, the English courts understand their role as related to Parliament through the theorists' models called Ultra Vires and Common Law theory. The next sections will demonstrate that these ways of justification and limitation of judicial review are also important elements of the snapshots of how the English and Australian courts understand their role in conducting judicial review.

It is important to note here before exemplifying in Section 2.5 below that this set of three elements of legal culture is flexible. Other scholars may have the other ways in setting them. For example, apart from the existence of a written constitution and type of reasoning of the courts, Fisher also regards the geography and economics of England and Australia as element of legal culture in understanding three narratives concerning objectors' rights to bring legal actions in challenging land use decisions in the countries.⁸⁰

⁸⁰ Elizabeth Fisher, 'Challenging Land Use Decisions in the UK and Australia: Three Overlapping Narratives' (Cityscapes: A Conference on Comparative Land Use Law, Yale Law School, 1-2 April 2016).

In general discussion of English constitutional orders, much literature merges constitutional frameworks and values and explains them together.⁸¹

This thesis unpacks English and Australian constitutional orders into the three aforementioned elements, because it considers them to be important aspects representing the overall pictures of differences between English and Australian judicial review. Additionally, it aims to demonstrate the connection and flow between such elements. For example, it is shown in Section 4 below that the Australian constitutional frameworks, such as the federal system and the written constitution, directly shape the particular understanding of the rule of law, the separation of powers and other constitutional values in the legal culture. On the other hand, the merger of the constitutional framework and constitutional value in the English system triggers flexibility for the courts in conducting judicial review. In short, elements of legal culture are designed upon the subject matter and purpose of the particular work. This set of three elements is merely a particular device of this thesis to describe the courts' mentality of their role in conducting judicial review more tangibly.

2.4 Legal Mentality

Another important aspect of the subject of legal culture of this thesis is 'legal mentality'. According to the Section 2.1 above, judicial review constitutionalism can be examined in various aspects, for example, focusing on patterns of practices of the lawyers or

⁸¹ Eg *The Character of the United Kingdom Constitution* (Eric Barendt, *An Introduction to Constitutional Law* (OUP 1998) 32-34)). The next sections will do so in case of English judicial review, but will separate them in examining Australian judicial review constitutionalism.

institutional design in process of judicial review according to distinctive constitutional orders of the legal system.⁸² However, this thesis focuses on legal mentality (of judicial review constitutionalism), which Legrand describes as '*an entire distinctive way of thinking about law*'.⁸³ It is a collective mental programme, which contains the assumptions, attitudes, aspirations and antipathies that provide the deep structures of legal rationality.⁸⁴ Bell refers it as a pre-logical set of core perspectives that shape action.⁸⁵

Three points about this methodology of legal mentality needed to be clarified. Firstly, Friedman conceptualises legal culture into two types; internal and external. While the former means '*the ideas and practices of legal professionals*', the latter refers to '*the demands on law brought to bear by those in the wider society*'.⁸⁶ It should be clear that this thesis is focused on the former, particularly on the legal mentality of the English and Australian judiciary, rather than lawyers in general. This is because it is the court that plays the leading role in determining the scope of judicial review in each case in reality, as well as deliberating the issue in relation to the entire administrative law system. According to Groves and Lee,

⁸² According to various connotations of legal culture (See Section 2.1 above).

⁸³ Pierre Legrand, 'What "Legal Transplants"?' in David Nelken and Johannes Feets (eds), *Adapting Legal Cultures* (Hart Publishing 2001) 55, 65; Zweigert and Kotz also consider legal mentality as significant mode of legal thinking in a legal system (See Bell, *French Legal Cultures* (n 17) 15).

⁸⁴ Legrand (n 83) in Bell, *French Legal Cultures* (n 17) 15.

⁸⁵ *ibid* 14-15.

⁸⁶ Friedman, *The Legal System: A Social Science Perspective* (n 8) 193-267. These definitions are flexible among scholars (See Nelken, 'Defining and Using the Concept of Legal Culture' (n 7) 112). Also it should be noted that this is different issue from the methodology of internal and external in terms of unit of legal culture, which will be described below.

'...Administrative law is all about what the agencies of the executive government...can and cannot do. More particularly, administrative law encompasses the different mechanisms and principles that enable people to question or challenge the decisions of these agencies of government...the courts play a significant role in these processes'.⁸⁷

Therefore, an examination of courts' particular understanding of their role in conducting judicial review in a legal system, needs to focus on the legal thinking of the judges in that legal system. In other words, the judiciary is a specific legal institution or actor, on which the determination of the grounds of judicial review is operated and shaped.⁸⁸ The point is that the English and Australian courts determine such questions differently because of their legal thinking within their legal systems' judicial review constitutionalism.

Secondly, legal mentality can be overlapping with other subjects of legal culture namely consciousness, experience of law, traditions, feeling and legal style. For example, Lloyd asserts that the approach to mentality still talks of style of inquiry and reasoning.⁸⁹ This thesis argues that it is impossible and unnecessary to set clear distinction between these diffused terms. The different works might refer to similar things with diverse terms. What this thesis does instead is demonstrating an example of legal mentality of judicial review constitutionalism, which this thesis is interested in. The obvious one is the quotation put at Section 2.3 of Chapter 1, displaying different 'ways of the judges'

⁸⁷ Matthew Groves and Hoong Phun Lee, 'Australian Administrative Law: The Constitutional and Legal Matrix' in Matthew Groves and Hoong Phun Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (CUP 2007) 1.

⁸⁸ According to the methodology of 'Practices of Legal Institutions' proposed by Sally Engle Merry, 'What is Legal Culture' in David Nelken (eds), *Using of Legal Culture* (Wildy, Simmonds & Hill Publishing 2012) 62-63.

⁸⁹ G E R Lloyd, *Demystifying Mentalities* (CUP 1990) in Bell, *French Legal Cultures* (n 17) 14-17.

thinking’ on the rule of law in England and Australia, which influence different perceptions of the English and Australian courts on their constitutional role in conducting judicial review.

Thirdly, as introduced in Section 4 of Chapter 1, although this chapter is focused on an examination of the current legal thinking in judicial review constitutionalism in these legal systems, a context is needed to better explain and understand the dynamic nature of judicial review.⁹⁰ As Webber asserts, the fit and normalisation of the past in the present in the process of continual change is required.⁹¹ For example, some contexts of English history since the 17th century in which individuals were fighting against the Monarchy are mentioned as a ground for describing the distinctive features of English law, such as the mentality in upholding parliament as the sovereign power in the legal system.⁹² Additionally, how the relationship between the court, the executive and tribunals has been discussed malleably in some significant English governmental committee reports since the beginning of the 20th century to the present will be explained in the next section.⁹³ All of these will be aggregated as part of the flow of the legal mentality of English judicial review constitutionalism. In the same vein, some discussions related to the role of the Australian courts in conducting judicial review in the past, namely

⁹⁰ Bell, *French Legal Cultures* (n 17) 256.

⁹¹ Webber (n 16) 36.

⁹² This will be exemplified in the next section.

⁹³ Namely, Committee on Ministers' Powers, *Report 1932* (so called ‘the Donoughmore Committee’), Committee on Administrative Tribunals and Enquiries, *Report 1957* (‘the Franks Committee’) and Review of Tribunals by Sir Andrew Leggatt, *Tribunals for users: One system, One service 2001* (‘the Leggatt Committee’). See more in Section 3 below.

the proposal of Dixon's Legalism in the 1950s and the Kerr Report in the 1970s, will also be demonstrated as significant elements in the formation of the contemporary mentality of Australian judicial review constitutionalism.⁹⁴

Up to this point, the section discusses legal mentality of judicial review constitutionalism as the subject of legal culture applied in this thesis. It connotes a '*structure for pattern of legal thinking or mental map*' of the English and Australian judiciary about their role in conducting judicial review,⁹⁵ which are embedded in the distinctive explanation of elements of constitutional orders such as constitutional frameworks, constitutional values and way of justification in their legal systems. This particular form of legal culture emphasises the contributions of the concept of legal culture discussed in Section 2.1. Rather than a dry categorisation of constitutional law, legal mentality of judicial review constitutionalism aggregates all elements of the judges' perspectives and conceptualised explanations into one whole picture, representing deep account of the differences between English and Australian judicial review in reality.

2.5 Proposed Methodological Approaches

Apart from the above description, there are other methodological approaches regarding the scope of the use of legal culture in this thesis. Inspired by Bell's work, five of the important ones are clarified below.

⁹⁴ See description and references of these elements in detail in Section 4 below.

⁹⁵ Bell, *French Legal Cultures* (n 17) preface vi.

2.5.1 Evidence of Legal Culture

Firstly, as a state of mind, we cannot look inside the individual judges' brains to learn about their legal thinking. On this point, Nelken argues that what judges do and say can be regarded as evidence of legal culture.⁹⁶ Since judges will only present the reasoning they perceive to be legitimate, these legal materials can be treated as their acceptable beliefs.⁹⁷ Therefore, legal thinking expressed by the judges in the pages of judgments, transcripts of legal argument, speeches and secondary literature are used to identify legal mentality of judicial review constitutionalism in this thesis.⁹⁸ Additionally, some leading textbooks and articles by scholars describing and commenting the judges' thinking are also examined in this chapter. Since the next sections are focused on '*the fundamental structures of thinking...which lie behind what is expressed*',⁹⁹ these materials, which are regarded as 'supporting elements', will facilitate to growth of the depth of judges' legal mentality of judicial review constitutionalism.

It is also important to note that a study of legal culture needs a boundary.¹⁰⁰ Rather than a 'too big' picture of differences between English and Australian judicial review, this thesis applies the method of a 'snapshot', examining only the important aspects in such differences. Among diffused and massive source of evidence of legal culture, this thesis

⁹⁶ Nelken, 'Comparative Law and Comparative Legal Studies' in Öricü Esin and David Nelken (eds), *Comparative Law: A Handbook* (Hart Publishing 2007) 32.

⁹⁷ Fisher, *Risk Regulation and Administrative Constitutionalism* (n 19) 61.

⁹⁸ A good example is Stephen Sedley, *Lions Under the Throne : Essays on the History of English Public Law* (CUP 2015) since it is written with a mind-set that judges are part of legal culture.

⁹⁹ Bell, *French Legal Cultures* (n 17) 20.

¹⁰⁰ *ibid* 2.

focuses only on significant ‘official culture’ such as the judgements and transcripts of legal argument of the leading cases and speeches of the upper courts namely the HL, UKSC and HCA, and a few important ones from the lower courts. According to the metaphor of this thesis, rather than considering every single stone at the bottom of the rivers, the main purpose of the next sections is to point out that the overall pictures of English and Australian geographies are different. Fisher also uses this methodology of a snapshot to represent overall pictures of how public administration is influenced by constitutional orders in the legal systems.¹⁰¹

2.5.2 Unit of Legal Culture

Secondly, Nelken demonstrates that there are many levels of legal culture that can be examined, ranging from the culture of the local institution like a courthouse or prosecutor’s office, called the micro level, to the culture of the nation, state and wider entity such as culture in Latin law, modern law or common law, called macro-level.¹⁰² Nelken regards this as ‘*unit of legal culture*’. He calls ‘*legal attitudes and behaviour within a given society or unit*’ as internal legal culture, and ‘*societies or other units of legal culture*’ as external legal culture.¹⁰³ As stated in Chapter 1, the English and Australian laws have been chosen as the units of legal culture. It should be noted that although this thesis is focused on a comparison of these national legal cultures, it will also touch on the influence of international treaties on English and Australian judicial review.

¹⁰¹ Fisher, *Risk Regulation and Administrative Constitutionalism* (n 19) 52.

¹⁰² Nelken, ‘Using the Concept of Legal Culture’ (n 8) 3-7; Nelken, ‘Comparative Law and Comparative Legal Studies’ (n 96) 28-29.

¹⁰³ Nelken, ‘Towards a Sociology of Legal Adaption’ (n 27) 27.

As mentioned above, there have been a spillover of EU law and the ECHR into ordinary English judicial review constitutionalism since the 1970s. Therefore, the adaptation of the methodology from ‘external legal culture’ into ‘interrelated legal culture’ is proposed in this thesis based on this closely intergrated relationship. It will be demonstrated in Section 3 below that the English legal mentality is flexible to adopt this and other interrelated legal cultures in perceiving the roles of the courts in conducting judicial review. Conversely, the integration of the international influence into the Australian judicial review constitutionalism is not flexible, but limited.¹⁰⁴ This different mentality of interrelated cultures is another significant difference between the English and Australian legal cultures, and this will be connected to the different determination of the grounds of judicial review in subsequent chapters.¹⁰⁵

2.5.3 An Outsider Perspective

Thirdly, legal culture can be examined by researchers of different perspectives. For example, it can be considered by an insider who is educated originally from the studied legal system. By this approach, the works are trying to understand and appreciate the views, processes and experience of participants within the culture.¹⁰⁶ Alternatively, it might be examined by an outsider of the legal system. Sometimes elements of legal culture

¹⁰⁴ Despite this fact, the influence of international treaties will still be regarded as the interrelated legal culture of Australian law, rather than external legal culture, because it can become domestic law if it is stipulated in a statute.

¹⁰⁵ For example, they will facilitate a more comprehensive understanding of why the Australian law is confined to the conceptual structure of jurisdictional error and traditional grounds related to the substantive exercise of discretion, while the English law develops various doctrinal approaches to determine the grounds of judicial review including some from the ECHR.

¹⁰⁶ Nelken, ‘Comparative Sociology of Law’ (n 10) 348-349.

might be close to lawyers' everyday uses of legal rules and ideas in their own legal system.¹⁰⁷ Therefore, perspectives of an outsider provide the benefit that the observation is conducted with fresh eyes. As stated in Section 3 of Chapter 1, my starting point in studying English and Australian legal culture was as an outsider. Therefore, I am neither too familiar nor uncomfortable about carrying out research on them.

2.5.4 Descriptive Approach

Fourthly, Webber points out that the two main approaches to narrate the accounts of examining legal culture are explanatory (or descriptive) and interpretive.¹⁰⁸ The former regards culture as '*an aggregating concept, capturing everything relevant to the operation of law in a specific social field*'.¹⁰⁹ The latter describes legal culture as '*the mode to understand how aspects of legal culture resonate and fit together*'.¹¹⁰ It should be clear that the use of legal culture in this thesis is to narrate the thick descriptions of the English and Australian judicial review, rather than interpreting them. As discussed in Section 4 of Chapter 1, this thesis does not interpret and compare whether English or Australian judicial review constitutionalism is a preferable way of thinking about the courts' roles in protecting legality. As Webber stated, legal culture can be applied in the sense of standing

¹⁰⁷ *ibid.*

¹⁰⁸ Webber (n 16) 1. See also Nelken, 'Using the Concept of Legal Culture' (n 8) 1, 8.

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*

in the position of an observer, not participant, speaking '*the language of tendency, not of right and wrong*'.¹¹¹

2.5.5 Non-Monolithic Nature

Most importantly, it shall be emphasised that all the above-proposed methodologies of legal culture are flexible and non-monolithic. As mentioned, the set of three elements in the formation of judicial review constitutionalism, consists of constitutional framework, constitutional value and the way of justification and limitation of judicial review, is this thesis's particular design in order to demonstrate the pictures of legal culture. In the same vein, different works might see different materials as evidence of legal culture. Likewise, the accounts of legal culture can be narrated in various ways, dependent upon the author's style of describing.

Apart from the non-monolithic nature in designing a particular application of legal culture, the result of examination on legal mentality of each element of legal culture also contain variations of thought. It is acknowledged that individual judges could have different thinking about their role in conducting judicial review.¹¹² This could be because of the different ways the rule of law is explained, not only in different legal cultures, but also within one legal culture.¹¹³ Alternatively, the ultra vires and common law models of

¹¹¹ Webber (n 16) 35.

¹¹² *ibid* 30. In the same way, Bell described that '*individuals develop their attitudes within a particular context*' ((n 17) 10-11).

¹¹³ n 78.

the justification for judicial review have different ways of interpreting the rule of law and parliamentary sovereignty.

According to the nature of legal culture, these variations are not unpredictable. The debates related to the legitimacy and scope of the court to conduct judicial review is ongoing in most legal cultures. Nevertheless, there is always a shared theme and pattern in the distribution of these ideas and values in the legal system.¹¹⁴ As Bell explains, '*the concept of culture identifies the shared beliefs, interests and ideologies which people have with regard to their activity and give it purpose*'.¹¹⁵ Therefore, the focus of the examination in subsequent sections will be shared themes of legal mentality in English and Australian judicial review constitutionalism.

An example that can be given here before examining others below is that, despite some Australian judges being said to be more conservative¹¹⁶ or activist¹¹⁷ than others, they share an overall position of legal thinking that the courts' role in conducting judicial review is rigid in their constitutional structures.¹¹⁸ This kind of shared theme in a legal

¹¹⁴ Friedman, 'The Concept of Legal Culture: A Reply' (n 13) 34.

¹¹⁵ Bell, *French Legal Cultures* (n 17) 11. This approach is similar to others, but with a slightly different explanation, namely the metaphor of '*common intention*' of a group of individuals drinking at a cocktail party (J R Searle, *The Social Construction of Reality* (London 1995) 26 cited in *ibid* 4-5), the recognition of culture as a '*collective phenomenon*' (*ibid*), and the concepts of '*organisational culture*' and '*typical or representative culture*' (*ibid* 10-12).

¹¹⁶ Justice Heydon is usually commented as a judge who rejected the judicial activism, as it leads to the destruction of the rule of law in Australian legal culture (Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' 10 *Otago L Rev* 493). See more in Section 4.4 below.

¹¹⁷ Eg Michael Kirby, 'Judicial Activism: Power without Responsibility-No, Appropriate Activism Conforming to Duty' (2006) 30 *Melb UL Rev* 576.

¹¹⁸ This will be exemplified in Section 4 below.

culture frequently appears as a package and needs to be unpacked, as will be conducted in subsequent sections. For example, Justice McHugh asserted that the common law's function in developing the law relied on a judge making legal rules and principles. However, he acknowledged that this creation of rules and principles had to be combined with constitutional structures to '*maintain its continuity and preserving its coherence*'.¹¹⁹ This is compatible with what was expressed by Chief Justice Gleeson, namely, that the common law developed by the courts must conform to the Constitution. Therefore, the ultimate limitation of judicial review is the constitution.¹²⁰ However, sometimes it is directly expressed; for instance, when Chief Justice Mason of the HCA explained that;

'...I employ the expression 'attitudinal basis' to signify the judicial perspective that there exists, or should exist, a relationship of mutual respect between the courts and the other arms of government. This perspective entails that the courts will avoid, so far as it is legitimately possible to do so, trespassing upon administrative decision-making, thereby generating public controversy leading to criticism of the courts and possible loss of respect for, and public confidence in, the courts. It was probably such an attitude of mind that lay behind Sir Owen Dixon's conception of judicial power...

...I do not suggest that this attitude of mind is confined to judges. Far from it. It is an attitude that may well be shared by the Australian legal community or a large section of it and perhaps by the wider community. In essence, it conceives of judges as appearing to have a limited role...'.¹²¹

¹¹⁹ Justice McHugh, 'Judicial Method' (Democracy and the Law, the Australian Bar Association Conference, London, 5 July 1998).

¹²⁰ Gleeson (n 78).

¹²¹ Mason A, 'Mike Taggart and Australian Exceptionalism' in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing 2009) 180.

This approach, which was applied to find uniformity of a legal culture will also be applied to English law; however, the result of the examination will be totally different from the Australian law. It will be demonstrated in the next section that the various discussions on the role of the English courts in conducting judicial review reflect the shared flexible legal mentality of the English legal culture.

2.6 Summary

This section proposes legal mentality of judicial review constitutionalism, as a particular form of legal culture, and its methodological approaches examining the ways of legal thinking of the judiciary about their proper role in conducting judicial review in the light of their distinctive constitutional orders. These subjects will be identified through the snapshot methodology on official documents such as important judgments, speeches and secondary literature of the judges. The examination will be conducted by an initial outsider of English and Australian law as the units of legal culture, and narrated in the descriptive approach, trying to understand its connection to the determination of the grounds of judicial review, rather than interpretative, trying to compare and prefer one over another. In addition, the results of the examination contain many disagreements but some shared themes of legal thinking can be drawn from them. This proposed form of legal mentality of judicial review constitutionalism is designed aiming to aggregate all important aspects into the whole pictures, containing a thick description of legal thinking, which will uphold comprehensive understanding of the courts' determination of the grounds of judicial review.

3. Flexible Legal Mentality of English Judicial Review Constitutionalism

This and the next section will examine legal mentality of English and Australian judicial review constitutionalism in line with the above proposed methodologies. At some points, the description has to be divided into the parts of ‘legal mentality’ and ‘judicial review constitutionalism’. The analysis begins with the latter, describing each element of judicial review constitutionalism, and then promptly follows with a demonstration of the judges’ ways of thinking, recognising, accepting or limiting their role in conducting judicial review regarding such element. This is similar to Bell’s template in proposing distinctive features of French legal culture, for example, starting with content of the *loi* and the *droit ecrit*, before pointing out their importance in French lawyers’ perspective, indicated by the term ‘primacy’.¹²² However, legal mentality and judicial review constitutionalism are not completely separated as the sections aim to conclude them as overall pictures of differences between English and Australian judicial review. Therefore, by ‘promptly following’ this thesis means that the relationship between them will be revealed in the analysis.

As described by Craig, English administrative law has been developed for more than 400 years since the establishment of administrative institutions to deal with facing situations during the 15th century,¹²³ but there was no general rationale for allocating these local authorities or defining the concept of the court to conduct judicial review until the

¹²² Bell, *French Legal Cultures* (n 17) Preface.

¹²³ Paul Craig, *Administrative Law* (8th edn, Sweet & Maxwell 2016) [1-002], [2-001].

17th century.¹²⁴ In the first edition of his administrative textbook, De Smith states that ‘...it was not until the seventeenth century that the modern conception of judicial review took shape.’¹²⁵ Subsequently, the English administrative law was gradually established related to remedies during the 18th century and grew considerably in 19th and 20th.¹²⁶ During this time, the courts have engendered some distinctive ways when thinking about their role in conducting judicial review by relying on some distinctive constitutional orders. This section runs through legal mentality of each element of English judicial review constitutionalism from the 17th century to the present. As mentioned earlier, the methodology of legal history is not applied to this examination; however, some historical contexts are significant for demonstrating the continuity of the English legal culture. The conclusion of contemporary legal mentality will be reached that the English courts perceive that they have flexibility in protecting legality of administrative actions. This is completely different from the legal mentality of Australian judicial review constitutionalism, described in the next section, that the judges understand their role in conducting judicial review as relatively rigid based on the framework of separation of powers prescribed in the written constitution.

3.1 English Constitutional Frameworks and Values

Although this chapter proposes the methodology of unpacking the elements in order to see the depth of legal mentality within them, constitutional frameworks and constitutional

¹²⁴ *ibid* [2-002].

¹²⁵ De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens & Sons Limited 1958) 65.

¹²⁶ Craig, *Administrative Law* (n 123) [1-004], [2-001]-[2-002].

values will be considered together in the case of English law because they are closely related. It is generally acknowledged that there is no written constitution in the UK. Therefore, constitutional values have become recognised as significant in explaining English administrative law.¹²⁷ As Lord Justice Laws states in *Thoburn v Sunderland City Council* that, although without a written constitution, the UK has a number of constitutional instruments, namely Magna Carta, the Petition of Right 1628, the Bill of Rights 1689, the Act of Settlement 1701 and the Act of Union 1707. The common law itself also recognises certain principles as fundamental to the rule of law.¹²⁸

In other words, the common law, statutes and constitutional values or general principles of law have become the main sources of the UK constitution.¹²⁹ Among them, the rule of law and parliamentary sovereignty are the constitutional values that have much influence on the courts' mentality in conducting judicial review. How these values have become integrated into the UK's unwritten constitution and have formed the background of English judges' mentality is a result of the context, described as follows.

Instead of a sudden and painful constitutional changes to recognise the importance of individuals' rights like the revolution in France,¹³⁰ the English process has been gradually developed through the qualification of powers between the Monarchy and

¹²⁷ John Gardner, 'Can there be a Written Constitution?' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1401244> accessed 2 March 2018.

¹²⁸ [2002] EWHC 195 (Admin).

¹²⁹ Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7th edn, CUP 2012) 160-198.

¹³⁰ Leslie Scott, 'Evolution of Public Law' 14 J Comp Legis & Int'l L 163, 168-171.

individuals throughout its history; for example, the Magna Carta and the Glorious Revolution.¹³¹ Two features were generated as result of this context. First, rather than the need for a canonical constitution to instantly guarantee individuals' rights after a revolution, the system gradually gave importance to the value that the governed had to be respected by the governors. Second, instead of a robust concept of the state as having authority and autonomy vis-à-vis the individuals, as explained in the French system, English legal thought is mainly based on the fluidity between the state and society.¹³²

These features, namely unnecessary of a canonical constitution and a concept of the state, have thereby generated two significant themes in achieving a liberal democracy in the UK. Firstly, the legal system sees parliament as the main governing institution that reduces the arbitrary prerogative of the Crown.¹³³ Secondly, it applies the common law tradition, through the exercise of prerogative writs, believing that judges should control public administrators.¹³⁴ Modern UK public law has been developed based on these two main themes,¹³⁵ which can be explained by various legal concepts.¹³⁶ The two themes of

¹³¹ Peter Leyland, *The Constitution of the United Kingdom : A Contextual Analysis* (2nd edn, Hart Publishing 2012) 14-17.

¹³² Cécile Laborde, 'The Concept of the State in British and French Political Thought' (2000) 48 *Political Studies* 540; Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (CUP 2012) 39-40.

¹³³ Scott (n 130) 163.

¹³⁴ Dicey later called this mentality the '*august dignity of the judges*' (A V Dicey, *Introduction to the Study of the Law of the Constitution* (7th edn, Macmillan 1908) 389).

¹³⁵ McLean (n 132) 12-18.

¹³⁶ Eg William Blackstone, *An Analysis of the Laws of England*, vol 1 (The Clarendon Press 1771); Walter Bagehot, *The Collected Works of Walter Bagehot*, vol 5 (Norman St John-Stevas ed, The Economist 1974).

parliamentary sovereignty and the courts' control of public administration have also shaped the English administrative law since the 17th century.¹³⁷ However, the most prominent explanation was A V Dicey's provision of a framework of an unwritten constitution in a discussion of parliamentary sovereignty in relation to the three limbs of the rule of law.¹³⁸

In relation to parliamentary sovereignty, Dicey explains the Westminster Parliament as having apparently unrestricted power;

*'Parliament has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.'*¹³⁹

This principle is explained together with the three limbs of the rule of law, the first of which is that *'no man is punishable... except for a distinct breach of the law established in the ordinary legal manner before the ordinary courts of the land'*.¹⁴⁰ The second limb focuses on the principle of equality, so that *'every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary*

¹³⁷ Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing 2010) 26 - 31; Louis Jaffe and Edith Henderson, 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 *Quarterly Review*.

¹³⁸ C J S Knight, 'The Rule of law, Parliamentary Sovereignty and the Ministerial Veto' (2015) 131 *The Law Quarterly Review* 547; Peter Cane, 'Understanding Administrative Adjudication' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing 2008) 276-277.

¹³⁹ A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1959) 39-40.

¹⁴⁰ *ibid* 188.

tribunals'.¹⁴¹ Finally, the third limb is what distinguishes the English understanding of the rule of law from that of other states;

*'The (unwritten) constitution is pervaded by the rule of law on the ground that the general principles of the constitution are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts.'*¹⁴²

Although this Diceyan concept was subjected to considerable criticism,¹⁴³ its 'general form' was extremely influential on legal mentality and shaped the development of English administrative law.¹⁴⁴ This is because it matched the duty of Parliament and the court in controlling the administrative actions with the two themes in achieving a liberal democracy described above. First, Parliamentary sovereignty upholds the will of the nation as supreme according to its elected nature;¹⁴⁵ therefore, the exercise of public power has to be channelled through Parliament.¹⁴⁶ Second, the three limbs rule of law reinforce the courts' role in protecting legality of administrative actions. In the first and

¹⁴¹ *ibid* 193.

¹⁴² *ibid* 195.

¹⁴³ Eg Paul Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon Press 1990) 12-13; Harry W Arthurs, 'Rethinking Administrative Law: A Slightly Dicey Business' (1979) 17 Osgoode Hall LJ 1.

¹⁴⁴ Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (n 143) 12). Loughlin also argues that '*the predominant approach to the subject in the 20th century has absorbed far too much of Dicey's method and underlying values*' (Martin Loughlin, 'Why the History of English Administrative Law is not Written' in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing 2009)).

¹⁴⁵ Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (n 143) 16.

¹⁴⁶ Craig, *Administrative Law* (n 123) [1-002].

second limbs, there is an emphasis on the function of the ‘ordinary courts’ to equally chastise any individual for any breach of the law. Most importantly, the third limb directly points out that the court’s main role is to engage in the protection of individuals’ rights. Drawing on the historical context, Dicey clearly argues that common law without a written constitution was a more effective technique in protecting the rights of individuals than that used on the continent. For him, constitutional documents could be easily revoked, while it was more difficult for governors to be arbitrary under the common law, where there are numerous judicial decisions to speak for individuals’ rights.¹⁴⁷

In short, the Diceyan concept not only describes a unitary democracy in which all public power is channelled through Parliament, but it is also for the court to conduct judicial review to ensure that the tasks of public administrators are legally performed. This cooperative function between the principle of parliamentary sovereignty and the rule of law is accepted and embedded as the widespread foundation of the English courts’ mentality in perceiving their role in conducting judicial review. Jowell regarded it as ‘perhaps the most enduring contribution of our common law’, supplying the foundation of a new model of democracy in Britain.¹⁴⁸ Apart from Lady Hale’s speech mentioned in Section 2.3 of Chapter 1, a number of judges also accept these constitutional values in

¹⁴⁷ A V Dicey, *Introduction to the Study of the Law of the Constitution* (n 139) 200-202.

¹⁴⁸ Jeffrey Jowell, ‘The Rule of Law Today’ in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (6th edn, OUP 2007). Cane also argues that ‘Judicial attitudes to Parliament were strongly influenced by Dicey’s espousal of Parliamentary supremacy as the fundamental principle of the English constitution’ (Peter Cane, *Controlling Administrative Power: An Historical Comparison* (CUP 2016) 44).

understanding their role in conducting judicial review, which can be categorised into two sides of mentality.¹⁴⁹

Firstly, the courts regard their role as protecting the rule of law by conducting judicial review. For example, Lord Neuberger argues that *'the role of the courts is therefore crucial in a democracy which is run in accordance with the rule of law'*.¹⁵⁰ Lord Phillips also states that *'the rule of law requires that the courts have jurisdiction to scrutinise the actions of government to ensure that they are lawful'*.¹⁵¹ Lord Justice Sedley displays this mentality by describing judges as sleeping lions, who *'woke to scrutinise all public law adjudications and decisions for both legality and fairness'*.¹⁵² Scholars like Robson supports this through a concept that *'judicial habits of mind'* enforce the ordinary courts to supervise the decisions of the inferior courts and bureaucracy.¹⁵³

However, this is to be balanced with another side of legal thinking that the courts should not always intervene in any administrative action, because they still need to be aware of the legitimate limits of the exercise of their judicial power in the light of parliamentary sovereignty. This mentality was demonstrated in *Arlidge v Local Government Board*, where the court did not intervene into the order of the local

¹⁴⁹ Jeffrey Jowell, 'Administrative Law' in Vernon Bogdanor (ed), *The British Constitution in the Twentieth Century* (OUP 2003) 374-384.

¹⁵⁰ Lord Neuberger, 'The UK Constitutional Settlement and the Role of the UK Supreme Court' (The Legal Wales Conference, 10 October 2014).

¹⁵¹ Lord Phillips, 'Judicial Independence and Accountability: A View from the Supreme Court' (The Politics of Judicial Independence, 8 February 2011).

¹⁵² Sedley (n 98) 39-40.

¹⁵³ William A Robson, *Justice and Administrative law: A Study of the British Constitution* (3rd edn, Stevens & Amp 1951) xi – xviii, 28-34, 40-42, 360-363, 409-418.

government board because judicial standards should not be applied to administrative decision-making.¹⁵⁴ By way of contrast to the last paragraph, Lord Justice Sedley also mentions that *'the judges were also required to respect and maintain the ring-fences erected by Parliament around newly created administrative bodies'*.¹⁵⁵ Galligan asserts that, although the function of the courts is to maintain the standard of legality, the scope of judicial review is limited by the doctrine of parliamentary sovereignty.¹⁵⁶

These two important constitutional values in English judicial review namely the rule of law and parliamentary sovereignty are commented on as 'generally' standing on the different sides of the scale. While the former mainly supports and constitute the roles of the courts to conduct judicial review, the latter limits the authority of the court.¹⁵⁷ This nature is recognised and described by scholars in various ways, for example, Craig's *twin concepts*¹⁵⁸ and Lord Justice Sedley's concept of *'Bi-polar sovereignty of the Crown in Parliament and the Crown in its courts'*.¹⁵⁹ In the same vein, Allan states that

¹⁵⁴ [1915] AC 120 (HL).

¹⁵⁵ Sedley (n 98) 59-60.

¹⁵⁶ Denis Galligan, 'Judicial Review and the Textbook Writers' (1982) 2 OJLS 257, 260.

¹⁵⁷ Parliamentary sovereignty is considered generally to limit their role in conducting judicial review, as it requires the courts to respect the power of public administrator, conferred from parliament as the supreme power. However, it will be shown below that ultra vires and common law theories particularly blend the explanation of parliamentary sovereignty as also supporting the courts' role in conducting judicial review.

¹⁵⁸ Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (n 143) 19-20.

¹⁵⁹ Stephen Sedley, 'Human Rights: a Twenty-First Century Agenda' [1995] PL 386, 389.

parliamentary sovereignty is constrained by legality, and qualified by the courts.¹⁶⁰ This is recognised by judges namely Lord Bridge stating in *X Ltd v Morgan-Grampian Ltd* that *'In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law'*.¹⁶¹ Lord Woolf also asserts two principles upon which the rule of law depended in a secondary work as the supremacy of parliament and the function of the courts as final arbiters in the application of the law.¹⁶²

All the mentioned works indicate that the courts have a role to 'strike a balance' between these two sides of constitutional values and find the most appropriate solution, whether they have jurisdiction to conduct judicial review in a particular case or not. Importantly, the nature of a balancing process is that the two values can be struck in different ways. Combining the absence of a written constitution to prescribe the boundary of the courts' scope of judicial review with this balancing process between the rule of law and parliamentary sovereignty, the English courts therefore understand their role in conducting judicial review to protect legality as flexible. They can malleably decide whether to give weight to the rule of law, and say that the case is within its scope of judicial review, or to emphasise on parliamentary sovereignty, and hold that they do not have the jurisdiction to intervene into the administrative action in another case. This merger between an unwritten constitution and the balancing process between the twin

¹⁶⁰ T R S Allan, 'Questions of Legality and Legitimacy: Form and Substance in British Constitutionalism' (2011) 9 International Journal of Constitutional Law 155, 156-157.

¹⁶¹ [1991] 1 AC 1, 48.

¹⁶² Lord Woolf, 'Droit Public- English Style' [1995] PL 57.

concepts is the first important constitutional order, generating flexible mentality of the English courts according to their judicial review geography.¹⁶³

3.2 Justification for the English Courts to Conduct Judicial Review

Apart from the collaboration between an unwritten constitution and the twin concepts, there are further explanations in regard to the role of the English courts in conducting judicial review. The point debated among academics is whether the courts have to justify their powers to conduct judicial review by relying on Parliament, or whether they can do so by their own powers independently of Parliament. While the ultra vires model represents the role of the courts on the former basis, the common law model holds on the latter one.¹⁶⁴

Initially, the (traditional) ultra vires model was proposed in the way that a court is justified in striking down actions that are *'beyond or exceed the scope of power'* of the administrative body transferred from Parliament through legislation.¹⁶⁵ According to this model, the court is an agent of Parliament, charged with policing the boundaries of administrative powers stipulated by Parliament. However, several aspects of this traditional ultra vires model were severely criticised. For example, in some cases public

¹⁶³ The term *'twin concepts'* is borrowed from Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (n 143), and will be used throughout the thesis referring to the rule of law and parliamentary sovereignty in English law.

¹⁶⁴ This chapter narrates these models, in order to demonstrate the different ways to interpret the role of the courts relating to parliament. It does not explain them in a chronological order.

¹⁶⁵ William Wade and Christopher Forsyth, *Administrative Law* (11th edn, OUP 2014) 27-28.

authority is provided by prerogative, not statutory power.¹⁶⁶ Therefore, another camp of the justification for judicial review was introduced in the form of the common law model. Apart from explicit Parliamentary intention, the courts can also overturn administrative acts that are contrary to the principles of common law, such as the rule of law. Judicial review is the creation of the common law by the court, which is the institution of judicial review per se. The ultra vires model, which was conceived in terms of legislative intent, could not provide the heads of review and their particular meanings.¹⁶⁷ Instead, according to the common law model, the proposition of the courts therefore has inherent powers to control administrative actions.

In response to the common law model, the ultra vires camp firstly defended the critique by confirming that under the ultra vires model, the sovereignty of Parliament should remain a fundamental element of the constitutional order.¹⁶⁸ Secondly, they developed a modified ultra vires model. Although Parliamentary intention does not explicitly appear in the wording of the statutes, the courts can overturn administrative acts that are contrary to the implied intentions of Parliament. Therefore, the grounds of judicial review, applied by the courts, are part of Parliamentary intention.¹⁶⁹ Thirdly, it criticises

¹⁶⁶ Dawn Oliver, 'Is the 'Ultra Vires' Rule the Basis of Judicial Review?' [1987] PL 543.

¹⁶⁷ Lord Justice Laws, 'Illegality: The Problem of Jurisdiction' in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing 2000).

¹⁶⁸ Christopher Forsyth, 'Of Fig Leaves and Fairy Tales: the Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 55 CLJ 122.

¹⁶⁹ Mark Elliott, 'The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law' (1999) 58 CLJ 129.

the common law model as abolishing the sovereignty of Parliament and leading to judicial supremacy.¹⁷⁰

There are various debates about these models in academic circles. Apart from ones regarding the preference between them, Allan points out that these models are based on a similar set of values, namely, parliamentary sovereignty and the rule of law.¹⁷¹ They have similar implications in reality. First, whether they are called implied intention or common law, they apply to the same long-standing principles, such as the rule of law. Second, in practice, it is the courts that decide what are implied intentions and common law principles.¹⁷²

This thesis does not intend to argue one model in preference over the other, or find solutions for the debates. However, it points out that the choices between these models are ‘options’ for the English courts in perceiving their position relating to Parliament when conducting judicial review. Judges heterogeneously rely on either of these models in actual cases. For example, although the model came later, the judgment in *R v Roberts, ex p Scurr* implicitly applied the ultra vires model to find that the payment was unlawful because it was excessive and went beyond the limits of legality.¹⁷³ Another example is that of Lord Greene, who applied the model in *Associated Provincial Pictures Houses Ltd*

¹⁷⁰ There was a debate between Craig and Allan about the meaning of legislative intent on this point (See their arguments in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing 2000)).

¹⁷¹ T R S Allan, ‘The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?’ (2002) 61 CLJ 87, 101-102.

¹⁷² T R S Allan, ‘The Rule of Law as the Foundation of Judicial Review’ in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing 2000).

¹⁷³ [1924] 1 KB 514.

v Wednesbury Corporation and declared that ‘the judicial role was primarily to ensure that the local authority remained within the four corners of the matters which it ought to consider’.¹⁷⁴ However, judges in *Regina (Cart) v Upper Tribunal* applied the common law model to justify that the court has inherent powers to protect the rule of law because common law is another limb of the development of a standard judicial review.¹⁷⁵ On the other hand, Lord Carnwath argues in a secondary work that there is no need to have a single foundation for judicial review;

‘While the ultra vires is a valid and useful tool, in those parts of the law which depend on a statutory or other constitutional foundation, the other important principles can be derived from the common law in the areas of law that the ultra vires principle cannot be readily applied.’¹⁷⁶

The flexibility that different judges in particular cases can malleably apply either ultra vires, common law model or none of them in their legal reasoning to justify their judicial review flowed from the previous elements. Jowell points out that it is the absence of a written constitution to set clear boundary for the courts’ authority to conduct judicial review, which allow such variation to exist.¹⁷⁷ This thesis adds that these models are generated from the gap in the balancing process between the twin concepts of

¹⁷⁴ [1948] 1 KB 223 (CA) 228, 231, 233.

¹⁷⁵ [2009] EWHC 3052 (Admin); [2010] EWCA Civ 859 (CA); [2011] UKSC 28. Legal reasoning in the case will be unpacked in detail in the next chapter.

¹⁷⁶ Robert Carnwath, ‘No Need for a single Foundation’ in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing 2000) 243.

¹⁷⁷ Jeffrey Jowell, ‘Of Vires and Vacuums: The Constitutional Context of Judicial Review’ in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing 2000) 339-340.

parliamentary sovereignty and the rule of law. The courts use these models to make a firm justification for their position relating to parliament when they conduct judicial review.

Consequently, the choice between ultra vires and common law models is regarded as another distinctive element in English judicial review constitutionalism, demonstrating the overall position that the English courts have flexibility in justifying their role to conduct judicial review. By ultra vires theory, the courts consider their roles to conduct judicial review as relying on Parliament. By common law theory, the courts regard themselves as having inherent and independent power to develop their own principles to control public authorities. Alternatively, some judges and scholars analyse these models as similar, and unnecessary to be chosen in practice. The next section will demonstrate that this flexibility is a distinctive feature of the English law. The Australian courts do not need these models to justify their scope of judicial review, as they have the framework of power prescribed in the written constitution to do so.

3.3 Fluid Separation of Powers between Court and Executive

'It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain' (Lord Mustill in *R v Secretary of State for the Home Department, ex parte Fire Brigades Union*)¹⁷⁸

It has been demonstrated in the analysis up to this point that the court and the parliament in England have a distinctive relationship, in which the English courts need to balance the rule of law and parliamentary sovereignty to identify their proper role in conducting

¹⁷⁸ [1995] 2 AC 513, 567.

judicial review in a particular case. This sub-section will complete Lord Mustill's '*peculiarity of the British concept of the separation of powers*' by unpacking the particular understanding on the relationship between court and executive in the English legal culture.

As mentioned earlier, although the contemporary form of English administrative law has its roots in the 17th century, it was extensively developed during the 19th and 20th centuries.¹⁷⁹ This was the result of significant social changes based on the Industrial Revolution and the birth of the concept of welfare state.¹⁸⁰ This led to a considerable growth in public administration and the number of tribunals throughout this period, and the role of the courts to maintain these organs within their scope of power was widely discussed.¹⁸¹ This led to the place of the court and these organs being included in some significant reports of governmental committees during the 20th century, namely the Donoughmore Committee, the Franks Committee and the Leggatt Committee, which will be discussed below.¹⁸² It will be seen that the discussions contained varied and flexible understandings of the relationship between the court and the executive and the proposition of tribunals. This will be regarded as another landscape of the English legal culture.

¹⁷⁹ nn 123-126.

¹⁸⁰ Craig, *Administrative Law* (n 123) [2-002], [2-011]; Cane, *Administrative Tribunals and Adjudication* (n 137) 23 - 31; See also Gavin Drewry, 'The Judicialisation of "Administrative" Tribunals in the UK: From Hewart to Leggatt' (2009) 28 *TRAS* <<http://rtsa.ro/tras/index.php/tras/article/view/27>> accessed 5 November 2018; Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth Century England* (CUP 2006).

¹⁸¹ Craig, *Administrative Law* (n 123) [2-017].

¹⁸² n 93.

The first example is ‘The New Despotism’, which was written in 1929 by Gordon Hewart, the Lord Chief Justice of England.¹⁸³ Among various proposals,¹⁸⁴ he expressed his concern about the ‘*increasing tendency to assign judicial powers to specialist tribunals*’.¹⁸⁵ This opinion corresponded with Dicey’s concept that the ordinary courts should be the only proper constitutional forum for resolving disputes.¹⁸⁶ The proposition of tribunal being a kind of executive holding adjudicative power should be rejected because it ‘*would pose a threat to the rule of law*’.¹⁸⁷ This meant that the boundary of authority between the court and the executive would remain firm. The adjudicative role should be dominated by the ordinary courts rather than the executive or tribunal. This was also related to the reluctance to the validity of administrative law at that time.¹⁸⁸

As a result, the Donoughmore Committee was established in 1929 to consider Hewart’s critique of the proliferation of tribunals and administrative law.¹⁸⁹ In the report in 1932, the committee generally insisted on the allocation between the judicial and the executive. The principles by which legal questions should be decided by the court and policy questions should primarily be the province of the executive were underlying.¹⁹⁰

¹⁸³ Lord Hewart, *The New Despotism* (London Ernest Benn Ltd 1928).

¹⁸⁴ For example, the abolition of the Office of Lord Chancellor (See Cane, *Administrative Tribunals and Adjudication* (n 137) 33-34; Drewry (n 180)).

¹⁸⁵ Drewry (n 180).

¹⁸⁶ *ibid.*

¹⁸⁷ *ibid.*

¹⁸⁸ Arthurs (n 143).

¹⁸⁹ n 93.

¹⁹⁰ Cane, ‘Understanding Administrative Adjudication’ (n 138) 285.

However, the application of this concept of the separation of powers was not fixed, as clarified in the report with the following statement;

*'Our conclusion on the whole matter is that there is nothing radically wrong about the existing practice of Parliament in permitting the exercise of judicial and quasi-judicial powers by Ministers [a reference to public enquiries] and of judicial powers by Ministerial tribunals'*¹⁹¹

Apart from this quotation, the relationship between the court and tribunal was unclear; hence some scholars may have said that the report had *'little or no impact'* on this constitutional issue.¹⁹² It was just designed *'to take the heat out of a rather synthetic controversy without unduly offending a top judge [Hewart]'*.¹⁹³ However, it is considered in this section to have been a demonstration of the flexible legal mentality in terms of how the relationship between the court and the executive could be understood. This can be seen from the following example of the wording of the report;

'In the British Constitution there is no such thing as the absolute separation of legislative, executive, and judicial powers; in practice it is inevitable that they should overlap...

*One of the main problems of a modern democratic state is how to preserve the distinction, whilst avoiding too rigid an insistence on it...*¹⁹⁴

Interestingly, Leslie Scott, the chairman of the Donoughmore Committee affirmed and connected this flexible mentality to other distinctive constitutional orders, namely, the

¹⁹¹ Donoughmore (n 93) 115.

¹⁹² Drewry (n 180).

¹⁹³ *ibid.*

¹⁹⁴ Donoughmore (n 93) 4.

absence of a written constitution, in an article published in the same year in which he made the following statement;

*In the British Empire the process of constitutional change is less painful than it would have been in most other States because our Constitution is not written. Our constitutional usage...and our rules are flexible, not rigid as are the paragraphs of enactments.*¹⁹⁵

Some scholars also emphasise this flexible mentality in Donoughmore; for example, Cane, who states that

*'Perhaps in response to the distinction between judicial and quasi-judicial decisions, the Committee itself threw separation of powers into the mix, saying that although it was impossible absolutely to separate legislative, executive and judicial powers, the distinction between them "is none the less real, and for our purposes significant"'*¹⁹⁶

Based on the non-fixed position in allocating powers between the court and the executive and in recognising that status of tribunal in Donoughmore, it was open for further discussion in the later reports.

The next report to consider is that of the Franks Committee in 1957.¹⁹⁷ Apart from creating a common framework for a number of ad hoc tribunals and articulating their operational principles of openness, fairness and impartiality,¹⁹⁸ the status of tribunal was also elaborated as '*not ordinary courts, but neither are they appendages of Government*

¹⁹⁵ Scott (n 130) 170.

¹⁹⁶ Cane, *Administrative Tribunals and Adjudication* (n 137) 35.

¹⁹⁷ Franks (n 93).

¹⁹⁸ *ibid* [41]-[42].

Departments'.¹⁹⁹ It was '*machinery provided by Parliament for adjudication rather than as part of the machinery of administration*'.²⁰⁰ This identification was '*the clear and unmistakable intention of Parliament*' to enable tribunals to operate independently from the government.²⁰¹

Many scholars have commented on the huge shift from Donoughmore by Franks. For example, Harlow and Rawlings consider that '*tribunals were pushed increasingly towards a court-substitute function*' in the report.²⁰² This is similar to Drewry, who described the report as '*the road of increased legal formality and judicialization [to the tribunals]*' and '*something of a watershed*' from Donoughmore.²⁰³ Instead, this move of the proposal of tribunal from '*not radically wrong*' in Donoughmore to '*more formally part of adjudication*' in Franks will be considered in this section to be the continuous manifestation of flexible legal mentality by which the relationship between the court and the executive can be understood. Neither Donoughmore nor Franks provided a clear cut or fixed distinction between them.

This flexible legal mentality has continued to flow. Another significant discussion comes from the Leggatt Committee,²⁰⁴ whose report began with a comment on the

¹⁹⁹ *ibid* [40].

²⁰⁰ *ibid*.

²⁰¹ *ibid*. All these recommendations were accepted and resulted in the Tribunals and Inquiries Act 1958.

²⁰² Carol Harlow and Richard Rawlings, *Law and Administration* (2nd edn, Butterworths 1987) 393.

²⁰³ Drewry (n 180). See Cane, who also regards Franks as '*a judicialized model of non-judicial administrative adjudication*' (Cane, *Administrative Tribunals and Adjudication* (n 137) 43).

²⁰⁴ Leggatt (n 93).

development of tribunals as *'wide variations of practice and approach, and almost no coherence....'*²⁰⁵ A more coherent framework was required to meet *'the needs of the user'*.²⁰⁶ Hence, a new structure of two-tier tribunals, namely the First Tier Tribunal ('FTT') and the UT, was proposed. While all the ad hoc specialist tribunals were collected and described as the former, the latter was established as an appellant institution on the questions of law. This recommendation led to the implementation of the Tribunals, Courts and Enforcement Act ('TCEA').²⁰⁷ The report and the Act were commented in the way embedding tribunals *'even more solidly into the fabric of the judicial system'* for at least three reasons.²⁰⁸ Firstly, the status of the UT is stipulated in Section 3 (5) of the TCEA as *'a superior court of the record'*. Therefore, whether a UT's decision is excluded from judicial review or not is questionable. Secondly, some of the legally-qualified members of tribunals are called 'judges', even though they do not hold judicial office in the traditional sense. Thirdly, Section 3 of the Constitutional Reform Act 2005, in which *'judicial independence'* is guaranteed, also applies to the UT in the same way as it does to the traditional judiciary.²⁰⁹

In the next chapter, various doctrinal approaches the courts at different levels in *Cart* apply in determine the status of the UT according to Section 3 (5) will be unpacked. However, what can be concluded here is that the relationship between court, executive

²⁰⁵ *ibid* [1.3].

²⁰⁶ *ibid* [1.4].

²⁰⁷ The structure of two-tier tribunals has been enacted in s 3 of the TCEA.

²⁰⁸ Drewry (n 180).

²⁰⁹ Cane, 'Understanding Administrative Adjudication' (n 138) 286.

and tribunal in England has not been as fixed, but various in the committee's reports since the early of 20th century to the present. After Leggatt, the flow of flexible approaches has continued. For example, the Law Commission's report about the Housing: Proportionate Dispute Resolution ('PDR') in 2004 stated that

'In practice the distinction between the two [courts and tribunals] is by no means clear cut, and is arguably becoming less clear and less important...

*We find it difficult to accept the rigid distinction drawn between courts and tribunals*²¹⁰

Drewry comments that this PDR principle reflects *'the same flexible and holistic objective...courts and tribunals have become and are becoming both more similar and more closely integrated in all kinds of ways'*.²¹¹

Rather than finding out which report provides the best answer for the proposition between court, executive and tribunal, it is considered in this section that the variation between them illustrates a shared theme of flexibility of the English legal culture. Some scholars point to this flexible mentality;²¹² but the most interesting proposal is from Cane, since it involves the application of a process to balance this non-fixed relationship between the court, the executive and tribunals, as follows;

'Tracing the long history of the English system has shown not only that a system of government may contain concentrating and diffusing elements at

²¹⁰ The Law Commission, *A Consultation Paper No. 180 on Housing: Proportionate Dispute Resolution - The Role of Tribunals* [2.107].

²¹¹ Drewry (n 180). See also, Review of Administrative Law in the United Kingdom, *Discussion Paper April 1981* (so called *'The Justice-All Souls Review'*), which discusses the limitations of the scope and approach of tribunals on some particular topics (See more in Craig, *Administrative Law* (n 123) [2-020]).

²¹² Drewry (n 180).

one and the same time, but also that the mixture of such elements and the balance between them may vary over time'.²¹³

This is clearly compatible with the analysed balancing process between the rule of law and parliamentary sovereignty when perceiving the relationship between the court and Parliament. The peculiarity of the English separation of powers can be concluded as being relatively fluid when these two lines are combined. This is another significant landscape of the English legal culture, apart from the particular understanding of the twin concepts of parliamentary sovereignty and the rule of law. They will become key to understanding the flexibility of the English courts have in applying various doctrinal approaches in their determination of the grounds of judicial review, which will be demonstrated in subsequent chapters.

Conversely, although the Australian legal system has conception of the rule of law and separation of powers, its deep understanding is very different to the English one. For example, it will be demonstrated in the next section that the distinction between the court and other governmental organs is discussed in a more rigid way, particularly in the Kerr Report. This and other elements of the Australian legal culture result in the application of relatively fixed and confined doctrinal approaches applied in determining the grounds of judicial review, which will also be unpacked in subsequent chapters.

Apart from the discussion in the report of the governmental committee, the fluid relationship between the court and the executive in English legal culture is also endorsed by academic work. Scholars have proposed a number of different approaches to find a

²¹³

Cane, *Controlling Administrative Power: An Historical Comparison* (n 148) 57.

solution to this relationship. For example, Loughlin clearly accepts fluidity in understanding the concept of the separation of powers.²¹⁴ For English law, he mentions Maitland's work to describe how '*...the two [court and executive] have been inextricably blended for ages*'.²¹⁵ Loughlin regards this as an '*unbalanced working of the doctrine of a separation of powers*',²¹⁶ and proposes a solution, which he calls '*The New Separation of Powers*'.²¹⁷ In short, rather than making tribunals closer to courts, Loughlin emphasizes that the executive is '*the primary interpreter of statutes in the modern state*'.²¹⁸ He confines the role of the courts to conducting judicial review as follows;

*'Most of these interpretations are never reviewed by the judiciary...
All governmental action should be reviewable in the light of a means-end rationality, the precise specification of which is determined by the institutional remit and competence of the particular official agency.'*²¹⁹

Judicial review is conducted '*under the ground that all agencies should have taken on the task of promoting or coordinating the 'public interest' – in the light of the rationality, reasonableness, and proportionality of their action*'.²²⁰ Apart from Loughlin, Harlow and Rawlings also show a variation of how the relationship between the court and the

²¹⁴ Martin Loughlin, *Foundations of Public Law* (OUP 2012) 445-447.

²¹⁵ Williams Maitland, 'The Shallows and Silences of Real Life' in H A L Fisher (ed), *Collected Papers* (CUP 1911) 467-479, 478 cited in *ibid* 446.

²¹⁶ Loughlin, *Foundation of Public Law* (n 214) 453.

²¹⁷ *ibid* 447-453.

²¹⁸ *ibid* 456.

²¹⁹ *ibid*.

²²⁰ *ibid* 460.

executive can be perceived in English law based on the Red-Light/ Green Light models.²²¹

In the former, courts are considered as ‘brakes’ that prevent the public authorities from abusing their powers. Therefore, the boundary between the court and the executive standing on the different sides should be firm. Conversely, based on the latter, the courts and decision-makers need to cooperate to produce a framework of coordinated administration. Despite there are various possibilities, the courts ‘generally’ facilitate the administrative bodies to perform their public functions rather than stopping them from doing so. Therefore, the boundary between them could be loose in some cases.

Similar to the above debate between ultra vires and common law theories, the aim of this section is not to find the best answer for the relationship between the court and the executive among these academic works. Instead, they are all considered to be ‘acceptable distinct approaches’, which can be deliberated flexibly based on English legal culture. In short, flexibility is the over-riding theme of the relationship between the court and the executive in English law.

3.4 Integrating Influences from Interrelated Legal Cultures

At this juncture, the particular understandings of the twin concepts of parliamentary sovereignty and the rule of law, the debate between ultra vires and common law theories of justification of judicial review and the fluid separation of powers between the court, the executive and tribunals in England have been deliberated. These are the detailed

²²¹ Harlow and Rawlings, *Law and Administration* (3rd edn, CUP 2009) Chapter 1.

examination of Lady Hale’s speech, quoted in Section 2.3 of Chapter 1, which recognizes the influence of Dicey’s concepts on English administrative law.

However, this is not the end of the story. Lady Hale further describes that

‘But in many respects, the Constitution which we have today would have been unrecognisable to...Dicey. Some may think that this is the great virtue of an unwritten constitution - that it can change and develop with changing times.... In particular where stands the sovereignty of Parliament, given the ceding...to the law-making powers of the European Union.’²²²

This addition is in the same vein with the further notice of Lord Justice Laws stated in *Thoburn* that the UK have a number of constitutional instruments. By this, the European Communities Act 1972, the Human Rights Act 1998 (‘HRA’) may now be added to this list.²²³ Therefore, the influence of EU law and the convention, namely the ECHR, is recognised by the English courts as being significant to understand the analysed constitutional values and the mentality of their role in conducting judicial review. As Brandy regarded, the HRA is *‘one of the most significant developments ever to occur in British public law’*.²²⁴

First and foremost, it shall be clarified that EU law mainly relates to constitutional law issues, which is the relationship between the supranational nature of the EU and English parliamentary sovereignty. Despite this is not directly to the influences of constitutional orders on judicial review doctrine, as the subject of legal culture explored

²²² Lady Hale, ‘The Supreme Court in the United Kingdom Constitution’ (The Bryce Lecture 2015, Oxford, 5 February 2015).

²²³ n 128.

²²⁴ Alan Brandy, *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (CUP 2012) 1.

in this chapter, it reinforces the idea of flexible mentality of English public law. The majority in the *R (Miller) v Secretary of State for Exiting the European Union* demonstrates this clearly that;

*'Unlike most countries, the UK does not have a constitution in the sense of a single code of fundamental law which prevails over all other sources of law. Our constitutional arrangements have developed over time in a pragmatic as much as in a principled way, through a combination of statutes, events, conventions, academic writings and judicial decisions. Reflecting its development and its contents, the UK constitution was described by the constitutional scholar, Professor AV Dicey, as "the most flexible polity in existence".'*²²⁵

This is similar to what has been analysed above, that without written constitution, it is flexible to integrate constitutional values, statutes and common law as parts of development of English public law. The judgment relies on this mentality demonstrating the development of how EU law as flexibly integrated with parliamentary sovereignty, since 1971 to 2016, and thereby answers the steps required from the domestic law in the process of leaving the European Union.²²⁶

Instead, the only direct relation of EU law to judicial review doctrine is that the English courts are obliged to apply EU legal principles such as proportionality to domestic cases.²²⁷ However, these are applied merely in cases when the decision-makers are acting within the scope of EU law. For example, in *International Trader's Ferry*, the court held

²²⁵ [2017] UKSC 5 [40].

²²⁶ *ibid* [2].

²²⁷ Craig, *Administrative Law* (n 123) [21-014].

that the Chief Constable's decision to limit the free movement of goods in the interest of public security or public health was not disproportionate.²²⁸

In contrast to EU law, the ECHR is more related to English judicial review constitutionalism since it has direct influence on legal mentality of the courts in conducting judicial review in general. The ECHR was not formally adopted into national law, until the HRA entered into force in 2000.²²⁹ Mainly, the HRA added two mechanisms assigning the courts to protect individuals' rights according to the ECHR. First, Section 6 incorporates listed rights (contained in ECHR) to be actioned in the UK as domestic law. Second, Section 2 brings the principles and jurisprudence of the European Court of Human Rights into the domestic law; for example, proportionality has been imported into English legal culture.²³⁰

According to the proposed methodology, what this chapter focuses is how these provisions in the HRA as the results of the interrelated legal culture (the ECHR) change, adapt, or integrate with the existing legal mentality of the courts perceiving their role in conducting judicial review. For example, it is questioned how the courts recognise the convention rights relating to the common law rights as a source of their role in conducting judicial review.²³¹ Various explanations of their relationship are given. For example, Lady Hale perceives that

²²⁸ [1999] 2 AC 418 (HL).

²²⁹ Craig, *Administrative Law* (n 123) [20-001].

²³⁰ *ibid* [20-033].

²³¹ Eg Lady Hale stated raises the issue about '*the relationship between the protection offered by the HRA 1998 and the protection offered by these common law principles*' (Lady Hale, 'UK

‘European instruments as the source of rights, remedies and obligations, emerge a renewed emphasis on the common law and distinctively UK constitutional principles as a source of legal inspiration...

*The natural starting point in any dispute should be domestic law, albeit not always unanimously. The Convention may then be used as a check to see if any further development of the common law may be required.*²³²

Alternatively, Lord Bingham in *R (Ullah) v Special Adjudicator* states that ‘*the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less*’.²³³

The bottom line of this variation in thinking about the interrelationship between Common law rights and Convention rights, is that the ECHR (through the HRA) increases the options for the English courts in protecting individuals’ rights by that executive decisions being challenged in court. Whether as a source of inspiration or being a ceiling, a shared pattern recognised is flexibility and willingness for the English courts in adapting such options into their conducting of judicial review. Lord Neuberger describes that

‘The introduction of the Convention into UK law has been a breath of fresh air...[which] has spurred the UK judiciary into fresh thinking about the law, because we now have new ideas to grapple with and to apply to our domestic law...

*The exercise carried out by the court can be characterised as far more intrusive or far less technical than under traditional judicial review.*²³⁴

Constitutionalism on the March?’ (The Constitutional and Administrative Law Bar Association Conference, 12 July 2014).

²³² *ibid.* See also *R (Osborn) v Parole Board* [2013] UKSC 61.

²³³ [2004] UKHL 26 [20].

²³⁴ Lord Neuberger, ‘The Role of Judges in Human Rights Jurisprudence: A Comparison of the Australian and UK experience’ (Conference at the Supreme Court of Victoria, Melbourne, 8 August 2014). See also Lord Neuberger, ‘The Supreme Court and the Rule of Law’ (The Conkerton Lecture, 9 October 2014).

Lady Hale also asserts that

*'The future of the Human Rights Act...is another example of the interesting ways in which the relationship between the courts and Parliament is developing. It has always been the role of a constitutional court to protect fundamental rights, within the framework of the law and the constitution, and that is what an independent judiciary will continue to do to the best of its ability.'*²³⁵

There are two notable points regarding this aspect of flexible mentality of the English courts in integrating interrelated influences into the perception of the role in conducting judicial review. Firstly, the courts retain the process of balancing the twin concepts of parliamentary sovereignty and the rule of law and the fluid separation of powers, in perceiving their role to conduct judicial review in particular cases. This can be seen from Lord Neuberger's assertion that,

*'The role of the court when balancing the reasons against the interference is quite sensitive, and the extent to which the court will have regard to the view of the executive decision maker will depend very much on this nature of the issues.'*²³⁶

Secondly, this flexibility in English judicial review constitutionalism flows from the constitutional framework namely the absence of written constitution. Lady Hale mentions this that *'Some may think that this is the great virtue of an unwritten constitution, that it can change and develop with changing times'*.²³⁷ Lord Neuberger also asserts that because of an unwritten constitution, the English judges therefore cannot avoid referring to the

²³⁵ Hale, 'The Supreme Court in the United Kingdom Constitution' (n 222).

²³⁶ Neuberger, 'The Role of Judges in Human Rights Jurisprudence: A Comparison of the Australian and UK experience' (n 234)

²³⁷ Hale, 'The Supreme Court in the United Kingdom Constitution' (n 222).

Convention rights. In his words, *'the absence of a constitution means that UK judges cannot easily refuse to follow a Strasbourg court decision on the ground that it would involve infringing our constitution'*.²³⁸ He confirms this by reiterating in another speech that,

*'While the UK has no constitution, in a typically understated and almost half-hearted we are now developing a sort of quasi-constitution...through signing up to the ECHR and then incorporating it in our domestic law in the HRA 1998. That means that judges in the UK can now give effect to many of the fundamental rights which are enshrined in most constitutions. So, if a decision of the executive infringes someone's human rights, the courts can quash it, and the common law, that is the law developed by the judges, has to be adjusted to accommodate such rights. So, new life has been breathed into the law, with proper recognition for the first time to fundamental rights...'*²³⁹

In summary, the openness and variation of thoughts in integrating the influences of interrelated legal cultures, particularly the ECHR (via the HRA) is another element that indicates the flexible mentality of the English courts in understanding their role in conducting judicial review. It will be shown in the next chapters, particularly chapters 5 and 6, that this mentality permeates the English courts so that they malleably adopt various doctrinal approaches from interrelated legal cultures, such as proportionality, in their determination of the scope of a judicial review. On the other hand, it will be demonstrated in the next section that the Australian courts have a different mentality whereby they firmly reject the integration of any influence from international treaties into their rigid framework of the separation of powers.

²³⁸ Neuberger, 'The Role of Judges in Human Rights Jurisprudence: A Comparison of the Australian and UK experience' (n 234).

²³⁹ Neuberger, 'The UK Constitutional Settlement and the Role of the UK Supreme Court' (n 150).

3.5 Substantive Conclusion

All the analyses above demonstrate the flow of legal mentality of English judicial review constitutionalism. In essence, the constitutional framework of an unwritten constitution influences the courts to rely on the constitutional rules when explaining their role in conducting judicial review. This generates the first milestone of flexible thinking when they operate legality. The important constitutional values the English courts apply as their foundation of judicial review are the rule of law and parliamentary sovereignty, which are explained as the concepts needed to be balanced. On the one hand, the courts refer to the rule of law to claim their jurisdiction of judicial review. On the other hand, they do not intervene into administrative action because they are concerned with parliamentary sovereignty. The nature of the balancing process between the twin concepts adds further flexibility to the mentality of the courts in understanding their role in conducting judicial review. The debate between two models of justification for judicial review, namely, ultra vires and common law also demonstrates malleability for English courts in interpreting the constitutional values to claim their scope of judicial review according to Parliament. Additionally, the flexible legal thinking in understanding relationship between the court, the executive and tribunals discussed in significant governmental reports and academic works is another distinction of English legal culture. The last distinguishing feature is flexibility in integrating the influences from interrelated legal cultures, particularly the ECHR (via the HRA) into the English courts' understanding of their role to conduct judicial review. With these elements, this section concludes that the English courts have a flexible mentality in understanding their role in conducting judicial review to protect legality. Lord Mance's statement fits with this conclusion;

*'Britain is peculiar in having no written constitutional backdrop. The 17th century left us with Parliamentary sovereignty, qualified now by Parliament's acceptance of the European Treaties and Human Rights Convention.... Fundamental common law principles do exist central to the rule of law; and what courts might do if any legislator, national or supranational, ever acted directly contrary to the rule of law is best left unanswered.'*²⁴⁰

This flexible mentality of English judicial review constitutionalism will become more obvious and understandable, when comparing with the Australian courts' mentality considering their role in conducting judicial review as relatively rigid.

4. Rigid Legal Mentality of Australian Judicial Review Constitutionalism

The particular way in which the English courts flexibly understand their role in conducting judicial review according to the distinctive understanding of some constitutional orders, namely, the rule of law, parliamentary sovereignty and the separation of powers, was unpacked in the previous section. The general forms of these constitutional values have been adopted into the Australian system based on its former colonial status. For example, the rule of law, which places the courts at the centre of the system for controlling administrative power, was also a starting constitutional value in Australia. Chief Justice French clarifies that *'Australia's Constitution which is rooted in the history of its British colonisers... has delivered a system of democratic government, and structures to protect*

²⁴⁰ Lord Mance, 'The Rule of Law - Common Traditions and Common Issues' (175th Anniversary of Founding of Hoge Raad, the Netherlands, 1 October 2013).

the rule of law'.²⁴¹ Particularly, Sir Brennan states that *'The Constitution substantially followed the Westminster practice described by Dicey'*.²⁴²

However, the Australian law has gradually developed its own distinctive ways to understand these constitutional orders apart from the English one.²⁴³ For example, as shown in the transcript of the legal argument of *Kirk*, quoted in Section 2.3 of Chapter 1, the understanding of rule of law is confined to Dicey, but operates within the written constitution. This section runs through this kind of legal mentality of each distinctive element of Australian judicial review constitutionalism. Apart from the rule of law, the particular understanding of the separation of powers, the concept of jurisdiction, the distinctions between legality and merits and between courts and tribunals in Australia will be unpacked. All of these will be demonstrated as sources of the greater rigid legal mentality by which the Australian courts understand their role in conducting judicial review.

4.1 Australian Constitutional Frameworks

Due to Australia's huge expanse of territory, the centralisation of power through a unitary state system could not function well. Therefore, the US model of a federal state system with a written constitution was introduced to the system as a workable constitutional

²⁴¹ French, 'Australia's Constitutional Evolution' (n 72).

²⁴² Sir Brennan, 'The Parliament, the Executive and the Courts: Roles and Immunities' (School of Law, Bond University, 21 February 1998).

²⁴³ Matthew Groves and Janina Boughey, 'Administrative Law in the Australian Environment' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (CUP 2014) 4; Groves and Lee (n 87) 2.

setting.²⁴⁴ This model was considered to reduce the tension between the colonies, in both the aspect of diverse cultures and the allocation of governmental powers.²⁴⁵ The framework of a federal system prescribed in the convention between the states was then enacted as the Commonwealth Constitution, which which came into existence on the 1st January 1901.²⁴⁶

It is acknowledged that the Constitution does not contain a provision that is directly related to the role of the courts in conducting judicial review of administrative action. However, it is still the starting point of the difference between the English and Australian legal cultures because the three main governmental powers, namely, legislative, executive and judicial, were initially setup under a framework of federal system in the first three chapters of the constitution. The Australian courts then gradually developed a distinctive understanding of constitutional values and hence, their role in conducting judicial review through the reading of this framework of federal separation of powers prescribed in the written constitution. In other words, the written constitution and the federal system became the ground of the Australian river, which has since been

²⁴⁴ Peter Cane, 'The Making of Australian Administrative Law' (2003) 24 Australian Bar Review 114; Groves and Lee (n 87) 4.

²⁴⁵ A federalism is considered as a solution to combine '*different political communities in a national polity*', and answer to the colonial states' concern about their states' affairs namely foreign affairs, defence, and trade at that time. It was the decentralisation of penal colonies and launch the white Australia policy. (See Patrick Parkinson, *Tradition and Change in Australian Law* (5th edn, Thomson Reuters 2013) 155-159; Helen Irving, *To Constitute a Nation : A Cultural History of Australia's Constitution* (CUP 1997)).

²⁴⁶ Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart Publishing 2011) 9-13; Gabrielle Appleby, Alexander Reilly and Laura Grenfell, *Australian Public Law* (2nd edn, OUP 2014) 51-55. Noteworthy, it does not mean that Australia had yet become independent nation by such creation of the Commonwealth on 1st January 1901. The position in 1900 was that the Constitution was legally binding because of the status accorded to British States as an original source of the law (Owen Dixon, 'The Law and the Constitution' (1935) 51 LQR 590).

thickened by other geographical features. Groves and Lee point out this logic in the following statement;

*'The Commonwealth Constitution is another important influence upon Australian administrative law. The adoption of a written constitution marked a crucial point of difference between Australia and England. The Constitution introduced a division or separation of powers that underpins the role of the courts and many other consequences that flow from that separation, such as the constitutional limitations on judicial review...'*²⁴⁷

*The Commonwealth Constitution does not expressly spell out the existence of a separation of powers doctrine, but the High Court held that the compartmentalisation of the legislative, executive and judicial powers into Chapters I, II and III of the Constitution respectively led inevitably to the proposition that Australia's constitutional framework dictated a separation of powers'*²⁴⁸

Not only in academic works, but also Justice Kirby stated in a case that

'The doctrine of the separation of powers in Australia rests on the construction of the Constitution. The separation of the judicial power of the Commonwealth is inferred from the structure and language of the Constitution, rather than spelt out expressly in it' (*Wilson v Minister for Aboriginal & Torres Strait Islander Affairs*)²⁴⁹

Therefore, the written constitution and the federal system should be regarded as the founding constitutional frameworks of the Australian judicial review. However, the key to understanding the rigid legal mentality has not only been given by them, but by the rigid way the Australian courts read the framework of federal separation of powers prescribed in the written constitution, which can be perceived through the particular

²⁴⁷ Groves and Lee (n 87) 2.

²⁴⁸ *ibid* 6. See also Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (3rd edn, OUP 2018) 13 and Saunders (n 246) 16, 186.

²⁴⁹ [1996] HCA 18 [30].

understanding of some significant constitutional values, namely the rule of law and separation of powers. According to Aroney,

*‘Combining the semantic and syntactical meaning and strictly logical implications of the relevant sections in Chapter I and III, the Constitution does not of itself generate the ‘rule of law’, federalism’ and ‘judicial review’. It is our reading of these provisions in the light of our shared cultural understandings that leads us to discern these larger concepts’*²⁵⁰

‘The rule of law, federalism and judicial review’ influenced by ‘the reading of the constitution in the light of [Australian] shared cultures understandings’ will be examined in depth in the next subsections but first, it should be noted that the Australian legal mentality not developed with the existence of the constitution, but continuously throughout the 20th century to the present day. Some notes about the timeframe of the exploration should be briefly clarified here.

After 1901,²⁵¹ the discussion of public law did not emphasise the role of the courts in conducting judicial review of administrative action; rather, it was focused on constitutional issues, namely the interpretation of the constitution and the constitutional review of legislation.²⁵² Despite this fact, two events that occurred during the 1950s-1960s

²⁵⁰ Nicholas Aroney, ‘The Justification of Judicial Review: Text, Structure, History and Principle’, in Rosalind Dixon (eds) *Australian Constitutional Values* (Hart 2018) 27, 37. This logic has also been recognised by other judges and scholars, for example, Hayne stated that ‘...the Constitution must be the starting point for any examination of the rule of law in Australia. The Constitution provides the essential framework of government within which the rule of law takes its place in Australia’ (Kenneth Hayne, ‘Rule of Law’ in Cheryl Saunders and Adrienne Stone (eds) *The Oxford Handbook of the Australian Constitution* (OUP 2018) 171).

²⁵¹ An exploration of the Australian legal culture cannot begin in the 17th century like the English one, but only from the existence of the Constitution in 1901. This is the Australian administrative law still followed the English one before the 1900s; hence, there is no need for a comparison.

²⁵² See Jeffrey Goldsworthy, *Australia: Devotion to Legalism in Interpreting Constitutions: A Comparative Study* (Oxford Constitutions of the World 2007).

are argued to have influenced the contemporary Australian legal culture. The first was the proposal of a judicial method called '*Strict and Complete Legalism*' by Dixon (so-called '*Dixon Legalism*'), when he became Chief Justice in 1955.²⁵³ The second was an establishment of the concept of separation of judicial power in 1956 in a case of *A-G (Commonwealth) v R, ex p Boilermakers' Society of Australia*.²⁵⁴ These two are explored below. However, at this stage, it is clear that the Australian legal culture neither existed at any point of time, nor did it grow overnight; rather it gradually developed from the past to the present.

The determination of the scope of judicial review of administrative action was explicitly discussed in detail in the 1970s. According to the combination of English and US heritage, the early scheme of Australian administrative law became complex.²⁵⁵ Therefore, the Commonwealth Administrative Review Committee (the so-called 'Kerr Committee') was established to reform and create the '*New Administrative Law*'. In the 1971 report,²⁵⁶ the Kerr Committee proposed the introduction of some mechanisms related to legal thinking about the courts' role in conducting judicial review.²⁵⁷ For example, as illustrated below, there was some deliberation about how the framework of federal separation of powers prescribed in the written constitution had been intergated

²⁵³ Owen Dixon, 'Judicial Method' [1956] 29 ALJ 468.

²⁵⁴ (1956) 94 CLR 254.

²⁵⁵ This resulted in some complex cases such as *Parisiennne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 (See Groves and Boughey (n 243) 6).

²⁵⁶ Australian Commonwealth Administrative Review Committee, *Kerr Report* (Parliamentary Paper no 144/1972, August 1971).

²⁵⁷ Groves and Boughey (n 243) 5-12.

with constitutional values. The Kerr report was later recognised as an important source of the mentality of judicial review in Australia. Groves and Lee repeatedly stated that

'The growth of administrative law in Australia has continued in an unabated form since the introduction of innovative reforms in the mid 1970s...

the 'New Administrative Law',...signalled the birth of a uniquely Australian system of administrative law that continues to evolve...

these developments have constituted the corpus of administrative law in Australian today...²⁵⁸

In summary, the back-drop of the greater rigidity of Australian judicial review will be unpacked in the following analysis, not only from the existence of the written constitution, but also from the distinctively rigid way in which the framework of federal separation of powers prescribed in the written constitution has been read by judges and scholars. This will be demonstrated through a particular understanding of significant constitutional values, namely the rule of law and the separation of powers, which were not directly pre-ordained by the Constitution, but have continuously and distinctively grown from the English one since 1901 through 1950s and 1970s until today.

4.2 Australian Constitutional Values that Justify Judicial Review

As explained above, the legal mentality of Australian judicial review constitutionalism is more rigid than the English one. However, this does not mean that the courts will always have either a broad or narrow scope of judicial review in all cases; in fact, the Australian

²⁵⁸ Groves and Lee (n 87) Preface, 2, 14. See also Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action; Text, Cases and Commentary* (4th edn, LexisNexis Butterworths 2017) [1.4.1] and Groves and Boughey (n 243) 4-5.

constitutional values can be said to provide both ‘entrenched justification’²⁵⁹ and ‘firm limitation’ of the courts’ role in conducting judicial review. With this strong justification and limitation, the Australian courts must rigidly adhere to the framework of separation of powers prescribed in the written constitution and statutory construction to determine if their jurisdiction to conduct judicial review in a particular case is conferred or confined. They do not engage in a balancing process like their English counterparts. These two sides of the understanding of constitutional values, namely justifying and limiting judicial review, will be unpacked in this and the next subsections before moving to the following subsection to demonstrate that the rigid legal mentality of Australian judicial review constitutionalism is the result of these two sides of constitutional values.

Starting from the constitutional values that justify judicial review, similar to the English analysis, the first concept to be examined is the rule of law. With regard to the role of the courts in conducting judicial review, there are two main features of the Australian understanding of the rule of law. Firstly, rather than the inter-relationship between the rule of law and parliamentary sovereignty, the Australian rule of law relies on the operation of a written constitution.²⁶⁰ Under the principle of Supremacy of the Constitution,²⁶¹ individuals’ rights are protected by the courts, whose powers are certified

²⁵⁹ This terminology is borrowed from the judgment of *Plaintiff s157/2002 v Commonwealth* (2003) 211 CLR 476, in which Section 75 (v) of the constitution was described as providing the ‘*minimum entrenched provision of judicial review*’ (See more below).

²⁶⁰ Chief Justice French, ‘Administrative Law in Australia: Themes and Values Revisited’ in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (CUP 2014) 28; Saunders (n 246) 216.

²⁶¹ Although this principle has not been explicitly cited in Australian judgments, it can be extracted from the frequent quoting of the US case of *Marbury v Madison* 5 US 137 by the Australian lawyers (See Stephan Gageler, ‘The Constitutional Dimension’ in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (CUP 2014) 171). This also has been

by the Constitution, which is the supreme law of the land. A number of examples affirm this distinctive understanding of the rule of law. For example, Chief Justice Gleeson mentions that *'The existence of a written constitution as the basic law of a federal democratic society has a specific implication for the substantive content of the rule of law'*.²⁶² In *Australian Communist Party v Commonwealth*, Justice Dixon stated that *'The rule of law is an assumption of the Australian Constitution'*.²⁶³ This simply means that the rule of law is the starting value and the main purpose of any operation of the Constitution. On the flip side, this statement also confirms that the Australian form of the rule of law is operated through the written Constitution. Spencer argues that this Australian form of the rule of law surpasses the sovereignty of Parliament in English law.²⁶⁴ Justice Dixon asserts that the doctrine of parliamentary sovereignty was inconsistent with the requirements of federalism and contrary to Australia's legal history.²⁶⁵

expressed in the judge's mentality that the *'Supreme Court... bowing to no power but the supremacy of law'* (Gleeson (n 78)).

²⁶² Gleeson (n 78).

²⁶³ (1951) 83 CLR 1. Justice Brennan exemplified this in the speech that *'Our Constitution, rooted in the common law...express the proposition that the nation is under the rule of law and that the Courts are the organ of government responsible ultimately for the enforcing of the rule of law'* (Brennan (n 242)).

²⁶⁴ Tom Spencer, 'An Australian Rule of Law' (2014) 21 Australian Journal of Administrative Law 98.

²⁶⁵ Michael Wait, 'The Slumbering Sovereign: Sir Owen Dixon's Common Law Constitution Revisited' (2001) 29 Federal Law Review 57.

Directly relating to the first feature, the Australian rule of law is not implemented through the Bill of Rights,²⁶⁶ but emphasises the separation of powers as a dominant requirement. However, this principle does not operate in the same way as it does in the analysed English law, in which the courts rely their power to conduct judicial review on parliamentary sovereignty and the authority of the executives has a fluid boundary. Instead, the framework of the separation of powers between the three branches of government prescribed in the written constitution must be rigidly protected. In term of justifying judicial review, the power of the legislative and the executive must be controlled and determined in a final and binding manner by the exercise of judicial power.²⁶⁷ Justice Hayne confirms this mentality by stating that

*'The whole system of Government in Australia is constructed upon the recognition that the ultimate responsibility for the final definition, maintenance and enforcement of the boundaries within which governmental power may be exercised rest upon the judicature.'*²⁶⁸

Sir Brennan also states that *'Under...the Australian...Constitution, the political branches of government are kept separate from the judicial branch'*.²⁶⁹ Therefore, a particular power needs to be clearly identified, whether judicial or non-judicial. If it is a non-judicial

²⁶⁶ Chief Justice French asserts that *'there was probably a variety of reasons behind the absence in Australia's Constitution of a Bill of Rights, some related to the desire to maintain the capacity to discriminate against particular racial groups [following the Australian white policy] and others reflecting a loftier version of the nascent Australian constitutionalism'* (Chief Justice French, 'Courts in a Representative Democracy' (University of Southern Queensland, Toowoomba, 25 June 2010)).

²⁶⁷ French, 'Administrative Law in Australia: Themes and Values Revisited' (n 260) 28; Saunders (n 246) 185; Connolly (n 76) 136-137.

²⁶⁸ K M Hayne, 'Deference: An Australian Perspective' [2010] PL 75, 76.

²⁶⁹ Brennan (n 242).

power, it must be controlled by judicial power.²⁷⁰ The keystone of this particular understanding of the separation of powers, the so-called ‘Separation of Judicial Power’, can be traced to a number of Australian cases, particularly the *Boilermakers’* case, in which the conferral of judicial powers on non-judicial bodies was prohibited.²⁷¹

This requirement of the separation of powers, as a part of the rule of law, is connected to the federal system and written Constitution. For the former, the separation of powers contains the legal framework and the establishment of institutions for the federal sphere of government by prescribing the continuance, powers and functions of the HCA.²⁷² For the later, such framework is prescribed as provisions in the written constitution. Chief Justice French stated that ‘*A sharp separation of the judicial from the legislative and executive powers is established under the Constitution of the Commonwealth.*’²⁷³

Apart from Chapter III of the Constitution, which defines and separates judicial powers from legislative and executive powers,²⁷⁴ the courts also justify their jurisdiction of judicial review of administrative action by interpreting particular provisions in the

²⁷⁰ Groves and Lee (n 87) 7; Brennan (n 242).

²⁷¹ n 254; Groves and Boughey (n 243) 16-17.

²⁷² Saunders (n 246) 39; Michael Taggart, ‘Australian Exceptionalism in Judicial Review’ (2008) 36 *Federal Law Review* 1, 4-5; Connolly (Connolly (n 76) 35.

²⁷³ French, ‘Courts in a Representative Democracy’ (n 266).

²⁷⁴ French, ‘Administrative Law in Australia: Themes and Values Revisited’ (n 260) 28. It shall be noted that, apart from judicial review of administrative action, the powers of the HCA and other Federal courts on judicial review of legislation are also valid under the Commonwealth Constitution (French, ‘Australia's Constitutional Evolution’ (n 72)). However, this chapter studies particularly on the aspect of judicial review of administrative action.

written Constitution. In *Plaintiff S157/2002 v Commonwealth of Australia*,²⁷⁵ the judgment states that privative clauses must be interpreted in the light of the ‘*minimum entrenched provision of judicial review*’ introduced by Section 75(v) of the Constitution.²⁷⁶ Chief Justice Gleeson ties this interpretation of the provision to the rule of law by saying that ‘*Section 75(v) secures a basic element of the rule of law... it cannot deprive this Court of its constitutional jurisdiction to enforce the law so enacted*’.²⁷⁷ This thereby enables the HCA to have jurisdiction to conduct judicial review in all matters and to contribute to the evolution of the grounds of judicial review.²⁷⁸ Furthermore, Gleeson described section 75 (v) as ‘*a basic guarantee of the rule of law*’ in his secondary work.²⁷⁹ Additionally, although this thesis focuses on judicial review at a federal level, it shall be shown that this interpretation of the provision in written constitution to entrench jurisdiction of the courts was also adopted at the level of the State Supreme Courts. It was

²⁷⁵ n 259.

²⁷⁶ Section 71 of the Constitution stipulates that ‘*The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction*’. Section 75(v) stipulates that ‘*In all matters: (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth; the High Court shall have original jurisdiction*’.

²⁷⁷ (n 259) 482-483.

²⁷⁸ Groves and Lee (n 87) 11-12; Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (6 th edn, Thomson Reuters Australia 2017) [1.50]; Gageler (n 261) 172-173; Chief Justice French, ‘Statutory Interpretation and Rationality in Administrative Law’ (National Administrative Law Lecture, Canberra, 23 July 2015); Creyke, McMillan and Smyth (n 258) [Pt B.2].

²⁷⁹ Murray Gleeson, *The Rule of Law and the Constitution* (ABC Books 2000) 67. See also Creyke, McMillan and Smyth (n 258) [5.1.1].

Section 73 of the Constitution, interpreted in *Kirk*. This will be exemplified in detail in the next chapter.

All of these constitutional values, which read the framework of separation of powers prescribed in the written constitution in a way that justified the role of the courts to conduct judicial review were affirmed in the Kerr Report. For example, relating to the federal system, the report stated that *'The normal way in which judicial review of Commonwealth administrative decisions may be sought is by proceedings in the High Court'*.²⁸⁰ This means that if the individual is affected by a government official exercising discretionary functions, he or she could seek judicial review from the HCA.²⁸¹ This suggestion highlights the role of the HCA to act as the final appellate court having supervisory jurisdiction of all administrative actions, whether committed by executive or state court.²⁸² It is an integration of the federal system into Australian judicial review constitutionalism. As the original purpose in importing federal system into the legal system, the HCA has duty to protect the boundary of power between the federation and states and between states. Regarding the engagement with the written Constitution, the Kerr Report mentions clearly that *'...under the Constitution...the High Court shall have original jurisdiction'*.²⁸³ This displays that the written Constitution becomes important

²⁸⁰ Kerr (n 256) [20].

²⁸¹ Groves and Boughey (n 243).

²⁸² Chief Justice French, 'The Courts and the Parliament' (Queensland Supreme Court Seminar, Brisbane, 4 August 2012).

²⁸³ Kerr (n 256) [23].

reference for the courts in perceiving their role in conducting judicial review. As Connolly regarded, the constitution is the '*ultimate source*' of the judicial power in Australia.²⁸⁴

So far, the analysis has demonstrated the distinctive way the rule of law in Australian law has been understood according to the constitutional frameworks. In essence, it emphasises rigid separation of powers between the Governments, particularly that the judicial powers need to review non-judicial powers, in order to respond and maintain the allocation of powers according to the federal system. This leads another concept, called the concept of jurisdiction, to be important in Australian judicial review constitutionalism. Generally, the concept of jurisdiction premises the notion that '*All powers have limits*'.²⁸⁵ It is described in different ways. For example, Sir Brennan asserts that '*The supervision of the judicial power in order to ensure conformity with the Constitution and the laws made under it*'.²⁸⁶ Justice Spigelman defines this duty of the courts to be the '*Integrity Branch of Government*'.²⁸⁷ Some scholars regard this concept as a part of the Australian substantive rule of law²⁸⁸ and the principle of legality.²⁸⁹ However, in terms of justification, they all have similar content, namely that the courts

²⁸⁴ Connolly (n 76) 241, 284.

²⁸⁵ Aronson, Groves and Weeks (n 278) [3.20].

²⁸⁶ Brennan (n 242).

²⁸⁷ James Spigelman, 'The Integrity Branch of Government' 78 *Australian Law Journal* 724; James Spigelman, 'The Centrality of Jurisdictional Error' 21 *Public Law Review* 77.

²⁸⁸ Gleeson, 'Courts and the Rule of Law' (n 78); Chief Justice French, 'The Rule of Law as a Many Coloured Dream Coat' (20th Annual Lecture Singapore Academy of Law, 18 September 2013, Singapore).

²⁸⁹ Chief Justice Gleeson, 'Legality: Spirit and Principle' (The Second Magna Carta Lecture, New South Wales Parliament House, Sydney, 20 November 2003).

have a role to conduct judicial review in order to police, enforce and ensure that the exercise of power is supported by constitutional authority and remains within the scope of that authority.²⁹⁰

In summary, further details have been added to the deep understanding of the constitutional values that justify the scope of judicial review in Australia. In essence, the rule of law emphasises the rigid separation of powers between government organs, particularly in terms of judicial power needing to review non-judicial power, in order to respond to and maintain the allocation of powers according to the federal system. This subsection points out that, rather than the ultra vires and common law models introduced by academic, the Australian judges straightforwardly refer to these constitutional frameworks and constitutional values as their justification to conduct judicial review. For example, Gageler asserts that

‘Within a constitutional system which establishes and secures such a separation of powers, it is the province and duty of the judicial power to declare and enforce the law that constrains and limits the powers of the other branches of government.’²⁹¹

He also mentions the judgment in *Church of Scientology v Woodward* stating that *‘judicial review is neither more nor less than the enforcement of the rule of law over executive action’*.²⁹² Chief Justice Gleeson also asserts in his speech that *‘judicial review of*

²⁹⁰ Mark Leeming, *Authority to Decide: the Law of Jurisdiction in Australia* (The Federation Press 2012) 16; Groves and Lee (n 87) 2-3; French, ‘The Rule of Law as a Many Coloured Dream Coat’ (n 288).

²⁹¹ Stephan Gageler, ‘The Underpinnings of Judicial Review of Administrative Action’ (2000) 28 *Federal Law Review* 303, 309.

²⁹² 154 CLR 25, 70 (See Gageler, ‘The Constitutional Dimension’ (n 261) 171).

administrative action is a familiar example of the application of the rule of law'.²⁹³ The concept of jurisdiction also endorses that the courts have to conduct judicial review because they have to police the boundaries of executive and judicial powers. This function to demarcate the limits of administrative powers and the reach of a supervisory review.²⁹⁴ Chief Justice French clearly asserts this mentality that

*'The role of the court is considered, essential to the rule of law, in the protection of rights and freedoms and policing the exercise of official power when it exceeds its legal limit...'*²⁹⁵

Apart from that, the justification also comes from the described provision in the written constitution, particularly Chapter III and section 75(v). For example, Justices Gaudron, McHugh, Gummow, Kirby and Hayne also connect the interpretation to the concept of jurisdiction in *Plaintiff s157/2002* that '*Section 75(v)... means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which law confers on them.*'²⁹⁶

It should be noted that, as observed by Aronson, Groves and Weeks, the term 'ultra vires' used to be applied in the early development of Australian administrative law. However, it was applied in a simple way as 'outside' the scope of power for others apart from judicial bodies.²⁹⁷ It did not contain the substantive content of the ultra vires model

²⁹³ Gleeson, 'Courts and the Rule of Law' (n 78).

²⁹⁴ Groves and Boughey (n 243) 20.

²⁹⁵ French, 'Courts in a Representative Democracy' (n 266).

²⁹⁶ n 259, 513.

²⁹⁷ Aronson, Groves and Weeks (n 278) [1.100]-[1.110].

relating the position of the court to Parliament as applied in England. At present, the concept of jurisdiction (and the approach of jurisdictional error) has become the dominant conclusory term in Australian law, rather than *ultra vires*.²⁹⁸ As a result, the justification for judicial review is more entrenched in Australian law than in English law because it is tied to the constitutional order in the Australian legal system. The *ultra vires* and common law models, as the result of flexibility in explaining the role of the courts, do not have relevance in Australian legal culture.

4.3 Australian Constitutional Values that Limit Judicial Review

The way in which the Australian courts read the framework of separation of powers prescribed in the written constitution in order to justify their role in conducting judicial review was illustrated in the previous subsection by a particular understanding of the rule of law, the separation of powers and the concept of jurisdiction. However, this entrenched justification of judicial review does not completely explain the rigidity of the Australian legal culture. The other side of the mentality which the Australian courts read the constitution in a way that limits their role to conduct judicial review, will be illustrated in this subsection through the same set of constitutional values but diverse ways of deliberation.

To begin with, the rigid separation of powers is still a significant requirement of the rule of law in Australia. However, not only are the legislative and executive required to stay within the boundary of their power, but also the judiciary. As Foster points out,

²⁹⁸

ibid.

'Boilermakers solidified the two limbs of the separation of judicial power doctrine'.²⁹⁹

The first limb prohibits *'the executive and legislative branches from exercising judicial power'*, while the second restricts the courts from *'carrying out the executive function of administration or the legislative function of determining policy'*.³⁰⁰ This limitation of judicial review has been widely regarded by judges and scholars as a significant aspect of the rule of law and the separation of powers in Australia. For example, according to Chief Justice Gleeson, *'The rule of law is not just a principle that...is enforced by courts. It controls the operation of courts themselves...'*.³⁰¹ Crawford repeatedly states in her analysis of the Australian rule of law that *'The HC...derives its powers from the Constitution. It cannot exceed those powers, when reviewing the legality of executive action, or performing any other of its functions'*.³⁰² In the same vein, Saunders argues that *'...the separation of judicial power can be used not only to protect the authority of courts by also to constrain it'*.³⁰³ Creyke, McMillan and Smyth also clearly articulate that *'...the separation of powers doctrine...permeates Australian administrative law and has constrained the scope of judicial review'*.³⁰⁴

²⁹⁹ Michelle Foster, 'The Separation of Judicial Power' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (OUP 2018) 678.

³⁰⁰ *ibid.*

³⁰¹ Gleeson, 'Courts and the Rule of Law' (n 78).

³⁰² Lisa Crawford, *The Rule of Law and the Australian Constitution* (The Federation Press 2017) 132, 174.

³⁰³ Saunders (n 246) 207.

³⁰⁴ Creyke, McMillan and Smyth (n 258) [7.3.12].

In the same way as it is justified, this particular understanding of the rule of law and separation of powers that rigidly limit of judicial review is operated with the written constitution. As deliberated by Chief Justice Gleeson,

'The ultimate limitation on the power of judges is ... the Constitution...

The principle that courts are bound by the Constitution, and all other laws, defines the relationship between judges and the other arms of government, and between judges and the community'.³⁰⁵

This opinion is shared by Chief Justice French when he compares it to the English law;

'In Australia, unlike the UK... Constitutions... constraint official power, be it legislative, executive or judicial'.³⁰⁶ Not only judges, but also scholars perceive this connection

between the rule of law, separation of powers and the constitution to limit the courts to conduct judicial review. For example, Crawford states that

...the legislative power of the Commonwealth, the judicial power of the Commonwealth, and the executive power of the Commonwealth, all of which are conferred and constrained by the Australian Constitution'.³⁰⁷

Taggart provides a prominent example;

'The Constitution is generally construed as establishing a firm separation of powers between the three branches of government...when it comes to administrative law the price to be paid for that strength on the constitutional side is considerable restraint; limiting the courts to enforcing the law...'³⁰⁸

³⁰⁵ Gleeson, 'Courts and the Rule of Law' (n 78).

³⁰⁶ French, 'Statutory Interpretation and Rationality in Administrative Law' (n 278).

³⁰⁷ Crawford (n 302) 6.

³⁰⁸ Taggart (n 272).

Apart from the rule of law and separation of powers, the position that the role of the courts to conduct judicial review should be clearly and rigidly limited is also deliberated through other constitutional values,³⁰⁹ the most significant of which is the distinction between legality and merits. While the courts' role is to determine legality, merits of the cases is for the executives. Judges and scholars in Australia share this rigid mentality based on the premise that the courts' jurisdiction to intervene in the merits should be limited. For example, Chief Justice Mason stated that '*...it would be a serious mistake to think that judicial review...comprehends review on the merits*'.³¹⁰ Indeed, this rigid distinction between legality and merits is rooted in the rule of law, the separation of powers and the constitution. For example, Saunders draws the connection that '*the separation of powers understood as...limiting courts to questions of law, ruling out considerations equated with merits*',³¹¹ is a '*characteristic features of Australian administrative law that are not shared with other Commonwealth countries*'.³¹² In the same vein, Cane and McDonald state that

'...in Australian law the legality/ merits distinction is increasingly thought to be an outworking of complex ideas about the separation of powers...This

³⁰⁹ For example, Debra Mortimer, 'The Constitutionalisation of Administrative Law', in Cheryl Saunders and Adrienne Stone (eds) *The Oxford Handbook of the Australian Constitution* (OUP 2018).

³¹⁰ Anthony Mason, 'Administrative Review – The Experience of the First Twelve Years' (1989) 18 *Federal Law Review* 122, 125.

³¹¹ Cheryl Saunders, 'Constitution as Catalyst: Different Paths within Australian Administrative Law' (2012) 10 *NZJPIL* 154.

³¹² *ibid* 147.

*is central to the court's understanding of how the rule of law is secured within Australia's constitutional arrangements.*³¹³

A particular comparison to the English law on this point was made by Elias, as follows,

'In Australia, the separation of powers provided by the Constitution has been used by the High Court to protect its constitutional responsibility to say what the law is. That has had implications for the development of Australian administrative law. It has been taken to emphasise a distinction between legality and merits which in other jurisdictions is less sharp. In Australia, the strict line observed between legality and merits means it is difficult to develop standards for judicial intervention from... 'merits review', a line the courts will not pass.

*In the UK..., where executive dominance of Parliament and parliamentary sovereignty is untrammelled by a constitutional text which distributes powers, judicial review is less secure...*³¹⁴

Correspondingly, the analysed constitutional values that limit the conduct of judicial review results in another distinctive element of the Australian legal culture. The relationship between the court and the executive and the proposition of tribunals in England was demonstrated as being flexible in the previous section. However, this is not the same in Australia, since the boundary of powers is fixed. The most explicit source of rigidity on this point is the Kerr Report. Although the report accepted the fact that judicial review could not be the sole mechanism to provide adequately review administrative actions, it was clearly stated that the role of the courts and other governmental organs

³¹³ Cane and McDonald (n 248) 23. See also Groves and Lee (n 87) 10-11; Creyke, McMillan and Smyth (n 258) [Pt B.3], [5.1.2], [5.3.42], [5.3.43], [7.2.2]; French, 'Administrative Law in Australia: Themes and Values Revisited' (n 260) 35.

³¹⁴ Dame Sian Elias, 'The Unity of Public Law?', in Mark Elliott, Jason Varuhas and Shona Stark (eds), *The Unity of Public Law?: Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing 2018) 19, 26.

need to be rigidly distinct.³¹⁵ Additionally, the rigid distinction between legality and merits are clearly the reason for this position. For example, the report repeatedly deliberates that ‘...we are of opinion that review on the merits should not and indeed...cannot be undertaken by the courts...’.³¹⁶ Unlike the analysed English law, these distinctions between legality and merits and between court and executive are systematically linked to the framework of separation of judicial powers. For instance, concept of separation of judicial power was expressly stated in the report.³¹⁷ Importantly, all of these constitutional values are operated by the written constitution. This is not only ‘to prevent the exercise of the judicial power of the Commonwealth by bodies other than the courts mentioned in Chapter III’,³¹⁸ but ‘the Commonwealth Constitution’ also ‘impose(s) significant qualifications on the exercise of the judicial power of the Commonwealth’.³¹⁹

The discussion in Kerr resulted in the creation of another two mechanisms of the Australian administrative law. Firstly, it proposed the enactment of legislation to simplify, codify and expand common law judicial review. This subsequently resulted in the

³¹⁵ The Kerr Report (n 256) [5]-[7]. Interestingly, some significant English reports, namely Donoughmore, Franks, Leggatt and Law Commission were discussed in the report ([113]-[116], [124], [136], [138]-139]).

³¹⁶ *ibid* [21]. See also [227], [228], [239], [247], [354] and [390] (2).

³¹⁷ *ibid* [6], [65].

³¹⁸ *ibid* [61].

³¹⁹ *ibid* [59].

ADJR,³²⁰ an act stipulating template for federal judicial review.³²¹ Secondly, the report proposed a new general administrative review tribunal to replace the inefficient proliferation of specialist tribunals, and this led to the establishment of the Administrative Appeals Tribunal established by the Administrative Appeals Tribunal Act 1975 ('AAT').³²² With the same methodology in analysing the relationship between EU law and English law above, although ADJR and AAT do not apply in the sphere of common law that is the scope of this thesis,³²³ they reinforce the idea of rigid mentality of Australian judicial review constitutionalism. For the ADJR, it demonstrates the mentality of the legal system to categorise the grounds of judicial review, and prescribe them as the written provisions.³²⁴ In the same vein, the AAT's main purpose is that the courts cannot infringe on the merits of administrative actions, since this is not within their remit, but that of executives. These emphasise the distinctive mentality that the Australian court has to rigidly consider, follow and refer to a framework of powers, prescribed in the form of a written document in considering their scope of judicial review. This position does not exist in the English law. The influence of this difference between the legal cultures on the determination of the grounds of judicial review, particularly one related to administrative

³²⁰ For example, that the grounds of review should be clarified and set out explicitly by statute (ibid [248]).

³²¹ Creyke McMillan and Smyth (n 258) [2.2.8].

³²² We have recommended that a new Administrative Court be created to exercise a general supervisory jurisdiction over administrative action (Kerr (n 256) [251]).

³²³ Section 4 of Chapter 1.

³²⁴ Section 5 of the ADJR systematically sets out the grounds of judicial review namely, breach of the rules of natural justice, error of law, no evidence, fraud, contrary to law, improper purpose, relevant consideration, bad faith, unreasonable and abuse of power.

discretion, will be demonstrated in the following chapters. For instance, while there are overlaps and flexibility in recognising the status of common law judicial review and the HRA, the Australian law has a clearer and more systematic distinction between judicial review by the ADJR and the common law judicial review. These are also products of the legal cultures.

Apart from the Kerr report, academic works in Australia also share this overall position of a rigid relationship between the court and other governmental organs. For Cane, it is ‘*a constitutional requirement*’ that ‘*the rigidity of the Australian approach to separation of powers makes it impossible for the federal Parliament to establish multi-functional agencies....*’³²⁵ Additionally, he compares this with the English position that ‘*...adjudicatory functions are performed either by courts or free-standing tribunals*’.³²⁶ This ‘*unique and rigidifying significance*’ of the Australian legal culture leads to the courts ‘*discouraging aggressive judicial review*’ and ‘*stressing the proper limits of the judicial ...*’³²⁷ Once again, the reasons for them are steadily linked to the other analysed constitutional values. The most prominent linkage is drawn by Owen, as follows;

‘*...Commonwealth tribunals may not...be vested with judicial power. The reason for that restriction is, of course, the separation of powers inherent in Chapter III, as identified in R v Kirby; Ex parte Boilermakers’ Society of Australian*’³²⁸

³²⁵ Cane, ‘Understanding Administrative Adjudication’ (n 138) 282, 292-293. See also Cane, *Controlling Administrative Power: An Historical Comparison* (n 148) 501.

³²⁶ *ibid.*

³²⁷ Cane, ‘The Making of Australian Administrative Law’ (n 244). See also Saunders, *The Constitution of Australia: A Contextual Analysis* (n 246) 201.

³²⁸ Nicholas Owens, ‘The Judicature’, in Cheryl Saunders and Adrienne Stone (eds) *The Oxford Handbook of the Australian Constitution* (OUP 2018) 661.

Crawford also clarifies that,

*'All this suggests that there is some clear distinction between legality and merits...These divisions and distinctions are said to be required by the Constitution...it has become the clear province of Australia's administrative review tribunals, which are not courts for the purposes of Ch III'*³²⁹

Besides the rule of law, the separation of judicial powers, the rigid distinctions between legality and merits and between court and executive, the concept of jurisdiction is another significant constitutional value that strengthens this overall position. As described above, the key requirement of the concept of jurisdiction is that court has the duty to police the boundary of governmental powers. Based on the same logic as the separation of judicial power, not only do the executive and the legislative need to be policed, but also the boundary of the courts' authority. As Leeming deliberates, *'The HC is not a court of unlimited jurisdiction...indeed, there are said to be no such courts in the Australian judicial system'*.³³⁰ This particular understanding of the concept of jurisdiction can be found in the judgment of some cases, for example, *Jackson v Sterling Industries Ltd*³³¹ and *PT Garuda Indonesia v Australian Competition and Consumer Commission*.³³² Once again, this is compatible with the other analysed constitutional orders. For example, as Groves and Lee describe, *'it is fundamental to the rule of law in the Australian*

³²⁹ Crawford (n 302) 124.

³³⁰ Leeming (n 290) 4.

³³¹ (1987) 162 CLR 612, 630.

³³² [2012] HCA 33 [16].

Constitution that there is no such thing as an unfettered discretion'.³³³ Therefore, the particular understanding of the concept of jurisdiction not only warrants judicial intervention, but also limits their judicial review to within the scope of power prescribed in the written constitution and statutory construction.

The last constitutional value unpacked in this section is the Concept of Legalism expounded by Dixon in 1955. In essence, this concept deliberates the role of the courts to *'determine the substance of the law'*, because they *'conform with ascertained legal principles'*.³³⁴ Rather than *'a freedom of choice'*, *'the inherited system must be given a rigidity and statute must become the only source of law'*.³³⁵ Josev provides the following example of the application of legalism;

*'If a legalistic judge was required to find the meaning of particular words in a statute, they...required reference to be made exclusively to authoritative legal materials in the search for meaning...the legalist therefore eschewed any decision-making on the basis of social factors or policy considerations...'*³³⁶

Despite being commented on various ways, the uniformity of Australian thinking has resulted in Dixon's Legalism meaning that the role of the courts should be rigidly confined to the determination of the law without considering the policy or consequences. For example, although the courts are free to reach a new conclusion, they must *'maintain*

³³³ Groves and Lee (n 87) 30. See also Crawford (n 302) 132.

³³⁴ Dixon, 'Judicial Method' (n 253); Tanya Josev, *The Campaign against the Courts: A History of the Judicial Activism Debate* (The Federation Press 2017) 6.

³³⁵ *ibid.*

³³⁶ Josev (n 334) 93.

its continuity and preserve its coherence'.³³⁷ Conversely, Justice Kirby described four limitations, namely, opportunity, needs, inclination and methodology, which he regarded as 'guideposts' to 'keep in the judicial mind as limits of judicial activism'.³³⁸ It was emphasised that '*...the judge is not a completely free agent. A measure of creativity is allowed. But it is a limited one whose parameters are fixed*'.³³⁹

Similar to the status of Dicey's concept analysed in the previous section, this 'general form' of Dixon's Legalism had a profound influence on the legal mentality of Australian courts' understanding of their constitutional role. For example, Justice Gleeson described Dixon's Legalism as '*a time-honoured and effective judicial approach, and also as being an approach necessary to ensure the Court's continuing legitimacy in the Australian political system*'.³⁴⁰ Saunders mentioned that '*legalism is widely accepted as the orthodox methodology for constitutional adjudication in Australia*',³⁴¹ and Justice Gageler considers it to be '*the dominant theme of the judicial style of the Court for much of the 20th century*'.³⁴²

³³⁷ Dixon, 'Judicial Method' (n 253) See also Heydon (n 116); Justice Hayne, "'Concerning Judicial Method"- Fifty Years on' (The Fourteenth Lucinda Lecture, Monash University, 17 October 2006).

³³⁸ Justice Kirby, 'Judicial Activism' (The Bar Association of India Lecture, New Delhi, 6 January 1997).

³³⁹ *ibid.*

³⁴⁰ Chief Justice Gleeson, 'Judicial Legitimacy' (Australian Bar Association Conference, New York, 2 July 2000).

³⁴¹ Saunders, *The Constitution of Australia: A Contextual Analysis* (n 246) 90.

³⁴² Stephen Gageler, 'Legalism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion the High Court of Australian* (OUP 2001) 429.

As explained above, at the time it existed, Dixon's Legalism was related to the role of the courts in interpreting the constitution. However, it will be argued in this section that it applies to judicial methods in general rather than a specific area. This can be recognised from Dixon's assertion that

'It [Legalism] goes deep in legal thinking. The influence is far-reaching that has been exerted upon the judicial and juridical thought of this country by the functions which the courts must fulfil under those great constitutional guarantees'.³⁴³

Consequently, Dixon's Legalism also influenced the legal mentality of Australian judicial review constitutionalism. Most clearly, Justice Heydon stated that *'Sir Owen Dixon thought that non-constitutional cases should be decided by recourse to legalism as well'.³⁴⁴* Importantly, he regarded it as a part of *'mentalite, which I interpret as mind set'.³⁴⁵* Therefore, Dixon's Legalism is represented another requirement for the role of the courts to be limited to the determination of law, not policy. It is further connected in this section, that this limitation can be perceived from the framework of separation of powers prescribed in the written constitution. This is supported by some scholars; for instance, in an analysis of legalism, Goldsworthy states that

'...the Court has often been guided by broad principles that it regards as underlying parts of the Constitution...The most important are federalism, the separation of powers, responsible government, representative government, nationhood, and the rule of law...

³⁴³ Dixon, 'Judicial Method' (n 253).

³⁴⁴ Heydon (n 116).

³⁴⁵ *ibid.*

[By these values] ...*the Court...look no further than the terms of the law in question....*³⁴⁶

In the same vein, Saunders asserts that ‘...it [legalism] *revealed ways in which those parts of the Constitution that distribute functions between the institutions of Commonwealth government might also operate as a constraint on power...*’³⁴⁷ Stellios describes Dixon’s concept as a ‘*conception of the role of the judiciary within the constitutional system*’.³⁴⁸

In summary, the particular understanding of constitutional values in Australia, namely the rule of law, the separation of judicial power, the rigid distinctions between legality and merits and between court and other governmental organs, the concept of jurisdiction and Dixon’s Legalism were unpacked in this subsection to demonstrate the distinctive way in which the framework of separation of powers prescribed in the written constitution is read in order to rigidly limit the role of the courts in conducting judicial review.

As an additional indicator, a number of academics propose various approaches to deliberate the role of the courts in conducting judicial review in Australia; for example, Justice Spigelman’s concept of the Integrity Branch of Government,³⁴⁹ Justice Gleeson’s

³⁴⁶ Goldsworthy (n 252).

³⁴⁷ Saunders, *The Constitution of Australia: A Contextual Analysis* (n 246) 94.

³⁴⁸ James Stellios, ‘Concepts of Judicial Review: Commentary on Dixon’ (2015) 43 *Federal Law Review* 511.

³⁴⁹ James Spigelman, ‘The Integrity Branch of Government’ (n 287).

concept of Judicial Legitimacy³⁵⁰ or the distinctive way of common law by Selway,³⁵¹ but they all uniformly agree that judicial review must adhere to the clear and rigid constitutional limitations. The various thoughts discussed in governmental committees' reports and academic works in the English legal culture do not exist in Australia. All of these analysed elements are the detailed examination of Justice Mason's recognition of *'judges...appearing to have a limited role'* as *'attitude of mind...shared by the Australian legal community'*,³⁵² as well as of Cane and McDonald's statement that *...[This] separation of powers sensibility that runs much deeper in the Australian judicial psyche than in the English'*.³⁵³

4.4 Rigidly Reading the Framework of Separation of Powers Prescribed in the Written Constitution

'...the most important was an acceptance that the role of the courts in judicial review is a mixture of constitutional duty and limits'.³⁵⁴

Consistent with the above statement by Groves and Boughey, it was demonstrated in the previous subsections that the constitutional values can be understood in a distinctive way to both justify and limit the Australian courts' conduct of judicial review. Rather than a balancing process, the entrenched justification and firm limitation result in a legal

³⁵⁰ Gleeson, 'Judicial Legitimacy' (n 340).

³⁵¹ Bradley Selway, 'The Principle behind Common Law Judicial Review of Administrative Action – The Search Continues' (2002) 30 Federal Law Review 217.

³⁵² As quoted in Section 2.3 above.

³⁵³ Cane and McDonald (n 248) 24.

³⁵⁴ Groves and Boughey (n 243) 17.

mentality the Australian courts have to rigidly follow the framework of separation of powers in determining the scope of judicial review in a particular case. This can be determined from the written constitution and statutory construction. This rigid mentality and approach are embedded in the Australian law, as exemplified in the Kerr Report as follows;

*'...it is necessary to decide what is the scope of review to be entrusted to the courts...The courts have steadfastly refused to adopt the attitude that they will review administrative decisions on the merits, except in so far as a particular statutory provision gives them that jurisdiction, and enables them to substitute their decision for that of the administrator.'*³⁵⁵

This is also deliberated through the concept of jurisdiction that *'the validity of executive action must be decided by reference to the statute by which the power is conferred....'*³⁵⁶ and the concept of Integrity Branches of Government that *'...intervention by a court is...depend on the statutory scheme under consideration'*.³⁵⁷ Chief Justice French similarly asserts that *'Typically, the courts look to text, context and purpose'*.³⁵⁸

According to Justice Hayne,

*'...judges make the common law... [However]...attention must focus upon that text. It matters not whether the text is the Constitution, a statute, a contract, or some other written instrument. The text must be both the starting point and the finishing point for the application of that standard of reasoning...'*³⁵⁹

³⁵⁵ Kerr (n 256) [88].

³⁵⁶ Crawford (n 302) 126.

³⁵⁷ James Spigelman, 'Jurisdictional Integrity' (2nd Lecture National Lecture Series for the Australian Institute of Administrative Law, 5 August 2004).

³⁵⁸ French, 'Statutory Interpretation and Rationality in Administrative Law' (n 278).

³⁵⁹ Hayne (n 337).

It should be noted that the English courts also consider the statute when determining the scope of judicial review. However, the Australian mentality is more rigid because of the analysed distinctive judicial review constitutionalism. Justice Gummow compared the two legal cultures on this point when he made the following statement;

*'In this distinctive position of the English judges may be seen the origin both of the separation of the judicial power ..., and the attribution to the judicial branch of the authority to construe first statute law and, thereafter, written and rigid constitutions...'*³⁶⁰

Cane further clarified it by stating that

*'... the judicial review jurisdiction of the English High Court is inherent in the sense that it is not dependent on or derived from a statutory grant of power. In the English system, judicial power is autonomous rather than conferred, and the common law is an independent source of law rather than a gloss on the Constitution and statutes...'*³⁶¹

*'[In Australia]...the Constitution and statutes are...the only sources of governmental power...'*³⁶²

All of these constitutional structures are gathered into a cluster of the rigid legal mentality of Australian judicial review constitutionalism. If the issue concerns a legal question (legality), the courts' justification to conduct judicial review is entrenched, but their ability to conduct judicial review is firmly limited if it is a question of merits. The courts have no flexibility. They must '*rigorously*' follow the '*boundary of powers*' *prescribed in the written constitution and statutory construction* because '*To do more*

³⁶⁰ William Gummow, 'Common Law' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (2018 OUP) 191.

³⁶¹ Peter Cane, *Controlling Administrative Power: An Historical Comparison* (n 148) 495.

³⁶² *ibid* 497.

would be to abdicate the judicial function... To do less would be to blur the legality/ merits distinction...'.³⁶³ This 'strict approach of the separation of judicial power'³⁶⁴ and other analysed constitutional values are the source of the rigidity of the Australian legal culture, which have a consequential impact on the confined doctrinal approaches in the development of the grounds of judicial review clearly different from the English law.

4.5 Unwelcoming Influences from Interrelated Legal Cultures

The last contrast between the English and Australian legal cultures is influence of international treaties. As seen in the last section, the English law is flexible for the courts to adopt interrelated legal cultures, namely EU law and the ECHR, to perceive their role in conducting judicial review. Conversely, this element is not included in the geography of Australian judicial review constitutionalism. The simple explanation for this is that Australia is not a member of a supranational organisation like the EU. Additionally, it is not in the same context of English law that needs to integrate provisions from the ECHR into the domestic law. However, this section argues that the rigid legal mentality of the Australian courts is the key to understanding this position. For example, although the Australian courts can take the international conventions signed by the executive into the determination of their judicial review, they cannot integrate them flexibly in the same way as English law. Taggart recognises this situation by saying that

'[In England]...This has opened the door to the use in relation to exercises of discretionary power of reinvigorated interpretative principles favouring compliance with common law rights and compliance with international

³⁶³ Spigelman, 'Jurisdictional Integrity' (n 357).

³⁶⁴ In Cane and McDonald's words (n 248) 23.

legal obligations. This trend has been hastened ...an increasing number of challenges to the exercise of discretionary power as inconsistent with domestic, regional and international human rights instruments. The judges in these countries, as well as in Australia, have affirmed the “principle of legality” and the centrality of the “rule of law”

...I...believe there are formidable doctrinal and practical difficulties in using the doctrine of legitimate expectation to achieve the desirable end of giving greater effect to unincorporated international human rights treaties in domestic law.³⁶⁵

Taggart is answered in this section by explaining that the difficulties involved in adopting a doctrine from an international treaty are products of the different way in which the Australian courts understand ‘the rule of law’ and ‘the principle of legality’. Rather than being flexible like the English one, the Australian judicial review constitutionalism emphasises the rigidity of separation of federal powers prescribed in the written constitution as a key mechanism in protecting the rule of law. Therefore, the courts avoid any influence, which might affect the entrenchment of such framework of powers. This rigid mentality leads them not to adopt the doctrines of proportionality and substantive legitimate expectations into their determination of judicial review. The connection between these doctrinal approaches and this aspect of legal culture will be compared to the English law in further detail in Chapters 5 and 6.

4.6 Substantive Conclusion

‘The Constitution and its implications are now the dominant force shaping Australian administrative law at the federal and state levels’ (Spigelman)³⁶⁶

³⁶⁵ Taggart (n 272) 12, 15. Legal reasoning in *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* [1995] HCA 20 will be discussed in detail in Chapter 6.

³⁶⁶ James Spigelman, ‘The Centrality of Jurisdictional Error’ (n 287).

The Australian written constitution is the starting point for examining the differences between the English and Australian legal cultures, especially the framework of the federal separation of powers prescribed in its first three chapters. However, the key to understanding the rigidity of the Australian legal culture is not only the constitution and its provisions, but the distinctive way in which the courts read the constitution, which is demonstrated by a particular understanding of the constitutional values. On the one hand, the courts have entrenched the justification to conduct judicial review according to the rule of law, the separation of judicial power, the concept of jurisdiction and the interpretation of Article 75(v) of the constitution. On the other hand, the limitations of judicial review are also firmly limited by the rule of law, the separation of judicial powers, the rigid distinction between legality and merits and between the court and the executive, the concept of jurisdiction and Dixon's Legalism. These two sides of mentality lead to the Australian courts having to rigidly consider, refer to, or follow the framework of separation of powers prescribed in the written constitution and statutory construction to determine the scope of judicial review. They also result in rejecting the integration of interrelated legal cultures in Australian courts' consideration, because they may affect this rigid framework of power. As stated by Justice Spigelman above, it is not only *'the constitution'*, but also *'its implications'*, that provide a back-drop for the rigid legal mentality of Australian judicial review constitutionalism, which becomes the *'dominant force'* in shaping the greater rigidity in the determination of the grounds of judicial review demonstrated in the following chapters.

5. Snapshots of English and Australian Rivers

*'English law turns to judicial discretion to determine the scope of judicial review...[The Australian approach] stands at the rule end of the rule-to-discretion spectrum.'*³⁶⁷

This quotation by Aronson, Groves and Weeks functions in the same way, as the labels of pragmatism and formalism and pragmatic and formalistic approaches referring to complex accounts by simplistic terms or sentences. This chapter goes deeper by demonstrating more detailed pictures of differences between English and Australian judicial review through legal mentality of judicial review constitutionalism, as a particular form of legal culture, exploring legal thinking of the individual judges in understanding their role in conducting judicial review according to distinctive constitutional orders. As for the English law, the courts understand that their role in conducting judicial review is flexible based on certain elements, namely the absence of a written Constitution, a balancing process between the twin concepts of parliamentary sovereignty and the rule of law, the choice between ultra vires and common law models of justification for judicial review, the fluid relationship between the court, the executive and tribunals, as well as the ability to integrate norms from interrelated legal cultures, like EU law and the ECHR into the consideration. Conversely, the legal mentality of Australian judicial review constitutionalism is concluded as being relatively rigid. The constitutional values, namely the rule of law, the separation of powers, the distinction between legality and merits, the rigid relationship between the court and the executive and the concept of jurisdiction are

³⁶⁷

Aronson, Groves and Weeks (n 278) [1.120]-[1.130].

distinctively understood to both entrench and limit the courts' scope of judicial review. Hence, the courts have to rigidly follow the federal framework of power prescribed in the written constitution and statutory construction in determining their scope of judicial review.

Through the metaphor of this thesis comparing English and Australian legal culture as the geography of rivers, this chapter concludes with the overall picture of an English river as having sandstone, where the water can flow flexibly through the spaces between them. On the other hand, the stones in an Australian river are a kind of granite, which create the certain ways and force water to flow around them.

These connotations of legal mentality of English and Australian judicial review constitutionalism will be referred to in the next chapters as a detailed examination of differences between English and Australian constitutional orders. The contrast between them is the central conceptual claim of the thesis, which will navigate a comprehensive understanding of deep-water legality and different determinations of the grounds of judicial review in England and Australia in the following chapters.

III. CHAPTER THREE

INFLUENCE OF THE LEGAL CULTURES ON ERROR OF LAW AND JURISDICTIONAL ERROR

1. Introduction

The English approach;

'The common law now, we could say that ... it is ridiculous to give any more [emphasis] on Pre-Anisminic.' (Lord Brown, *Regina (Cart) v Upper Tribunal*)¹

'Any error of law made by an administrative tribunal or inferior court in reaching its decision can be quashed for error of law.' (Lord Browne-Wilkinson, *Regina v Lord President of the Privy Council, Ex parte Page*)²

In comparison with the Australian one;

'Your first proposition cannot be supported, can it, that Their Honours could not look at it? If Their Honours were inquiring whether or not there was a jurisdictional error, they were perfectly entitled to look at it.' (Justice Brennan, *Craig v State of South Australia*)³

In the previous chapter, differences between English and Australian constitutional orders were examined through the methodology of legal mentality of judicial review constitutionalism. While the legal mentality of English judicial review constitutionalism is flexible, the Australian one is rigid. As discussed in Chapter 1, this drives a comprehensive

¹ The oral pleading of *Regina (Cart) v Upper Tribunal* [2011] UKSC 28, proceeded on 14th March 2011.

² [1993] AC 682 (HL) 702.

³ The Transcript of legal argument in *Craig v The State of South Australia* (1995) 184 CLR 163.

understanding of the courts' determination of the grounds of judicial review discussed in Chapters 3 to 6. Like most Administrative Law textbooks, the discussion in this chapter begins with the influence of legal cultures on error of law and jurisdictional error.⁴

Superficially, these grounds of judicial review seem to be simple and conclusory. The English courts used to apply the distinction between jurisdictional and non-jurisdictional error in their determination of the scope of judicial review,⁵ before moving to the approach that all error of laws are reviewable by a court of law in *Anisminic Ltd v Foreign Compensation Commission*.⁶ The two first quotes above stated by Lord Brown in oral pleading of *Cart* and Lord Browne-Wilkinson in judgment of *Page* clearly assert this position. On the other hand, jurisdictional error has not been obsolete in Australian law. Instead, it has become a central approach for the courts' determination of judicial review. Apart from the quote of Sir Brennan stated above, this position has been widely recognised by Australian judges and scholars.⁷

⁴ Eg Paul Craig, *Administrative Law* (8th edn, Sweet & Maxwell 2016) Chapter 16; Peter Cane, *Administrative Law* (5th edn, OUP 2011) Chapter 7.1; Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (6 th edn, Thomson Reuters Australia 2017) Chapter 4; William Wade and Christopher Forsyth, *Administrative Law* (11th edn, OUP 2014) Chapter 8; Mark Elliott, *Administrative Law: Text and Materials* (Mark Elliott and Jason Varuhas eds, 5th edn, OUP 2017) Chapter 2.

⁵ This will be exemplified in Section 3.1 below.

⁶ [1969] 2 AC 147 (HL).

⁷ Mark Aronson, 'Jurisdictional Error and Beyond' in Matthew Groves (ed), *Modern Administrative Law in Australia* (CUP 2014); Mark Aronson, 'Jurisdictional Error without the tears' in Matthew Groves and Hoong Phun Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (CUP 2007); Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action; Text, Cases and Commentary* (4th edn, LexisNexis Butterworths 2017) [12.4.8]-[12.4.9]; Matthew Groves and Janina Boughey, 'Administrative Law in the Australian Environment' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (CUP 2014) 18.

However, this chapter argues that error of law and jurisdictional error are one of the most complicated areas in English and Australian administrative law. Apart from entitling an article '*Jurisdictional Error without the Tears*' to imply that administrative law students normally cry when dealing with this area,⁸ Aronson also states that

*'A sizeable proportion of any administrative law class will start to get seriously edgy when they are introduced to the doctrinal distinction between errors of law that are jurisdictional and those that are not, and most of those students will not confine themselves to that particular distinction. They will start asking harder questions.'*⁹

This chapter points out that the determination of error of law and jurisdictional error are complicated because they are mixed with two factors, which the courts have to consider in the question of scope of judicial review. These factors will be discussed in detail in Section 2 below, but introduced here as follow.

First, the courts have to deliberate 'what type of institution' they are reviewing. As Leeming stated, '*the truth that whether there is jurisdictional error depends upon the body said to have made it is readily illustrated*'.¹⁰ The role of the courts to quash administrative decision becomes controversial when the institutions they review are not 'regular' executive agencies, but tribunals and inferior courts, which have adjudicative authority aiming for efficiency, expertise and neutrality in some areas of public administration. As expressed in the transcript of legal argument of *Kirk*, Mr. Hatcher, a barrister stated that

⁸ Aronson, 'Jurisdictional Error without the tears' (n 7).

⁹ Aronson, 'Jurisdictional Error and Beyond' (n 7) 249.

¹⁰ Mark Leeming, *Authority to Decide: the Law of Jurisdiction in Australia* (The Federation Press 2012) 49.

‘The fact is that the lines in Craig v The State of South Australia are hardly well drawn. They do not sort of put a very clear border around what will constitute jurisdictional error and what will not, particularly in a circumstance where one is dealing with a statutory tribunal...’¹¹

Lady Hale of the UKSC also considers this nature of institution as an important factor in the determination of judicial review by stating in an oral pleading of *Cart* that *‘there are members of the UT, who are not lawyers, and who sit alone and have jurisdiction to decide points of law? That’s to me a highly relevant consideration...’*¹²

Secondly, such tribunals and inferior courts usually come with legislative restrictions to exclude the courts from conducting judicial review of their decision. For example, a clause in legislation mentions status of tribunal and inferior court as ‘superior court of record’, or regards its decision as ‘final and conclusive’. Therefore, the second factor relating is ‘to what extent a legislative restriction can be scrutinised by the court’. These two factors fit into the determination of error of law and jurisdictional error. For example, if the court considers tribunals or inferior courts as a superior court of record, whether by its nature of the institution or the effect of legislative restriction, judicial review can be argued as restrictive.

At the surface level,¹³ the English and Australian courts reach similar kinds of overall outcome that their jurisdiction in conducting judicial review of tribunals and inferior courts’ decisions with legislative restriction are limited. However, the English and Australian courts apply ‘different doctrinal approaches’ in detail under the grounds of error

¹¹ The Transcript of legal argument in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

¹² n 1.

¹³ See the methodologies of surface and deep-water legality in Chapter 1.

of law and jurisdictional error in explaining ‘the extent to which they limit their jurisdiction in conducting judicial review of decision of this kind of quasi-judicial institution with legislative restriction’. Importantly, these differences in the determination of the scope of judicial review are a result of the courts’ different understanding of deep-water legality and legal cultures.

In fact, some scholars have pointed out the connection between the doctrines and the constitutional backdrop of the legal systems.¹⁴ For example, Lewans points out that the incoherence of the determination of jurisdictional error was a product of the ‘*Diceyan Dialectic*’ or ‘*Diceyan constitutionalism*’.¹⁵ A recent one is Boughey and Crawford’s considering jurisdictional error as a doctrine in pursuing the ‘*Australian constitutional purpose*’, particularly in upholding the framework of separation of powers.¹⁶ However, the connection will be clarified in this chapter with a detailed examination of the legal reasoning given in the leading cases. Some approaches from the past will also be briefly examined to demonstrate the continuity of influence of the legal cultures,¹⁷ although the main focus will be on current cases. For English law, Section 3 below will contain a discussion of *Regina (Cart) v Upper Tribunal*, where the claimants sought for judicial review against the decision of the UT, given status as a superior court of the record by

¹⁴ Eg Aronson, ‘Jurisdictional Error and Beyond’ (n 7) 264-267; Aronson, ‘Jurisdictional Error without the tears’ (n 7) 344-345; James Spigelman, ‘The Centrality of Jurisdictional Error’ 21 Public Law Review 77.

¹⁵ Matthew Lewans, *Administrative Law and Judicial Deference* (Hart Publishing 2016) 44-58.

¹⁶ Janina Boughey and Lisa Crawford, ‘Reconsidering *R (on the application of Cart) v Upper Tribunal* and the Rationale for Jurisdictional Error’ PL 592.

¹⁷ Eg *R v Hickman Ex parte Fox and Clinton* (1945) 70 CLR 598 of the Australian law and English cases that applied the collateral fact doctrine, such as *Bunbury v Fuller* (1853) 9 Ex 111.

Section 3(5) of the TCEA.¹⁸ This will be compared to Section 4, examining *Kirk v Industrial Court (NSW)*, a significant Australian case heard during the same period with *Cart*, discussing whether the court has a role to conduct judicial review of the decision of the Industrial Court of New South Wales ('ICNSW'), which is given the status of a superior court of the record by Section 152 of the Industrial Relations Act 1996 of NSW ('IRA').¹⁹

Four points namely the validity of error of law and jurisdictional error as grounds of judicial review, justifications, doctrines and application, which the English and Australian courts apply to determine their jurisdiction in conducting judicial review of the decision of the UT and the ICNSW will be unpacked from legal reasoning of *Cart* and *Kirk*. It will be demonstrated that, while the determination of error of law, the status of the UT and the interpretation of Section 3(5) of the TCEA, were flexibly adapted by individual judges in *Cart* with various justifications and doctrines, the consideration of jurisdictional error, the status of the ICNSW and the interpretation of Section 152 of the IRA were determined by rigidly following the framework of the separation of powers in *Kirk*.

Importantly, these doctrinal approaches integrated with the two aforementioned factors will be connected to the flexible and rigid legal mentality of English and Australian judicial review constitutionalism. These comparative methodological approaches of unpacking legal reasoning, deep-water legality and legal culture will draw a more holistic picture of this area of the English and Australian laws. Thereby, the final section makes a

¹⁸ [2009] EWHC 3052 (Admin); [2010] EWCA Civ 859 (CA); [2011] UKSC 28.

¹⁹ (2010) 239 CLR 531.

conclusion, and paves the way to the next chapters. Apart from judicial review of tribunals and inferior courts, error of law and jurisdictional error are also relating to the determination of other grounds of judicial review in England and Australia.

2. Error of Law and Jurisdictional Error at Surface and Deep Levels

As introduced above, this section exemplifies how the determination of error of law in English law and jurisdictional error in Australian law are complicated by the nature of institution and legislative restriction. At a surface level, these two factors are premised in a similar way in England and Australia supported by general principles regarded as institutional and democratic reasons for creating tribunals and inferior courts. These lead to controversy whether courts have to limit jurisdiction in conducting judicial review of their decisions. However, at a deep-water level, the English and Australian courts have different ways in considering these factors. For example, the structure and system of tribunal and privative clauses vary in England and Australia. Although these are not the focus of this chapter, they are a necessary background in understanding the different determinations of the scope of judicial review between *Cart* and *Kirk*.²⁰

2.1 Two Complicated Factors Limiting Scope of Judicial Review

As Justice McHugh of the HCA described that '*In carrying out judicial review, the Judiciary often undermines Executive power*',²¹ scope of judicial review is therefore a

²⁰ Indeed, the distinction between court and tribunal is also a part of legal culture. As shown in the previous chapter, while the Australian law rigidly distinct tribunal and court through the written constitution, the English law is set flexibly in different circumstances.

²¹ Justice McHugh, 'Tensions between the Executive and the Judiciary' (Australian Bar Association Conference, Paris, 10 July 2002).

question of, to what extent the court should intervene into the executive's action.²² The first complication is that tribunals and inferior courts are institutions at the centre of the tension between court and executive, because they perform an adjudicative function but are not courts in the traditional sense.²³ As described in the previous chapter, this kind of institution was first established in England when the Industrial Revolution led to the extremely rapid and complex growth of public administration, which resulted in a significant shift in the setting of the role of government. Mainly, authority in deciding various social and economic administrations was centralised from local authorities to specialised executive agencies.²⁴ With names like 'board' and 'commission', such institutions were delegated an admixture of administrative and judicial functions from statutory schemes.²⁵ They were regarded as 'quasi-judicial', and later termed as 'administrative tribunal'.²⁶

This nature of tribunals having an adjudicative function is claimed as advantageous in tackling the complexity of social and economic administration.²⁷ Three main points can be conceptualised as reasons to prefer tribunals over courts in adjudicating disputes

²² See also Section 1.2 of Chapter 1.

²³ Peter Cane, 'Understanding Administrative Adjudication' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing 2008) 273-274.

²⁴ *ibid.*

²⁵ Some of them were also delegated legislative function (C Stebbings, *Legal Foundations of Tribunals in Nineteenth Century England* (CUP 2006) 8).

²⁶ The first tribunal was an income tax commissioner created at the very end of the 18th century (Cane, *Administrative Tribunals and Adjudication* (Hart Publishing 2010) 13-14).

²⁷ *ibid* 31; Craig (n 4) [2-017]-[2-019].

between citizen and government.²⁸ First, tribunals offer speedier, cheaper and more accessible processes than the courts' procedure, which are considered as too formal, elaborate, slow, costly, and unduly disruptive to some areas of public administration requiring prompt decisions namely welfare, industrial, financial, social security and revenue matters. This point of efficiency is advanced by the second advantage that specialised tribunals have more expertise than courts to resolve disputes in the mentioned areas of complex public administration. The third reason in preferring tribunals over court is regarding their mentalities of being neutral in considering the disputes. It is claimed that the courts might not be sympathetic in advancing substantive interests of the individuals, according to the intention of legislation particularly one relating to the foundation of the welfare state or migration at the time of operation.²⁹

These three reasons that support the tribunal as having 'institutional competence' for adjudicative functions, have been widely discussed by scholars.³⁰ For example, Stebbings argues that '*the flexibility, continuity and relative political neutrality of non-departmental agencies made them [tribunals] ideally constituted for specialised purposes of dispute-resolution*'.³¹ They lead to the issue that the courts should limit or should not be

²⁸ Wade and Forsyth (n 4) 765-766; Anthony J Connolly, *The Foundations of Australian Public Law: State, Power, Accountability* (CUP 2017) 312-313.

²⁹ McHugh (n 21).

³⁰ This is compatible to the reasons in discussing the concept of deference. However, the definition and application of concept of deference varies between scholars and legal systems. As discussed in Section 4 of Chapter 1, it is not focus of this thesis, but only additional indicator of influences of legal culture, which will become more obvious in the analyses in Chapters 4 and 5.

³¹ Stebbings (n 25) 63.

able to conduct judicial review of the decisions taken by a tribunal, unless the aforementioned reasons for creating tribunals would be undermined.³²

Apart from such institutional reasons, courts' jurisdiction in conducting judicial review of tribunals and inferior courts are argued as limited according to 'democratic reason'.³³ This is because the tribunals and inferior courts' authorities in adjudicating dispute between citizen and government are legitimatised by Parliament, as representative of people in the legal system. Therefore, their decisions are usually excluded from judicial review by courts through a clause in the legislature, for example being stipulated as 'final', 'authoritative' or 'conclusive'. This kind of legislative restriction is generally regarded as a 'privative clause' or an 'ouster clause', aiming to generate a degree of certainty and finality to the tribunals' decisions. It would be disruptive in running public administration, if it were to be uncertain whether the tribunal's decision would be overturned by the court or not.

2.2 The Adjudicative Monopoly of the Courts

So far, this section discusses the two factors namely the nature of being quasi-judicial institution and legislative restriction, which lead to the argument of limiting the role of the court in conducting judicial review of the decisions of tribunals and inferior courts. However, the other side of argument is that courts are still understood as having an adjudicative monopoly in providing final answers over disputes between citizens and

³² Cane, *Administrative Law* (n 4) 181-183. See also William A Robson, *Justice and Administrative law: A Study of the British Constitution* (3rd edn, Stevens & Amp 1951) 35-36, 91, 236-237, 282, 319, 321.

³³ This is another limb in the discussion of the concept of deference (See n 30).

government in order to protect legality of the actions.³⁴ This is justified generally by the rule of law and separation of powers. Although tribunals have an adjudicative function, they are not a court in the traditional sense.³⁵ Their review of original administrative actions is not regarded as ‘judicial review’, but an ‘internal review’ within the executive branch³⁶ but by different officials.³⁷ Cane refers to Fuller’s concept of adjudication explaining that such internal review comes from a party in the dispute itself.³⁸ Conversely, judicial review provides the opportunity for parties that their cases be heard before a neutral third party.³⁹ In the same vein, Wade argues that tribunals are less desirable than courts on the ground of independence that *‘the whole object of the tribunals was to provide a cheaper and speedier source of justice...You cannot reduce the price of an article and speed up production without lowering quality’*.⁴⁰

These two sides of the argument, limiting and supporting the court’s role in conducting judicial review of tribunals and inferior courts’ decisions, float at the surface level of both the English and Australian legal systems. They fit into the determination of the grounds of judicial review to the extent to which the court’s jurisdiction should be

³⁴ Cane, *Administrative Tribunals and Adjudication* (n 26) 39.

³⁵ *ibid* foreword.

³⁶ By this, judicial review is an external review as it takes place by court which is a different institution from executive (*ibid* 7).

³⁷ *ibid* 7-8. See also Peter Cane, ‘Judicial Review in the Age of Tribunals’ [2009] PL 479.

³⁸ L L Fuller, ‘The Forms and Limits of Adjudication’ (1978) 92 *Harvard Law Review* 353 in Cane, *Administrative Tribunals and Adjudication* (n 26) 10-11.

³⁹ Cane, *Administrative Tribunals and Adjudication* (n 26) 10-11.

⁴⁰ H W R Wade, *Towards Administrative Justice* (University of Michigan Press 1963) 88.

based on these factors. The judgment in *Kirk* draws back to the logic of tension between court and executive by mentioning Sawyer's work⁴¹ that

*'Those two purposes [of keeping tribunal within the scope of judicial review and reasons for their expertise] pull in opposite directions. There being this tension between them, it is unsurprising that the course of judicial decision-making in this area has not yielded principles that are always easily applied.'*⁴²

2.3 Understanding the Complications through Legal Culture

As mentioned in the introduction, the determination of the scope of judicial review complicated with the two factors have been answered differently in England and Australia, namely through error of law and jurisdictional error. These differences can be better comprehended through an analysis of English and Australian legal cultures. The rule of law and separation of powers may appear as shared constitutional values behind the distinction between reviewable and non-reviewable tribunal's decision in England and Australia.⁴³ However, the English and Australian courts have different deep understandings of such constitutional values, and thereby differently perceive their role and therefore apply different doctrinal approaches in determining their scope of judicial review in this area. These notions are explicit in the legal reasoning in the judgments of *Cart* and *Kirk*, but before demonstrating that, a brief description of the tribunal system and privative clauses in England and Australia is provided as background information.

⁴¹ Sawyer, 'Error of Law on the Face of an Administrative Record' (1956) 3 University of Western Australia Annual Law Review 24, 34-35.

⁴² n 19 [58].

⁴³ Cane, *Administrative Tribunals and Adjudication* (n 26) 32.

As described in Section 3.3 of Chapter 2, the status of tribunals in England has been discussed flexibly from Donoughmore to Franks, Leggatt, and other later reports of governmental committees. This flexibility has led to various doctrinal approaches being applied to determine the scope of judicial review of tribunal's decision. The doctrines applied in the past, namely the jurisdictional fact doctrine and the error on the face of the record, will be connected in this section as a part of the continuity of the legal mentality of English judicial review. However, the focus will be on *Cart*, which is regarded as the leading case in modern law. As introduced in the previous chapter, the current framework of a two-tier tribunal, namely the FFT and the UT, was established under the TCEA. The UT is the appellant institution of the FFT on questions of law. If the UT allows and determines the appeal, the claimant can further appeal to the Court of Appeal ('CA').⁴⁴ However, if the UT refuses permission, it is then questionable whether such refusal is subjected to judicial review by the court or not. The TCEA does not give a clear answer on this, but the status of the UT is stipulated in Section 3(5) where it is described as a superior court of the record. This was the situation in *Cart*, in which the courts included the consideration of the nature of the UT and interpretation of Section 3(5) of the TCEA in their determination of the scope of judicial review. The flexibility of the different levels of courts in *Cart* in applying various justifications, doctrines and legal reasoning to decide these questions will be unpacked in the next section. Importantly, they will be connected to the analysed English legal culture.

⁴⁴ TCEA, s 3, 9, 11.

This is completely different from the Australian law, where tribunals and inferior courts were established with different frameworks. At the federal level, there are two types of review, namely judicial review and merits review. The former is a judicial function of the courts, which is operated by common law. The latter is a judicial function of tribunals, operated by a general system of administrative review tribunal called '*the Administrative Appeals Tribunal*', as a result of the suggestion of the Kerr Committee in 1971 that there shall be another mechanism apart from judicial review by the courts, to supplement review on merits of administrative decisions.⁴⁵ As described in Section 4 of Chapter 2, the establishment of the Administrative Appeals Tribunal can be regarded as an additional point, reinforcing the influence of the Australian legal culture. This reflects that the scope of common law judicial review in Australian law is clearly distinctive from merits review based on the rigid framework of the separation of powers.

At state level, a number of specialist tribunals and inferior courts such as industrial and environmental courts have been established.⁴⁶ The scope of judicial review of these institutions' decisions are significantly discussed in common law cases, in particular *Craig*,⁴⁷ *Kirk* and some later cases. Importantly, the doctrinal approaches applied by the courts will be unpacked in Section 4 below and it will be demonstrated that they adhered to the jurisdictional error approach being determined through the rigid framework of the

⁴⁵ See Section 4 of Chapter 2.

⁴⁶ Cane, 'Understanding Administrative Adjudication' (n 23) 57-67.

⁴⁷ (1995) 184 CLR 163.

separation of powers prescribed in the written constitution and statutes, analysed as the main elements of Australian judicial review constitutionalism.

A caveat before the main analysis is that the comparison of *Cart* and *Kirk* may be complex, since they have different subjects. While the discussion in *Cart* is regarding the scope of judicial review of the UT, which is a tribunal, *Craig* and *Kirk* were considering jurisdiction of the HCA and State Supreme Court over the District Court and ICNSW. The point to be clarified is that this chapter does not focus on the different structures of tribunal systems and privative clauses between England and Australia, but studies different determinations of the scope of judicial review of ‘this kind of quasi-judicial institution with legislative restriction’, whether they are called tribunal or inferior court, and connects them to the legal cultures. The process of unpacking legal reasoning in *Cart* and *Kirk* allows this chapter to fulfil this task.

3. English Doctrinal Approaches

The various justifications and doctrines flexibly applied by English judges to determine the scope of judicial review of tribunals’ decisions will be examined in this section, ranging from the distinction between jurisdictional and non-jurisdictional error applied from the 17th century to the turning point in *Anisminic* in 1970s and the variations of the current law in *Cart*. Such flexibility is influenced from the flexible legal mentality of English judicial review constitutionalism.

3.1 Prior to *Cart*

As unpacked in the previous chapter, the flexible legal mentality of English judicial review has gradually been developed since the 17th century based on the inter-relationship between

parliamentary sovereignty and the rule of law. Therefore, the influence of this flexible mentality on the determination of the scope of judicial review should also be seen to have flowed from the 17th century to modern cases as well in order to sustain the argument that the English law is more flexible than its Australian counterpart. As Craig points out,

*'the present attitude of the courts towards judicial review cannot be adequately understood without some idea of 18th and 19th century case law. This history reveals the differing judicial views as to how far they should be reviewing tribunals and other inferior bodies.'*⁴⁸

The English courts determined the extent of control of administrative action from the origin of judicial review by the distinction between jurisdictional error and non-jurisdictional error approach.⁴⁹ The court could conduct judicial review of the administrative decision if the issue was jurisdictional error, but it could not do so if it was a non-jurisdictional error. The English law deployed this approach for more than 300 years before abandoning in *Anisminic* in the 1970s.⁵⁰ This may cast a doubt on the argument in this section that the English approaches have been flexible since the 17th century.

It is argued in this section that the English courts had at least two aspects of flexibility in their determination of the scope of judicial review based on the dichotomy of jurisdictional error. Firstly, they could use either the collateral (preliminary) fact doctrine or the theory of limited review to determine the extent of control of administrative action.⁵¹ Although these two theories were based on a similar approach of the distinction between

⁴⁸ Craig, *Administrative Law* (n 4) [16-017].

⁴⁹ *ibid* [16-001].

⁵⁰ As will be exemplified below.

⁵¹ Craig, *Administrative Law* (n 4) [16-001], [16-003].

jurisdictional and non-jurisdictional errors,⁵² their different explanations demonstrated flexibility in terms of the justification the court could provide to claim the scope of judicial review.⁵³ According to the collateral fact doctrine,

'A public body is given power on the existence of certain conditions. There are certain preliminary questions that it must decide before it can proceed to the merits. These include matters such as whether the public body was properly constituted and whether the case was of a kind referred to the statute'.⁵⁴

On the other hand, Gordon proposed a later theory, as follows;

'If a public body is given jurisdiction over a certain topic, the question is whether the facts relating to that topic exist in the opinion of the public body... The public body's jurisdiction was limited, but that limit was determined not by the truth or falsehood of its findings, but by their scope or nature.'⁵⁵

The courts malleably applied either of these to determine the scope of judicial review before the 1970s. For example, Justice Coleridge applied the collateral fact doctrine in *Bunbury v Fuller*, when he stated that

'Now it is a general rule, that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends... [Thus the question]

⁵² *ibid* [16-001]; Wade and Forsyth (n 4) 234. For example, *R v Northumberland Compensation Appeal Tribunal, ex p Shaw* [1952] 1 KB 338, 346 and *R v Fulham etc Rent Tribunal ex p Philippe* [1950] 2 All ER 211.

⁵³ There were also other theories apart from these two (See Craig, *Administrative Law* (n 4) [16-008]-[16-011]).

⁵⁴ *ibid* [16-004]. It was also later explained by Lord Diplock in *Anisminic* (n 6) 887-905; hence Endicott calls it as '*Lord Diplock's presumption*' (Timothy Endicott, *Administrative Law* (4th edn, OUP 2018) 326.

⁵⁵ Scott Gordon, 'The Relation of Facts to Jurisdiction' (1929) 45 QLR 458.

*whether some collateral matter be or be not within the limits...must always be open to inquiry in the superior Court.*⁵⁶

On the other hand, *R v Bolton* was a prominent example of a case that relied on the theory of limited review to justify the courts' jurisdiction in conducting judicial review.⁵⁷

Secondly and more importantly, there are 'real difficulties' in both the collateral fact doctrine and the theory of limited review in terms of certainty in determining the dichotomy between jurisdictional error and non-jurisdictional error.⁵⁸ Craig provides some concrete examples of this. In terms of collateral fact,

*'The distinction between kind and type on the one hand, and truth or detail or situation on the other, proved illusory. There was no predictability as to how a case would be categorized before the court pronounced on the matter. There was also no ex post facto rationality that could be achieved by juxtaposing cases and asking why one case went one way and another was decided differently.'*⁵⁹

Gordon's theory also contained this kind of indetermination in terms of the '*difficulties in distinguishing scope and truth*'.⁶⁰ This led to the overall position that '*the scope of jurisdictional review is not self-defining*'.⁶¹ Another factor that added complexity to the distinction between jurisdictional error and non-jurisdictional error was the error on the face of the record. As shown by Lord Justice Denning in *Shaw*, '*The effect was to permit*

⁵⁶ n 17 [140]. See also *Nichols. V Walker* (1632-1633) Cro. Car. 394 and other examples in Wade and Forsyth (n 4) 208-209.

⁵⁷ (1841) 1 QB 66. See other examples in nn 23-24, 32 of Craig (n 4) [16-018]; Elliott (n 4) 35-37.

⁵⁸ Craig, *Administrative Law* (n 4) [16-001]. See also Paul Craig, *The Hamlyn Lectures: UK, EU and Global Administrative Law* (CUP 2015) 30-35.

⁵⁹ Craig, *Administrative Law* (n 4) [16-005].

⁶⁰ *ibid* [16-007].

⁶¹ *ibid* [16-016].

any error of law disclosed on the face of the record of the proceedings to be quashed, irrespective of whether it was categorised as a jurisdictional error'.⁶²

Most scholars regard the difficulty in finding certainty when considering the question of jurisdiction as a kind of problem, which was later solved by *Anisminic*. For example, Elliott considers the '*diversity in legal meaning [determined from the statute]*' as '*inimical to the rule of law requirement of legal certainty*'.⁶³ The first edition of De Smith's textbook also mentions that '*No satisfactory test has ever been formulated for distinguishing matters which go to jurisdiction from matters which go to the merits*'.⁶⁴ Henderson described this as a '*lack of theoretical clarity*' or '*theoretical vagueness*'.⁶⁵ All of this led to a negative impression that '*the courts manipulated the distinction for instrumental purpose, choosing to find that a particular issue was jurisdictional if they wanted to intervene, and non-jurisdictional if they did not*'.⁶⁶

Rather than regarding this approach as problematic, this section considers that the distinction between jurisdictional error and non-jurisdictional error provided flexibility for the English courts in determining the scope of judicial review. Importantly, it was not dependent on judicial desire but embedded in English legal culture. Firstly, as Craig stated,

'The answer resides not in a logic which compels, for example, that all questions of law must always be for the courts or the tribunal. Such logic is

⁶² n 52; Wade and Forsyth (n 4) 224.

⁶³ Elliott (n 4) 38.

⁶⁴ De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens & Sons Limited 1958) 69-70.

⁶⁵ E G Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Harvard University Press 1963) 158-159.

⁶⁶ Elliott (n 4) 38-39. See also Lewans (n 15) 4-5.

*flawed. A response must always be based on a value judgment, the precise content of which will not necessarily always be the same*⁶⁷

This reflects that the rigid distinction between legality and merits and between court and tribunal did not exist in England through the distinction between jurisdictional error and non-jurisdictional error. Instead, it was the implication of the flexible understanding of the role of the courts to conduct judicial review according to the fluid relationship between them and tribunals.

Most importantly, the flexibility in distinguishing jurisdictional error from non-jurisdictional error reflects the logic of the balancing process between parliamentary sovereignty and the rule of law. On the one hand, Craig regards the collateral fact doctrine and the limited theory of review as *'tools used to preserve judicial control'*.⁶⁸ Endicott also discusses the collateral fact doctrine,⁶⁹ as being justified by the rule of law.⁷⁰ This is done through a discussion of the nature of the institutions. The judges who are independent and have a better understanding of the standards of the law, should impose their views rather than the misguided views of the law expressed by the public authorities, otherwise the rule of law will fail.

On the other hand, the courts have to *'give some leeway to agency autonomy'*, as *'this would emasculate autonomy over issues that had been assigned to the body by*

⁶⁷ Craig, *Administrative Law* (n 4) [16-016].

⁶⁸ *ibid* [16-038].

⁶⁹ Referred to Lord Diplock's doctrine in *Anisminic* (n 6).

⁷⁰ Endicott (n 54) 328-329.

Parliament'.⁷¹ As Craig asserts, '*...the courts, moreover, did not feel comfortable deciding the precise meaning of all statutory conditions in the enabling legislation.*'⁷² In other words, they had to respect the administrative authority conferred by parliament, which is a sovereign power. Furthermore, the logic of balancing these two sides of mentality was clear. As Craig recognised, '*the courts persisted with the collateral fact doctrine and limited review for so long...because they believed that these best captured the appropriate balance between judicial control and agency autonomy*'.⁷³ This logic was also supported by Murray, who stated that jurisdictional fact doctrine '*represented a compromise between judicial control of the administrative process and judicial restraint*'.⁷⁴

This reflection of the twin concepts of parliamentary sovereignty and the rule of law through the dichotomy of jurisdictional and non-jurisdictional error can also be demonstrated through the writ system. Ever since the origin of English judicial review, the court's jurisdiction had been '*interwoven with the intricacies of the prerogative writs*'.⁷⁵ The snapshot of this is whether the court would give a writ or not was also the result of the balancing process between the rule of law and parliamentary sovereignty. On the one hand,

⁷¹ Craig, *Administrative Law* (n 4) [16-038].

⁷² *ibid.*

⁷³ *ibid*; Paul Craig, 'Jurisdiction, Judicial Control and Agency Autonomy, A Special Relationship' in Ian Loveland (ed), *American Influences on Public Law in the UK* (OUP 1995).

⁷⁴ P Murray, 'Process, Substance and the History of Error of Law Review' (Cambridge Public Law Conference, September 2014).

⁷⁵ Craig, *Administrative Law* (n 4) [1-003]. See also Peter Cane, *Controlling Administrative Power: An Historical Comparison* (CUP 2016) 249-251; Craig, *The Hamlyn Lectures: UK, EU and Global Administrative Law* (n 58) 51.

the role of the courts to give remedy to an illegal administrative action was supported by the principle of legality and the rule of law. According to Craig,

‘the motivation behind early judicial review resided principally in the desire to ensure the predominance of the HC over ‘inferior jurisdictions’, and to provide remedies to those whom the established judiciary felt had been unjustly or illegally treated by such authorities.’⁷⁶

Henderson also regards a writ as *‘a means by which a citizen could demand legality from his government’* and *‘new modes of proceeding in the courts...which gave the aggrieved subject quicker and easier relief from illegal action by officials’*.⁷⁷ On the other hand, *‘in striving to attain these objectives, the court could indeed often come into direct conflict with the legislative will’*.⁷⁸ Hence, the English courts had the flexibility to balance *‘the necessity of general rules of law’* and *‘the necessity of specialised knowledge, flexibility, and creativeness in the administration of government, setup from the legislature’*.⁷⁹

This balancing process led to another connection to the English legal culture, namely, that the English courts’ determination of the scope of judicial review paid relatively less attention to statutory construction. According to Henderson, *‘...in the early days of judicial review, the courts inclined to the view that every question of statutory construction was jurisdictional, quite aside from the meaning of the word....’*⁸⁰ As will be seen below, this is totally different from the Australian law, which rigidly relies on the

⁷⁶ Craig, *Administrative Law* (n 4) [1-003].

⁷⁷ Henderson (n 65) 1, 158-159.

⁷⁸ Craig, *Administrative Law* (n 4) [1-003].

⁷⁹ Henderson (n 65) 3.

⁸⁰ *ibid* 7.

framework of separation of powers prescribed in the written constitution and statutory construction.

Although English judicial review had been based on the jurisdictional fact doctrine for a long time, it did not lead to the conclusion that the English approach was rigid. In reality, the courts manipulated the determination of the scope of judicial review through the jurisdictional error approach. While most scholars consider this to be problematic, it is regarded in this section as another product of the flowing flexible legal mentality of the English judicial review constitutionalism. The courts could apply various approaches such as the collateral fact doctrine, the theory of limited review and the error on the face of the record, integrated with the complex writ system, to determine the scope of judicial review. The determination did not depend on the courts' wishes, but was embedded in the balancing process between parliamentary sovereignty and the rule of law. Craig connects this to the principle of legality;

'The discussion thus far focused on the judicial creativity evident in development of direct challenge through the prerogative writs. This operated in tandem with collateral attack, which constituted the early method of challenging decisions... The legality of the contested decision would be the central issue in the success or failure of such claims'.⁸¹

In short, the jurisdictional fact doctrine had already captured *'the best balance'* for the determination of the role of the courts to conduct judicial review at that time. Based on its nature, *'...we do not have to accept the balance between judicial control and agency autonomy adopted by earlier courts, but we should not forget that there is an issue here at*

⁸¹ Craig, *The Hamlyn Lectures: UK, EU and Global Administrative Law* (n 58) 59.

all...'.⁸² Therefore, a move to other doctrinal approaches was not made for a long time because flexibility had already been provided by the jurisdictional fact doctrine.

However, the English law did not remain there permanently. The door to move to other doctrinal approaches was always open. Craig endorsed this part of English legal mentality, as follows;

*'It is clear from a reading of the case law that the courts did not feel that they were bound by some a priori logic to employ either of the now discredited theories...They acknowledged the possibilities open to them when devising the tests for jurisdictional control.'*⁸³

Hence, the English courts changed without hesitation when it was time to do so.⁸⁴ This change was precipitated by the considerable social changes in England during the 20th century. As described in Section 3 of Chapter 2, the Industrial Revolution and the concept of Welfare State led to the establishment of central institutions to perform functions that had previously been performed locally. A number of tribunals were created to make decision in public administration. Based on this '*volume of public administrative decision-making*' the courts '*started looking for ways to provide greater protection for citizens by extending their control over the executive and bureaucracy*'.⁸⁵ The distinction between jurisdictional and non-jurisdictional error that provided 'too intangible' flexibility for determining the scope of judicial review judicial review, was regarded as producing

⁸² Craig, *Administrative Law* (n 4) [16-038].

⁸³ Craig, *The Hamlyn Lectures: UK, EU and Global Administrative Law* (n 58) 34.

⁸⁴ As mentioned, the jurisdictional error dichotomy was considered to be problematic. Therefore '*the demise of the collateral fact doctrine is to be welcomed*' (Craig, *Administrative Law* (n 4) [16-037]).

⁸⁵ Cane, *Controlling Administrative Power: An Historical Comparison* (n 75) 250.

uncertainty in public administration. There was no magic line of division between the old and new centuries.⁸⁶ However, the most important step among cases⁸⁷ was the rebuilding of the approach to determine the court's jurisdiction in conducting judicial review in 1969 in *Anisminic*.⁸⁸

This case was an important step for two main reasons.⁸⁹ Firstly, the court in *Anisminic* answered the question about the scope of judicial review through the discussion that the legislative restriction needs to be interpreted strictly. This increased the opportunities for judicial supervision of tribunals by the full range of judicial review grounds.⁹⁰ Second, it expanded the scope of judicial review by broadening the concept so that all errors of law would go to jurisdiction. These left behind the problem of unclear distinctions between jurisdictional and non-jurisdictional errors of law, as well as what was error on the face of the record.⁹¹ This approach in *Anisminic* was expanded in later cases, one of the most important of which was Lord Browne-Wilkinson in *Page*, as stated at the beginning of this chapter.⁹² It becomes the basis for the discussion of scope of judicial

⁸⁶ Craig, *Administrative Law* (n 4) [16-021].

⁸⁷ For example, *Arlidge v Local Government Board* [1915] AC 120 and *R v Board of Education* [1910] 2 KB 165. However, they are not much cited as being authoritative. Wade and Forsyth argue that '...there is no longer a need for the detailed account [of these cases] given in earlier editions of this book' ((n 4) 208-209, 224).

⁸⁸ n 6. See B Gould, 'Anisminic and Jurisdictional Review' [1970] PL 358.

⁸⁹ This significance of *Anisminic* was generally recognised by literature, for example, David Feldman, '*Anisminic Ltd v Foreign Compensation Commission* [1968]: In Perspective' in Satvinder Juss and Maurice Sunkin (eds), *Landmark Cases in Public Law* (Hart Publishing 2017) 92.

⁹⁰ Aronson, Groves and Weeks (n 4) [1.100].

⁹¹ Craig, *Administrative Law* (n 4) [16-034].

⁹² Eg *O'Reilly v Mackman* [1983] 2 AC 237 (HL); *Racal Communications Ltd, Re* [1981] AC 374 (HL); *Pearlman v Keepers and Governors of Harrow School* [1979] QB 56 CA, even though with

review in this area and in general that the courts are responsible and have a role to conduct judicial review of error of law; however, they would leave factual and discretionary issues to the executive to decide.⁹³

While some scholars argues that '*administrative law was just invented in the second half of the twentieth century* [by the move in *Anisminic*]',⁹⁴ in this section, it is considered to be another wave in the continuous fluidity of the English law. The approach in *Anisminic* was an alternative way to provide flexibility for the courts to determine the scope of judicial review. Cane supports the view that it was a change of the '*form of action*' from '*procedure*' (related to the writ system) to '*substance*' (related to ground of judicial review), in '*a very different juridical environment*'.⁹⁵

Despite this variation, the shared theme of English law that the courts have the flexibility to determine the scope of judicial review of quasi-judicial institutions can be captured. As Craig argues, '*the difference between then* [before 1970s] *and now is exaggerated*.⁹⁶ Rather than the contrast between the rigidity to the jurisdictional fact doctrine and the courts' ability to intervene in all errors of law, it was merely

different kinds of explanation (See Craig, *Administrative Law* (n 4) [16-023]-[16-026]; Elliott (n 4) 46-50; Wade and Forsyth (n 4) 220-222).

⁹³ This premise leads to discussion in the next chapters that some decisive factual and discretionary issues in administrative action are regarded by the court as error of law. However, the line in determining whether the factual and discretionary issue is decisive or not is set differently between the legal systems, according to their different legal cultures. This will be clearer when the discussion runs into the conclusion of this chapter.

⁹⁴ See Endicott (n 54) 61.

⁹⁵ Peter Cane, 'The Making of Australian Administrative Law' (2003) 24 *Australian Bar Review* 114.

⁹⁶ Craig, *The Hamlyn Lectures: UK, EU and Global Administrative Law* (n 58) 25.

'*unsystematic*' in moving from one form of flexibility to another.⁹⁷ In this section, it was simplified by illustrating that they were all running in the light of the English legal culture. This will be further clarified in the analysis of *Cart* below, where the judgments of different levels of courts can either create a new doctrine in addition to *Anisminic* or articulate it differently in their determination of the scope of judicial review of the UT. In any doctrine, the determination is still based on the balancing process between the rule of law and parliamentary sovereignty.

3.2 *Cart*

After *Anisminic*, as described above, a significant milestone in discussing scope of judicial review of tribunal's decision was the reformation of the organisation of tribunals into two-tier institutions; FTT and UT, by the TCEA. The courts in *Cart* had to determine whether they had a role to conduct judicial review of the refusal of appeal of the UT, which is an appellant tribunal with delegated adjudicative power and the status of a superior court of the record from parliament. The connection between the doctrinal approaches applied by the courts at different levels in *Cart* in considering the status of the UT, interpreting Section 3(5) of the TCEA and determining the scope of judicial review and English legal culture, is discussed in this section. Three main points of doctrinal approaches can be unpacked below.

First, all the judgments of different levels of court in *Cart* refer to the elements of English judicial review constitutionalism, namely the twin concepts of parliamentary sovereignty and the rule of law and the common law theory as their justifications in

⁹⁷

ibid.

conducting judicial review of the UT's decision. To begin with, Lord Justice Laws of the Queen's Bench Division explained that it is the court's constitutional duty to protect the rule of law by judicial review.⁹⁸ He described the rule of law as related to the principle of parliamentary sovereignty, which requires all public bodies to remain within the scope of powers prescribed by parliamentary statutes.⁹⁹ However, since this principle alone cannot account for the entire rule of law because the texts produced by parliament cannot speak, an institution is needed to interpret the statutes. Lord Justice Laws claimed that this task must not be performed by the legislature, executive, or the public body itself, because they are not neutral and this may lead to arbitrary government; rather, it should be performed by the court because it is impartial and independent.¹⁰⁰ However, since the administrative powers are authorised by Parliament, which is sovereign, the courts, which have no connection to individuals, need to justify their intervention in administrative action. In this respect, Lord Justice Laws implies that this function of the courts can be explained through the common law theory of the justification for judicial review. It is the inherent power of the court (at common law) to determine whether or not an administrative action is lawful.¹⁰¹ He further explained that the judicial review mechanism is not a refusal of legislative sovereignty; rather, it is a confirmation of the rule of law,¹⁰² because mediation

⁹⁸ *Cart* 2009 (n 18) [34].

⁹⁹ *ibid* [38].

¹⁰⁰ *ibid* [37].

¹⁰¹ *ibid* [34].

¹⁰² *ibid* [38].

is required between parliamentary sovereignty and an independent judicial power to protect the legality of actions.¹⁰³

Subsequently, judgments by the CA and the UKSC also describe their justification for judicial review in relations to these constitutional values. According to Lord Justice Sedley, the court has a constitutional duty to protect legality and due process to preserve the integrity of the rule of law.¹⁰⁴ Similarly, Baroness Hale explained that the purpose of judicial review is to maintain the rule of law and to protect the principle of legality by ensuring that decisions are taken in accordance with the law, especially the laws enacted by Parliament.¹⁰⁵ Lord Phillips of the UKSC also agreed that the rule of law requires those enacted by Parliament, together with the principles of common law, to be enforced by a judiciary that is independent of the legislature and the executive.¹⁰⁶ All the other judgments by Lord Brown, Lord Clarke and Lord Dyson also implicitly refer to the twin concepts of parliamentary sovereignty and the rule of law, together with common law theory, as justification for the court's claim to its authority to decide its jurisdiction in judicial review of the UT's decision.¹⁰⁷

All of this legal reasoning indicates compatibility with how the rule of law and parliamentary sovereignty are understood in English judicial review constitutionalism, as analysed in the previous chapter. They are the implications of the mentality that the courts

¹⁰³ *ibid* [39].

¹⁰⁴ *Cart* 2010 (n 18) [28], [37].

¹⁰⁵ *Cart* 2011 (n 18) [37].

¹⁰⁶ *ibid* [89].

¹⁰⁷ *ibid* [100] (Lord Brown), [102] (Lord Clarke), [127] (Lord Dyson).

have to solve the balance between the twin concepts of the rule of law and parliamentary sovereignty in particular cases. On the one hand, the courts respect the decision of the UT in adjudicating the dispute between the claimant and the FTT because its authority is delegated from Parliament through the TCEA and reinforced by the ouster clause. On the other hand, they have to protect legality of administrative action according to the rule of law. The common law theory was implicitly added to strengthen the justification for the courts to conduct judicial review of the UT's decision.

Additionally, influence of English legal culture can be seen from the point that the courts can flexibly arrange the distinctive explanation of these constitutional values to justify or limit their scope of judicial review in the way they consider as appropriate to the cases. This flexibility relates to the nature of the balancing process of the twin concepts and the point that there is no written constitution to provide clear jurisdiction and justification for the courts in conducting judicial review. The next section will demonstrate that this is different from the Australian approach, where the way to explain these constitutional values as justification for the courts to conduct judicial review are relatively fixed, namely by emphasising the federal separation of powers.

Secondly, not only do the judgments of the courts at different levels in *Cart* have different explanations of constitutional values in justifying their scope of judicial review, but they also flexibly adapt or create various doctrines to determine their scope of judicial review of the UT's decision. According to the two described factors, it shall be clarified that all the judgments similarly held that judicial review will be ousted only when legislature expresses clear intention. However, they have different doctrines in considering the nature of the UT, leading to different determinations of the scope of judicial review.

According to Lord Justice Laws, the scope of judicial review is determined through the approach of ‘jurisdictional error’. However, this is not the same concept of jurisdictional error applied before *Anisminic*. The judgment explained that the role of the UT established by the TCEA is a decisive factor in determining if the requirement of the principle of legality has been fulfilled.¹⁰⁸ For Lord Justice Laws, according to the TCEA, the UT is an alter ego of the High Court because it has some judicial qualifications. Firstly, it has the power to exercise a ‘judicial review’, and can grant forms of relief.¹⁰⁹ Secondly, its members, who consist of Lords Justices, High Court judges, circuit judges and district judges, are *ex officio* judges.¹¹⁰ Thirdly, the UT is part of a comprehensive judicial structure, which is regarded as a rationalised court.¹¹¹ Therefore, it is the final judge of the law and thus is unable to make a legal error. Since the nature of the UT is an institution which already satisfies the requirement of the principle of legality, the court has no duty to intervene in its decisions. There was no jurisdictional error committed by the UT.¹¹²

In contrast, Lord Justice Sedley applied different doctrine in determining the scope of judicial review over the UT. Although the TCEA invests the UT with powers akin to those of the High Court,¹¹³ it is not an ‘avatar’ of the court; it stands in the shoes of a

¹⁰⁸ *Cart* 2009 (n 18) [78].

¹⁰⁹ *ibid* [14], [88].

¹¹⁰ *ibid* [16].

¹¹¹ *ibid* [87].

¹¹² *ibid* [94].

¹¹³ He mentioned that ‘*the UT is in certain classes of case given a jurisdiction which replicates the judicial review jurisdiction of the High Court*’ (*Cart* 2010 (n 18) [13]).

tribunal rather than in those of the High Court.¹¹⁴ It would be against the rule of law if there was an error in its decision and the court could correct it; therefore, it is still the function of the court to protect legality. However, apart from the duty to protect legality, the new coherent tribunal system invested by Parliament was another factor to consider when seeking to apply a proper ‘judicial policy’.¹¹⁵ Therefore, the court will only intervene in cases of a serious error of law.¹¹⁶ In this case, it chose to limit its scope of judicial review because of the consideration of Parliament’s intention to establish a new structure of tribunals.¹¹⁷

In terms of the UKSC, all the judgments led by Baroness Hale also relied on the discussion about the nature of the UT in deciding the court’s jurisdiction to conduct judicial review of the UT, but solved by different doctrines from the lower courts’.¹¹⁸ Particularly, the judgments focus on the consistency of the role of the UT according to the TCEA. They applied the second-tier appeal from civil procedure as a rational and proportionate approach to the availability of a judicial review. There were two main reasons for supporting this approach. Firstly, the court had to consider Parliament’s intention to restructure the tribunal system expressed in the TCEA. Since the UT plays three roles,¹¹⁹

¹¹⁴ *ibid* [19].

¹¹⁵ *ibid* [35]-[37].

¹¹⁶ *ibid* [30], [45].

¹¹⁷ *ibid* [30], [31], [42].

¹¹⁸ *Cart* 2011 (n 18) [38]-[39].

¹¹⁹ First, it acts as the tribunal of first instance. Second, the UT may exercise a statutory jurisdiction equivalent to the judicial review of the High Court. Third, there is a right of appeal to the UT (*ibid* [24]-[26]).

it would be inconsistent to distinguish the scope of judicial review among these various roles.¹²⁰ There should only be one approach for all three of the UT's roles, namely, a second-tier appeal approach. Secondly, Parliament's intention in the TCEA was to create tribunals to adjudicate on disputes in specialised areas of expertise. Therefore, this approach, which only focuses on important errors or other legally compelling issues, is an appropriate level of independent scrutiny outside the tribunal structure.¹²¹ Other judgments (Lord Phillips,¹²² Lord Clarke¹²³ and Lord Dyson¹²⁴) in the UKSC followed this approach, leaving the court to consider whether or not an error was sufficiently important to lead to an infringement of the rule of law.

Although the outcomes of these doctrines were similar, that the court shall not intervene into the decision of the UT in this case, they were determined by different doctrines and lines of reasoning. This variation reflects the flexible legal mentality of English judicial review constitutionalism. Without the written constitution to prescribe the courts' boundary of jurisdiction and the nature of balancing process of the twin concepts, different judges can flexibly apply different doctrines they consider as appropriate to determine the scope of judicial review of the UT's decision in this case. It will be demonstrated below that, rather than variation, jurisdictional error has been applied as an entrenched doctrine in this area in Australia.

¹²⁰ *ibid* [37].

¹²¹ *ibid* [51].

¹²² *ibid* [61].

¹²³ *ibid* [103]-[105].

¹²⁴ *ibid* [128], [130-132].

So far, it has been demonstrated in this section that the justifications and doctrines applied by the courts at different levels in *Cart* were products of English legal culture. The next point is that such varied justifications and doctrines are the adaptations of error of law. It has been described in Section 3.1 above that the English approaches moved from the distinction between jurisdictional and non-jurisdictional error to the distinction between error of law and error of fact in *Anisminic* and *Page*. The basis is that the courts would conduct judicial review for error of law, and leave factual and discretionary issues to the executive to decide.

Through the methodologies of this thesis, error of law can be regarded as the English deep-water legality. Asking whether it is an error of law or not is similar to asking whether the administrative action complies with legality or not, if it does not, the court has a role to conduct judicial review of it. The point is that the various doctrines and justifications applied by different judges in *Cart* described above demonstrate that the status of error of law in determining the scope of judicial review in English law has not been confined, but flexibly adapted, including this area of judicial review of tribunal's decision.¹²⁵ The next section will show differences on this in Australia. Jurisdictional error is the Australian deep-water legality, which is applied as a central approach in the determination of all grounds of (common law) judicial review. This is influenced from the rigid legal mentality of Australian judicial review constitutionalism.

¹²⁵ Legal reasoning in cases after *Cart* (Eg *Phillips v Upper Tribunal (Tax and Chancery Chamber)* [2013] EWHC 2934 (Admin); *A v Secretary of State for the Home Department* [2013] EWHC 1272 (Admin)) remains various and flexible. However, the main approach is still similar to the one in *Cart* that judicial review of the UT is available when the claimant can come within the preceding test.

3.3 Products of the English Legal Culture

As mentioned in Section 3 of Chapter 1, the English determination of the scope of judicial review of a tribunal and inferior court is usually regarded by the literature as pragmatic.

Apart from Elliott and Thomas, Wade and Forsyth also assert that

*‘The court makes a profoundly pragmatic case that permission to apply for judicial review of the UT should only be granted when the stringent ‘second tier appeal criteria’ were met.’*¹²⁶

Literature in the field discuss such different ways in the aspect of comparing their doctrinal advantages and disadvantage through various explanations, methodologies and conclusions. For example, Craig sets criteria, namely certainty and flexibility to compare the application of error of law in substituting the decisions between the English, US, Canadian and EU laws.¹²⁷ Elliott and Thomas comment a second-tier appeal approach by the UKSC in *Cart*, as an appropriate one in determining the scope of judicial review in England.¹²⁸ Some compare the approach to the Australian law, for example, Aronson argues that *‘England needs its discretionary filter, if only to prevent its courts being*

¹²⁶ Wade and Forsyth (n 4) 222. See also Mark Elliott, ‘From Heresy to Orthodoxy: Substantive Legitimate Expectations in English Public Law’ in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing 2016). Although the main relating to substantive legitimate expectations (as will be discussed in Chapter 6), Elliott also mentioned the area of judicial review of tribunal’s decision as example of the flexibility of approaches applied in English law.

¹²⁷ Paul Craig, ‘Judicial Review of Questions of Law: A Comparative Perspective’ in Susan R Ackerman and Peter L Lindseth (eds), *Comparative Administrative Law* (Edward Elgar 2011). See also Craig, *Administrative Law* (n 4) [16-040]-[16-044].

¹²⁸ Mark Elliott and Robert Thomas, ‘Tribunal Justice and Proportionate Dispute Resolution’ (2012) 71 CLJ 297.

flooded with challenges for any and every error of law, especially since their courts sometimes take a very relaxed view as to what might constitute such an error.¹²⁹

Instead, a comprehensive picture of the flexibility in the English determination of the scope of judicial review of a decision of a quasi-judicial institution with legislative restriction is unpacked and demonstrated in this chapter. Despite staying with the distinction between jurisdictional error and non-jurisdictional error approach for a long time, the English approach was not rigid, since the courts could flexibly apply various justifications and doctrines in reaching different results of the balancing process between the twin concepts. Although the approach was moved to another form in *Anisminic*, the overall theme of flexibility was still shared. This was made explicit in the legal reasoning of *Cart* in three points. Firstly, the English courts can flexibly explain constitutional values like the twin concepts between the rule of law and parliamentary sovereignty and the common law theory in a way they consider appropriate to justify their scope of judicial review. Secondly, they can adapt or engender new doctrines to determine the nature of the UT in relation to their scope of judicial review. Thirdly, the status of error of law as the English version of deep-water legality has been not been fixed, but malleably adapted. The court will only be able to conduct judicial review of the UT's decision when there is an important error or other legally compelling issue. It is clear that these doctrinal approaches are connected with the flexible legal mentality of English judicial review constitutionalism. The distinctive elements of English legal culture, namely, the twin concepts and common law theory, were referred to in the legal reasoning of the judgments in *Cart*. The status of

¹²⁹

Aronson, 'Jurisdictional Error and Beyond' (n 7) 263.

error of law, in relation to the nature of UT, was flexibly determined by the individual judges through various doctrines. The connection between the flexibility of the English doctrinal approaches and its legal system's legal culture will become more obvious when compared with the Australian analysis

4. Australian Doctrinal Approaches

Rather than moving flexibly, the Australian courts have continued to adhere to the distinction between jurisdictional error and non-jurisdictional error in determining the scope of judicial review relating to the nature of the institution and legislative restriction. This ground has become a central approach, covering all common law grounds of judicial review including jurisdictional fact. How this entrenched application of jurisdictional error is connected to the Australian legal culture will be demonstrated in this section by unpacking the legal reasoning of the courts in *Kirk* and surrounding cases. On the other hand, it will be demonstrated in the next chapter in the case of jurisdictional fact.

Both chapters will lead to the obvious contrast between the English and Australian judicial review. While the English determination of the scope of judicial review has been conducted through various doctrines based on the balance of the twin concepts, the Australian one has rigidly adhered to the framework of separation of powers prescribed in the written constitution and statutory construction. This task can be fulfilled through the application of jurisdictional error and jurisdictional fact; in other words, the rigidity of the grounds and the fixed doctrinal approaches applied to determine them are products of the Australian legal culture.

4.1 Prior to *Kirk*

The first step in discussing jurisdiction of the Australian court in conducting judicial review of tribunal and inferior court was presented in relation to the legislative restriction. In *R v Hickman Ex parte Fox and Clinton*, not only that the inferior court was delegated the power to run public administration by the legislature, but the privative clause also gave restriction for its decision not to be reviewed by the court.¹³⁰ Justice Dixon proposed that, in general, a privative clause expanding the authority of the decision-maker was not constitutionally invalid.¹³¹ However, it would exclude judicial review only when '*its face appears to be within power and is in fact a bona fide attempt to act in the course of its authority*'.¹³²

This approach, known as the *Hickman* principle, has been applied as the main approach in dealing with privative clauses relating to matters of jurisdiction of the court in conducting judicial review of tribunals and inferior courts for many years.¹³³ However, it was much criticised in the operation.¹³⁴ This section argues that this is because the doctrinal approach was not compatible with the Australian legal culture. As analysed in Chapter 2, the understanding of the rule of law in Australia emphasises the rigid separation of powers for the purposes of maintaining the federal boundary of powers between court and executive. However, the *Hickman* principle excessively relied on judicial discretion. For

¹³⁰ n 17.

¹³¹ *ibid.*

¹³² *ibid* (Dixon J).

¹³³ Aronson, Groves and Weeks (n 4) [18.20].

¹³⁴ *ibid.*

example, while the privative clause was given to limit judicial review, the *Hickman* principle could not provide a clue, as to the extent that limitation affects. The judgment merely said that a privative clause is constitutional valid, but the courts could still claim their jurisdiction of judicial review by asserting that the decision breaches a fundamental jurisdictional requirement.¹³⁵ Therefore, it depended on the court deciding whether to intervene into the tribunal and inferior court's decisions or not. The boundary between court and executive was then not able to be set clearly.

Thus, the approach in determining the scope of judicial review of tribunals and inferior courts had been moved to the position giving more importance to the separation of powers between judicial review and non-judicial functions. The significant step was taken in *A-G (Commonwealth) v R, ex p Boilermakers' Society of Australia* (1957) 95 CLR 529,¹³⁶ involving the determination of the scope of judicial review of the Commonwealth Court of Conciliation and Arbitration ('CCCA'). The HCA asserted that '*the doctrine of the separation of powers forbids the amalgamation of judicial and non-judicial functions*'.¹³⁷ On this basis, the CCCA was considered as a non-judicial body. The conferral of the judicial power on it was thereby unlawful because it conflicted with the separation of powers. As described in the previous chapter, this separation of judicial power was the starting point in emphasising the premise of the rigid separation of powers when discussing the scope of judicial review. The doctrinal approaches in determining the

¹³⁵ Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (3rd edn, OUP 2018) 192-194.

¹³⁶ (1956) 94 CLR 254.

¹³⁷ *ibid* 257.

scope of judicial review in cases have been operated with rigid mentality. This was done so through the ground of jurisdictional error. The significant cases, as they are the best in demonstrating influence of Australian legal culture on the approach, are those of *Craig* and *Kirk*.¹³⁸

In *Craig*, the claimant was charged with larceny and arson in the District Court of South Australia ('DCSA'), which held that the accused was without legal representation through no fault.¹³⁹ By relying on *Dietrich v The Queen*,¹⁴⁰ the judge considered that the trial should be postponed until further order. The claimant then argued with the HCA that the DCSA had committed a jurisdictional error because of the misunderstanding of the reasoning in *Dietrich*. Like *Cart*, it is questioned whether or not the highest court has the role to intervene in the proceedings of the DCSA, as an institution with an adjudicative function or not. However, it is clear that the judgments in *Craig* applied different ways from *Cart* in claiming the court's jurisdiction to intervene into the DCSA's decision. There are two significant connections between legal reasoning of the judgments in *Craig* and the rigid legal mentality of Australian judicial review constitutionalism.

First, instead of being abandoned as was the case in *Anisminic*, the distinction between jurisdictional and non-jurisdictional error was applied in *Craig* to determine the

¹³⁸ Although Aronson argued that jurisdictional error firstly appeared in public law in 1905, its current understanding has been developed around 1980s-1990s. *Craig* was an important step in doing so (Aronson, 'Jurisdictional Error and Beyond' (n 7) 253).

¹³⁹ n 47 [5].

¹⁴⁰ (1992) 177 CLR 292.

scope of judicial review of the DCSA.¹⁴¹ This was clearly expressed by Mr Doyle, a barrister responding to the judges in an oral pleading of *Craig* that

'We certainly do not advance what is sometimes called "the wide Anisminic notion" that any error of law is jurisdictional...

*This Court has not accepted Lord Diplock's view that the distinction between jurisdictional and non-jurisdictional errors was for practical purposes abolished.'*¹⁴²

The legal reasoning given in the judgment of *Craig* explained that, if an administrative decision contains a jurisdictional error, it exceeds its authority or power, and such an error will invalidate any order or decision of the executive.¹⁴³ This doctrine is directly compatible to the rigid separation of powers and concept of jurisdiction, analysed as an element in Australian judicial review constitutionalism. The legal reasoning of the judgment continues that *'an administrative tribunal lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law'*.¹⁴⁴ This was to say that the administrative action contains jurisdictional error and the court can conduct judicial review of it, when it is not in accordance with the principle of legality. The framework of legality starts to operate in accordance with 'jurisdictional error'.

¹⁴¹ n 47 [9]. The court clearly denied that it had abandoned the distinction between jurisdictional error and non-jurisdictional error ([13]).

¹⁴² n 3.

¹⁴³ n 47 [14].

¹⁴⁴ *ibid*

Second, this jurisdictional error doctrine was applied to judicial review of both a tribunal and inferior court.¹⁴⁵ However, what is jurisdictional error for tribunal and for inferior court is different according to their nature under the framework of powers in the Australian constitution. The judgment asserted that *'it is important to bear in mind a critical distinction which exists between administrative tribunals and courts of law'*.¹⁴⁶ On the one hand, an inferior court is composed of persons with either formal legal qualifications or practical training, and it exercises jurisdiction as part of a hierarchical legal system entrusted with the administration of justice under the Constitutions. On the other hand, a tribunal is composed of persons without formal legal qualifications and it is not part of the hierarchical judicial structure.¹⁴⁷ Since the DCSA is undoubtedly a court, the primary focus of discussion was upon what constitutes jurisdictional error on the part of an inferior court. This legal reasoning also obviously demonstrates the logic of the rigid separation of powers in the courts' determinations of the scope of judicial review, which is considered from statutory construction in a particular case. The transcript of legal argument of *Craig* clearly expresses this as follow.

'Justice Brennan: Do you wish to propound any criterion for determining whether an error is jurisdictional or not?

*Mr Peek: ...one can see things which do constitute it, such as a requirement to satisfy some definite condition precedent, often statutory, that an inquiry in relation to that will go to jurisdictional error...'*¹⁴⁸

¹⁴⁵ *ibid* [10].

¹⁴⁶ *ibid* [13].

¹⁴⁷ *ibid* [10].

¹⁴⁸ n 3.

Combining with the first point discussed above, an inferior court will fall into jurisdictional error for the purpose of the writ where it acts outside its scope of power. The judgment held that

‘Jurisdictional error is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its functions and power.’¹⁴⁹

The judgment then listed what can be regarded as jurisdictional error for inferior court. The categories are examples of the situations making the inferior court’s decision excess its jurisdiction.¹⁵⁰ Although the list is not exhaustive,¹⁵¹ it shows that what is regarded as jurisdictional error is rigidly considered from the nature of institution, according to the separation of powers prescribed in written document like constitution and statutes.

4.2 *Kirk*

The legal reasoning in *Kirk* not only confirmed the doctrine of jurisdictional error, considered from the framework of separation of powers in *Craig*,¹⁵² but it also entrenched

¹⁴⁹ n 47 [12].

¹⁵⁰ For example, ‘*An inferior court would... act wholly outside the general area of its jurisdiction in that sense if, having jurisdiction strictly limited to civil matters, it purported to hear and determine a criminal charge*’ (ibid). However, legal reasoning in *Kirk*, which will be analysed below, confirms this point that ‘*the Supreme Court held that Craig does not provide a rigid taxonomy of jurisdictional error. The instances of jurisdictional error by an inferior court identified there are only examples*’ (n 19 [73]).

¹⁵¹ This is the reason why scholars like Aronson comment that the Australian law also has a degree of pragmatism. This will be exemplified below.

¹⁵² n 19 [67]-[68].

how the doctrinal approach is linked to the rigid legal mentality of Australian judicial review constitutionalism.¹⁵³ Four main points are unpacked below.

First, the court in *Kirk* clearly applied a distinctive understanding of Australian constitutional values and frameworks analysed in Chapter 2 in justifying and limiting their scope of judicial review. In addition to the entrenchment of jurisdiction of the HCA by section 75(v) and Chapter III of the constitution premised in *Plaintiff S157/2002 v Commonwealth of Australia*,¹⁵⁴ the judgment of *Kirk* extended that section 73 of the Constitution entrenched State Supreme Court's jurisdiction similarly to the Court of the Queen's Bench in England.¹⁵⁵ It leads to the consequence that the HCA can review decision of the Australian State Supreme Courts in the same way as the UKSC reviews the Queen's Bench. Additionally, state parliaments may not validly deprive the State Supreme Court's supervisory jurisdiction in conducting judicial review, which is a '*mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court*'.¹⁵⁶ As Justice Spigelman stated in an extra-judiciary work, this legal reasoning in *Kirk* '*has completed a process of convergence between State and Commonwealth judicial review*'.¹⁵⁷ The judgment

¹⁵³ Aronson, Groves and Weeks argues *Kirk* as the most important HCA decision since *Craig* (n 4) [4.340].

¹⁵⁴ (2003) 211 CLR 476 in *Kirk* (n 19) [66].

¹⁵⁵ n 19 [95]-[97].

¹⁵⁶ *ibid* [98].

¹⁵⁷ Spigelman (n 14).

stated clearly that all of these entrenchments of jurisdictions of the HCA and State Supreme Courts are products of the Australian legal culture by describing that

*‘The supervisory jurisdiction exercised by the State Supreme Courts by the grant of prerogative relief or orders in the nature of that relief is governed in fundamental respects by principles established as part of the common law of Australia.’*¹⁵⁸

They are also regarded as the operation of the rule of law, securing *‘a level of judicial enforcement of the legal limits on administrative decision-making at both levels of government’*.¹⁵⁹ In the transcript of legal argument of the case, Mr. Hatcher, a barrister tied this to the federal framework of separation of powers that *‘In our respectful submission, the rule of law is assumed to operate under our Constitution and binds New South Wales as much as any individual in the Commonwealth’*.¹⁶⁰ Crawford and Goldsworthy also observe that *‘the decision in Kirk has been widely applauded, for enhancing the rule of law and harmonising the principles of public law that apply at the State and Commonwealth levels.’*¹⁶¹

Apart from that the scope of legislative power was also explained that it needs to follow the framework of separation of powers by not altering the authority of the court.¹⁶²

¹⁵⁸ n 19 [99].

¹⁵⁹ C Finn, ‘Constitutionalising Supervisory Review at State Level: The End of Hickman?’ [2010] Public Law Review 92.

¹⁶⁰ n 11.

¹⁶¹ Lisa Crawford and Jaffe Goldsworthy, ‘Constitutionalism’ in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (OUP 2018) 376-378.

¹⁶² n 19 [96].

The judgment clearly demonstrated that Australian judicial review constitutionalism has influence on this.

*'The operation of a privative provision is...affected by constitutional considerations...although a privative provision demonstrates a legislative purpose favouring finality, ...the extent to which the provision can be given an operation that immunises the decisions of an inferior court or tribunal from judicial review, yet remain consistent with the constitutional framework for the Australian judicial system.'*¹⁶³

This section points out that such '*constitutional considerations*' refer to the Australian legal culture. This legal reasoning limiting privative clauses according to the framework of separation of powers and written constitution was also expressed in the other sources such as judges' speeches. For example, Chief Justice Gleeson stated that

*'... Parliament's capacity to empower administrative action is fettered by the limits imposed by the Constitution upon its powers. And, as the Constitution assumes the rule of law, a question may arise as to the consequences of that assumption in this context.'*¹⁶⁴

Secondly, the judgment stated clearly that the abandoning of jurisdictional error in *Anisminic*, which rendered the decision ultra vires, is not a step that this Court has taken.¹⁶⁵ Instead, the scope of judicial review in Australia is determined by the distinction between jurisdictional and non-jurisdictional error. This doctrine functions by marking the relevant limits of administrative power. If the decision of the inferior court is beyond its framework

¹⁶³ ibid [93]. The judgment also explained this aspect at the federal level that '*In considering Commonwealth legislation, account must be taken of the two fundamental constitutional considerations pointed out in Plaintiff S157/2002 v The Commonwealth: ...s 75(v) of the Constitution [and]...Ch III*' ([96]).

¹⁶⁴ Chief Justice Gleeson, 'Courts and the Rule of Law' (The Rule of Law Series, Melbourne University, 7 November 2001).

¹⁶⁵ n 19 [65].

of power, it is regarded as containing a jurisdictional error, and therefore within the scope of judicial review by the State Supreme Court and HCA. The court will decide whether to intervene in actions, depending on whether or not the state executive or judicial power is excess to its jurisdiction. The judgment explicitly demonstrated that this doctrine is compatible with the analysed distinctive understanding of constitutional values in the Australian legal culture, particularly the rigid separation of powers. For example,

‘The observations made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts point to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context.’¹⁶⁶

Justice Spigelman also notes this connection in his secondary work that

‘The constitutional dimension of the distinction between jurisdictional and non-jurisdictional error places it at the centre of our administrative law jurisprudence. The distinction is necessitated in Australian law by our separation of powers doctrine which is, in many respects, more definitive, some would say more rigid, than that adopted by the constitutional law of other nations...’

In Kirk, ...the High Court has extended this protection and affirmed the centrality of the concept of jurisdictional error in Australian administrative law.’¹⁶⁷

Additionally, the conversation between Justice Hayne and Mr. Agius in the transcript of legal argument of *Kirk* also makes clear that jurisdictional error is a doctrine in complying the rule of law, requiring rigid separation of powers in Australia.

‘Justice Hayne: Now, yes, one matter of expressing that ground has been this notion of impossibility of compliance. It also had references to the rule of law too.’

¹⁶⁶ *ibid* [100].

¹⁶⁷ Spigelman (n 14).

*Mr Agius: But the rule of law is brought in aid because it is said that the way in which the section is being interpreted renders it impossible with compliance therefore it is in breach of the rule of law, that therefore there is jurisdictional error. That is the structure of the argument. That is what is being put against us...*¹⁶⁸

Leeming also concludes the meaning of jurisdictional error as an error made by a court or body exercising public power ‘*as to the limits of the authority*’ it has to decide in some matters.¹⁶⁹ This is an expression of how the concept of jurisdiction dominates the Australian determination of the scope of judicial review through the application of jurisdictional error. As Leeming observed,

*‘...the distinction [between jurisdictional and non-jurisdictional error] reflects the entrenched supervisory jurisdiction of the High Court and the Supreme Courts in relation to executive action, coupled with a fundamental conception that courts are different from persons and bodies exercising executive power in that they may and ordinarily will have some authority to decide question of law.’*¹⁷⁰

The compatibility of the jurisdictional error approach and the Australian legal culture can also be found in academic work. The most explicit one is those of Selway, who connects jurisdictional error to the particular understanding of many constitutional values, namely the separation of power, the concept of jurisdiction, the distinction between legality and merits, the distinction between the court and other governmental organs and the existence of the Australian written constitution, compared to the absence in the UK law;

¹⁶⁸ n 11. See also Boughy and Crawford (n 16) considering jurisdictional error as a doctrine for constitutional purpose in Australia.

¹⁶⁹ Leeming (n 10) 12, 46.

¹⁷⁰ *ibid* 58.

‘Australian courts must retain a distinction between jurisdictional errors and non-jurisdictional errors...Such a distinction is inherent in any analysis based upon separation of powers principles...’

... the constitutional context means that the courts cannot engage in merit review and are required to differentiate between jurisdictional errors and non-jurisdictional errors...

...When the role of the Commonwealth Constitution in identifying and limiting the role of the courts in judicial review is understood it is not surprising that countries with a written Constitution, such as Australia...have taken a more limited view of the proper role of judicial review than have countries with an uncontrolled Constitution, such as the UK...’¹⁷¹

Lastly, contrary to the complexity of the English one, Australian judicial review systematically ties the writ system to the approach of jurisdictional error. Cane and McDonald clarify this as follows;

*‘The grounds of judicial review...are tightly linked to the available remedies. Substantively, ‘jurisdictional error’ has become the conceptual lodestar of judicial review under s 75(v)...as the constitutional writs are available only for excess or denial of jurisdiction’.*¹⁷²

In summary, rather than applying various doctrines, the Australian law is confined to the approach of jurisdictional error because it corresponds to the particular understanding of constitutional values in the Australian landscape. As Aronson, Groves and Weeks state, *‘Kirk twice described the distinction between jurisdictional and non-jurisdictional error of law as useful. That was no accident’.*¹⁷³ It means that the rigid

¹⁷¹ Bradley Selway, ‘The Principle behind Common Law Judicial Review of Administrative Action – The Search Continues’ (2002) 30 Federal Law Review 217, 234-235.

¹⁷² Cane and McDonald (n 135) 30-31; See also Aronson, Groves and Weeks (n 4) [1.100], [1.110]; for example that *‘The language of jurisdictional error dominates Australia’s judicial review in the HC’s constitutional writ jurisdiction’.*

¹⁷³ Aronson, Groves and Weeks (n 4) [4.350].

separation of powers functions well with the distinction between jurisdictional and non-jurisdictional error.

Third, as shown above, while the various doctrines in *Cart* were determined by different applications, the consideration of jurisdictional error in Australian law has been applied in a relatively fixed way. Apart from legislative restrictions described above, the determination of the nature of institution was considered from the framework of separation of powers in the Constitution and particular statutory construction. According to the constitution, the ICNSW was regarded as ‘*a court of limited jurisdiction*’, which should not ‘*be the final judge of its exercise of power; it should be subject to the control of the courts of more general jurisdiction*’. It ‘*cannot be authoritatively determine questions of law, but that courts can*’.¹⁷⁴ The ICNSW cannot be turned into the superior court of the record by legislative restriction. Mr. Hatcher clearly stated this mentality in transcript of legal argument of the case that

‘...It would still be an inferior court for the purposes of Craig. It is a court of limited jurisdiction. The distinction that is drawn in Craig between administrative tribunal and an inferior court is a distinction we would say predicated upon the fact that a Court sits in a hierarchy at the apex of which sits this Court so its decisions as to law and fact are subject to review...

*Yes. It is a statutory court and it is subject to prerogative relief in the court of general jurisdiction in the State*¹⁷⁵

Justice Hayne responded to this through the concept of jurisdiction and the framework of separation of powers that

¹⁷⁴ n 19 [64], [69], [70] and [72].

¹⁷⁵ n 11.

‘...going to enforcing the exercise or restraining excess of jurisdiction by a court of limited jurisdiction, regardless of whether it is described as a superior or an inferior court. What is relevant is limits of jurisdiction.’¹⁷⁶

The courts are not required to engage in the balancing process of the rule of law and parliamentary sovereignty as the court in *Cart* did. Instead, they merely follow the framework of separation of powers prescribed in the written constitution in reaching the conclusion that the State Supreme Court has the jurisdiction to conduct judicial review of the ICNSW’s decision.

Apart from the framework of constitution, the nature of institution can also be systematically considered through statutory construction. The judgment held that

‘The most immediately relevant statutory context is found in the provisions that establish the inferior court, and regulate appeals from, or review of, its decisions. The decisions of many inferior courts are open to appeal or review for error of law... In the present case, a wider statutory context must be considered.’¹⁷⁷

Justice Gummow explicitly expresses this in the transcript of legal argument that

‘What is the nature of the jurisdictional error? Is it a case where you say there has been – it is so difficult to work out what the body appears to have thought it was doing, but one says there is constructively a failure to apply themselves to the statutory tasks.’¹⁷⁸

Mr. Hatcher, a barrister responded that

‘Yes... They have come to a view of the legislation and so construed the legislation as to make it impossible of compliance and we say that that

¹⁷⁶ *ibid.*

¹⁷⁷ n 19 [87]-[88].

¹⁷⁸ n 11.

cannot accord with the implications arising under the Australian Constitution...

*We do have to start with the statute, and it is a statute that, taken literally.*¹⁷⁹

This application of jurisdictional error considered from the constitution and statutory construction has also been recognised in judges' speeches and among scholars. For example, Chief Justice Gleeson stated that

*'...the statute in that case was construed to mean that the decision in question would not be invalidated on the ground of failure to conform to the limitations on power or authority, or the manner of its exercise, contained in the statute, provided that the decision was a bona fide attempt to exercise the power, that it related to the subject matter of the legislation, and that it was reasonably capable of reference to the power.'*¹⁸⁰

In the same vein, Leeming stated that *'...ultimately, it is the task of statutory construction, which will depend upon the individual legislative regime in its context... [in the application of jurisdictional error]'*¹⁸¹ Fisher also makes it clear that

*'such a doctrine [jurisdictional error] does indeed depend on the idea that statutes provide rigid frameworks that mark the boundaries of administrative power. Such boundaries can be policed through statutory construction...'*¹⁸²

This demonstrates that the Australian courts are unable to choose to intervene in an administrative action. Instead, they determine the scope of judicial review based on the

¹⁷⁹ *ibid.*

¹⁸⁰ Gleeson (n 164).

¹⁸¹ Leeming (n 10) 48.

¹⁸² Elizabeth Fisher, "Jurisdictional" Facts and "Hot" Facts: Legal Formalism, Legal Pluralism, and the Nature of Australian Administrative Law' (2015) 38 Melbourne University Law Review 968, 972.

subject matter of the case according to the rigid framework of separation of powers prescribed in the written constitution and statutory construction. The point is explicit when it is compared to the flexible English approach, in which the judge is not ‘rigidly’ required to consider a statute, but rather the overall intention of parliament in establishing a new structure of tribunals. Lord Brown of the UKSC stated this mentality clearly in an oral argument of *Cart* that *‘It is not the interpretation of the 2007 Act. It’s rethinking the common law in this new context. What’s a good idea? What’s the necessary extended to the rule of law?’*¹⁸³ Therefore, jurisdictional error has become an entrenched ground and central approach in determining the scope of judicial review because it fulfils this constitutional requirement well. The courts have not applied various and flexible doctrinal approaches to determine the scope of judicial review like their English counterparts.

Fourth, jurisdictional error is not only the doctrine in determining the scope of judicial review applied in *Craig* and *Kirk*, but also regarded as the central approach in the determination of the scope of judicial review in Australia. All the grounds of judicial review are questioned whether they are jurisdictional error or not. This is supported by scholars.¹⁸⁴ For example, Aronson clearly stated that

*‘[Jurisdictional error] used to apply only to judicial review of decisions of inferior courts, and that it used to have a very restricted meaning. From those early day, it now commands the whole field of common law judicial review in Australia.’*¹⁸⁵

¹⁸³ n 1.

¹⁸⁴ n 7. See also Cheryl Saunders, ‘Constitution as Catalyst: Different Paths within Australian Administrative Law’ (2012) 10 NZJPIL.

¹⁸⁵ Aronson, ‘Jurisdictional Error and Beyond’ (n 7) 249-250.

The transcript of legal argument of *S20/2002* also demonstrates that, rather than the distinction between error of law and fact applied in England, the Australian courts apply jurisdictional error in determining their scope of judicial review.

*‘Justice Gummow: That is right, but you do not need to talk about error of law and error of fact. It is just a jurisdictional error...’*¹⁸⁶

This was also shown when Justice Gaudron replied to Mr. Besanko in the oral pleading of *Enfield* that

*‘[It] depends... on what is the effective decision where there has been error in approach or error in procedures or perhaps jurisdictional error... The question, ultimately, must be would people be acting with lawful authority if these errors or any one of these errors were detected?’*¹⁸⁷

It is of significance that this jurisdictional error is not one that was applied prior to *Anisminic* of English law. As Justice Gaudron stated this clearly in her oral pleading of *Craig* that *‘...if there is an error about those you have, I would have thought, a jurisdictional error, quite apart from anything that happened in Anisminic’*.¹⁸⁸ In English law, error of law has been adapted flexibly from the distinction between jurisdictional and non-jurisdictional errors to the distinction between law and fact in *Anisminic*, and a variety of justifications and doctrines in *Cart*. Conversely, jurisdictional error, which is an entrenched ground and central approach for determining the scope of judicial review, is regarded as the Australian deep-water legality. Its application to maintain the rigid

¹⁸⁶ The Transcript of legal argument in *Re Minister for Immigration and Multicultural Affairs; Ex p Applicant S20/2002* (2003) 198 ALR 59.

¹⁸⁷ The Transcript of legal argument in *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135.

¹⁸⁸ n 3.

separation of powers in Australia will be further demonstrated throughout Chapter 4 to 6. More cases will be unpacked in order to demonstrate the rigidity in applying the jurisdictional error approach to determine all common law grounds of judicial review through the framework of separation of powers prescribed in the written constitution and statutory construction, rather than through judicial indetermination.

4.3 Products of the Australian Legal Culture

*'Kirk acknowledged that Craig's list of jurisdictional errors was malleable, and (in some places) unhelpful...It might or might not apply in individual circumstances, depending on the statutory and constitutional contexts.'*¹⁸⁹

This quote, which Aronson, Groves and Weeks comment on the approach of jurisdictional error in Australian law under the heading of *'Kirk's pragmatic flexibility'*, demonstrates that all legal systems contain both a degree of pragmatism and formalism in determining the scope of judicial review. Therefore, these conclusory label of formalistic or formalism cannot entirely represent the determination of the scope of judicial review in Australia.

While scholars discuss the functionality of the doctrine,¹⁹⁰ this section unpacks four points of doctrinal approaches in the determination of the scope of judicial review in *Craig* and *Kirk*, in comparison to the English law. Firstly, while the English courts can explain constitutional values in interpreting legislation restricting and justifying their jurisdiction of judicial review in various ways, the Australian courts do so in a relatively fixed way.

¹⁸⁹ Aronson, Groves and Weeks (n 4) [4.350].

¹⁹⁰ For example, Aronson supports the catalogue of jurisdictional error as useful doctrine for Australian law because it limits the legislative capacity to cut the scope of judicial review, at the same time allows the courts to respect the administrative need for finality in subordinate decision-making. (ibid; Aronson, 'Jurisdictional Error and Beyond' (n 7); Aronson, 'Jurisdictional Error without the tears' (n 7)).

For example, the rule of law is understood as emphasising the separation of powers, and being operated by a written constitution. Rigidly, legislative restrictions cannot operate in the way depriving the courts' jurisdiction according to the separation of powers. Secondly, rather than variation of doctrines, jurisdictional error has been applied as an entrenched doctrine in the determination of the scope of judicial review of tribunal and inferior court's decision. This is because it is compatible to the Australian judicial review geography. Thirdly, the application of jurisdictional error is considered from the framework of a written constitution and statutory construction. Fourthly, jurisdictional error becomes a central approach in deciding the scope of judicial review in Australia. Through the process of unpacking, all of these doctrinal approaches can be linked to the Australian legal culture in a clearer manner.

5. Conclusion

The overall conclusion of the scope of judicial review of the decisions of quasi-judicial institutions with legislative restriction seems conclusory at error of law and jurisdictional error in England and Australia. On the surface level, the reality appears to be that both English and Australian courts can choose to intervene whenever they wish to do so. However, this statement is demonstrated to be imprecise in this chapter. For the English law, although the courts have flexibility to consider the nature of the institution, interpret privative clauses and determine whether the tribunal's decision is covered by error of law or not, their judicial criteria are based on a balance of parliamentary sovereignty and the rule of law. As for the Australian law, the statement that the courts manipulate the determination of the scope of judicial review based on their desire is even more incorrect. Not only do the courts have to rigidly follow the framework of separation of powers

prescribed in the written constitution and statutory construction in determining their jurisdiction based on the subject matter, but the approach to do so is also confined to jurisdictional error. A snapshot of the examinations is provided in the table below.

Doctrinal Approaches	English Law	Australian Law
Justifications	Directly influenced from elements in English Judicial Review Constitutionalism But various ways by the individual judges in explaining them	Directly influenced from elements in Australian Judicial Review Constitutionalism Explained in relatively fixed way
Doctrines	Various between the individual judges namely Collateral Fact Theory/ Theory of Limited Review (<i>Pre-Anisminic</i>) Distinction between Law and Fact (<i>Anisminic</i>) Jurisdictional Error (<i>Cart</i>) Judicial Policy (<i>Cart</i>) Second-Tier Appeal (<i>Cart</i>)	Entrenched at Jurisdictional Error (<i>Craig and Kirk</i>)
Applications	Varies and flexible depending on the doctrine	Rigidly considered from the framework of separation of powers, prescribed in the written constitution and statutory construction
Status of the Ground	Error of Law is adapted flexibly in the determination of the scope of judicial review including this area of judicial review of the decisions of tribunals and inferior courts	Jurisdictional Error as entrenched and central approach in all areas of determination of the scope of judicial review
Nature of Institution and Legislative Restriction	Status of the UT was considered in various ways by the individual judges	Both factors are answered in a relatively rigid way through the framework of separation of powers

Different from other works in the field, this chapter does not argue for an English or Australian approach as preferable over the other, but upholds a more inclusive

understanding of the laws by comparing and considering all the doctrinal approaches as being embedded in the English and Australian legal cultures. For the former, the various doctrinal approaches are the results of the nature of a balancing process between parliamentary sovereignty and the rule of law, the absence of an unwritten constitution and the fluid separation of powers. For the later, the retention of jurisdictional error is influenced by the rigid legal mentality of the Australian legal culture.

The analysis in this chapter is the groundwork for the next chapters. This chapter sets up the arguments that error of law and jurisdictional error are English and Australian deep-water legality respectively. The next chapters will explore the different ways other grounds of judicial review are included into the English error of law and Australian jurisdictional error. It will be demonstrated that the examination of other grounds of judicial review go in the same direction as this chapter. For example, various doctrinal approaches have been used flexibly to determine jurisdictional fact as an exceptional ground to review factual issues in the contemporary English cases. The relationship between jurisdictional fact and error of law is unclear and debatable; conversely, jurisdictional fact is an entrenched ground of judicial review and subset of jurisdictional error in Australia. All of these doctrinal approaches are products of the English and Australian legal cultures. While this will strengthen the contrast between the flexibility and rigidity of English and Australian judicial review, a comprehensive understanding cannot be complete without the process of unpacking and diving into deep-water.

IV. CHAPTER FOUR

INFLUENCE OF THE LEGAL CULTURES ON JURISDICTIONAL FACT

1. Introduction

*‘Where the existence or non-existence of a fact is left to the judgment and discretion of a public body..., it is duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power.’ (Lord Brightman, *Puhlhofer v Hillingdon London Borough Council*)¹*

*‘The standard grounds of judicial review disclaim review on the merits, or review simply for factual error.’ (Justice Weinberg, *Cabal v Attorney-General of the Commonwealth*)²*

The different doctrinal approaches on the grounds of error of law and jurisdictional error, applied by the courts in *Cart* and *Kirk*, in determining the scope of judicial review of a quasi-judicial institution where there is a legislative restriction on review, were examined in the previous chapter. It was found that the flexibility of English law and the entrenchment of Australian law were influenced by the English and Australian legal cultures respectively. Hence, the purpose of this chapter is to explore the influence of these legal cultures on another area with a similar root, namely, the scope of judicial review of a factual issue.

¹ [1986] 1 AC 484, 518.

² [2001] FCA 583 [49].

The above statements of Lord Brightman of the HL and Justice Weinberg of the Federal Court of Australia clearly describe the principles similarly applied by the English and Australian laws on a surface level. Generally, the courts do not conduct judicial review of the factual issues of an administrative action.³ However, in some situations, they consider that some kinds of fact make an administrative action unlawful and claim the jurisdiction to conduct judicial review of them. Jurisdictional fact appears as a ground of judicial review,⁴ indicating unlawful and reviewable factual issues in both England and Australia. The courts determine the legality of factual determination by considering whether Parliament pre-conditionally requires it through the act to be reviewed and, if they consider that it does, they have the jurisdiction to conduct judicial review of the rejection or misinterpretation of the evidence related to that jurisdictional fact.⁵

However, the English and the Australian courts have different ways in determining jurisdictional fact as a ground of judicial review. On the one hand, Lord Hope stated in *R (Jones) v First-tier Tribunal* that ‘a pragmatic approach should be taken to the dividing line between law and fact’.⁶ As discussed in Section 3 of Chapter 1, although the label of

³ The reasons for this position will be explored in Section 2 below.

⁴ As discussed in Section 4 of Chapter 1, jurisdictional fact can be defined by various statuses, such as ground, doctrine or approach, all of which refer to the same thing, namely, the rule the courts apply to determine their jurisdiction of judicial review.

⁵ Mark Leeming, *Authority to Decide: the Law of Jurisdiction in Australia* (The Federation Press 2012) 13; Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action; Text, Cases and Commentary* (4th edn, LexisNexis Butterworths 2017) [12.3.9]; Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (6th edn, Thomson Reuters Australia 2017) [4.470]; Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (3rd edn, OUP 2018) 182; William Wade and Christopher Forsyth, *Administrative Law* (11th edn, OUP 2014) 208, 234.

⁶ [2013] UKSC 19 [16].

‘pragmatic’ or ‘pragmatism’ is conclusory and cannot represent the entire picture of English law, it can ‘superficially’ indicate flexibility of the English approach in determining the scope of judicial review. Jurisdictional fact has been determined by the various doctrinal approaches in different cases. On the other hand, the transcript seeking leave to appeal the case to the HCA in *Timbarra* below demonstrates that jurisdictional fact has been an entrenched ground of judicial review, under the central approach of jurisdictional error in Australia.

‘Mr Flick: The consequence of this decision is that the fact in issue... becomes a fact which is reviewable...It is a fact which becomes open to scrutiny by a superior court...’

Justice Gummow: That depends on whether it is a jurisdictional fact....The principles as to how one determines whether something is a jurisdictional fact are settled...’⁷

The methodologies of legal culture and deep-water legality will be utilised in this chapter in an attempt to comprehensively understand these different approaches. The examination will be structured in the same way as the previous chapter. The reason for making jurisdictional fact the focus of this chapter will be explained in Section 2. After that, flexibility of the justifications and applications which the English courts apply to determine jurisdictional fact as a ground of judicial review will be unpacked in Section 3, from the legal reasoning in *R v Secretary of State for the Home Department, Ex p*

⁷ The Transcript of legal argument in *Timbarra Protection Coalition Inc Ross Mining NL & Ors* (1999) 46 NSW LR 55.

Khawaja,⁸ *E v Secretary of State for the Home Department*,⁹ *(R) A v Croydon LBC*,¹⁰ until the described ‘*pragmatic distinction between law and fact*’ in *Jones*.¹¹ In terms of comparison, the legal reasoning in *Timbarra Protection Coalition Inc v Ross Mining NL & Ors*,¹² *Corporation of the City of Enfield v Development Assessment Commission*¹³ and later cases, namely *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources*¹⁴ and *Plaintiff M 70/2011 v Minister for Immigration and Citizenship*,¹⁵ will be unpacked in Section 4 to demonstrate that the Australian courts have relatively fixed justifications and applications in regarding jurisdictional fact as an entrenched ground of judicial review.¹⁶

Importantly, such flexibility and entrenchment will also be connected to the English and Australian legal cultures. In fact, this kind of connection between doctrinal approaches and the constitutional order of the legal systems has been mentioned by many

⁸ [1984] AC 74 (HL).

⁹ [2004] EWCA Civ 49.

¹⁰ [2009] UKSC 8.

¹¹ n 6. These cases are cited by judges and scholars as leading cases in this area, for example, Paul Craig, *Administrative Law* (8th edn, Sweet & Maxwell 2016) Chapter 17; Mark Elliott, *Administrative Law: Text and Materials* (Mark Elliott and Jason Varuhas eds, 5th edn, OUP 2017) 65-81.

¹² (1999) 46 NSW LR 55.

¹³ (2000) 199 CLR 135.

¹⁴ [2007] FCA 1480; [2008] FCAFC 3.

¹⁵ [2011] HCA 32.

¹⁶ These cases are widely cited by scholars as leading cases in this area, for example, Creyke, McMillan and Smyth (n 5) [12.3.9]; Mark Aronson, ‘The Resurgence of Jurisdictional Facts’ (2001) 12 *Public Law Review* 17.

judges and scholars. The prominent example is Justice Kirby of the HCA, who made the following statement in the transcript of legal argument of *Enfield*:

‘They come from a different history and have a different purpose, and though there is a discretion at the end of each of them, they just have to proceed in a different way. That is not the first time that has happened in the inherited law from England.’¹⁷

An in-depth examination of this statement will be made in this chapter by unpacking the different ways in which the English and Australian courts determine jurisdictional fact from the legal reasoning of leading cases, and connecting them to their ‘different history and purpose’ based on the concept of legal culture.

Finally, the general statement of the thesis that the legal cultures of England and Australia deeply influence their courts’ determination of the grounds of judicial review will be affirmed in the last section. Additionally, jurisdictional fact is also connected to the analysis in the previous chapter. While the relationship between jurisdictional fact and error of law is non-fixed and debatable in English law, it is clear that jurisdictional fact is a subset of jurisdictional error in the Australian legal system. Furthermore, some of the associations between jurisdictional fact and the grounds related to the substantive exercise of discretion will be introduced in the final section of this chapter and analysed in the next.

2. Judicial Review of Factual Issues at Surface and Deep Levels

Parallel to the previous chapter, there is a tension between two sets of arguments related to the scope of judicial review of factual issues at the surface level of English and

¹⁷ The Transcript of legal argument in *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135.

Australian law. On the one hand, the courts should not conduct judicial review because factual determinations are an area of administrative authority; on the other hand, the courts justify their jurisdiction to conduct judicial review of some factual issues by their role to protect the rule of law. They then need to elaborate lines to indicate the factual issues that need to be reviewed and these are different in the English and Australian law based on the different legal cultures. Through the deep-water perspective, the determination of jurisdictional fact as a ground of judicial review demonstrates this prominently.

2.1 Distinction between Law and Fact

In addition to Lord Brightman's quote at the beginning of this chapter, the distinction between law and fact has been stated in a number of English cases. This approach is a continuation of the premise in *Anisminic*, which was analysed in the previous chapter. As Craig concludes, '*The effect of Anisminic, as interpreted in Racal, O'Reilly and Page, is that all errors of law became susceptible to review*'.¹⁸ However, the courts will leave factual and discretionary issues to the executive to decide. For example, Lord Hailsham made the following statement in *Chief Constable of the North Wales Police v Evans*;

*'It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions...'*¹⁹

This principle has also been recognised by scholars; for example, Cane stated that

¹⁸ Craig (n 11) [16-039]. See also Wade and Forsyth (n 5) 219-234; Timothy Endicott, *Administrative Law* (4th edn, OUP 2018) 319-330.

¹⁹ [1982] 1 WLR 1155, 1160. See also *Piglowska v Piglowski* [1999] 1 WLR 1360, 1362.

‘Traditionally, bodies exercising judicial review jurisdiction...on point of law have been reluctant to hold decisions and rules illegal on the basis of factual errors. In other words, they have given administrators more freedom in deciding issues of fact than in deciding issues of law.’²⁰

Likewise, apart from Justice Weinberg’s statement at the start of this chapter, Chief Justice Mason of the HCA also made this assertion in *Australian Broadcasting Tribunal v Bond*²¹ by citing Justice Brennan in *Waterford v The Commonwealth* stating that ‘There is no error of law simply in making a wrong finding of fact’,²² and Justice Menzies, who made the following statement in *R v The District Court; Ex parte White*;

‘Even if the reasoning whereby the Court reached its conclusion of fact were demonstrably unsound, this would not amount to an error of law... To establish some faulty (e.g. illogical) inference of fact would not disclose an error of law.’²³

Australian scholars like Aronson, Groves and Weeks also mention this distinction, as follows;

‘One of the most fundamental distinction in legal doctrine is that between law and fact.... Statutory mechanisms for seeking judicial correction of tribunals and other decision-makers are frequently restricted to correction for errors of law, not fact.’²⁴

²⁰ Peter Cane, *Administrative Law* (5th edn, OUP 2011) 182.

²¹ (1990) 170 CLR 321 [88].

²² (1987) 163 CLR 54, 77.

²³ (1966) 116 CLR 644, 654.

²⁴ Aronson, Groves and Weeks (n 5) [4.10].

Similarly, Creyke, McMillan and Smyth observe that *'Law and Fact is now deeply rooted in public law'*.²⁵ However, this premise is usually presented in Australian literature in terms of the distinction between legality and merits rather than between law and fact.²⁶ Indeed, they have a 'similar implication at the surface level'. A factual evaluation can be considered as the merits part of an administrative decision, while a legal issue refers to the legality. As Creyke, McMillan and Smyth assert, *'the law and fact distinction is anchored in the legality and merits distinction'*.²⁷

In short, whether presented in relation to law and fact or legality and merits, the English and Australian courts do not generally conduct judicial review of the factual determination in an administrative action. The reasons for this limitation have been widely discussed, but they can be conceptualised as two limbs, the first of which is simply related to democracy. Based on the separation of powers in general term, parliament entrusts and delegates the evaluation of facts to the administrative authority; therefore, it would be disrespectful of the legitimacy of parliament for the courts to assume the role of decision-makers.²⁸

The second limb is related to the institutional competence of the executive. Because of their expertise and experience in specific fields of public administration, particularly

²⁵ Creyke, McMillan and Smyth (n 5) [12.5.30].

²⁶ This moves into the territory of deep-water legality, which will be discussed in Section 4 below.

²⁷ Creyke, McMillan and Smyth (n 5) [12.3.1].

²⁸ Jeffrey Jowell, 'Of Vires and Vacuums: The Constitutional Context of Judicial Review' in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing 2000); Aronson, Groves and Weeks (n 5) [4.20].

technical ones, such as industrial law, trademarks and professional discipline,²⁹ administrative agents can better understand and interpret a factual reference³⁰ in using a rule than judges.³¹ In addition, if the court overturns the decision, it has to restart the entire process of gathering and analysing evidence relevant to the finding of facts. This is not only resource and time-consuming, but it also has an impact on correctly evaluating the facts.³² Since facts are naturally complex and repeated by way of a historical narrative, no two-people perceive the same facts in precisely the same way.³³ When the decision-makers examine the facts before the courts, they find inevitable differences in the material placed before them. Although it is the same material, its meaning and evaluation differ based on the varied experience and backgrounds of the court and the decision-makers. Reverting back to the issue of the expertise of administrative agents, there is no reason to believe that the court can identify the facts more accurately through a judicial hearing than the decision-maker can through a fact-finding process.

It is evident that the democratic and institutional competences of the executive in determining factual issues are parallel to the reasons that limit the scope of judicial review of the decision of tribunals and inferior courts, which were analysed in the previous

²⁹ Eg Fisher explains that an Environmental Impact Assessment is a process that involves the consideration of scientific fact, public participation and public administration (Elizabeth Fisher, 'Jurisdictional' Facts and "Hot" Facts: Legal Formalism, Legal Pluralism, and the Nature of Australian Administrative Law' (2015) 38 Melbourne University Law Review 968). See also Creyke, McMillan and Smyth (n 5) [7.5.14]-[7.5.17], [12.5.3].

³⁰ Cane (n 20) 182-183.

³¹ Aronson, Groves and Weeks (n 5) [4.20].

³² Cane (n 20) 182-183.

³³ Endicott (n 18) 341-343.

chapter. Likewise, these reasons are explained through the concept of deference in some of the literature.³⁴ As mentioned earlier, the language of deference is uncertain and fluctuates in different legal systems; therefore, it is not the focus of this chapter. However, judges' perception of deference can be an additional indicator of the influence of legal cultures. An obvious example will be shown in the sections below, while the concept of deference is debatable in English law, the HCA firmly rejected it in the determination of the jurisdictional fact in *Enfield*. These are also explainable through the English and Australian legal cultures.³⁵

2.2 Courts' Reviews of Some Kinds of Fact

At this juncture, the general premise has been demonstrated that the English and Australian courts shall not conduct judicial review of the factual aspects of administrative action. However, this is not the only aspect at the surface level of the scope of judicial review of factual issues in England and Australia. In reality, the courts frequently claim their jurisdiction to re-gather facts or re-determine some factual issues based on the premise that *'The result can be as unjust when an administrative body gets the facts wrong as when it gets the law wrong...'*³⁶ Therefore, the courts have a role to conduct a judicial review of such factual issues in the name of protecting the rule of law.

³⁴ Matthew Lewans, *Administrative Law and Judicial Deference* (Hart Publishing 2016) 5; Aronson, Groves and Weeks (n 5) [4.40]-[4.60].

³⁵ In English law, the validity in debating the concept of deference is obvious in the area of judicial review of discretion, particularly on proportionality. This will be connected to the English legal culture in the next chapter.

³⁶ Endicott (n 18) 341.

This position has been generally described by English judges and scholars. For example, Wade and Forsyth cite a number of English cases in asserting that '*Certain mistakes of fact can carry an administrative authority...outside its jurisdiction*'.³⁷ Hence, the judicial control of a factual issue of administrative action '*promotes the rule of law*'.³⁸ In the same vein, Cane contends that '*In general, the law requires administrators to answer questions of fact consistently with relevant available evidence*'.³⁹ Likewise, in Australia, a judicial review of the determination of the fact is also justified by the rationale of the rule of law. For example, in *Bond*, Justice Mason stated that '*to expose all findings of fact, or the generality of them, to judicial review would expose the steps in administrative decision-making to comprehensive review by the courts*'.⁴⁰ Creyke, McMillan and Smyth also contend that '*A decision that is based on an incorrect fact can be unfair decision*'.⁴¹

2.3 Understanding Jurisdictional Fact by means of Deep-water Legality

The two sets of general principles in determining the scope of judicial review of factual issues have been described up to this point. While the courts are justified in conducting judicial review of factual issues based on the rule of law, the democratic reasons and institutional competences of the executives make them hesitate to do so. The implication is that the courts in most legal systems, including those of England and Australia, have to

³⁷ Wade and Forsyth (n 5) 208 citing *Terry v Huntington* (1679) Hardr 480.

³⁸ Endicott (n 18) 356.

³⁹ Cane (n 20) 182.

⁴⁰ n 22 [44].

⁴¹ Creyke, McMillan and Smyth (n 5) [12.1.2].

establish lines when determining whether or not the disputed factual issue needs to be reviewed and they do so based on the principle of legality. As Cane stated, '*not all errors of fact are errors of law* [in the sense that brings illegality to an administrative action]'.⁴² The court will only conduct a judicial review of a factual determination when it is 'unlawful'. Therefore, 'the scope of judicial review of a factual issue' is dependent upon 'the court's understanding of what legality shall cover'.

Among the grounds of judicial review of a factual issue, there are some which are 'not controversial' in terms of whether or not the court has jurisdiction to conduct judicial review. The prominent one is the '*No Evidence Rule*', which is applicable when there is no evidence (at all) to satisfy the statutory element of the decision. The English and Australian courts similarly justify their scope of judicial review of this kind of factual issue.⁴³ The factual determination that lack of evidence is undoubtedly unlawful. This ground is commonly 'included in the courts' understanding of legality', and not the focus of the following sections, since the courts do not need deep-water, but merely surface-water legality to determine their scope of judicial review.

Instead, the focus of the next sections will be the grounds of judicial review of factual issues which are 'controversial' based on whether the court has the jurisdiction to conduct judicial review or not. Jurisdictional fact is specifically selected for a close

⁴² Cane (n 20) 180.

⁴³ For English law, see *R v Criminal Injuries Compensation Board, ex p Philippe* [1999] 2 AC 330. For Australian law, see *The Queen v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100.

examination in this chapter among various grounds in this middle area of the spectrum.⁴⁴ This is because its definition in general sense is similar in England and Australia, relating to a review of the ‘objective fact’, whether the court considers that the statute requires the factual reference to be reviewed or not.⁴⁵ However, as mentioned earlier, the English and Australian courts have different ways of determining jurisdictional fact as a ground of judicial review. The Australian courts are entrenched in their determination, while the English courts adopt a more flexible approach.

Most scholars discuss the different approaches of the English and Australian law in terms of their advantages and disadvantages. For example, Williams argues that the line distinguishing jurisdictional from non-jurisdictional fact in England is unclear, and thus, needs to be restructured.⁴⁶ Elliott and Craig debate whether or not jurisdictional fact should be replaced by the four criteria established in *E*.⁴⁷ In Australia, although the validity of the ground has been entrenched, some scholars have also commented on its application. For example, Aronson points out that jurisdictional fact has been developed in a way that threatens the framework of the separation of powers by enabling the courts to expand their jurisdiction without considering the statutory construction.⁴⁸ The following sections do not

⁴⁴ The other grounds in this group relate to the ones of the substantive exercise of discretion. The different kinds of relationship between them and jurisdictional fact in England and Australia can also be tracked by the legal cultures. This will be discussed in detail in the next chapter.

⁴⁵ n 5.

⁴⁶ Rebecca Williams, ‘When is an Error not an Error? Reform of Jurisdictional Review of Error of Law and Fact’ [2007] PL 793.

⁴⁷ n 9. This will be exemplified below.

⁴⁸ Aronson (n 16).

contain this kind of analysis, but it is demonstrated that ‘these different doctrinal approaches’ are the result of the different understanding of the English and Australian courts of ‘whether jurisdictional fact is covered by (deep-water) legality or not’, which is embedded in their different legal cultures.

3. English Doctrinal Approaches

The analysis in this section will be divided into two parts in order to demonstrate that the English doctrinal approaches are products of the English legal culture. Firstly, the distinctive process in which the courts in *Khawaja, E, R (A) v Croydon* and *Jones* applied various malleable justifications and applications to determine the status of jurisdictional fact as a ground of judicial review in England is illustrated in Sections 3.1 to 3.3. Subsequently, this distinctive process will be connected to the flexible English legal culture in Section 3.4. This pattern is different from the analysis of *Cart* in the previous chapter in that the elements of English judicial review constitutionalism, namely twin concepts and the common law justification for judicial review, are mentioned in the judgments of the case.

3.1 Prior to *E*

Before *Anisminic*, jurisdictional fact had been applied in the English law in parallel to the distinction between jurisdictional and non-jurisdictional error. If the court considered a factual reference as a pre-condition required by the statute and the administrative agencies failed to satisfy it, the court conducted a judicial review and quashed the administrative

action.⁴⁹ Afterwards, as discussed in the previous chapter, the judgments in *Anisminic* and *Page* abandoned the distinction between jurisdictional and non-jurisdictional error, and adopted the approach that all errors of law are jurisdictional errors. Therefore, whether or not jurisdictional fact remains a valid ground of judicial review is questionable.

Generally, jurisdictional fact has been categorised by scholars as a valid ground of judicial review by referring to *Khawaja*.⁵⁰ In this case, the appellant was an immigrant from India, who had been granted an entry certificate to the UK in 1974. However, he did not disclose the fact that he had been married in 1973 and this was only discovered later. At this point, an immigration order was made detaining the appellant as '*an illegal entrant*', defined by Section 33(1) of the Immigration Act 1971 as '*a person unlawfully entering or seeking to enter in breach of a deportation order or of the immigration laws, and includes also a person who has so entered*'. Then, the appellant sought a judicial review from the court to quash this factual determination regarding him as an illegal entrant.⁵¹

It was clear from the judgments of this case that the scope of judicial review was determined through the ground of jurisdictional fact. When reviewing the phrase '*illegal entrant*', the court considered whether its function had been delegated by parliament or

⁴⁹ Eg *White and Collins v Minister of Health* [1939] 2 KB 838; *R v Fulham, Hammersmith and Kensington Rent Tribunal, ex parte Zerek* [1951] 2 KB.

⁵⁰ Williams (n 46) 794-795.

⁵¹ n 8, 74F-75B.

not. For example, by referring to cases like *R v Secretary for the Home Department, Ex parte Zamir*, which Lord Fraser made the following statement;

‘On this question, ...an immigration officer is only entitled to order the detention and removal of a person who has entered to the country by virtue of an ex facie valid permission if the person is an illegal entrant. That is a “precedent fact” which has to be established.’⁵²

Lord Wilberforce also clarified this with the following assertion;

‘The main argument on this part of the case [Zamir] was that cases where it was sought to remove an “illegal entrant” were part of a category of “precedent fact” cases - where an administrative discretion exists if, but only if, some precedent fact is established to exist, and the existence of which is independently triable by a court...The present, as other illegal entrant cases, does involve the making of a finding of fact by the administration as can be seen by an examination of the administrative process.’⁵³

In terms of justification, the two sets of arguments supporting and limiting the courts’ jurisdiction in conducting judicial review were described in the judgments. For example, Lord Wilberforce mentioned the following;

‘How far can, or should, the court find the facts for itself, how far should it accept, or consider itself bound to accept, or entitled to accept, the findings of the administrative authorities? On principle one would expect that, on the one hand, the court, exercising powers of review, would not act as a court of appeal or attempt to try or retry the issue. On the other hand, since the critical conclusion of fact is one reached by an administrative authority (as opposed to a judicial body) the court would think it proper to review it in order to see whether it was properly reached, not only as a matter of procedure, but also in substance and in law.’⁵⁴

⁵² [1980] AC 930 in *ibid* 96F-97G.

⁵³ *ibid* 99F-100D, 106E-109F (Lord Scarman).

⁵⁴ *ibid* 100H-101D.

It was emphasised in the conclusion of the judgment that

‘...whatever the theory may be, the courts have in general been willing and able to review for themselves the factual basis...[Conversely], by the fact that of necessity extensive fact-finding operations have to be carried out by the immigration authorities which cannot be repeated by the reviewing court....’⁵⁵

Likewise, Lord Scarman declared that

‘The principle formulated was that the courts will not intervene to quash the decision of a statutory authority unless it can be shown that authority erred in law, was guilty or a breach of natural justice or acted unreasonably.’⁵⁶

On the other hand, the judge made the following assertion;

‘The court’s duty is to examine into the truth of the facts set forth in the return... where the exercise of executive power depends upon the precedent establishment of an objective fact, the courts will decide whether the requirement has been satisfied.’⁵⁷

In terms of the application, Lord Wilberforce considered whether the factual determination in the present case was a jurisdictional fact or not by comparing it to the context in the other cases.⁵⁸ He concluded that *‘...they [the determinations in cases] have not always consistently or correctly stated the basis on which such review should be made’*.⁵⁹ Lord Bridge supported this conclusion by stating that *‘all of these approaches*

⁵⁵ ibid 104E-104G.

⁵⁶ ibid 109F-109H.

⁵⁷ ibid 110E-110F. See also 120E-120G (Lord Bridge).

⁵⁸ ibid 101D-104E.

⁵⁹ ibid 104G-104H.

rely upon the statutory juxtaposition of the immigration officer's power to refuse leave to enter and thereupon to order removal of the unsuccessful aspiring entrant'.⁶⁰

In short, jurisdictional fact was accepted as a valid ground of judicial review in England in *Khawaja* and it was justified by two sets of values, namely the rule of law and the institutional competence of the decision-maker. However, the application how the judges identified the factual reference as a jurisdictional fact was not explained in detail,⁶¹ only that it depended on the situation. Then, it was concluded that, in this case, the court had the jurisdiction to review the determination of the phrase '*illegal errant*', since it was a precedent fact. Therefore, the court could require the submission or rejection of evidence related to the interpretation of this phrase.⁶²

After *Khawaja*, there were a few cases in which the courts applied jurisdictional fact to indicate that the factual determination was reviewable.⁶³ However, the application of jurisdictional fact was still not certain in these cases. Subsequently, Lord Justice Carnwath established the criteria for the court to review certain factual issues in *E*. Since then, there has been a debate about whether this new approach in *E* replaces jurisdictional fact like the way *Anisminic* replaced jurisdictional error.

⁶⁰ *ibid* 121H-122A.

⁶¹ This particularly applies when compared with later English cases, as well as Australian cases, as will be revealed in the next sections.

⁶² n 8, 97D-98E, 105B-106B, 113F-114D, 125H-126B, 128B-129C.

⁶³ *Puhlhofer* (n 1) and *Dowty Boulton Paul Ltd v Wolverhampton Corporation (No 2)* [1976] Ch13.

3.2 *E*

The appellants in *E* applied for asylum in the UK, but the application was declined by the Secretary of State for the Home Department. Afterward, new objective evidence related to the determination of the facts became available during the hearing and the date of promulgation in the process of appeal to the Immigration Appeal Tribunal ('IAT')⁶⁴ and the appellants presented it.⁶⁵ However, the IAT refused to consider this new evidence,⁶⁶ whereupon the case was taken to the CA on the ground that an important part of the IAT's decision was based on ignorance or mistaken facts.⁶⁷

The issue in this case was that the IAA limits the right to appeal to the CA merely on a '*point of law*'.⁶⁸ Rather than applying jurisdictional fact like the judges in *Khawaja* did, Lord Justice Carnwath established a new approach to determine whether or not the re-submission of evidence related to the determination of the factual reference was included in his understanding of legality (regarded as a '*point of law*'). This demonstrates that the English courts can be flexible in determining the scope of judicial review of factual issues. How this flexibility in the doctrinal approaches is connected to the English legal culture is discussed under three points below.

⁶⁴ Under Part III of Schedule 4 of the Immigration and Asylum Act 1999 ('IAA').

⁶⁵ n 9 [6]-[9].

⁶⁶ *ibid* [11].

⁶⁷ *ibid* [1].

⁶⁸ Paragraph 23 of Schedule 4 of the IAA Act and paragraph 30 (2)(c) of the Immigration and Asylum Appeals (Procedure) Rules 2003.

Firstly, Lord Justice Carnwath presented two sets of arguments in justifying and limiting the scope of judicial review, but he used terminologies that were different from those used in *Khawaja*. On the one hand, he mentioned ‘*the principle of finality*’, which meant that the court should respect the factual determination of the decision-maker and the IAT, because their power was conferred on them by parliament.⁶⁹ On the other hand, the determination of the IAT needed to be supervised by the court because there was ‘*a risk of serious injustice when an important evidence had been overlooked*’.⁷⁰ Furthermore, the balancing process was explicitly conducted in the judgment. For example, it held that the court’s intervention in the administrative factual determination should be limited to law,⁷¹ as he explained in the following statement;

‘We will consider first the question of error of fact as a ground for review in administrative law...the new evidence shows that the basis of the IAT’s decision in each case was mistaken, and that such a mistake can provide grounds for an appeal even where it is limited to questions of law.’⁷²

These statements imply that the courts should only conduct judicial review of the serious factual determinations.⁷³ Although it was not as clearly expressed as it was in *Cart*, this legal reasoning reflected the twin concepts of parliamentary sovereignty and the rule of law. On the one hand, the rule of law justifies the court’s conduct of a judicial review of some factual issues of administrative action; on the other hand, the jurisdiction is limited

⁶⁹ n 9 [29], [35].

⁷⁰ *ibid* [35].

⁷¹ *ibid* [40], [42] and [43].

⁷² *ibid* [37].

⁷³ *ibid* [38].

because the executives' authority to determine the facts, as delegated by Parliament, shall be final.

Secondly, Lord Justice Carnwath admitted that it was '*paradoxical*' for the court to find a fixed doctrine in dividing law and fact.⁷⁴ He described various doctrines that had been applied for this purpose; for example, the no evidence rule in *R v Criminal Injuries Compensation Board, Ex p A*⁷⁵ and the misunderstanding or ignorance of an established and relevant fact in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*.⁷⁶ He also attempted to relate a breach of the rules of natural justice in factual determination to unfairness.⁷⁷ Importantly, Lord Justice Carnwath explained that the court can be flexible in applying these doctrines in particular cases, as follows;

*'...the application of these principles will vary according to the power or duty under review; and, in particular, according to whether it is a duty to decide a finite dispute (such as that of a tribunal), or a continuing responsibility (such as that of a minister or local authority).'*⁷⁸

Apart from consolidating all the possible grounds for the court to determine whether or not a factual question is within the scope of judicial review, Lord Justice

⁷⁴ *ibid* [44].

⁷⁵ [1999] 2 AC 330 in *ibid* [45].

⁷⁶ [1977] AC 1014 (HL) in 9 [46].

⁷⁷ n 9 [48]-[49].

⁷⁸ *ibid* [43]. It is recognised that the quasi-judicial nature of a tribunal was also a factor in this consideration. This also demonstrates the flexibility of the English law, which will become more obvious in the discussion of *Jones* below.

Carnwath also ‘rearranged’ four criteria in a new application that related factual determination to ‘unfairness’ as follows;

‘First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter.

Secondly, the fact or evidence must have been “established”, in the sense that it was uncontentious and objectively verifiable.

Thirdly, the appellant must not have been responsible for the mistake.

Fourthly, the mistake must have played a material part in the tribunal’s reasoning.’⁷⁹

Furthermore, Lord Justice Carnwath added a degree of flexibility to these criteria by saying that they are applied differently in different areas of public law.⁸⁰ He argued that *‘the context was important’*;⁸¹ therefore, this doctrine was an exception to the traditional one that was applied to a review of the submission of evidence in other cases.⁸²

This variation of doctrines not only reveals the way in which legality can be flexibly understood by the English courts, but it also leads to a third point related to the validity of jurisdictional fact as a ground of judicial review. Although Lord Justice Carnwath did not specifically mention *‘jurisdictional fact’* in the judgment, the second and fourth criteria, namely *‘objective’* and *‘play a material part in the tribunal’s reasoning’*, are akin to identifying a reviewable precedent fact. This will be obvious in the next section, since they are parallel to the criteria of *‘objectivity’* and *‘essentiality’* in determining the

⁷⁹ *ibid* [66].

⁸⁰ *ibid* [72].

⁸¹ *ibid* [74].

⁸² Eg the *‘Ladd v Marshall Principle’*, which is strictly applied in asylum cases (*ibid* [68]-[70]).

jurisdictional fact in *Timbarra* and *Enfield* based on Australian law. These doctrinal approaches demonstrate the English courts' flexibility in determining the validity of the grounds of judicial review of factual issues. Rather than being fixed on jurisdictional fact, the criteria Lord Justice Carnwath applied in *E*, which looked like those used to review jurisdictional fact, were explained in terms of the doctrine of unfairness.

3.3 After *E*

After that, the application in *E* was applied in later cases,⁸³ apart from which, the relationship between jurisdictional fact and the criteria in *E* has been widely debated by scholars. For example, Wade and Forsyth categorise the criteria in *E* as a ground for reviewing factual issues apart from jurisdictional fact. The courts will conduct a judicial review when an erroneous and decisive fact is either jurisdictional, based on no evidence or unfair.⁸⁴ In the same vein, Elliott described the approach in *E* in the section of '*Supervision of the Fact-finding Process*', apart from jurisdictional fact in the section of '*Applying Statutory Criteria to the Facts*'.⁸⁵ Craig also explains the existing law as follows;

*'...if the claimant can show that the error concerns a jurisdictional fact then the court will review the determination and will not require the claimant to prove the four criteria in the E case. In other instances the claimant must show that the four criteria in the E case have been met.'*⁸⁶

⁸³ Eg *R (Tran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 (See Elliott (n 11) 75-76).

⁸⁴ Wade and Forsyth (n 5) 234.

⁸⁵ Elliott (n 11) 65-76.

⁸⁶ Craig (n 11) [17-019].

However, in terms of functionality, Craig suggests that the criteria of unfairness in *E* should be ‘*the default position*’ for the consideration of all kinds of errors of fact. This is mainly explained by the appropriateness of the judicial function in conducting judicial review.⁸⁷ Interestingly, Craig links this to legality in the following statement;

*‘The reality is that the conception of legality within judicial review is used as a label to cover a variety of more specific grounds of challenge relating to the rule of law. The courts have on a number of previous occasions forged the link between factual mistake and error of law in order to facilitate judicial intervention...’*⁸⁸

Instead of using the existing categorisation of the grounds of judicial review, Craig argues that ‘*...the reasoning in the E case was following a well-trodden path*’⁸⁹ based on its characteristic of balance;

*‘...the perspective roles of courts and initial decision-makers in deciding whether a factual error has occurred. There are ...well-developed tests for maintaining judicial control over facts without the courts thereby assuming the role of primary fact-finder.’*⁹⁰

In other words, Craig argues that the approach in *E* is ‘*advantageous*’ for searching for ‘*legality*’ in particular cases because it well balances the tension between judicial and executive functions in deciding factual issues.

Although corresponding with Craig’s argument, this section has a different purpose. Rather than finding a solution to what the English approach should be like, it is

⁸⁷ *ibid* [17-014]-[17-035].

⁸⁸ *ibid* [17-018].

⁸⁹ *ibid*.

⁹⁰ *ibid* [17-036].

emphasised in this section that the flexibility between jurisdictional fact and the criteria in *E*, as well as all the academic debates, is embedded in the flexibility accorded to the English courts to understand legality. This ‘deep understanding of legality’ is rooted in the nature of English law, which will be clearly demonstrated in the next section with a comparison of Australian law, in which the validity of jurisdictional fact is much more entrenched based on the Australian legal culture.

R (A) v Croydon is another case that demonstrates the fluctuation of English law in determining jurisdictional fact. Rather than following the approach in *E*, the judgments reintroduced jurisdictional fact in reviewing a precedent fact, but developed a clearer application than *Khawaja*.

3.3.1 *R (A) v Croydon*

The appellants in *R (A) v Croydon* claimed that they were less than 18 years of age and were thus eligible for accommodation provided by the National Asylum Support Service under the Children’s Act 1989. However, their claim was refused for the reason that they were not ‘*children in need within their area who appears to them to require accommodation*’ according to Section 20 (1) of the Act. The appellants then sought a judicial review from the High Court, the CA, and then the UKSC.

Rather than taking the approach in *E*, the UKSC revived the jurisdictional fact doctrine from *Khawaja*, stating that there were two factual determinations in this case, namely, whether or not the child was ‘*in need*’, and whether that person was ‘*a child*’ or not. Baroness Hale, Lord Hope and other judges went into a similar direction that parliament intended both questions to be decided on the authority of the decision-maker,

but subjected to a review of the courts.⁹¹ Parallel to the analysis of *E* above, there are three points of flexibility in determining jurisdictional fact in the case.

Firstly, in terms of justification, all the judges asserted that two sets of values were involved in determining the scope of judicial review of factual issues, but in a different way from *Khawaja* and *E*. Rather than the principle of finality and the interest of justice, Baroness Hale stated that '[The determination]... *still requires us to decide which questions are to be regarded as setting the limits to the jurisdiction of the public authority and which questions simply relate to the exercise of that jurisdiction*'.⁹² The decision would be unlawful if the decision-maker did not have the power to decide. This view was supported by Lord Hope, who explained that the intervention of the court was an '*appropriate process of judicialisation*'.⁹³ This reasoning further demonstrates flexibility accorded to the English courts in terms of providing various explanations of constitutional value in determining the scope of judicial review of the facts.

Secondly, similar to *E*, Baroness Hale discussed the various doctrines the court could apply when reviewing the factual determination.⁹⁴ However, in this case, the phrase '*child*' was applied to a question of '*jurisdictional or precedent fact of which the ultimate arbiters are the courts rather than the public authorities involved*'.⁹⁵ Baroness Hale clearly

⁹¹ n 10 [26]-[29], [32]-[34], [50]-[51], [53], [66]-[68].

⁹² *ibid* [31].

⁹³ *ibid* [48], [54].

⁹⁴ *ibid* [26].

⁹⁵ *ibid* [29].

mentioned the precedent cases namely *Bunbury v Fuller*, *Zerek* and *Khawaja*.⁹⁶ This was the homecoming of the ground of jurisdictional fact. Lord Hope also supported the view that ‘...where the exercise of executive power depends upon the precedent establishment of an objective fact, the courts will...decide whether the requirement has been satisfied’.⁹⁷ This legal reasoning illustrates that the status of jurisdictional fact as a ground of judicial review is not fixed, but flexible in England.

Thirdly, the judgments in *R (A) v Croydon* further clarified method for the application of jurisdictional fact that the court considers the proper function in conducting judicial review from construction of the relevant statutes.⁹⁸ For example, Baroness Hale asserted that it was not appropriate to apply the definition of a child in Section 105(1), since the word needed to be read into Section 20(1).⁹⁹ Two main reasons were given for considering that this provision was a question of jurisdictional fact. The first related to legislative history in that Section 20(1), which succeeded Section 2 of the Child Care Act 1980, was consolidated from the Children Act 1948, which was established to assist children who needed help in the post-war welfare state.¹⁰⁰ Parliament delegates the duty to help children under the relevant age to the local authorities, but the courts are able to review their actions as the ultimate arbiter.¹⁰¹ Baroness Hale asserted that there was no evidence

⁹⁶ *ibid* [30] citing *Bunbury v Fuller* (1853) 9 Ex 111; n 49; n 8.

⁹⁷ *ibid* [52].

⁹⁸ *ibid* [31]-[33], [51]-[54].

⁹⁹ *ibid* [14].

¹⁰⁰ *ibid* [15].

¹⁰¹ *ibid* [29].

that this purpose had changed in the process of drafting and considering the Review of Child Care Law, Report to Ministers of an Interdepartmental Working Party (1985) and the White Paper and the Law on Child Care and Family Services (1987).¹⁰²

Another factor was the consideration of various duties related to the care of children established in the 1989 Act. Parliament leaves some of these to the authority of decision-makers, while others are intended to be controlled by the courts based on the principles of judicial review.¹⁰³ Many of the latter provisions relate to the determination of the age of the child.¹⁰⁴ For example, Section 46 gives the police the power to remove a child to suitable accommodation; however, the court can review this exercise of power when someone who is not a child is being removed.¹⁰⁵ Another example is Section 25, which is relatively akin to Section 20(1). Baroness Hale asserted that the court can intervene in the decision if a person who is not a child is locked up in this way.¹⁰⁶

Based on these reasons, Baroness Hale concluded that the ‘*wording of the 1989 Act*’¹⁰⁷ gave the court the jurisdiction to conduct judicial review of the factual determination of the decision-maker in this case.¹⁰⁸ The word ‘*child*’ was a jurisdictional fact. Parliament intended the court to consider whether or not the pre-condition is satisfied

¹⁰² ibid [16].

¹⁰³ ibid [17].

¹⁰⁴ ibid.

¹⁰⁵ ibid [18].

¹⁰⁶ ibid [19].

¹⁰⁷ ibid [29].

¹⁰⁸ ibid [21], [32].

in the exercise of statutory power.¹⁰⁹ In the same vein, Lord Hope also identified the scope of judicial review using statutory language and schemes.¹¹⁰

The flexibility of the English court to determine jurisdictional fact as a ground of judicial review has been demonstrated up to this point. The approach in *E* seemed to replace the doctrine of jurisdictional fact in *Khawaja*, but the doctrine was revived with a clearer application in *R (A) v Croydon*. The last step in emphasising this distinctively flexible process of English law is to unpack the judgments in *Jones*.

3.3.2 Jones

In *Jones*, a lorry crashed into the claimants' vehicle, as the driver attempted to avoid hitting a man who suddenly ran into the road. The claimants applied to the Criminal Injuries Compensation Scheme 2001 ('CICS') asking for compensation for the serious injuries they had sustained in the accident. However, the Social Entitlement Chamber rejected the application on the ground that it was not a '*crime of violence*' based on paragraph 8 of the scheme, because the primary aim of the man who ran into the road was to commit suicide, not to cause hardship to others or be deliberately reckless. Hence, he lacked the mens rea for the offence stipulated in Section 20. The case was appealed to the FTT and the UT, both of which dismissed it. Then, the claimants sought a judicial review by the CA, which held that the man would have foreseen that his action would possibly harm other road

¹⁰⁹ *ibid* [24]-[25].

¹¹⁰ *ibid* [53].

users; therefore, the FFT had erred in law, and its decision would be quashed. The case was then brought to the UKSC.

Although it was not labelled in the judgments, the determination of the scope of judicial review in this case was considered on the ground of jurisdictional fact. The court considered whether or not a factual reference, namely a '*crime of violence*', was a precondition required by Parliament to be reviewed by court.¹¹¹ This consideration was made through the statutory construction. For example, Lord Hope pointed out that the aim of the CICS in compensating personal injury arose from a great variety of offences.¹¹² Although this kind of crime was defined in Section 20 of the Person Act 1861 as '*inflicting bodily injury, with or without weapon*', this definition was not precise. It should be taken to mean either the actual intention to do harm or recklessness.¹¹³ It was unnecessary for a person to have been able to foresee that his unlawful act might cause physical harm or the gravity of that harm described in the section.¹¹⁴ Lord Hope supported that various definitions of the phrase '*a crime of violence*' had been applied in a variety of cases.¹¹⁵

Apart from the CICS and the Person Act 1861, the judgments also considered the court's jurisdiction through a new framework of a tribunal established under the TCEA.¹¹⁶ The UT is a specialist institution appointed by Parliament to develop the structure and

¹¹¹ n 6 [12]-[18].

¹¹² *ibid* [7]-[8].

¹¹³ *ibid* [9]-[10].

¹¹⁴ *ibid* [11].

¹¹⁵ *ibid* [12]-[14].

¹¹⁶ *ibid* [16]-[20], [42]-[43].

consistency of the decisions of different panels at the first-tier level. Parallel to the analysis of *Cart* in the previous chapter, the court shall not have the authority to change the decisions of the UT.¹¹⁷

Having considered all the aforementioned factors, Lord Hope and Lord Carnwath held that whether or not a crime of violence had taken place was primarily a decision for the tribunal, not the appellant courts. Since Parliament had entrusted the UT to develop a structured guidance on the use of the phrase. Lord Hope made the following statement;

*‘So that the expertise of tribunals at the first tier and that of the Upper Tribunal can be used to best effect. An appeal court should not venture too readily into this area by classifying issues as issues of law which are really best left for determination by the specialist appellate tribunals.’*¹¹⁸

This legal reasoning once again demonstrates the flexibility accorded to the English courts in providing various justifications and applications to determine the jurisdictional fact. This led Lord Hope to conclude, as quoted at the start of this chapter that ‘*A pragmatic approach should be taken to the dividing line between law and fact*’. Similarly, Lord Carnwath made the asserting of the judgment of Lord Hoffman in *Moyna v Secretary of State for Work and Pensions* that ‘*The idea that the division between law and fact should come down to a matter of expediency might seem almost revolutionary...*’¹¹⁹

¹¹⁷ *ibid* [41].

¹¹⁸ *ibid* [16].

¹¹⁹ *Moyna v Secretary of State for Work and Pensions* [2003] 1 WLR 1929 in *ibid* [46].

3.4 Products of the English Legal Culture

The above analysis has demonstrated flexibility and fluctuation of the English law in determining jurisdictional fact as a ground of judicial review through the process of unpacking various doctrinal approaches from the legal reasoning of leading cases. These are captured in a snapshot in the table below.

English Doctrinal Approaches		
Status of Jurisdictional Fact	Flexible and Fluctuating	
	<i>Khawaja</i>	Applied as a valid ground to review the precedent fact
	<i>E</i>	Debatable whether it should be replaced by the approach in <i>E</i> or not
	<i>R (A) v Croydon</i>	Clearly stated as a valid ground to review the precedent fact
	<i>Jones</i>	Similarly application as <i>R (A) v Croydon</i> , but not termed as jurisdictional fact
Justifications	Flexible	
	<i>Khawaja</i>	Duties of the courts in intervening or leaving the factual determination to the authority of decision-makers
	<i>E</i>	Interest of justice Vs the principle of finality
	<i>R (A) v Croydon</i>	Concept of limited jurisdiction Vs appropriate process of judicialisation
	<i>Jones</i>	Expertise and consistency of tribunal system and parliament trust
Application	Flexible	
	<i>Khawaja</i>	Not explained in detail, but regarded as dependent upon the particular case
	<i>E</i>	Four criteria lead the factual determination to unfairness. Some criteria, namely ‘objectively verifiable’ and ‘play a material part of the reasoning’ are compatible to those used to identify the precedent fact
	<i>R (A) v Croydon</i>	Considered from statutory construction
	<i>Jones</i>	Considered from statutory construction and nature of institution

Aside from the described jurisdictional fact, the factual issues are reviewed through other doctrines in some English cases, for example, ‘the application of law to fact’ in *R v Monopolies and Mergers Commission Ex p South Yorkshire Transport Ltd.*¹²⁰ These overlaps between the grounds of judicial review of factual issues lead English scholars to propose a solution by ‘fixing certain flexibilities of the grounds’. Apart from Craig arguing that the approach in *E* was more comprehensive, Endicott suggests categorising the doctrines and adopting an analytical approach in reviewing errors of law and fact to relieve ‘the uncertainty, variability and inconsistency’ of the cases. This is regarded as ‘pragmatic articulation’.¹²¹

However, the above analysis demonstrates that these suggestions to ‘fix certain flexibilities’ of the grounds do not reflect what is really happening in the legal reasoning of the cases. The English courts will never establish a sharp view of the determination of jurisdictional fact. Therefore, the suggestion of one scholar is not prioritised over the proposals of others in this section; rather, it is on digging deeply into the root of all the doctrinal approaches in the distinctively flexible process of the English law, since they are all products of the English legal culture. Two main elements are discussed below.

Firstly, there is no clear boundary of power between the executive and the courts without a written constitution. Although the courts have considered their jurisdiction through statutory construction in some cases, they have still demonstrated flexibility by means of applying various justifications and factors that they have regarded as being the

¹²⁰ [1993] 1 WLR 23.

¹²¹ Timothy Endicott, ‘Questions of Law’ (1998) 114 LQR 292.

most appropriate for determining the jurisdictional fact in a particular case. This will become obvious when comparing the English law to its Australian counterpart in the next section. With a written constitution that prescribes a framework of the separation of powers, Australian courts have a more rigid legal mentality in determining jurisdictional fact. This results in them applying more fixed justifications and applications in their deliberations.

Secondly, the degree of malleability of the English approach is increased by the balance of the twin concepts of parliamentary sovereignty and rule of law, both of which need to be considered when the courts determine the scope of judicial review. On the one hand, they provide various justifications for claiming the jurisdiction of judicial review. On the other hand, they have to respect the delegation of the authority to determine factual issues from Parliament to the executive, defined in various terms. This nature of balancing process between the two sets of values also enables the English courts to flexibly adopt and rearrange various applications, ranging from the criteria in *E* to the statutory construction and institutional competence of the UT in *Jones* in their determination of jurisdictional fact. The different approaches in the Australian law, where there are no twin concepts for the courts to balance, will be demonstrated in the next section.

4. Australian Doctrinal Approaches

In this section, the doctrinal approaches in determining jurisdictional fact as a ground of judicial review will be unpacked from the legal reasoning in *Timbarra*, *Enfield* and some later cases and demonstrated as being embedded in the Australian legal culture. Different from the English law, the distinctive element of Australian judicial review

constitutionalism, namely the rigid federal framework of the separation of powers, is directly expressed in the judgments. Therefore, it is not necessary to divide the argument in this section into two lines, since the connections between the doctrinal approaches and the legal culture can be demonstrated. The conclusion will be reached that the doctrinal approaches applied by the Australian courts do not fluctuate in their legal reasoning like the analysed English ones. However, they are confined to jurisdictional fact, which is regarded as an entrenched subset of jurisdictional error and determined through the rigid framework of separation of powers prescribed in the written constitution and statutory construction. Parallel to the jurisdictional error analysis in the previous chapter, the rigidity of jurisdictional fact is also embedded in the Australian legal culture.

4.1 *Timbarra*

Traditionally, jurisdictional fact was applied to define the jurisdiction of a court or tribunal by considering ascertainable facts, such as monetary value;¹²² however, it was likely to be held that the factual determination was not jurisdictional in these cases.¹²³ Hence, in the late 1990s, the courts began to regard more objective facts as jurisdictional facts.¹²⁴ Nevertheless, the ground was not fully discussed until *Timbarra*, where the granting of development consent from Tenterfield Shire Council to Ross Mining NL & ORS was challenged by Timbarra Protection Coalition Inc. on the grounds that it would have a

¹²² E Bullen, 'Legislative Limits on Environmental Decision-making: The Application of the Administrative Law Doctrines of Jurisdictional Fact and Ultra Vires' (2006) 23 EPLJ 265, 267.

¹²³ Nevertheless, the ground has been accepted as valid since then, for example, *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369, 391.

¹²⁴ Eg *Londish v Knox Grammar School* (1997) 97 LGERA 1; *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297.

negative effect on the frogs, mammals, bats and owls in the area. Based on Section 77(3)(d1) of the Environmental Planning and Assessment Act 1979 (NSW) ('EPA'), Ross Mining had to submit a proposal, together with a Species Impact Statement ('SIS') because such a development was *'likely to significantly affect threatened species, populations or ecological communities, or their habitats'*. Since the consent to develop had been granted without the submission of a SIS, it was invalid.¹²⁵

It can be seen that the main issue in this case was similar to those in the English cases analysed above, namely, considering whether a factual reference, *'likely to significantly affect threatened species'* in this case, should be reviewed by the court or not. However, while the English law is flexible in this respect, it has been entrenched by the judgments of the NSW Court of Appeal that the scope of judicial review of this kind of factual determination must be considered on the ground of jurisdictional fact. The connection between the doctrinal approaches and the Australian legal culture can be discussed under three points.

Firstly, jurisdictional fact were clearly regarded as a ground of judicial review in *Timbarra*, since Chief Justice Spigelman declared that the issue in this case was whether or not the phrase in Section 77(3)(d1) was a jurisdictional fact.¹²⁶ Secondly, in terms of justification, it was explicitly held that the determination was based on the premise of the rule of law requiring rigid separation of powers. Chief Justice Spigelman held that it is important to consider whether Parliament intended the power to decide the factual

¹²⁵ n 12 [3]-[22].

¹²⁶ *ibid* [34].

reference to be given to the primary decision-maker or not, and if that was its intention, then it is not jurisdictional fact.¹²⁷ As he stated;

*'[When]...Parliament intends the primary decision maker to determine the existence or non-existence of the fact, the reason for the court not to intervene is either a rule of law of statutory interpretation as to the intent of Parliament, or the application of a rule of the common law to the exercise of a statutory interpretation.'*¹²⁸

Conversely, if Parliament intended the factual determination to be subjected to the court, it would be a jurisdictional fact. According to Chief Justice Spigelman;

*'Where the process of construction leads to the conclusion that Parliament intended that the factual reference can only be satisfied by the actual existence (or non-existence) of the fact or facts, then the rule of law requires a court with a judicial review jurisdiction to give effect to that intention by inquiry into the existence of the fact or facts.'*¹²⁹

Although the primary decision-maker has the expertise and experience to preliminarily decide the issue, the court has considerable experience of making ultimate judgments.¹³⁰

This understanding of legality is clearly parallel to the distinctive Australian judicial review constitutionalism. If the factual determination is intended to be within the boundary of administrative authority, the court has no jurisdiction to conduct judicial review of it. However, if the factual reference is considered as to be a jurisdictional fact,

¹²⁷ *ibid* [44].

¹²⁸ *ibid* [41].

¹²⁹ *ibid* [40].

¹³⁰ *ibid* [90].

the court has the jurisdiction to protect the decision-maker's boundary of power by ensuring that the intention of parliament is fulfilled.

Thirdly, Chief Justice Spigelman provided a clear application for the courts to identify a jurisdictional fact based on statutory construction.¹³¹ Whether explicitly or implicitly,¹³² the statutory formation and meaning of the words chosen by Parliament must be able to indicate the purpose and objective underlying the legislation.¹³³ Additionally, two criteria for considering statutory construction were proposed in the judgment. Firstly, the factual determination must '*objectively exist in fact*', and secondly, the legislature must intend that '*the absence or presence of the fact is important so that to invalidate action under the statute*'.¹³⁴ These two criteria were defined as '*objectivity and essentiality*',¹³⁵ and it was further explained that they were interrelated because the indicators of essentiality often suggest objectivity.¹³⁶ Apart from that, the judgment clarified that, in cases where a factual reference appears in a statutory formation that contains words that refer to the mental state of the primary decision-maker, such as 'opinion', 'belief' and 'satisfaction', although not necessarily, the construction is often against a conclusion of

¹³¹ *ibid* [28], [37].

¹³² *ibid* [48],

¹³³ *ibid* [39].

¹³⁴ *ibid* [37].

¹³⁵ *ibid* [38].

¹³⁶ *ibid*.

jurisdictional fact. It is likely that Parliament leaves decision-makers the discretion to decide the factual reference.¹³⁷

After that, Chief Justice Spigelman used these applications to consider whether or not the phrase '*likely to significantly affect threatened species*' was a jurisdictional fact. In doing so, he considered a number of factors of the provisions in the EPA. For example, he interpreted the legislative scheme in this case differently from the other cases because it was concerned with Section 77(3)(d1) of the Act, not Section 90(1)(c3).¹³⁸ Importantly, Chief Justice Spigelman held that Section 77 did not involve the exercise of statutory power by consent,¹³⁹ but established the requirements of an application culminating in Section 91(1).¹⁴⁰ Therefore, Section 77(3)(d1) did not confer a power on a decision-maker, but imposed a requirement on an applicant.¹⁴¹ This was the key reason that the factual reference was more likely to be an objective fact.¹⁴² Subsequently, Chief Justice Spigelman mentioned several cases to demonstrate that the court needed to distinguish a fact that had to be adjudicated upon during the course of the inquiry from one that was essentially preliminary to the decision-making process.¹⁴³

¹³⁷ ibid [42].

¹³⁸ Eg *Londish* (n 124) in ibid [25]-[29], [31]-[33], [45]-[47].

¹³⁹ ibid [47]-[48]

¹⁴⁰ ibid [49]-[50].

¹⁴¹ ibid [33].

¹⁴² ibid [50]-[51].

¹⁴³ ibid [52]-[60] citing *Ex parte Hulin; Re Gillespie* (1965) 65 SR (NSW) 31, 33; *Parisienne Basket Shoes* (n 123).

The additional point was that there was no distinction between the phrases ‘*is critical habitat*’ and ‘*is likely to significantly affect threatened species*’ in Section 77(3)(d1). Where the section referred to ‘*critical habitat*’, there was no issue of how this appeared to a consensual authority.¹⁴⁴ The consideration went further to other legislature that critical habitat in Section 4(1) of the EPA had the same meaning as in the Threatened Species Conservation Act 1995 (NSW), in which there was no issue of ‘*appearance*’, ‘*opinion*’ or ‘*satisfaction*’. Whether or not a critical habitat is proposed to be developed is entirely a matter of objective fact;¹⁴⁵ therefore, it is unlikely that Parliament intended a significant difference in the statutory treatment of the two cases.¹⁴⁶

Finally, Chief Justice Spigelman considered the purpose of the EPA in that a SIS enables the consensual authority’s decision-making process to be better informed with the aim of enhancing the quality of the decision-making process by ensuring that detailed information is available to primary decision-makers in a systematic and well-ordered way.¹⁴⁷ This makes it more likely for the court to indicate that the EPA intended the requirement to prepare a SIS to be both objectively ascertained and essential.¹⁴⁸ The courts should be able to control this statutory requirement.¹⁴⁹

¹⁴⁴ *ibid* [61].

¹⁴⁵ *ibid* [62].

¹⁴⁶ *ibid* [64].

¹⁴⁷ *ibid* [73].

¹⁴⁸ *ibid* [76].

¹⁴⁹ *ibid* [77].

Having considered all of these reasons, Chief Justice Spigelman held that the factual reference was a jurisdictional fact.¹⁵⁰ As demonstrated in the previous section, although the English courts also read into the relevant legislature in *R (A) v Croydon* and *Jones*, the application of statutory construction is far more detailed in *Timbarra*. The Australian courts strictly focus on the wording of the legislature based on a clear framework of objectivity and essentiality. This is influenced by the importance given by the rigid legal mentality to the framework of separation of powers, which Chief Justice Gleeson and Justice Gummow also attach to this approach by repeatedly stating it in the transcript of legal argument of *Timbarra*, as follows;

Mr Flick: ...the point of importance for this Court is what is the extent to which a court should project itself into the factual merits of a decision where

--

Justice Gummow: That depends on the way Parliament has drawn its legislation when it creates these jurisdictions...

Mr Flick: ... to answer your Honour, it is a question of statutory construction...

*Chief Justice Gleeson: This case turns upon the application of well-settled principles to the construction of the State statute in question and does not...raise an issue of a kind that warrants the grant of special leave to appeal.*¹⁵¹

In short, the judgments in *Timbarra* applied clear justifications and applications in deciding whether or not the factual reference was a jurisdictional fact within the scope of judicial review. All of these doctrinal approaches are dominated by the Australian legal

¹⁵⁰ *ibid* [81], [94].

¹⁵¹ n 7.

culture. This connection was determined was further entrenched in later cases, the most significant of which was *Enfield*.

4.2 *Enfield*

In this case, the Corporation of the City of Enfield challenged a decision of the Development Assessment Commission, which approved a provisional development plan proposed by Collex Waste Management Services Pty Ltd to alter and add to an existing liquid waste treatment plant on its land on the grounds that the project belonged to ‘*a special industry*’, which was a non-complying development.¹⁵² Based on Section 35(3)(a) of the Development Act (South Australia), the Commission had to refuse consent unless it concurred after notifying the public.¹⁵³ This case was brought to the Supreme Court of South Australia, and thereby the HCA, to decide whether or not the factual reference, namely ‘*special industry*’ was a jurisdictional fact.¹⁵⁴ Entrenched from *Timbarra*, there were three points of connection between the doctrinal approaches to determine the jurisdictional fact in *Enfield* and the Australian legal culture, as explained below.

Firstly, the judgments affirmed the justification for judicial review relating to the Australian judicial review constitutionalism. On the one hand, it was explained that the court had no jurisdiction to conduct judicial review if the issue was not a jurisdictional fact

¹⁵² n 13 [2], [9].

¹⁵³ *ibid* [3]-[8], [10]

¹⁵⁴ *ibid* [12].

because there were ‘grey areas of uncertainty to the practical judgment’.¹⁵⁵ The judgment of Justice Brennan in *Quin* was described to support this point that

*‘The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.’*¹⁵⁶

On the other hand, the judgment reserved the right for the court ‘to inquire into the relevant facts to decide jurisdictional fact’.¹⁵⁷ This perspective was shown by referring to the US case namely, *Marbury v Madison*, he stated that ‘An essential characteristic of the judicature is that it declares and enforces the law which determines the limits of the power conferred by statute upon administrative decision-makers’.¹⁵⁸ Apart from Section 75(v) of the Constitution, Justice Gaudron also linked the justification to the concept of jurisdiction that administrative bodies are compelled to operate within the relevant limitations of their powers,¹⁵⁹ and the courts should ensure that they only exercise their administrative powers within the limits of their jurisdiction and in accordance with the laws that govern their exercise.¹⁶⁰ She stated that ‘Anything less is an abdication of their judicial responsibility’.¹⁶¹

¹⁵⁵ *ibid* [38].

¹⁵⁶ *ibid* [44] citing *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

¹⁵⁷ *ibid* [38].

¹⁵⁸ *ibid* [43].

¹⁵⁹ *ibid* [54]-[55].

¹⁶⁰ *ibid* [56].

¹⁶¹ *ibid* [60].

Interestingly, while the concept of deference allowing various intensities of judicial review is debatable in English law, it was completely rejected in *Enfield*, when the judge made the following statement;

*'...in Australia this situation...is the product not of any doctrine of "deference", but of basic principles of administrative law respecting the exercise of discretionary powers.'*¹⁶²

*'Commentary upon Chevron [applying the doctrine of deference] has seen it as indicative of a "delegalisation" of the administrative process.'*¹⁶³

Whether or not the courts should intervene in the factual determination depends on the rule of law, the separation of powers and the concept of jurisdiction.¹⁶⁴ The mentality that influenced their approaches was also clearly expressed in the transcript of legal argument of the case; for example,

'Justice Kirby: It may reserve that in the name of the rule of law to the courts themselves...

Justice Gummow: ...a means of curbing is ...it [the doctrine of deference]... It is built on another foundation - that is how it seems to me - no immediate analogy here...

Justice Kirby: It [Deference] is a very nebulous word that can cover a whole multitude of attitudes...

*I just do not quite see how it works as a legal proposition, as distinct from maybe some sociological explanation of why courts come to a particular conclusion in a particular case.'*¹⁶⁵

¹⁶² *ibid* [44].

¹⁶³ *ibid* [42].

¹⁶⁴ *ibid* [40], [59]-[60].

¹⁶⁵ n 17.

This illustrates the distinctive mentality of the Australian courts that, rather than attempting a balance, the scope of judicial review is rigidly determined based on the framework of the separation of powers. If parliament intends the court to review the factual determination of the executive, its constitutional role is to protect the rule of law and the jurisdiction of the executive. However, if the court considers the factual determination to be within the scope of the executive, it has no jurisdiction to conduct judicial review.¹⁶⁶ The courts do not determine their intervention flexibly based on their desire.

Secondly, in considering the statutory construction, the application of the jurisdictional fact in *Timbarra*, namely the criteria of objectivity and essentiality, were emphasised in *Enfield*. The judgment considered the construction of the Development Act when addressing the phrase ‘*special industry*’ as a jurisdictional fact in three main points. Firstly, Section 35 of the Act had a different statutory scheme from Section 33. The planning merits were not involved in the satisfactory conditions for lifting the prohibition imposed by Section 32.¹⁶⁷ Secondly, the text of Section 35 did not suggest that the determination of whether the responsible authority is obliged to consent rests upon its own classification of the relevant circumstances. Therefore, the legislation did not define the criteria of operation as being the opinion of the relevant authority of the classification of the development.¹⁶⁸ Section 25 is not an opinion or satisfaction reasonably formed based on the material put before the decision-maker. However, it is stipulated in direct terms as

¹⁶⁶ This is endorsed by Gageler that ‘the better label is “respect” for an agency’s interpretation rather than deference’ (S Gageler, ‘Deference’ (2015) 22 *Australian Journal of Administrative Law* 151).

¹⁶⁷ n 13 [32].

¹⁶⁸ *ibid* [33].

a precondition, which obliges refusal or a grant of consent.¹⁶⁹ Thirdly, the judgment determined that the construction related to regulation 16(2) of the development regulations, made by the Governor under the power conferred by Section 108 of the Development Act, did not turn the imperative element in regulation 16(1) into the expression of an opinion. The nature of the determination under regulation 16(1) was correctly interpreted in the present case, since it is consistent with the character of the prohibition upon the granting of consent imposed in Section 35(3) without a concurrence.¹⁷⁰

This application of jurisdictional fact was consistent with the approach in *Timbarra*, where the scope of judicial review was considered based on a framework of the separation of powers. The reason given was extremely strict to the statutory construction. Justice Hayne implicitly regarded these doctrinal approaches as being based on the logic of legality in the transcript of legal argument of *Enfield* that ‘*We have to begin, do we not, with the statute and the regulation, identify what the issue was and what is the alleged illegality or unlawfulness*’.¹⁷¹

Thirdly, the status of jurisdictional fact as a valid ground of judicial review in Australia became even more entrenched in *Enfield*. For example, the legal reasoning clearly connoted ‘*jurisdictional fact*’ as the term used to identify ‘*criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion*’.¹⁷² Importantly,

¹⁶⁹ *ibid* [34].

¹⁷⁰ *ibid* [36]-[37].

¹⁷¹ n 17.

¹⁷² n 13 [28].

while the English courts are flexible and unclear in regarding a jurisdictional fact as covered by an error of law, the ground has been included as a subset of jurisdictional error in Australian law. This was not explicit in the judgments, but the transcript of legal argument of *Enfield*, as demonstrated in the conclusion of Chapter 3. This clear and systematic categorisation of the grounds of judicial review is also a product of the Australian legal culture, as will be exemplified in Chapters 5 and 6.

4.3 After *Timbarra* and *Enfield*

Up to this point, the analysis of *Timbarra* and *Enfield* has demonstrated that the Australian courts cannot choose to intervene in a factual issue whenever they wish to do so; instead, they must decide the scope of judicial review based on the subject matter of the case through the rigid framework of separation of powers prescribed in the written constitution and statutory construction. Rather than applying various doctrinal approaches in doing so, like the English courts,¹⁷³ the Australian approach has been confined to jurisdictional fact because it functions well with this Australian constitutional requirement. Some of the cases after *Timbarra* and *Enfield* will be unpacked in this section in order to demonstrate the continuity of jurisdictional fact in the light of the Australian legal culture. The prominent ones are *Anvil Hill* and *M70/2011*.

In *Anvil Hill*, it was questioned whether the proposed action of the construction and operation of an open-cut coal mine and ancillary facilities was a controlled action, which

¹⁷³ This does not mean that the English courts decide their jurisdiction according to their desire. Instead, as shown in the previous section, all the various doctrines applied to determine jurisdictional fact are embedded in the flexible English legal mentality, particularly the balancing process between the rule of law and parliamentary sovereignty.

would have or be likely to have a significant impact on a matter protected by the Environment Protection and Biodiversity Conservation Act 1999 (Cth).¹⁷⁴ It was clear from the legal reasoning of the judgment that this question was considered based on the jurisdictional fact approach. For example, the precedent in *Timbarra* was directly cited.¹⁷⁵ Apart from affirming the validity of the ground, its application was also rigid in terms of the consideration of statutory construction. As Tamberlin, Finn and Mansfield JJ stated, ‘*The starting point for ascertaining whether a fact or circumstance is a jurisdictional fact must be the words of the statute, read in their context.*’¹⁷⁶ This was repeatedly emphasised in the judgment of Stone J, as follows;

*‘Ultimately the question whether a particular finding of fact is jurisdictional depends on the proper construction of the relevant statute. The consequence of characterising a fact as jurisdictional is that the finding of fact can be reviewed on the merits and the court’s opinion may be substituted for that of the administrative decision-maker.’*¹⁷⁷

Additionally, the criteria for determining the jurisdictional fact setup in *Timbarra* and *Enfield*, namely objectivity and essentiality and the recognition of a reference to the mental state by the use of words such as ‘opinion’, ‘belief’ or ‘satisfaction’, were also applied in *Anvil Hill*.¹⁷⁸ Therefore, it can be systematically concluded that the court did not have a

¹⁷⁴ n 14 [1]-[2]. Although jurisdictional fact was applied in this case as a ground under the ADJR, the entrenchment of jurisdictional fact is also demonstrated well as a product of the Australian legal culture. Therefore, it is included in this section.

¹⁷⁵ *ibid* [59]-[61] (Stone J).

¹⁷⁶ *ibid* [21].

¹⁷⁷ *ibid* [60].

¹⁷⁸ *ibid* [63] (Stone J) and [28] (Tamberlin, Finn and Mansfield JJ) .

role to intervene in the case because it was not jurisdictional fact.¹⁷⁹ There were no various doctrinal approaches moving flexibly between cases, like the analysed English law.

Notably, the legal reasoning in the judgment was explicit in that the entrenched status and application of jurisdictional fact were products of the Australian legal culture, particularly how the rule of law and separation of powers are distinctively understood. For example, the judgment of Justice Stone explained the logic in *Timbarra* that,

*‘Where the process of construction leads to the conclusion that parliament intended that the factual reference can only be satisfied by the actual existence (or non-existence) of the fact or facts, then the rule of law requires a court with a judicial review jurisdiction to give effect to that intention by inquiry into the existence of the fact or facts’.*¹⁸⁰

Another case that demonstrates the continuous adherence to jurisdictional fact in Australia is *Plaintiff M70/2011*. The fact of this case was that the minister wanted to transfer the applicant, an asylum seeker, from detention on Christmas Island to Malaysia. However, it was disputed as to whether or not Malaysia was a ‘specified country’ to which minister had the lawful discretionary power to transfer ‘offshore entry’ people.¹⁸¹ Entrenched from *Timbarra* and *Enfield*, Chief Justice French applied jurisdictional fact to determine whether the factual reference was a jurisdictional fact or not by adopting the clear definition that it was a ground ‘*applied to the exercise of a statutory power is often used to designate a factual criterion, satisfaction of which is necessary to enliven the power*

¹⁷⁹ *ibid* [70]-[71] (Stone J).

¹⁸⁰ *ibid* [61].

¹⁸¹ n 15 [5]-[18].

of a decision-maker to exercise a discretion'.¹⁸² Similarly, the ground was determined through the framework of separation of powers prescribed in the written constitution and statutory construction. As French CJ held,

'The question is one of statutory construction...

...Absent clear words, the subsection should not be construed as conferring upon courts the power to substitute their judgment for that of the Minister by characterising the matters ...as jurisdictional facts...

On the other hand, ...if the Minister were to proceed to make a declaration on the basis of a misconstrued criterion, he would be making a declaration not authorised by the Parliament. The misconstruction of the criterion would be a jurisdictional error'.¹⁸³

The *'formation of a state of mind by the decision-maker, be it an opinion, belief, state of satisfaction or suspicion, the existence of the state of mind itself will constitute a jurisdictional fact'* was applied once again.¹⁸⁴ Chief Justice French reached the conclusion from these doctrinal approaches that the factual reference was not a jurisdictional fact.¹⁸⁵ The justifications given were evidently compatible to the analysed particular understanding of constitutional values in Australia. For example, it was not the role of the court to conduct judicial review because the framework of powers perceived from the wording of s 198A(3)(a) of the Migration Act indicates that the determination should be

¹⁸² *ibid* [57].

¹⁸³ *ibid* [58]-[59].

¹⁸⁴ *ibid* [57].

¹⁸⁵ *ibid* [60]-[67].

'the subject of the Minister's assessment' in order to *'support the continuance of the matters'*.¹⁸⁶

Interestingly, while French CJ considered that the factual reference in *M70/2011* meant that the court could not intervene, the majority of judges namely Gummow, Hayne, Crennan and Bell JJ, held that it was a jurisdictional fact.¹⁸⁷ Despite these different outcomes, the majority applied the same doctrinal approaches as French CJ. The application of the ground also remained on the detail attention of the proper construction, text, context and purpose of Section 198A of the Act.¹⁸⁸ The justification for claiming the factual reference as jurisdictional fact was consistently compatible with the Australian legal culture. For example, the access and protections of such references to Section 198A *'must be provided [by courts] as a matter of legal obligation'*.¹⁸⁹ It was held that *'the Minister's declaration was made beyond power...s 198A(1) cannot be engaged to take either plaintiff from Australia to Malaysia'*.¹⁹⁰

This point needed to be further exemplified. Although the Australian approach is confined to jurisdictional fact, it does not mean that the outcome of the case must always be fixed among judges in the way the scope of judicial review of a factual issue is limited. As Fisher points out, the courts, particularly the ones at state level, can still respond

¹⁸⁶ *ibid* [61].

¹⁸⁷ *ibid* [136].

¹⁸⁸ *ibid* [109]-[119].

¹⁸⁹ *ibid* [116].

¹⁹⁰ *ibid* [136].

flexibly to a *'hot situation'* and the complexity of day-to-day public administration in different subject matters, namely planning law and environment law.¹⁹¹ This kind of flexibility was also mentioned by Chief Justice Spigelman, as follows;

*'...determining whether a fact or event, or combination of such, has the requisite quality of essentiality to be classified as jurisdictional, always requires a multiplicity of factors to be considered. Different judges may reach divergent conclusions...'*¹⁹²

However, this flexibility has to be rigidly operated through the approach of jurisdictional fact, which Fisher regards as representing an idea *'that public administration is capable of operating within clearly identifiable legal boundaries'*.¹⁹³ This is compatible with the argument in this chapter. The Australian courts are able to decide their jurisdiction to conduct judicial review based on different cases. However, the operation of jurisdictional fact *'is not blind to the importance of context'*.¹⁹⁴ Nevertheless, this does not mean that they can choose whether to intervene or not solely based on their desire. Instead, they have to determine the scope of judicial review through the rigid framework of separation of powers prescribed in the written constitution and statutory construction. Aronson also notes this point by cautioning that the ground should not be expanded in a way that enables the court to intervene in any factual issue by stating that it is a jurisdictional fact.¹⁹⁵ This

¹⁹¹ Elizabeth Fisher, 'Environmental Law as "Hot Law"' (2013) 25 Journal of Environmental Law 347.

¹⁹² James Spigelman, 'The Centrality of Jurisdictional Error' 21 Public Law Review 77, 86.

¹⁹³ Fisher, "'Jurisdictional' Facts and 'Hot' Facts: Legal Formalism, Legal Pluralism, and the Nature of Australian Administrative Law' (n 29) 976.

¹⁹⁴ *ibid* 975-976.

¹⁹⁵ Aronson (n 16).

would result in blurring the distinction between legality and merits. Instead, it is the role of the court to decide whether or not the factual condition is met based on the framework of the federal separation of powers. This can be achieved by adopting the concept of jurisdictional error and its derivatives, such as jurisdictional fact.¹⁹⁶ Hence, Chief Justice Spigelman issued a conclusory statement that jurisdictional fact is not a '*blank cheque to the judiciary to intervene whenever a judge believes the outcome to be undesirable*'.¹⁹⁷

Apart from *Anvil Hill* and *M70/2011*, there are a number of cases at both at the federal and state levels that demonstrated plenty of opportunity for the courts to abandon their adherence to the application of jurisdictional fact; however, they did not do so, but stayed with jurisdictional fact and the fixed doctrinal approaches in determining them. Importantly, the legal mentality of the Australian courts that rigidly relies on the separation of powers can be found on many occasions. For example, Judge Basten stated in *Barrick Australian v Williams* that

*'Where a power is said to depend upon...the satisfaction of the decision-maker as to the contingency, the jurisdictional fact will be the relevant state of satisfaction... if the matter is one requiring evaluative judgment, it is more likely that the legislature intended that the officer form an opinion as to the contingency, rather than that the power be engaged only where the objective facts are established...'*¹⁹⁸

¹⁹⁶ *ibid.*

¹⁹⁷ See Fisher, "'Jurisdictional" Facts and "Hot" Facts: Legal Formalism, Legal Pluralism, and the Nature of Australian Administrative Law' (n 29) 993.

¹⁹⁸ (2009) 74 NSWLR 733 [26]. See also *Woolworths v Pallas Newco* (2004) 61 NSWLR 707; *Anor and Gedeon v Commissioner of the New South Wales Crime Commission* (2008) 236 CLR 120; *Caterpillar of Australian Pty Ltd v Industrial Court of New South Wales* (2009) 78 NSWLR 43.

As an additional indicator, while the debates in academic circles on the ground in England were described in the previous section, it is demonstrated in this section that there is less room for Australian scholars to argue the validity of the ground. Jurisdictional fact is *'firmly established in the Australian legal system'*.¹⁹⁹ The connection to the Australian legal culture can be found in some works. For example, Justice Mason also asserted in a secondary work that *'the parameters within which administrative power may be exercised cannot exceed the constitutional limits of Parliament's legislative power'*.²⁰⁰ In the same way, Keane argues for rigid application of jurisdictional fact according to the distinction between legality and merits.²⁰¹

4.4 Products of the Australian Legal Culture

In this section, the doctrinal approaches applied to determine jurisdictional fact as a ground of judicial review have been unpacked from the legal reasoning in *Timbarra, Enfield, Anvil Hill, M70/2011*. They are captured in a snapshot in the table below.

¹⁹⁹ Leeming (n 5) 61. See also Aronson, Groves and Weeks (n 5) [4.470]-[4.480]; Creyke, McMillan and Smyth (n 5) [7.2.27].

²⁰⁰ Brian Mason, 'Jurisdictional Facts after Plaintiff M70' (2013) 24 PLR 37, 39.

²⁰¹ PA Keane, Legality and Merits in Administrative Law: An Historical Perspective (2009) 1 Northern Territory Law Journal 117, 136.

Australian Doctrinal Approaches in <i>Timbarra</i> and <i>Enfield</i> and later cases		
Status of Jurisdictional Fact	Entrenched as valid ground of judicial review A subset of jurisdictional error	
Justifications	Fixed and Systematic	
	To intervene	Not to intervene
	The rule of law The rigid separation of powers The concept of jurisdiction The principle of legality Rejection of deference	The rule of law The separation of powers Distinction between legality and merits
Applications	Strictly considered from statutory construction With the criteria of objectivity and essentiality	

Unlike Section 3, the connections of these distinctive elements to the Australian legal culture have already been shown above so that; they only need to be summarised in this section. Rather than being flexible, the Australian courts have clear and fixed justifications and applications to determine jurisdictional fact as a ground of judicial review in the cases. This is influenced by their rigid legal mentality that the scope of judicial review must be strictly considered by following the framework of the separation of powers prescribed in the written constitution and identified from the construction of the relevant statutes. Jurisdictional fact becomes an entrenched ground of judicial review, and systematically fits as a subset of jurisdictional error. The concept of deference, which appears in England and facilitates flexibility in considering the scope of judicial review, is firmly rejected in Australia. Unlike the English law, there is only room for scholars to debate the development of the ground, rather than its validity. All of these analyses clarify the following statement made by Justice Gageler in a speech;

*'In Australia, it [the distinction between fact and law] also has a constitutional dimension, underpinning the principles of the separation of judicial power and strong form judicial review of administrative action.'*²⁰²

While the English courts are flexible when determining jurisdictional fact, this does not fit the Australian courts' understanding of legality based on the Australian legal culture. Chief Justice Mason verified this statement by referring to the approach in *Enfield* as '*the Australianisation of our law*'.²⁰³

5. Conclusion

It was demonstrated in the previous chapter that the English and Australian courts have a 'different way' to reach a 'similar conclusion' in determining the scope of judicial review of the decisions of tribunals and inferior courts. This assertion goes further in this chapter by revealing 'the different doctrinal approaches and conclusions' in the English and Australian determinations of jurisdictional fact as a ground of judicial review. On the one hand, the jurisdictional fact doctrine was implicitly abandoned in *Anisminic*, and replaced with the distinction between law and fact; however, it waved back as an exception for the court to intervene in factual issue. The modern law then becomes flexible in applying various justifications and applications in the determination; in fact, it has been debated whether jurisdictional fact should be a valid ground of judicial review or not. On the other hand, the Australian courts' approaches in determining jurisdictional fact as an entrenched

²⁰² Justice Gageler, 'What is a Question of Law?' (The National Conference of Tax Institute Justice Hill Memorial Lecture, March 2014).

²⁰³ Anthony Mason, 'The Evolving Role and Function of the High Court' in Opeskin and Wheeler (ed), *The Australian Federal Judicial System* (Melbourne University Press 2000) 116.

ground of judicial review. Connecting this to the previous chapter, while jurisdictional fact systematically fits into jurisdictional error in Australian law, how jurisdictional fact relates to an error of law in English law is left open.

It is not argued in this chapter that these differences are random. Instead, these approaches are the products of the understanding of the English and Australian courts of the deep-water legality embedded in their different legal cultures. The pragmatic approach in *Jones* would definitely not be adopted by Australian judges; likewise, English lawyers would be doubtful when hearing that Australian judges absolutely reject the concept of deference.

The way in which this theme runs through the determination of the grounds of judicial review related to the substantive exercise of discretion will be demonstrated in the following chapters. For example, while the status, justification and application of the English courts in determining proportionality as a ground of judicial review have been widely debated, they have been firmly excluded by the Australian courts. Furthermore, since jurisdictional fact is a ground of judicial review of factual issues, it inevitably overlaps with the grounds relating to the substantive exercise of discretion. The differences in the relationship between these grounds of judicial review in England and Australia will be discussed in the next chapter. For example, in English law, not only it has been debated whether jurisdictional fact is replaced by a factual evaluation against unfairness, but the grounds are also a mixture of rationality and proportionality. Conversely, the grounds, namely jurisdictional fact, illogicality and irrationality and *Wednesbury*, are systemically categorised under jurisdictional error in Australia. Indeed, Spigelman CJ has stated this since *Timbarra* that when factual determination is not jurisdictional fact, the court may

inquire into when there is an unreasonableness of the decision.²⁰⁴ This is similar to Justice Gaudron, who held in *Enfield* that when it is not jurisdictional fact, the question is only whether the decision is reasonable or not. However, if it is a jurisdictional fact, it has nothing to do with the grounds related to the substantive exercise of discretion.²⁰⁵ All of these points will be analysed as the further products of the legal cultures in the next chapter.

²⁰⁴ n 12 [41].

²⁰⁵ n 13 [59].

V. CHAPTER FIVE

INFLUENCE OF THE LEGAL CULTURES ON THE GROUNDS RELATING TO SUBSTANTIVE EXERCISE OF DISCRETION

1. Introduction

‘They [The courts] can only interfere with an act of executive authority if it be shown that the authority has contravened the law... When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case.’ (Associated Provincial Pictures Houses Ltd v Wednesbury Corporation)¹

The above judgment of Lord Greene premises one of the most ‘confusing’ grounds of judicial review in England and Australia,² called ‘*Wednesbury Unreasonableness*’ or ‘*Irrationality*’.³ Both the English and Australian courts similarly began with this approach when deciding the scope of judicial review of the substantive exercise of administrative discretion. However, this area of the law has evolved differently in different legal systems with the passage of time.

¹ [1948] 1 KB 223 (CA) 228.

² Among scholars and judges, for example, Geoff Airo-Farulla, ‘Reasonableness, Rationality and Proportionality’ in Matthews Groves and H P Lee (eds), *Australian Administrative Law* (CUP 2007); Mark Aronson, ‘The Growth of Substantive Review’ in John Bell and others (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing 2016); Rebecca Williams, ‘Structuring Substantive Review’ [2017] PL 99; William Wade and Christopher Forsyth, *Administrative Law* (11th edn, OUP 2014) 302-305.

³ Lord Diplock’s terminology in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410-411.

On the one hand, the determination of judicial review of administrative discretion is flexible in the English courts. They are able to apply various concepts and grounds, such as irrationality and anxious scrutiny, and include the influence of interrelated legal cultures, such as proportionality, in their consideration.⁴ The degree of intensity in reviewing administrative discretion varies among these approaches. For example, according to Lord Justice Laws in *R v Secretary of State for Education and Employment, ex parte Begbie*; ‘the Wednesbury principle itself constitutes a sliding scale of review more or less intrusive according to the nature and gravity of what is at stake’.⁵

On the other hand, rather than being flexible, the Australian courts’ determination of judicial review of the substantive exercise of discretion is confined to the legal system’s constitutional guidelines. This was recognised in the transcript of legal argument of *Re Minister for Immigration and Multicultural Affairs; Ex p Applicant S20/2002*, when Chief Justice Gleeson asked whether the English approach was ‘treated under the rubric of abuse of power’.⁶ Mr Gageler, a barrister in the case, promptly gave the following response;

‘...the fundamental point to which jurisprudence in this Court has adhered, that is, that judicial review is concerned with policing legal limits on a decision-maker’s power, that is, judicial review is at heart concerned with jurisdictional error. That...appears to have been departed from in some of the more recent cases in the House of Lords [of England].’⁷

⁴ This will be unpacked in Section 3 below.

⁵ [2000] ELR 445, 1129-1130.

⁶ The Transcript of legal argument in *Re Minister for Immigration and Multicultural Affairs; Ex p Applicant S20/2002* (2003) 198 ALR 59.

⁷ *ibid.*

In addition, in *Murrumbidgee Groundwater Preservation Association Inc v Minister for Natural Resources*, Chief Justice Spigelman explained that,

*'A challenge...on the basis of irrationality or unreasonableness requires the Court to be conscious of the permissible scope of judicial review. The legality and merits dichotomy is at the heart of Australian administrative law and the boundary between the two is policed more rigorously in this country than...in other common law jurisdictions.'*⁸

*'It is always necessary to commence with the identification of the particular statutory power, understood in its context.'*⁹

This mentality results in the firm rejection of proportionality in Australia, and emerging grounds like illogicality and irrationality are slowly being developed.¹⁰ As Creyke, McMillan and Smyth conclude, *'English courts have long shown greater readiness than Australian courts to develop "unreasonableness", "irrationality" and "proportionality" as pivotal criteria in administrative law'*.¹¹

This area of judicial review of administrative discretion is commonly recognised as one of the hardest to understand and map-out in administrative law. The aim is to simplify it in this chapter by unpacking the different doctrinal approaches from the legal reasoning in leading English and Australian cases, comparing and demonstrating them as products of the differences between English and Australian legal cultures. After this introduction, Section 2 will move the focus of this chapter to the issues and debates in the

⁸ (2005) 138 LGERA 11, 127.

⁹ *ibid* 139.

¹⁰ This will be unpacked in Section 4 below.

¹¹ Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action; Text, Cases and Commentary* (4th edn, LexisNexis Butterworths 2017) [14.2.10].

area. Next, flexibility accorded to the English courts in *Kennedy v Charity Commission*¹² and *Pham v Secretary of State for the Home Department*¹³ in terms of justifications, doctrines and applications, as well as their ability to adopt interrelated legal cultures into their determination of the scope of judicial review will be unpacked in Section 3. Conversely, the relatively fixed justifications, doctrines, applications and systematic categorisation between the grounds applied in *Re Minister for Immigration and Multicultural Affairs; Ex p Applicant S20/2002*,¹⁴ *Minister for Immigration and Citizenship v SZMDs*¹⁵ and *Minister for Immigration and Citizenship v Li*¹⁶ will be demonstrated in Section 4. In the final section, the analysis in this chapter will be concluded, and pave the way for the study of substantive legitimate expectations in the next chapter.

2. Judicial Review of Administrative Discretion at Surface and Deep Levels

As discussed above, while some concepts are recognised and applied in the determination of judicial review of administrative discretion in the same way in England and Australia, others are treated differently. The classification of these points is explained as being located at surface and deep-water levels. It begins with two sides of the concept floating

¹² [2014] UKSC 20.

¹³ [2015] UKSC 19.

¹⁴ (2003) 198 ALR 59.

¹⁵ [2010] HCA 16.

¹⁶ [2013] HCA 18.

on the surface-water level of the two countries. On the one hand, the courts generally avoid interfering with administrative discretion, since this is a power granted to administrative agents so that they can consider the merits of a particular situation during the course of public administration. On the other hand, the courts claim jurisdiction to conduct judicial review of some administrative discretion, particularly when it *'contravenes the law'*.¹⁷ According to the framework of this thesis, in this role, the courts are regarded as protecting 'surface-water' legality. Nevertheless, from a deep-water perspective, the English and Australian courts have different doctrinal approaches in deciding the extent to which they should intervene in administrative discretion. The comparison of these differences and their connection to the English and Australian 'deep-water' understanding of legality and legal cultures will be exemplified as the focus of this chapter.

2.1 Discretion: Power to Choose

Discretion is an unavoidable feature of administrative law, being the *'power for the administrator to choose how to act'* during the course of public administration.¹⁸ Similar to factual determination described in the previous chapter,¹⁹ it is necessary and indeed beneficial, to give administrative agents the authority for two main reasons. Firstly, not only can a rule not be applied itself, but discretion also allows the merits of particular cases to be considered, which leads to flexibility, consistency and responsiveness in

¹⁷ Lord Greene's words in *Wednesbury* (n 1).

¹⁸ Mark Elliott, *Administrative Law: Text and Materials* (Mark Elliott and Jason Varuhas eds, 5th edn, OUP 2017) 235; Peter Cane, *Administrative Law* (5th edn, OUP 2011) 140-143; Wade and Forsyth (n 2) 286.

¹⁹ However, the relationship between the grounds of judicial review of factual determinations and one of the substantive exercise of discretion is the point at the deep-water level, which is argued as being influenced by the specific legal culture in Sections 3 and 4 below.

implementing the rule.²⁰ Furthermore, granting discretion to public administrators, who have experience and expertise in particular administrative activities, generates an efficient public administration.²¹ Secondly, it is more democratic to allow public administrators to exercise their discretion rather than a non-elected organ like the court because they are the persons assigned the task by the legislature.²²

These reasons form the basis of the first part of the court's understanding of its role when conducting judicial review, namely, that it should avoid interfering with public administrators' substantive exercise of their discretion.²³ As conceptualised by Craig, *'it is not for the courts to substitute their choice as to how the discretion ought to have been exercised for that of the administration'*.²⁴ This mentality similarly floats on the surface level of both the English and Australian law. In terms of the former, Lord Greene continued the quotation shown at the beginning of this chapter with the following statement;

*'When discretion of this kind is granted the law recognises certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion... is an absolute one and cannot be questioned in any court of law.'*²⁵

²⁰ Wade and Forsyth (n 2) 286; Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (3rd edn, OUP 2018) 196.

²¹ Cane (n 18) 140-141.

²² Paul Craig, *Administrative Law* (8th edn, Sweet & Maxwell 2016) [21-002].

²³ Elliott (n 18) 262.

²⁴ Craig (n 22) [21-002].

²⁵ n 1.

This premise has been frequently cited as the starting point of the English courts' determination of the scope of judicial review in later cases.²⁶

The necessity of discretion has also been explained in Australia, in the Kerr Report 1971, which read as follows;

*'In recent times in Australia... there has been a considerable expansion in the range of activities regulated, and in the volume and range of services provided, by government and statutory authorities.... This expansion has been accompanied, as it must be, by a substantial increase in the powers and discretions conferred by statute on Ministers of the Crown, officers of the administration and statutory authorities...'*²⁷

This was followed by the position that the Australian courts should generally not intervene in the exercise of administrative discretion. For example, Justice Mason of the HCA directly cited *Wednesbury* in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*;

*'The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislator has vested in the administrator.'*²⁸

Then, it became explicit in the judgment of Justice Brennan in *Attorney-General (NSW) v Quin*,²⁹ when he made the following statement; *'the duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law*

²⁶ Eg *R v Cambridge Health Authority, Ex p B* [1995] 2 All ER 129 and *R (Rogers) v Swindon NHS Primary Care Trust* [2006] 1 WLR 2649

²⁷ Australian Commonwealth Administrative Review Committee, *Kerr Report* (Parliamentary Paper no 144/1972, August 1971) [15].

²⁸ (1986) 162 CLR 24 [15](d).

²⁹ (1990) 170 CLR 1. The main discussion in *Quin* is on the grounds of legitimate expectations. Therefore, its legal reasoning will be unpacked in the next chapter.

*which determines the limits and governs the exercise of the repository's power.*³⁰ Consequently, the courts' jurisdiction to conduct judicial review is limited, as the administrative discretion does not go beyond the law. In the same vein as the English law, this judgment has been cited in a number of Australian cases.³¹

2.2 Courts Review Some Exercises of Discretion

While the courts accept their limitation to intervene in the substantive exercise of administrative discretion, the second part of their understanding is that they still have a role to conduct judicial review if an exercise of discretion is *'unreasonable, arbitrary, capricious or inconsistent'*.³² In this situation, the court needs to observe *'what the law says about how administrative discretion should be exercised'*³³ or review *'whether the exercise of discretion is in a proper and lawful way in accordance with the presumed intentions of the legislature that conferred it'*.³⁴ Either way leads to protecting the surface-water legality, which is similarly recognised in England and Australia.

In terms of English law, this premise was explained by Lord Russell in *Kruse v Johnson* that if a local authority is unjust, *'the court might well say "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires"'*.³⁵

³⁰ *ibid* [17].

³¹ Eg *NAIS v Minister for Immigration and Multicultural Affairs* (2005) 228 CLR 470.

³² Wade and Forsyth (n 2) 259, 286-288, 291; Elliott (n 18), 222-223, 235, 239, 247; Farulla (n 2) 212-213.

³³ Cane (n 18) 140; Wade and Forsyth (n 2) 286.

³⁴ Wade and Forsyth (n 2) 259.

³⁵ [1898] 2 QB 91, 100.

It was then referred to in a number of English cases; for example, *R v Board of Education*³⁶ and *Williams v Giddy*,³⁷ until *Wednesbury*, when Lord Greene held that ‘*The power of the court to interfere in each case is...concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them.*’³⁸ Most scholars refer this protection of surface-water legality to the rule of law; for example, Elliott states that ‘*the existence of unlimited or unregulated discretion is considered anathema to the rule of law.*’³⁹ In the same vein, Cane explains that ‘*It is a basic tenet of the rule of law... that discretionary power should be controlled: uncontrolled...discretion is undesirable in most contexts.*’⁴⁰ Also, Wade and Forsyth assert that ‘*What the rule of law demands is not that wide discretionary power should be eliminate, but that the law should control its exercise.*’⁴¹

As for Australian law, the basis on which the courts conduct judicial review of some substantive exercise of discretion has also been accepted and stipulated in the 1971 Kerr Report that ‘*In the case of administrative decisions the judicial correction of which on the merits is possible because they raise justiciable issues...*’⁴² Evidence can also be found in the judgments of cases; for example, in *House v The King*, Justice Starke asserted

³⁶ [1910] 2 KB 165.

³⁷ [1911] AC 381 (See n 8 of Chapter 11 of Wade and Forsyth (n 2)).

³⁸ n 1, 234.

³⁹ Elliott (n 18) 235. See also Jowell Jeffrey, ‘The Rule of Law’ in Jowell, Oliver and O’Cinneide (eds), *The Changing Constitution* (OUP 2015).

⁴⁰ Cane (n 18) 171.

⁴¹ Wade and Forsyth (n 2) 286.

⁴² Kerr (n 27) [390].

that '[discretion] *must be exercised judicially...and not arbitrary or capriciously...*'⁴³

Subsequently, Chief Justice Brennan made the following observation in *Kruger v Commonwealth*;

*'When a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised.'*⁴⁴

This has also been described by Australian scholars, for example, Aronson, Groves and Weeks clearly assert that '*an act or decision can be judicially reviewed on the ground of its unreasonableness*'.⁴⁵

2.3 Extent of Judicial Review of Administrative Discretion

Up to this point, two parts of the courts' understanding of their role in conducting judicial review of administrative discretion have been described. On the one hand, administrative agents are allowed to use their discretion with the aim of enhancing the efficiency and effectiveness of public administration. Therefore, the courts should not usurp this power by quashing administrative decisions based on the discretion of administrators. On the other hand, the courts have to conduct judicial review to ensure that the exercise of discretion is in accordance with the law, for instance, it is not misused or unreasonable. These bases are recognised at the surface level of the law in both England and Australia.

⁴³ (1936) 55 CLR 499, 503

⁴⁴ (1997) 190 CLR 1, 36. See also *Minister for Immigration and Border Protection v Singh* (2014) 139 ALD 50 [43].

⁴⁵ Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (6 th edn, Thomson Reuters Australia 2017) [6.390].

However, the turning point here is *'how the court would determine discretion as unreasonable, leading the administrative action to be unlawful'*.

As discussed in Chapter 1, there are some kinds of misuse of discretion that the English and Australian courts similarly consider, without difficulty, to lead to unlawfulness. The two most prominent ones in relation to administrative discretion are improper purpose and relevant and irrelevant considerations. Although these grounds are applied differently in detail,⁴⁶ they are similarly regarded as being included in the scope of legality, because they relate to the 'meaning of legislative provision'. The English and Australian courts can directly claim jurisdiction in conducting judicial review on these grounds because they relate to 'matters of law'. Therefore, they are not the focus of this chapter.

Conversely, some substantive exercises of discretion are controversial that the courts need to consider whether or not they led to an unreasonable and unlawfulness of the administrative action. This has been described as an important point in both the English and Australian law. For example, according to Wade and Forsyth, *the next requirement ...is that the courts should draw those limits in a way which strikes the most suitable balance between executive efficiency and legal protection of the citizen'*.⁴⁷ In Australia, Chief Justice French also held in *Li* that *'Lawfulness, fairness and rationality... lie at the*

⁴⁶ See Craig (n 22) [19-010]-[19-018] for English law, and Hoong Phun Lee, 'Improper Purpose' in Matthew Groves and Hoong Phun Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (CUP 2007) and Naomi Sidebotham, 'Relevant and Irrelevant Considerations' in Matthew Groves and Hoong Phun Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (CUP 2007) for Australian law.

⁴⁷ Wade and Forsyth (n 2) 286.

heart of administrative justice'.⁴⁸ The most prominent statement is that made by Justice Brennan in *Quin*, as follows;

*'If it be right to say that the court's jurisdiction in judicial review goes no further than declaring and enforcing the law...the next question immediately arises: what is the law? And that question, of course, must be answered by the court itself.'*⁴⁹

The extent to which the court in a legal system considers administrative discretion as unreasonable is characterised in this section as a product of its deep understanding of what law is, which is embedded in the legal system's legal cultures. Comparative methodology illustrates that English and Australian courts use different doctrinal approaches to determine the grounds of judicial review related to the substantive exercise of discretion based on their diverse legal cultures.

As explained in the introduction, various grounds of judicial review and their application have considerably evolved in English law from the traditional *Wednesbury* unreasonableness to the adaptation of a variety of intensity and the adoption of proportionality from EU law and the ECHR into the courts' consideration of the scope of judicial review. The cases that best demonstrate the flexibility of doctrinal approaches and the mentality of the English courts, and are thereby selected for the analysis in the next section, are *Kennedy* and *Pham*.

The law in Australia also began with *Wednesbury*, but its development has been relatively different. In brief, the HCA accepted a new ground called '*irrationality and*

⁴⁸ n 16 [14].

⁴⁹ n 29 [20].

illogicality' to challenge a decision made by the Refugee Review Tribunal ('RRT') in *S20/2002*. However, these grounds were relatively rigid considered because manifest reasoning had to be demonstrated for an administrative action to be regarded as unlawful.⁵⁰ They were later categorised with the other grounds like *Wednesbury* and jurisdictional fact under the central approach of jurisdictional error in *SZMDS* and *Li*. Also, proportionality was completely rejected in these cases.

These different approaches between the English and Australian law have been described and analysed in both English and Australian literature, but mainly in respect of their functionality. For example, there has been a widespread debate among English scholars about the preference in applying the grounds of judicial review, particularly between rationality and proportionality. Some argue that proportionality or the concept of anxious scrutiny has a better methodological framework for reviewing administrative discretion,⁵¹ while others contend that proportionality intrudes excessively on the merits of administrative action, and therefore *Wednesbury* remains the appropriate approach in reviewing administrative discretion,⁵² or support the concept of deference in reducing the degree of intensity of a review of the grounds.⁵³ At the same time, some scholars conclude

⁵⁰ n 14 [61].

⁵¹ Craig (n 22) [21-007]-[21-014]; Paul Craig, 'Proportionality, Rationality and Review' [2010] NZLR 265; Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 CLJ 174. Otherwise, this camp argues that unreasonableness should be improved by giving the review structure and intensity by the consideration of weight and balance (See Paul Craig, 'The Nature of Reasonableness Review' (2013) 66 Current Legal Problems 131).

⁵² Tom Hickman, 'Problems for Proportionality' [2010] New Zealand Law Review 303; *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 (Lord Lowry).

⁵³ Murray Hunt, 'Sovereignty's Blight: Why Contemporary Public Law needs the Concept of 'Due Deference'' in Nick Bamforth and Peter Leyland (eds), *Public Law in a Multi-layered Constitution* (Hart Publishing 2003).

that all the grounds of judicial review of substantive administrative discretion have a similar basis,⁵⁴ or that it is unnecessary to choose between them;⁵⁵ otherwise, the grounds are said to merge into a kind of scale or spectrum.⁵⁶ Australian scholars have analysed the advantages and disadvantages of adopting these various English doctrines and grounds into the Australian legal system.⁵⁷ Rather than debating this issue, the literature directly preferred to adopt the same direction as traditional models like *Wednesbury*. Proportionality is firmly rejected in Australia.⁵⁸

Instead of giving a solution for these debates, a dive will be made into deep water in the next sections in order to understand the determination of the grounds of judicial review of the substantive exercise of administrative discretion from the perspective of the legal culture. This connection has been recognised by scholars, particularly in Australia; for example, by Cane and McDonald in the following statements;

*‘Nonetheless, it is important to acknowledge that the strict separation of power in Australia plays a substantial role in heightening judicial sensibilities to the importance of leaving some latitude for administrators to get things “wrong” ...’*⁵⁹

⁵⁴ Williams (n 2).

⁵⁵ Jowell Jeffrey, ‘Proportionality and Unreasonableness: Neither Merger nor Takeover’ in Hanna Wilberg and Mark Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart’s Rainbow* (Hart Publishing 2015).

⁵⁶ Eg Taggart’s Rainbow Review (see Michael Taggart, ‘Proportionality, Deference, Wednesbury’ [2008] NZL Rev 423) and Laws’ Sliding Scale (n 5).

⁵⁷ Matthew Groves and Greg Weeks, ‘Modern Extensions of Substantive Review: A Survey of Themes in Taggart’s Work and in the Wider Literature’ in Hanna Wilberg and Mark Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart’s Rainbow* (Hart Publishing 2015); Farulla (n 2); Aronson (n 2).

⁵⁸ Michael Taggart, ‘Australian Exceptionalism in Judicial Review’ (2008) 36 Federal Law Review 1.

⁵⁹ Cane and McDonald (n 20) 24.

In terms of English law, Lord Reed stated in *Bank Mellat v HM Treasury (No 2)* that

*'The degree of restraint practised by courts in applying the principle of proportionality, and the extent to which they will respect the judgment of the primary decision maker...reflect national traditions and institutional culture.'*⁶⁰

The next sections are the detailed examinations of these statements. The doctrinal approaches, namely justifications, doctrines, applications, influence of international treaties and the validity and categorisation of the grounds of judicial review will be unpacked from legal reasoning of the aforementioned leading cases, and demonstrated as products of the English and Australian legal cultures. Furthermore, these analyses will facilitate a better understanding of the academic concepts and debates mentioned above. For example, the Australian courts do not intervene in administrative discretion based on the distinction between legality and merits, while English scholars point to the concept of deference in doing so. This also relates to the varied terminologies applied in England. In essence, a framework of deep-water legality and legal culture will draw all the elements of the English and Australian determination of judicial review of administrative discretion into one holistic picture.

3. English Doctrinal Approaches

Rather than the particular grounds of judicial review, like jurisdictional fact and substantive legitimate expectations referred to in the previous and subsequent chapters, the overarching grounds of judicial review related to unreasonableness, applied by the English and Australian courts in conducting judicial review of the substantive exercise of

⁶⁰ [2013] UKSC 39 [71].

administrative discretion are the subject of the analysis in this chapter. However, this and the next sections do not contain descriptions of all the cases in this area, but are focused instead on particularly connecting the overarching doctrinal approaches of leading English and Australian cases with a framework of deep-water legality and legal culture. For the English law, this section starts with a summary of the ‘choices’ the courts have in determining the scope of judicial review of substantive administrative discretion, namely, *Wednesbury*, modified rationality, the concept of anxious scrutiny, proportionality and deference. These approaches have existed in English case law for some time. However, *Kennedy* and *Pham* illustrate them as ways in which ‘(deep-water) legality can be flexibly operated in England’ based on the legal mentality of English judicial review constitutionalism.

3.1 Choices in English Law

The first approach for the English court in conducting judicial review of administrative discretion is the aforementioned *Wednesbury* unreasonableness. Although it has been applied in a few cases,⁶¹ this ground has been widely criticised by English scholars and judges as being ‘*unreasonably rigid*’ and therefore, ‘*undesirable*’.⁶² This is because of its application that administrative discretion will be ‘*unlawful*’ if it is ‘*so unreasonable that no reasonable authority could ever come to it*’.⁶³ Lord Greene cited an example of this situation in *Short v Poole Corporation*, in which the decision to dismiss a school teacher

⁶¹ Cane (n 18) 186-188.

⁶² Craig, *Administrative Law* (n 22) [21-001], [21-007]; Wade and Forsyth (n 2) 303.

⁶³ n 1, 229

because of her red hair was deemed to be unreasonable.⁶⁴ This approach is so stringent that it is unlikely to be applicable to a real-life situation and it would be difficult for the claimant to win the case. The initial comment of *Wednesbury* came from no lesser a person than Lord Diplock, who stated that the ground is ‘*so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*’.⁶⁵

According to the methodology of this thesis, *Wednesbury* is ‘an operation of legality in the narrowest sense’. Only administrative discretion that is ‘*so unreasonable*’ can make an administrative action unlawful. This causes courts and scholars to attempt to move to other approaches by asserting that ‘*Wednesbury is not a monolithic ground of judicial review*’ over administrative discretion in England.⁶⁶ The first to mention is that the courts apply the ground of rationality with variable standards of review for cases with different subject matters; for instance, the court raises the intensity of a review in cases that involve human rights.⁶⁷ The most-cited of these cases is *R v Ministry of Defence, Ex p Smith*, in which Lord Bingham made the following statement in the Court of Appeal;

*‘...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...’*⁶⁸

⁶⁴ [1926] Ch 66.

⁶⁵ n 3.

⁶⁶ Cane (n 18) 189-192; Wade and Forsyth (n 2) 304-305.

⁶⁷ Cane (n 18) 186-188; Craig (n 22) [21-010]-[21-011].

⁶⁸ [1996] QB 517, CA (Civ Div) 554.

This kind of broader application than the position in *Wednesbury* is commented by scholars in various ways. For example, some consider it positively as the modification of rationality (so-called '*Modified Rationality*' or '*Super-Wednesbury*'), or as making a contribution under the concept of anxious scrutiny, not only applied to rights-based cases,⁶⁹ but expanded to apply to cases that are non-rights-based.⁷⁰

Another option for the English courts to determine the scope of judicial review of administrative discretion is the use of proportionality as a ground of judicial review. Indeed, this door has been open since Lord Diplock stated in *CCSU* that the courts could adopt proportionality, '*which is recognised in the administrative law of several of our fellow members of the European Economic Community*' into their consideration.⁷¹ As briefly described in Chapter 2, proportionality enters English law by two main routes in practice.⁷² Firstly, as a member state of the EU, proportionality is directly applied in England when decision-makers are acting within the scope of EU law. Secondly, proportionality was introduced into the English law by Article 2 of the HRA, in relation to Section 6 of the HRA. Since it is clear from the jurisprudence of the ECHR that

⁶⁹ Eg *Bugdaycay v Secretary of State for the Home Department* [1987] 1 AC 514, Lord Carnwath, 'From Judicial Outrage to Sliding Scales: Where Next for *Wednesbury*' (the ALBA Annual Lecture, 12 November 2013); Lord Sumption, 'Anxious Scrutiny' (Bar Association Annual Lecture, 4 November 2014).

⁷⁰ Paul Craig, 'Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application' [2015] PL 60.

⁷¹ n 3.

⁷² Proportionality is also applied on the grounds of substantive legitimate expectations, which will be discussed in the next chapter.

proportionality is a general principle of law;⁷³ therefore, the English courts can review and quash a breach of the qualified Convention rights by proportionality.⁷⁴

The application of proportionality in EU law and the ECHR, namely its methodology and intensity of review, has been adopted in these areas. In terms of the former, there is a series of questions to consider regarding proportionality. The first is whether it is necessary for the public administration to take a measure (known as the ‘Necessity Question’). The second is whether the measure is sufficient to achieve an aim (the ‘Sufficiency Question’). The third is the question of finding a balance between burdening an individual and fulfilling public administration (known as a ‘Narrow Sense of Proportionality’).⁷⁵ As for the latter, the level of intensity in undertaking a judicial review of administrative discretion can vary; for instance, the courts will review cases that involve fundamental rights more intensively than others.⁷⁶ Additionally, they will apply a different level of intensity when reviewing these same rights-based cases in different circumstances. The classic example is that the court in *Regina (Animal Defenders International) v Secretary of State for Culture, Media and Sport* reviewed the limitation of political speech at election time more intrusively than the freedom of speech in the context of private interest in *Belfast City Council v Miss Behavin’ Ltd*.⁷⁷

⁷³ Craig, *Administrative Law* (n 22) [20-042]-[20-044].

⁷⁴ Recognised in a number of cases such as *Alconbury Developments Ltd v Secretary of State for the Environment* [2001] 2 WLR 1389 and *R v Secretary of State for the Home Department, ex p Daly* [2001] 2 AC 532.

⁷⁵ Paul Craig, *EU Administrative Law* (2nd edn, OUP 2012) 590.

⁷⁶ Eg *R (Quila and another) v Secretary of State for the Home Department* [2011] UKSC 45.

⁷⁷ [2008] 1 AC 1312.

As discussed above, on the one hand, this application of proportionality is regarded as being positive, for example, it has a '*more structured analysis*', which requires the administration to '*justify its policy choice*' and the courts to '*strike down a decision*' in more specific detail than *Wednesbury*.⁷⁸ Thereby, it is argued that proportionality should become a general head of judicial review in the UK, even without referring to the ECHR.⁷⁹ Lord Sumption connected this with the concept of anxious scrutiny that '*Anxious scrutiny was originally designed to broaden the test for substantive review at common law by importing some element of the doctrine of proportionality from the case-law of the ECHR*'⁸⁰

On the other hand, some scholars regard the variable intensity of review as a dangerous element of the proportionality test, leading the court to substitute the discretion of decision-makers with its own. This has led to an increasing debate about the concept of deference to render the use of proportionality approach. In the same vein, a number of scholars question the extent to which the courts should defer to the institutional and democratic competences of the decision-makers.⁸¹ For example, it is argued that the degree of deference should be based on the subject of the case.⁸²

⁷⁸ Paul Craig, 'Unreasonableness and Proportionality in UK Law' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing 1999) 91-100.

⁷⁹ *ibid.*

⁸⁰ Sumption (n 69).

⁸¹ Elliot (n 18) 284-302.

⁸² Alison Young, 'In Defence of Due Deference' (2009) 72 MLR 554.

The status of the HRA in the domestic law is more complex; for example, the different answers to the question, ‘what is the role of the courts according to the HRA?’, can lead to different determinations of the common law grounds of judicial review. For instance, in *Miss Behavin*, Baroness Hale asserts that the role of the court in adjudicating cases involving human rights (under the HRA) is quite different from its role in an ordinary judicial review.⁸³ This can support the argument that proportionality should be applied in cases that directly involve human rights, but *Wednesbury* reasonableness applied in cases that do not directly involve such rights, which may be compatible with Taggart’s rainbow concept.⁸⁴ On the other hand, the idea that the role of the HRA is to introduce a substantive approach from the ECHR to domestic law⁸⁵ can support Craig’s argument that proportionality should be a general head of judicial review in the UK.⁸⁶

Rather than preferring or criticising these approaches, this section regards them as ‘choices’, which the English courts can ‘flexibly’ apply in their determination of the scope of judicial review. Lord Justice Laws also made the following statement, which is compatible with the methodology of this thesis;

*‘On the surface at least the test of unreasonableness or irrationality...leaves no scope for a variable standard or review according to the subject-matter of the case...But in fact the courts, while broadly adhering to the monolithic language of Wednesbury, have to a considerable extent in recent years adopted variable standards of review...’*⁸⁷

⁸³ n 77.

⁸⁴ n 56.

⁸⁵ *R v Denbigh High School HL, Ex parte Begum* [2006] UKHL 15.

⁸⁶ *Alconbury* (n 74) (Lord Slynn).

⁸⁷ Lord Justice Laws, ‘Wednesbury’ in Forsyth and Hare (ed), *The Golden Metwand and the Crooked Cord* (Hart Publishing 1998) 186-187.

While Laws only noted the variable standards prior to the HRA, it is pointed out in this section that all the aforementioned doctrinal approaches, namely, modified rationality, anxious scrutiny, proportionality and deference are ‘the widened-up operations of legality’, reflecting ‘how legality is understood at the deep-water level in England’. All these choices available to the English courts are the background for understanding how the doctrinal approaches in *Kennedy* and *Pham* are connected to the English legal culture.

3.2 *Kennedy*

The claimant in *Kennedy* was a journalist, who had asked the Charity Commission to disclose information related to the affairs of a specific charity. However, the decision-maker refused the request according to Sections 2(2) and 32(2) of the Freedom of Information Act 2000 (‘FOIA’), on the grounds that it had absolute exemption from the duty to disclose ‘*any document placed in its custody or created by it, for the purposes of an inquiry which it has in the public interest conducted in the exercise of its function*’.⁸⁸ The applicant then respectively appealed to the Information Commission, Information Tribunal, High Court, CA and finally, the UKSC.

The focus of this case is not the consideration of the FOIA, since all the judgments of the UKSC agreed that the applicant’s claim could not succeed by referring to Section

⁸⁸

n 12 [2]-[23], [160]-[171].

32.⁸⁹ After examining the wording and construction of the sections⁹⁰ and comparing it to the Inquiries Act 2005,⁹¹ Lord Mance held as follows;

‘The construction is clear: section 32 was intended to provide an absolute exemption which would not cease abruptly at the end of the court, arbitration or inquiry proceedings, but would continue until the relevant documents became historical records [Section 63(1) of the FIOA].’⁹²

Also, since a document becomes a historical record in 30 years after the year of its creation based on Section 62(2) of the FOIA, it is not likely that the aim of the provision is that an inquiry should run for more than 30 years.⁹³

Instead, the point is Lord Mance’s legal reasoning after examining Section 32, which was as follows;

‘...however [it] does not mean that the information held by the Charity Commission as a result of its inquiries may not be required to be disclosed outside section 32 under other statutory and/or common law powers preserved by section 78 of the FOIA.’

This means that the protection of the legality of administrative discretion does not only rely on Section 32 of the FOIA, but also other laws. Apart from the Charities Act 1993

⁸⁹ ibid [101].

⁹⁰ ibid [28].

⁹¹ ibid [31]-[33].

⁹² ibid [34] (Lord Mance), agreed by [102]-[104] (Lord Toulson), [171]-[172], [200] (Lord Wilson), [221] (Lord Carnwath).

⁹³ ibid [104] (Lord Toulson).

(‘CRA’), the point was raised in the case to what extent domestic laws should be read under the protection of freedom of expression in Article 10 of the ECHR.⁹⁴

The conclusion of the case was split into two camps. Firstly, although the majority, namely, Lord Neuberger, Lord Mance, Lord Clarke, Lord Sumption and Lord Toulson considered that the CRA had a higher standard of not disclosing information when reviewing administrative discretion than the ECHR jurisprudence, they accepted the presumption of openness in common law. Therefore, the CRA could be compared to Article 10 of the ECHR.⁹⁵ Conversely, Lord Wilson and Lord Carnwath held that there was no basis in reading down Article 10 of the ECHR in determining the FOIA and CRA.

More important than this conclusion was the legal reasoning of the extent to which the courts should adopt norms from interrelated legal cultures like the ECHR (through the HRA) into in their common law determination of legality. Although the distinctive elements of English legal culture, namely an unwritten constitution and the twin concepts of parliamentary sovereignty and the rule of law, were not defined in the judgments of *Kennedy* as they were in *Cart*, some connections between English legal culture and the doctrinal approaches can be drawn under three points.

Firstly, apart from the phrase that the disclosure of information may be required by ‘*other statutory and/or common law powers*’, Lord Mance also set the determination of the scope of judicial review in this case as part of the operation of legality by emphasising that ‘*the scheme...ought to be regarded with the principle that any such scheme must be*

⁹⁴ ibid [34], [102]

⁹⁵ ibid [43]-[56] (Lord Mance), [109]-[132] (Lord Toulson), [136] (Lord Clarke), [157] (Lord Sumption).

in accordance with law'.⁹⁶ Next, he demonstrated his (deep) understanding of (English) legality as not ending with the domestic law, but being open to the influence of interrelated legal cultures, like the provisions in the ECHR. He explicitly called for '*the general principle of open justice*' and argued that administrative discretion must be '*in accordance with any applicable Convention rights*'.⁹⁷ This was claimed to be a '*fruitful feature*' in the UK.⁹⁸ Legality does not '*need to be protected by any particular statute or route*'.⁹⁹ This flexible operation of legality can be termed '*a common law presumption in favour of openness*',¹⁰⁰ which was supported by Lords Toulson and Sumption, as follows;

*'What we now term human rights law and public law has developed through our common law over a long period of time...This has always been the way of the common law and it has not ceased on the enactment of the Human Rights Act 1998...'*¹⁰¹

While the adoption of the norms from interrelated legal cultures into the determination of the scope of judicial review is accepted, the relationship between the ECHR and domestic law is a different point. Lord Mance explains that, although it is flexible, the determination should still begin with the domestic law, as follows;

'In some areas, the common law may go further than the Convention, and in some contexts it may also be inspired by the Convention rights and

⁹⁶ *ibid* [37].

⁹⁷ *ibid* [37].

⁹⁸ *ibid* [38]

⁹⁹ *ibid* [39].

¹⁰⁰ *ibid* [45], [47]. Lord Justice Toulson's reasoning in *Guardian News and Media* [2013] QB 618 [88] that '*The development of the common law did not come to an end on the passing of the Human Rights Act 1998. It is in vigorous health and flourishing in many parts of the world which share a common legal tradition*' has been quoted (*ibid* [46]).

¹⁰¹ *ibid* [133].

*jurisprudence...And in time, of course, a synthesis may emerge. But the natural starting point in any dispute is to start with domestic law, and it is certainly not to focus exclusively on the Convention rights, without surveying the wider common law scene.*¹⁰²

Therefore, in the current case, the court ‘*should be regard to first the Charities Act and then article 10*’.¹⁰³ Based on this approach, Lord Mance found that the objectives of the CRA of maintaining public trust, accountability, proportionality and transparency by disclosing information to the public,¹⁰⁴ were ‘*comparable to any that might arise under Article 10*’.¹⁰⁵ Hence, the CRA was ‘*no less favourable*’ in imposing a general duty to disclose information on the public authorities than the ECHR.¹⁰⁶

Indeed, the core character of the English operation of deep-water legality is not that it is ‘always open’ to influences from interrelated legal cultures, but that it is based on ‘flexible lines whether to open or not’. This was demonstrated when the dissenting judgments did not agree with the approach of openness. For example, Lord Wilson explained the court’s role in conducting a judicial review as ‘*a social watchdog*’ to consider whether the administrative discretion was ‘*in accordance with an elaborate statutory scheme, drawn by Parliament*’.¹⁰⁷ Lord Carnwath also perceived the role of the

¹⁰² ibid [46].

¹⁰³ ibid [42].

¹⁰⁴ ibid [43].

¹⁰⁵ ibid [45]. The analysis of the jurisprudence of Article 10 of the ECHR was done in [58]-[100] (Lord Mance) and [142]-[146] (Lord Toulson).

¹⁰⁶ ibid [101]. The other majority judgments also followed the same direction (eg [135], [147], [149] (Lord Toulson), [154] (Lord Sumption)).

¹⁰⁷ ibid [189].

court in protecting legality as ‘*depending on the statutory or other legal framework within which the particular inquiry is established*’, which is the CRA in this case.¹⁰⁸

Instead of arguing for or against either judgment, the focus of this section is the flexibility how the individual judges in *Kennedy* can provide different understandings of whether their determination of the scope of judicial review of administrative discretion was influenced by interrelated legal cultures. This process was described by Lord Neuberger in an extra judicial speech, as follows;

*‘Initially...the attitude of many lawyers and judges in the UK to the Convention was not unlike that of a child to a new toy. As we became fascinated with the new toy, the old toy, the common law, was left in the cupboard. Recently, the judges have tried to bring the common law back to centre stage. The most dramatic example of this is...Kennedy.’*¹⁰⁹

This metaphorical description of common law, the ECHR (through the HRA) and the relationship between them as toys, either or both of which the courts feel free to pick up or leave during their play times, demonstrates that the doctrinal approach to determine the scope of judicial review in *Kennedy* is a product of the flexible mentality of English judicial review constitutionalism.

As described in Section 3.1 above, the flexibility of the relationship between the HRA and common law is usually related to the doctrines the courts apply in determining the scope of judicial review. This is the second point of a doctrinal approach to be unpacked from the legal reasoning of *Kennedy*. Similar to the methodology of Lord Diplock in *CCSU*

¹⁰⁸ *ibid* [241].

¹⁰⁹ Lord Neuberger, ‘The Role of Judges in Human Rights Jurisprudence: A Comparison of the Australian and UK experience’ (Conference at the Supreme Court of Victoria, Melbourne, 8 August 2014).

and Lord Woolf in *Coughlan*,¹¹⁰ Lord Mance in *Kennedy* listed a range of doctrines the English courts can apply to determine the scope of judicial review of the substantive exercise of discretion, from the rigid *Wednesbury*,¹¹¹ the modification of *Wednesbury* and the concept of anxious scrutiny,¹¹² the principles of fair procedure,¹¹³ to proportionality. Apart from that the application of the grounds was also described referencing to Craig's work that '*Both reasonableness review and proportionality involve considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision maker's view depending on the context*'.¹¹⁴ Moreover, the overlap and preference between them are accepted, as shown in the following statement;

*'The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages...There seems no reason why such factors should not be relevant in judicial review even outside the scope of Convention and EU law.'*¹¹⁵

This part of legal reasoning clearly demonstrates that the English courts are able to apply various doctrines and applications in their determination of the scope of judicial review. It was followed by the statement that these approaches '*enable them* [the courts]

¹¹⁰ This will be exemplified in the next chapter.

¹¹¹ n 12 [51].

¹¹² *ibid* [52]-[54] citing *Bugdaycay* (n 69); *Smith* (n 68).

¹¹³ *ibid* [53].

¹¹⁴ *ibid* [54] citing Craig, 'The Nature of Reasonableness Review' (n 51).

¹¹⁵ *ibid* [54].

to perform their constitutional function in an increasingly complex polity'.¹¹⁶ This means that the flexibility of the court's determination of the substantive exercise of discretion is a product of its constitutional function. While the judgment stopped here, it is continued in this section that the 'constitutional function' has a deep perspective based on the English legal culture.

However, the elements of English judicial review constitutionalism that can prove this were not prescribed in *Kennedy* simply because there is 'no written constitution' to provide the framework and scope of the court's authority in conducting judicial review. Elliott also recognises this with the following assertion;

*'...the law in this area has long been a barometer signifying the courts' perception of how fundamental constitutional principles shape their own role relative to that of executive government. As the law continues to evolve...much will therefore turn upon the UKSC's understanding of where the constitutional parameters of judicial review lies; in an unwritten constitutional order such as that of the UK.'*¹¹⁷

This section agrees that '*discerning their location* [influence of an unwritten constitution] *is no easy matter*'; however, it is proposed that the way to make this concrete is to compare it to the different doctrinal approaches of the Australian law, which are based on the existence of a written constitution as the constitutional framework of the legal system. Hence, making this connection explicit is a co-function of this section and the next.

Another distinctive element of the English legal culture, argued in *Kennedy* as influencing the described flexibility of doctrines and the adoption of interrelated legal

¹¹⁶ *ibid* [52] citing *R (Q) v Secretary of State for the Home Department* [2004] QB 36 [112] (Lord Phillips).

¹¹⁷ Elliott (n 18) 314-315.

cultures, is the twin concept of parliamentary sovereignty and the rule of law. Likewise, this was not mentioned directly in the legal reasoning of the judgments. However, this section points out that it was operational in the legal reasoning of *Kennedy*. All the judgments, whether they accepted or rejected the reading down of domestic law by Article 10 of the ECHR, described two sides of value the courts are required to consider in determining the scope of judicial review. For example, Lord Mance argues that the disclosure of information underpins democracy and accountability, legitimate interest and openness when taking administrative action,¹¹⁸ particularly in cases that involve charities, like this one.¹¹⁹ For this reason, the court should review administrative discretion not the disclosure of information. On the other hand, public administration requires information to be ‘*genuinely private, confidential or sensitive*’¹²⁰ in some situations, particularly those that relate to national security or international affairs. This supports the position that the court should not force public administrators to disclose the information by means of a judicial review because they are ‘*not equipped by training or experience, or furnished with the requisite knowledge or advice*’.¹²¹

These are explained by the individual judges in various terms. For example, Lord Toulson referred to the values of ‘*open justice*’, ‘*democracy*’, ‘*the rule of law*’, ‘*public confidence*’, ‘*checks and balances*’ and ‘*transparency of the legal process*’¹²² to be

¹¹⁸ n 12 [1].

¹¹⁹ *ibid* [49].

¹²⁰ *ibid* [1].

¹²¹ *ibid* [50].

¹²² *ibid* [110], [112], [115], [118].

considered along with ‘*public interest*’ and ‘*discretion granted by parliament in running public administration*’.¹²³ These are all regarded as part of the ‘*constitutional landscape*’.¹²⁴ Importantly, all the judgments point out that they need to be ‘*balanced by the court*’ on the case-by-case basis. For example, Lord Mance asserted that

*‘These competing considerations, and the balance between them, lie behind the issues on this appeal’*¹²⁵

*‘All such considerations can and would need to be taken into account, ...they are no reason why the balancing exercise should not be undertaken.’*¹²⁶

In the same vein, Lord Toulson prescribed that

*‘In the case of a statutory inquiry Parliament decided to leave it to the public body to rule on what should be disclosed, balancing the public interest in its decision being open to proper public scrutiny against any countervailing factors, but the exercise of such power must be amenable to review by the court.’*¹²⁷

*‘There is no standard formula for determining how strong the countervailing factor or factors must be. The court has to carry out a balancing exercise which will be fact-specific.’*¹²⁸

It is argued in this section that the balancing process between these values in determining the scope of judicial review of administrative discretion is an ‘implication’ of the balancing process between the twin concepts of parliamentary sovereignty and the rule

¹²³ *ibid* [107], [114], [121], [123], [130].

¹²⁴ *ibid* [108].

¹²⁵ *ibid* [1].

¹²⁶ *ibid* [49].

¹²⁷ *ibid* [123].

¹²⁸ *ibid* [113]. See also [125], [140], [153] (Lord Toulson), [175] (Lord Wilson).

of law. On the one hand, the explanation of '*democracy and accountability, legitimate interest and openness*' and '*open justice*' in administrative action endorse the necessity for the courts to conduct judicial review in order to protect the rule of law of administrative action. On the other hand, parliamentary sovereignty guides the court not to change the legal framework, where parliament grants the administrative agent the role to exercise discretion regarding the confidentiality of public administration. These two sides of mentality were resolved through the process of balancing by the court, which facilitated the malleability in their determination of the scope judicial review, as described above. This application of flexible doctrinal approaches based on the flexible mentality of English legal culture is continuously illustrated in *Pham*, as detailed below.

3.3 *Pham*

The claimant in *Pham* was born in Vietnam, migrated to the UK, and acquired British nationality. Later, the Home Secretary made an order under Section 40(2) of the British Nationality Act 1981 ('BNA'), which deprived him of his British nationality and announced that he was to be deported to Vietnam on the grounds of national security, since he had received terrorist training in Yemen. However, the Vietnamese government declined the claimant's Vietnamese nationality and he pleaded that his Vietnamese citizenship had been lost when he was granted the British one. Therefore, the order of the decision-maker was unlawful, since he was going to be stateless based on the meaning of Article 1(1) of the Convention related to the Status of Stateless Persons, as he was '*not*

considered as a national by any state under the operation of its law'. The case was brought to the Special Immigration Appeals Commission, the CA and eventually, the UKSC.¹²⁹

Again, the judges reached an agreement on the conclusion of the case, namely that there was no evidence that the Vietnamese Government treated the claimant as a non-national by the operation of its law, so the decision was not unlawful based on Section 40(4) of the BNA.¹³⁰ Instead, this section is focused on the legal reasoning and doctrinal approaches applied by the court in determining the scope of judicial review of administrative discretion, especially when it relates to an interrelated legal culture like EU law. Lord Carnwath addressed two points in this respect, the first of which was whether the order was lawful, since the deprivation of the claimant's British nationality would also cause him to lose his citizenship of the EU.¹³¹ The second was whether or not consideration must be given to the question of proportionality if such consideration fell within the ambit of EU law.¹³² Similar to *Kennedy*, these were the questions on which the courts determined their scope of judicial review based on their understanding of legality. Three points of the doctrinal approaches unpacked from the legal reasoning of *Pham* can demonstrate the courts' flexibility in operating legality.

Firstly, the flexibility in adopting interrelated legal cultures into the operation of legality was confirmed in *Kennedy*, particularly since Lord Mance argued that it is open

¹²⁹ n 13 [1]-[30].

¹³⁰ *ibid* [35]-[38] (Lord Carnwath), [63], [66]-[67] (Lord Mance), [101]-[102] (Lord Sumption), [112] (Lord Sumption).

¹³¹ This was also pointed out by other judges, namely *ibid* [31], [39] (Lord Carnwath), [68]-[69] (Lord Mance).

¹³² *ibid* [39] (Lord Carnwath).

for the courts to consider EU law if *'it offers advantages over the relevant domestic law'*.¹³³ However, the *'starting point'* remains identifying *'the ultimate legislative authority'* in the domestic law.¹³⁴ Parliamentary sovereignty was emphasised as being significant; therefore, *'we must view the UK as independent, Parliament as sovereign and European law as part of domestic law because Parliament has so willed'*.¹³⁵ Importantly, Lord Mance obviously included EU law as a part of the *'domestic constitutional arrangements'* when he made the following statement;

*'A domestic court must ultimately decide for itself what is consistent with its own domestic constitutional arrangements, including in the case of the 1972 Act what jurisdictional limits exist under the European Treaties...'*¹³⁶

This part of legal reasoning in *Pham* is a prominent output of this aspect of English legal culture. It is possible and flexible for the English courts to adopt an interrelated legal culture as the source of an understanding of their role in the conducting of judicial review. By way of comparison, it will be demonstrated in the next section that this kind of adoption of international treaty as part of legality is almost impossible in Australia because of the country's legal culture.

The second point that demonstrates flexibility of doctrinal approaches in the determination of the scope of judicial review in *Pham* is the validity of proportionality as a doctrine adopted from EU law. It will be clarified that the conclusion of all judgments

¹³³ *ibid* [72].

¹³⁴ *ibid* [80].

¹³⁵ *ibid* [80].

¹³⁶ *ibid* [90].

was similar because this point had to be a preliminary issue remitted by the SIAC, according to the availability of the facts. When it was not, the court did not deal with it.¹³⁷ However, the focus of this section is the legal reasoning for the application of proportionality, as if this has been pointed out to the SIAC. It is clear that the judgments accepted the advantages of proportionality and argued for its status to be a general head of judicial review in common law. For example, by referring to *Kennedy* and Craig's work, Lord Carnwath argued that these approaches were in greater force in the present case.¹³⁸ Proportionality would '*ensure that any future consideration by the higher courts will be informed by a clear understanding of the practical differences...*'.¹³⁹ This was similar to Lord Mance, who regarded proportionality as '*a tool directing attention to different aspects of what is implied in any rational assessment of the reasonableness of a restriction*'.¹⁴⁰ This is even clear in Lord Reed's judgment, as follows;

*'It may be helpful to distinguish between proportionality as a general ground of review of administrative action, confining the exercise of power to means which are proportionate to the ends pursued, from proportionality as a basis for scrutinising justifications put forward for interferences with legal rights.'*¹⁴¹

Although the conclusions were similar, there was a small difference in the opinions of the relationship between proportionality and rationality. Lord Sumption doubted that '*if the withdrawal of Mr Pham's British nationality was within the ambit of EU law it will be*

¹³⁷ *ibid* [56]-[62] (Lord Carnwath), [102] (Lord Sumption), [110] (Lord Sumption), [121] (Lord Reed).

¹³⁸ *ibid* [60]. See also [94]-[95] (Lord Mance).

¹³⁹ *ibid* [62].

¹⁴⁰ *ibid* [96], [98].

¹⁴¹ *ibid* [113]-[114].

necessary to apply to the decision the principle of proportionality'.¹⁴² He pointed out that this could mislead people to perceive that *'the principle of proportionality as it applies in EU law is liable to produce a different result in a case like this by comparison with ordinary principles of English public law'*,¹⁴³ instead, he expressed the following belief;

*'Although English law has not adopted the principle of proportionality generally, it has...stumbled towards a concept which is in significant respects similar, and over the last three decades has been influenced by European jurisprudence even in areas of law lying beyond the domains of EU and international human rights law.'*¹⁴⁴

Therefore, what should be done is to *'expand the scope of rationality review so as to incorporate at common law significant elements of the principle of proportionality'*.¹⁴⁵

However, Lord Reed contended that it did not mean that *'the Wednesbury test, even when applied with "heightened" or "anxious" scrutiny, is identical to the principle of proportionality as understood in EU law'*.¹⁴⁶

Rather than giving a certain solution to how the relationship between rationality and proportionality, and between the ECHR or EU law and common law should be, it is pointed out in this section that the norms from interrelated legal culture, like Convention rights and proportionality, could be adopted as part of the court's understanding of legality in *Pham* 'in a flexible manner'. Similar to *Kennedy*, the implication of the balancing

¹⁴² *ibid* [103].

¹⁴³ *ibid* [104].

¹⁴⁴ *ibid*.

¹⁴⁵ *ibid* [105]-[106].

¹⁴⁶ *ibid* [115].

process between the twin concepts appeared in *Pham*. For example, Lord Sumption regarded the ‘*individual’s right to nationality*’ and ‘*national security*’ as being located on ‘*the [different] weightiest ends of the sliding scale*’, whereby the courts have to determine ‘*the approach they court takes to draw a balance*’.¹⁴⁷

3.4 Other Elements in the English Picture

Arguments that supported the application of proportionality, either as a model for developing common law rationality or as a general head of judicial review, continued after *Kennedy* and *Pham*. For example, in *Keyu v Secretary of State for Foreign and Commonwealth Affairs*, Lord Neuberger argued that ‘*the four-stage [proportionality] test...should now be applied in place of rationality in all domestic judicial review cases*’.¹⁴⁸ However, this is not a conclusion of the scope of judicial review of administrative discretion in England. For example, when Lord Mance ended his judgment in *Kennedy*, he clearly stated that ‘*the nature of judicial review in every case depends on the context*’.¹⁴⁹ In the same vein, Lord Reed stated in *Pham* that ‘*proportionality is not a monolithic principle, expressed and applied in a uniform way in different legal systems and in different contexts*’.¹⁵⁰ This has also been recognised by some scholars; for example, Elliott concludes his chapter by saying that ‘*the general tenor of these cases is that the law in this*

¹⁴⁷ *ibid* [108].

¹⁴⁸ [2015] UKSC 69 [131].

¹⁴⁹ n 12 [51].

¹⁵⁰ n 13 [115]-[116].

*area is evolving*¹⁵¹ and Craig also made the following similar statement that '*Judicial deliberation in this area, whether under the guise of reasonableness or proportionality, is never going to be uncontroversial*'.¹⁵²

Apart from the cases, there is also room for various academic debates, as described above. These not only include comments about the particular grounds of judicial review, but also focus on the relationship and overlaps between them. Additionally, the analysis has been extended to other areas of judicial review; for example, a factual evaluation is a kind of administrative discretion. Therefore, the grounds for administrative discretion and those for factual issues described in the previous chapter usually merge and overlap. For example, a factual determination can be argued as being unreasonable using the *Wednesbury* approach.¹⁵³ On the other hand, the criteria set by Lord Justice Carnwath in *E* demonstrate an attempt to merge the doctrine of jurisdictional fact and unfairness into a general test to review the facts. These attempts to categorise or rearrange the grounds by scholars also result in a variety of terminologies being applied in the English literature, for instance, *unreasonableness*,¹⁵⁴ rule of reason and law¹⁵⁵ and abuse of power.¹⁵⁶

¹⁵¹ Elliott (n 18) 309.

¹⁵² Craig, 'The Nature of Reasonableness Review' (n 51) 167.

¹⁵³ Eg *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014 (HL).

¹⁵⁴ Craig, *Administrative Law* (n 22) [19-002].

¹⁵⁵ Wade and Forsyth (n 2) 293-305.

¹⁵⁶ Farulla (n 2) 214-215.

3.5 Products of the English Legal Culture

Rather than concluding the English determination of the scope of judicial review of administrative discretion under the label of pragmatism or a pragmatic legal reasoning process,¹⁵⁷ it has been unpacked in detail under the systematic points of doctrinal approaches and encapsulated in the snapshot below.

Doctrinal Approaches	English Law
Choice of grounds and concepts the courts can apply in conducting judicial review	Wednesbury Unreasonableness Modified Rationality Anxious Scrutiny Proportionality in cases related to Convention rights (with Deference) Proportionality in common Law without reference to the HRA
Application	Varied depending on the grounds, for example; <ul style="list-style-type: none"> • Stringent and rigid (Traditional <i>Wednesbury</i>) • Variable intensities of review (Modified rationality) • Methodology of structured analysis and variable intensities of review (Proportionality) • Various degrees depending on the case (Deference)
Influence of international treaties	Flexible to be included in the scope of legality However, the extent depends on particular cases and individual judges
Relationship between the grounds	Overlap between ones of administrative discretion and ones of factual determination
Academic Debates	Various as room is opened up, for example; <ul style="list-style-type: none"> • Development in applying particular concepts • Preferences between the grounds • Relationship between the HRA and common law • Whether and should proportionality become a general head of judicial review

¹⁵⁷

See Section 3 of Chapter 1.

Justifications	Various and flexible, but containing a similar kind of balancing process	
	To intervene (Implication of the rule of law)	Not to intervene (Parliamentary sovereignty)
	Open justice, Democracy, Rule of law, Public confidence, Checks and balances and Transparency of the legal process (<i>Kennedy</i>) Right to nationality (<i>Pham</i>)	Public interest and Discretion granted by parliament in running the public administration (<i>Kennedy</i>) National Security (<i>Pham</i>)

Importantly, all the doctrinal approaches and legal reasoning in the prior cases of *Kennedy* and *Pham*, as well as the secondary elements, namely, a variety of academic debates, terminologies and overlaps between the grounds, are connected to English legal culture. Two connections are explicit, the first of which is that the flexibility in taking the ECHR and EU law into the consideration of the scope of judicial review of administrative discretion in *Kennedy* and *Pham* are products of the flexible legal mentality of the English courts, particularly in the aspect of accepting an interrelated legal culture as part of their constitutional arrangement. The second is that the legal reasoning in *Kennedy* and *Pham* demonstrate the implications of a balancing process between the twin concepts of parliamentary sovereignty and the rule of law. This uncertain consideration of interrelated legal culture as the source of mentality on the role of the court in conducting judicial review and the nature of the balancing process led to the flexibility of the doctrinal approaches applied in the cases. Additionally, the absence of a written constitution is believed to be another factor that influences this flexibility. This will be clarified in the next section when it is compared with the completely different story of Australian law. The scope of judicial review of administrative discretion in Australia is determined by relatively fixed doctrinal approaches. The relationship between the grounds of judicial review are systematically

categorised in the judgments. The influence of interrelated legal cultures, like proportionality, are firmly rejected. All of these will be connected to the written constitution and rigid framework of separation of powers.

4. Australian Doctrinal Approaches

In contrast to the English law, the grounds of judicial review of administrative discretion have not changed much in Australia. Rather than being flexible, *Wednesbury* Unreasonableness remains the ‘*perennial feature of the [Australian] common law*’.¹⁵⁸ Correspondingly, the reason for this rigid position does not hide under swirling water, but is tangible based on the premise of the distinction between legality and merits. The courts have a role to ensure that discretionary power complies with the legal limits. A judicial review will only be conducted when administrative discretion becomes ultra vires and the ground that leads to such a case is that discretion is so unreasonable that ‘*no reasonable person could ever come to it*’ or goes ‘*beyond anything that could have been intended by the conferring of the discretionary power*’.¹⁵⁹ Traditional *Wednesbury* unreasonableness has been applied in a number of cases; for example, the judgments in *Peko* held that

*...the decision is “manifestly unreasonable”. This ground of review was considered by Lord Greene in Wednesbury, in which his Lordship said that it would only be made out if it were shown that the decision was so unreasonable that no reasonable person could have come to it.*¹⁶⁰

¹⁵⁸ Creyke, McMillan and Smyth (n 11) [14.2.2].

¹⁵⁹ Kerr (n 27) 11-12 (vi).

¹⁶⁰ n 28 [15].

Subsequently, in *Griffiths v Rose*, Justice Perram further increased the degree of rigidity in applying the ground of unreasonableness by holding that a review on this basis will only succeed ‘when a level of unreasonableness is reached which, in essence, permits of no contrary view’.¹⁶¹

Different from the English law, the channel of ‘other choices’ the courts can use to step away from *Wednesbury* has not been opened much. As described in Chapter 2, Australia is not a member of the EU and has not ratified the ECHR; therefore, there is no aspect of this interrelated legal culture that can influence the adoption of proportionality into the domestic law, as well as an act to imply it, like the HRA.¹⁶² Although the ADJR operates in tandem with the common law, the application in determining the scope of judicial review through unreasonableness is similarly settled at the standard of *Wednesbury*.¹⁶³ Therefore, the relationship and preference between the common law and the ADJR on this point have not been debated in the same way as those between the ECHR and the common law in the UK. Similarly, the concept of deference limiting the intensity of the review has not been widely discussed; indeed, it was firmly rejected since *Enfield*, as demonstrated in the last chapter.¹⁶⁴

However, this does not mean that there are no ‘moves’ in this area of Australian law at all. The prominent one is the introduction of new ground of judicial review of

¹⁶¹ (2011) 192 FCR 130 [50].

¹⁶² Administrative Review Council Federal Judicial Review in Australia, *Report No 50* (2012) [7.44].

¹⁶³ ADJR, s 5(2)(g), 6(2)(g).

¹⁶⁴ The rule of restraint may be argued to be an alternative for deference. This will be exemplified in *S20/2002* (n 14) and *SZMDs* (n 15) below.

administrative discretion in *S20/2002* called '*illogicality and irrationality*'. This is because Section 476(2)(b) of the Migration Act 1958 (Cth) ('MA') at that time provided that a decision of the RRT could not be challenged on the ground '*that the decision involved an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power [Wednesbury]*'. Therefore, the applicant had to argue instead that the RRT's decision was '*irrational, illogical and not based upon findings or inferences supported by logical grounds*'. Completely different from the flexibility of English law, the consideration of illogicality and irrationality as a ground of judicial review requires serious manifestation of unreasonableness in order to treat the administrative discretion as unlawful.¹⁶⁵ Its validity, application and relationship with other grounds were further considered later in *SZMDs* and *Li*. Additionally, the proposal to apply proportionality as a general ground of judicial review has been firmly rejected.¹⁶⁶

Because of the described slow development, it is not necessary to describe other prior Australian cases as background material as in the previous section. Instead, this section will be directly focused on unpacking the legal reasoning of *S20/2002*, *SZMD* and *Li*, and connecting them as products of the Australian legal culture. Although this has been recognised in some literature,¹⁶⁷ the methodological approach of unpacking and comparing it to the English law will make the connection become clearer for both English and Australian law.

¹⁶⁵ Aronson, Groves and Weeks (n 45) [6.420].

¹⁶⁶ The rejection is also expressed in the determination of substantive legitimate expectations in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1. This will be unpacked in the next chapter.

¹⁶⁷ See n 59.

4.1 *S20/2002*

The applicant in *S20/2002* was refused the protection of a visa, since the Minister for Immigration and Multicultural Affairs was not satisfied that the applicant was a person Australia was obliged to protect based on the criterion in Section 36(2) of the MA.¹⁶⁸ This decision was subsequently approved by the RRT, which has the power to affirm, vary or set aside the delegate's decision based on Sections 65 and 415 of the MA. As explained above, the applicant challenged the decision for being illogical, irrational, or not based on findings or inferences of fact supported by logical grounds.¹⁶⁹ Despite some different details in the decisions of individual judges,¹⁷⁰ they all agreed that illogicality and irrationality was a valid ground of judicial review. The focus of this section is the legal reasoning in the judgments on this position. Three points that demonstrate the connection between the determination of these grounds and Australian legal culture are unpacked below.

Firstly, similar to the English law, the determination of illogicality and irrationality as ground of judicial review was explicitly described as an operation of legality by Chief Justice Gleeson in the following statement;

‘To describe reasoning as illogical, or unreasonable, or irrational, may merely be an emphatic way of expressing disagreement with it. If it is suggested that there is a legal consequence, it may be necessary to be more

¹⁶⁸ n 14 [2].

¹⁶⁹ *ibid* [1]-[4] (Gleeson CJ) and [82]-[109] (Kirby J). Indeed, the decision was also challenged on the grounds that it was affected by either actual or apprehended bias. However, this issue is not the focus of this section.

¹⁷⁰ For example, Justice Kirby was the only judge who endorsed heightened scrutiny in conducting judicial review of administrative discretion, which imperils life or liberty (*ibid* [158]-[159]).

precise as to the nature and quality of the error attributed to the decision-maker...¹⁷¹

'...where there is a duty to act judicially, a power must be exercised "according to law...", and irrationality of the kind ... may involve non-compliance with the duty....In a context such as the present, it is necessary to identify and characterise the suggested error, and relate it to the legal rubric under which a decision is challenged.¹⁷²

The logic of legality was applied so that the court would only be able to conduct judicial review when the administrative discretion was regarded as being unlawful. However, the determination of judges in *S20/2002* as to whether the disputed administrative discretion was unlawful or not was clearly different from the English law. Rather than being flexible the extent to which an interrelated legal culture influences the domestic law, the court in *S20/2002* connected the determination of the scope of judicial review to the centrality of jurisdictional error.¹⁷³ Justice Kirby made this point clear in the following statement;

'Where the reasons of a tribunal established by the Parliament to make decisions and exercise powers of the kind in question, disclose an irrational, illogical or perverse process of reasoning, ...It may involve jurisdictional error... importantly, it will authorise relief from this Court under its constitutional mandate to hold all officers of the Commonwealth answerable to the Constitution and to the other laws pursuant (or subject) to which they exercise their powers.¹⁷⁴

This is systematic and parallel to the area of judicial review of quasi-judicial institutions and jurisdictional fact analysed in Chapters 3 and 4.

¹⁷¹ *ibid* [5].

¹⁷² *ibid* [9].

¹⁷³ *ibid* [59].

¹⁷⁴ *ibid* [81]. See also [34] (McHugh and Gummow JJ).

Next, it was shown in the previous section that various grounds of judicial review overlap in England, and the courts leave these open to decide in later cases and for scholars to discuss whether or not they are covered by legality. In Australia, although the grounds of judicial review like *Wednesbury*, illogicality and irrationality are corresponding in nature, an attempt was made to categorise their application in the judgments of *S20/2002*. For example, Chief Justice Gleeson described the overlap as follows;

*'As with illogicality and irrationality, unreasonableness is a protean concept, and may require closer definition where it is said to be relevant to judicial review of an administrative decision. The grounds of judicial review...overlap...'*¹⁷⁵

Similarly, while the relationship between the grounds of judicial review of administrative discretion and those of factual determination is flexible in England, the judgment in *S20/2002* attempted to clarify their validity, since Justices McHugh and Gummow held that

*'The jurisdictional fact which supplies the hinge upon which a particular statutory regime turns may be so identified in the relevant law as to be purely factual in content...That in turn led the courts to treat the formation of the statutory state of satisfaction as "reasonable" and thus to posit some criterion for the assessment of the factual elements which went to supply that state of satisfaction...'*¹⁷⁶

This means that illogicality and irrationality, claimed as a ground in *S20/2002*, can apply when reviewing an administrative decision that encompasses subjectively unreasonable factual findings. Read with *Enfield* and *Timbarra*, the formation becomes that

¹⁷⁵ *ibid* [20].

¹⁷⁶ *ibid* [54]. See also [125] (Kirby J).

jurisdictional fact is applied to review objective factual determination, while illogicality and irrationality can apply for reviewing the subjective unreasonableness of both factual determination and administrative discretion. This formation was added and considered in *SZMDs* and *Li*, which will shortly be unpacked below.

Next, the judgment in *S20/2002* emphasised *‘the distinction between the functions of judges and juries’*, whereby *‘the limitation placed by legislatures...and the scope of judicial review procedures created by statutes’*.¹⁷⁷ This leads to the second point that, instead of the different applications to determine the scope of judicial review being dependent upon the doctrine, illogicality and irrationality were determined through the statutory construction of the relevant legislature. This application was repeatedly described by all the judges in the relatively same manner. For example, Chief Justice Gleeson stated, *‘We are concerned with the statutory provisions that operate upon the state of satisfaction, or lack of satisfaction, of an administrative decision-maker’*.¹⁷⁸ The words *‘we are concerned’* demonstrate well how the framework of the separation of powers prescribed in the relevant legislature is important to the mentality of the Australian courts. Justice Kirby also explained that

*‘The nature and source of the official's power will usually be deduced from the enactment pursuant to which he or she has acted. By contrast, the review can be...pursuant to the statute that confers the power on the official, or the Constitution.’*¹⁷⁹

‘The legislative provision that confers the jurisdiction on the administrative decision-maker and the nature of the decision for which it provides, construed in its statutory and constitutional context, will also supply the

¹⁷⁷ *ibid* [58].

¹⁷⁸ *ibid* [8].

¹⁷⁹ *ibid* [113].

*limits of that jurisdiction and indicate the circumstances that will establish whether the decision-maker has trespassed beyond, or otherwise misconceived, his or her authority to act.*¹⁸⁰

The legal reasoning in *S20/2002* that has been unpacked up to this point demonstrates that illogicality and irrationality were accepted as a valid ground of judicial review of the subjective exercise of discretion and the factual determination of administrative action. This was formulated apart from jurisdictional fact, but they are all systematically categorised as a subset of jurisdictional error. Parallel to the previous chapters, the application in determining the grounds was fixed in the consideration of statutory construction.

Compared to the English law, all of these doctrinal approaches demonstrate a relatively clear answer to ‘the question of what is law?’. Using similar logic to the English law analysis, this different operation of legality and determination of the scope of judicial review are products of the Australian legal culture. As shown above, it was difficult to demonstrate the connection between the scope of judicial review and legal culture in the case of English law, but this was a comparatively simple process in terms of the Australian law, because the distinctive elements of Australian legal culture were directly referred to as the justification for determining the scope of judicial review in *S20/2002*. These are the rule of law, the distinction between legality and merits, the entrenchment of the jurisdiction of the HCA by Section 75(v) of the written constitution, and the centrality of jurisdictional error. For example, Justices McHugh and Gummow explained that

¹⁸⁰ *ibid* [123]. See also [116].

*'In broad terms, the appellant's purpose in moving under s 75(v) of the Constitution is to ensure that there are available any grounds of review...'*¹⁸¹

*'We emphasised that the distinction between jurisdictional and non-jurisdictional error which informs s 75(v) manifests the separation between the judicial power and the legislative function of translating policy into statutory form and the executive function of administration of those laws.'*¹⁸²

The legal reasoning given by Justice Kirby was also explicit. For example, he stated that

*'According to the present doctrine of this Court interpreting s 75(v), a person seeking relief under that provision must establish jurisdictional error in order to secure the issue of the writs of Mandamus or prohibition. Therefore, if the appellant can establish jurisdictional error, he may obtain relief from this Court.'*¹⁸³

Clearly, unlike *Kennedy* the judgments in *S20/2002* did not describe two sides of values, transformed from the twin concepts between parliamentary sovereignty and the rule of law, as well as the balancing process between them. Instead, the distinctive elements of the Australian legal culture were directly explained to support the courts' fixed and clear approaches in determining the scope of judicial review. Justice Kirby defined this set of related elements as *'this country's peculiar constitutional arrangement'*.¹⁸⁴

The last focal point to examine in *S20/2002* is the discussion of *'the rule of restraint'*, which was described together with a proposal to increase the intensity of a review of administrative discretion by Justice Kirby that the courts *'should not be confined*

¹⁸¹ *ibid* [26]-[27].

¹⁸² *ibid* [58]-[59].

¹⁸³ *ibid* [119], [122], [154]. See also [112]-[114] (Kirby J), [173] (Callinan J).

¹⁸⁴ *ibid* [168].

to the rigidities and technical limitations of a bygone age'.¹⁸⁵ From his perspective, a '*more rigorous examination*' through judicial review can be taken in some cases that relate to human rights.¹⁸⁶ Justice Kirby asserted that this was not an '*endorsement of an unrestrained judicial review*'.¹⁸⁷ This legal reasoning was partly compatible to the reasons given for rejecting the concept of deference, analysed in the previous chapter. If it amounts to jurisdictional error, considered from the relevant statutory context, the courts will neither defer nor restrain it.¹⁸⁸ This strict attachment to the mentality of the Australian court in determining the scope of judicial review through the framework of the separation of powers became more explicit in *SZMDs*. For example, while Justice Kirby still left room for '*remote from ordinary judicial experience*' in administrative discretion related to government policy or the evaluation of complex evidence,¹⁸⁹ Mr. Gageler stated in the transcript of legal argument of *SZMDs* that '*it hard to think of illogicality as a question of degree*'.¹⁹⁰

4.2 *SZMDs*

The situation in *SZMDs* was relatively similar to that in *S20/2002*. The applicants requested the protection of a visa under Section 36(2) of the MA, claiming that they feared they

¹⁸⁵ *ibid* [159].

¹⁸⁶ *ibid* [150].

¹⁸⁷ *ibid* [148].

¹⁸⁸ *ibid* [149].

¹⁸⁹ *ibid*.

¹⁹⁰ The Transcript of legal argument in *Minister for Immigration and Citizenship v SZMDs* [2010] HCA 16.

would be prosecuted in Pakistan because of their homosexuality. The decision-maker rejected the application and the RRT approved the rejection on the ground that it was not satisfied with the obligation to protect. The difference from *S20/2002* in terms of fact was that unreasonableness was no longer prohibited from being argued against the RRT because of the amendment of the legislation.¹⁹¹ Therefore, the applicant in *SZMDs* appealed the case to the Federal Court and the HCA on the grounds that the decision was *'unreasonable, illogical and irrational'*, and thereby consisted of a jurisdictional error.¹⁹² The legal reasoning given by the judgments in *SZMDs*, following *S20/2002*, demonstrates how the doctrinal approaches to determine the scope of judicial review became fixed in the light of the Australian legal culture. Three points can be unpacked, as detailed below.

Firstly, even though the conclusion of the case was divided into two sides,¹⁹³ all the judgments clearly regarded the determination of illogicality and irrationality as an operation of legality. For example, Justice Heydon asserted that *'As the Tribunal's reasoning was not illogical, it is not necessary to determine any of the questions of law about which the parties were in controversy'*.¹⁹⁴ Justices Crennan and Bell also stated that *'satisfaction of the existence of facts must amount in point of law to what an empowering provision prescribes or specifies'*.¹⁹⁵

¹⁹¹ By introducing the privative clause in Section 474 of the MA in the light of *Plaintiff s157/2002 v Commonwealth* (2003) 211 CLR 476.

¹⁹² n 15 [1]-[4], [8]-[15], [56]-[72], [90]-[120].

¹⁹³ While the majority, which consisted of Justices Heydon, Crennan and Bell, held that the RRT's decision was not illogical and irrational (ibid [56]-[137]), Justices Gummow and Kiefel held a dissenting opinion that it was (ibid [1]-[55]).

¹⁹⁴ ibid [87].

¹⁹⁵ ibid [122].

Next, rather than possessing the features of flexibility as in the English law, jurisdictional error is the central approach in the operation of Australian deep-water legality. This was clarified by Justices Gummow and Kiefel at the very front of their judgments, when they declared that *'The only avenue of judicial review in the present case was that rooted in s 75(v) of the Constitution itself and that required jurisdictional error to quash the administrative decision in question'*.¹⁹⁶ Justices Crennan and Bell also clearly stated that *'The main question arising on the appeal is whether "illogicality", "irrationality", or "lack of articulation" in a finding of jurisdictional fact can amount to jurisdictional error'*.¹⁹⁷

Furthermore, rather than being debatable like the relationship between common law and the ECHR in English law, the judgments of Justices Gummow and Kiefel illustrated that the present case *'[did] not arise under one of the systems of review of administrative decisions which are established by laws of the Commonwealth...In particular, the ADJR'*,¹⁹⁸ but *'the application of the doctrine of jurisdictional error'*.¹⁹⁹ They clarified the fact that the English approaches, namely, the rubric of abuse of power and the consideration of whether to import proportionality from EU law into the domestic law, were not required in the present case.²⁰⁰

¹⁹⁶ *ibid* [7] then emphasised in [36].

¹⁹⁷ *ibid* [94], [123], [130]-[131].

¹⁹⁸ *ibid* [5], then emphasised in [28].

¹⁹⁹ *ibid* [29].

²⁰⁰ *ibid* [27].

Next, the categorisation between common law grounds of judicial review were described in additions to *S20/2002*. Justices Gummow and Kiefel began by explaining the different application of jurisdictional fact in the English and Australian laws. For instance, the ground is generally covered in the English court's understanding of legality, but the extent of the understanding is flexible and debatable. In their words,

*'In the English system the "jurisdictional fact" was an appropriate marker for the enforcement of legality; how much further the field for judicial review of administrative action extended remained a matter of debate'.*²⁰¹

This is different from the Australian deep-water legality, which involves determining jurisdictional fact by rigidly considering the statutory construction.²⁰² Factual determination becomes unlawful when it fails to exercise jurisdiction.²⁰³ This application of jurisdictional fact was claimed to have '*added significance where the law in question is made by a legislature*'.²⁰⁴ This means that the court gave importance to the framework of the separation of powers when determining the scope of judicial review.

Not only is this application of jurisdictional fact parallel with those in *Timbarra* and *Enfield* analysed in the previous chapter, but Justices Gummow and Kiefel also clarified that jurisdictional fact can be confused with unreasonableness,²⁰⁵ and rather than leaving this room open, Justices Crennan and Bell attempted to establish a categorisation

²⁰¹ *ibid* [18], [20]-[22].

²⁰² *ibid* [23].

²⁰³ *ibid* [24].

²⁰⁴ *ibid* [25].

²⁰⁵ *ibid* [39].

between them. Firstly, they asserted that the *Wednesbury* standard should be retained in applying unreasonableness.²⁰⁶ The court could conduct judicial review of discretion, even ‘*in circumstances where no reasons are required*’.²⁰⁷ Secondly, jurisdictional fact is based on the ground that ‘*fact-finding must be based on probative material, one correlative of which is that a decision based on no evidence displays jurisdictional error*’.²⁰⁸ Thirdly, the judgment affirmed that illogicality and irrationality could be applied as a way to review the state of satisfaction²⁰⁹ in the reasoning process of administrative discretion, similar to *S20/2002*.²¹⁰

This legal reasoning clarified the formation of the categorisation between the grounds of judicial review from *S20/2002*. While *Wednesbury* could be applied as ‘*a safety net*’ for reviewing administrative discretion, even when no reasons were required,²¹¹ illogicality and irrationality could be applied to review the subjective legal reasoning of factual determination and administrative discretion and jurisdictional fact could be applied for reviewing objective fact related to the submission of evidence. However, all of these grounds are covered under the approach of jurisdictional error, regarded as Australian deep-water legality.²¹² The judgment went further than *s20/2002* by demonstrating that

²⁰⁶ *ibid* [124].

²⁰⁷ *ibid* [128].

²⁰⁸ *ibid* [124].

²⁰⁹ *ibid* [124].

²¹⁰ *ibid* [131].

²¹¹ A term applied by Creyke, McMillan and Smyth (n 11) [14.2.2].

²¹² n 15 [132].

these approaches are clearly different from the English law, where proportionality has been adopted from EU law and merged into the common law.²¹³ This was also clear from the transcript of legal argument of the case, in which Justice Kiefel stated that

*‘The word “proportionality” can have many colours to it. Sometimes when it is waved around in English decisions it does not entirely mean quite the same thing as the system from which it is derived’.*²¹⁴

Apart from the categorisation, the determination of the aforementioned grounds of judicial review of administrative discretion is fixed on the consideration of statutory construction. For example, Justices Gummow and Kiefel stated that *‘many of the leading authorities in this court in which administrative decisions were challenged concerned legislative regimes’*.²¹⁵ Similarly, Justices Crennan and Bell asserted that *‘jurisdictional error is where a statutory power is conferred the legislature is taken to intend that the discretion is to be exercised reasonably and justly’*.²¹⁶ Subsequently, although the conclusions of the judges in *SZMDs* were different, they similarly considered the statutory construction of the MA in a very detailed manner, and this was explicitly done without the interference of an interrelated legal culture.²¹⁷

In terms of justification, similar to *S20/2002*, the legal reasoning in *SZMDs* demonstrates direct references to the distinctive elements of Australian legal culture,

²¹³ *ibid* [127].

²¹⁴ n 190.

²¹⁵ n 15 [34].

²¹⁶ *ibid* [123].

²¹⁷ *ibid* [41]-[54] (Gummow and Kiefel JJ), [131]-[136] (Crennan and Kiefel JJ).

namely, the written constitution. For example, Justices Crennan and Bell stated that *'This Court has observed with reference to s75(v) of the Constitution and jurisdictional error'*²¹⁸ and Justices Gummow and Kiefel asserted that the *'judicial review in this case was that rooted in section 75(v) of the Constitution'*.²¹⁹ Additionally, Justices Gummow and Kiefel further explained that the privative clause in Section 474 of the MA ousting the judicial review of the RRT's decision was ineffective based on the premise in *Plaintiff S157/2002*.²²⁰ This determination of the scope of judicial review related to the status of the privative clause was systematic to the analysis of *Kirk* in Chapter 3. Eventually, they stated that the distinction between jurisdictional error and non-jurisdictional error was connected to the *'setting of the Australian Constitution'*.²²¹ Indeed, not only jurisdictional error, but all the fixed doctrinal approaches the courts applied to determine the scope of judicial review in *SZMDs* were products of the rigid mentality of Australian judicial review constitutionalism.

4.3 *Li*

Following on from *S20/2002* and *SZMDs*, the situation in *Li* was also based on the same statutory regime of the MA. The applicant requested that the process of reviewing her visa be postponed until the outcome of her skills assessment was finalised. The application was refused by the Minister for Immigration and Citizenship and the refusal was approved by

²¹⁸ *ibid* [123].

²¹⁹ *ibid* [7].

²²⁰ *ibid* [7].

²²¹ *ibid* [16].

the Migration Review Tribunal ('MRT') under Section 363(1)(b) of the MA. The case was appealed to both the Federal Court and the HCA on the grounds that the MRT's decision was one that no reasonable tribunal could have made.²²² It is comprehensively shown in this section how the doctrinal approaches from *S20/2002* and *SZMDs* were further entrenched in *Li* in the light of the Australian legal culture in the three points.

Firstly, the judgments in *Li* affirmed that the scope of judicial review was determined by the logic of legality. For example, Chief Justice French held that '*Every statutory discretion, however broad, is constrained by law*'.²²³ He also cited *R v Anderson*; *Ex parte Ipec-Air Pty Ltd*²²⁴ and *Sharp v Wakefield*²²⁵ to explain that '*discretion allowed by statute to the holder of an office is intended to be exercised according to the rules of reason and justice...according to law*'.²²⁶ The rationality ground required by the rules of reason is '*an essential element of lawfulness in decision-making*'.²²⁷ Justices Hayne, Kiefel and Bell also asserted that '*when something is to be done within the discretion of an authority, it is to be done according to the rules of reason and justice. That is what is meant*

²²² n 16 [1]-[16] (French CJ), [33]-[45] (Hayne, Kiefel and Bell JJ).

²²³ *ibid* [23].

²²⁴ [1965] HCA 27.

²²⁵ [1891] AC 173.

²²⁶ n 16 [24].

²²⁷ *ibid* [26].

by "according to law".²²⁸ A decision-maker's discretion 'resides within the bounds of legal reasonableness'.²²⁹ They emphasised that

*'Whether a decision-maker be regarded, by reference to the scope and purpose of the statute...the final conclusion will in each case be that the decision-maker has been unreasonable in a legal sense.'*²³⁰

Next, although the grounds on which to review administrative discretion were categorised in a slightly different way from *SZMDs*, the relationship between those grounds has been described; rather than left unanswered. For example, Chief Justice French accepted the overlap between the traditional *Wednesbury* unreasonableness²³¹ and illogicality and irrationality, as ground for reviewing the process of giving reasoning in administrative discretion.²³² However, he clarified that

*'A distinction may arguably be drawn between rationality and reasonableness on the basis that not every rational decision is reasonable. It is not necessary for present purposes to undertake a general consideration of that distinction which might be thought to invite a kind of proportionality analysis to bridge a propounded gap between the two concepts.'*²³³

Rather than being debatable, this legal reasoning was designed to re-check that the door for incorporating proportionality into the Australian common law had been properly locked. Justices Hayne, Kiefel and Bell also considered that, although *Wednesbury* is not

²²⁸ *ibid* [65].

²²⁹ *ibid* [66].

²³⁰ *ibid* [72].

²³¹ *ibid* [26]-[27].

²³² *ibid* [28].

²³³ *ibid* [30].

the endpoint in controlling discretion,²³⁴ its development should not be flexible as it was in the English law; instead, the determination was subjected to *'the scope and purpose of the statute'*.²³⁵ In the same vein, Justice Gageler also held that *Wednesbury* should remain in the Australian law rather than being modified.²³⁶

In short, the judgments in *Li* did not attempt to distinguish the grounds rigidly as they did in *SZMDs*. However, they emphasised that the courts must determine the unlawfulness of administrative discretion through the approach of jurisdictional error and the consideration of the relevant statutory construction, as opposed to being complex, varied and influenced by an interrelated legal culture like the English law. This leads to the second point of doctrinal approaches. For example, Chief Justice French cited Justice Dixon in *Shrimpton v The Commonwealth*, as follows;

*'Every statutory discretion is confined by the subject matter, scope and purpose of the legislation under which it is conferred. Where the discretion is conferred on a judicial or administrative officer without definition of the grounds upon which it is to be exercised then.'*²³⁷

Justices Hayne, Kiefel and Bell also held that *'The legal standard of reasonableness must be the standard indicated by the true construction of the statute'*.²³⁸ Similarly, Justice Gageler stated that

²³⁴ *ibid* [64], [68].

²³⁵ *ibid* [72].

²³⁶ *ibid* [113].

²³⁷ *ibid* [23] citing [1945] HCA 4. See also the reference to *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 [24] that *'discretionary power is to be ascertained by reference to the scope and purpose of the statutory enactment'*.

²³⁸ *ibid* [67], [74], [88]-[89].

*'Implication of reasonableness is a manifestation of the general and deeply rooted common law principle of construction that such decision-making authority as is conferred by statute must be exercised according to law and to reason within limits set by the subject-matter, scope and purposes of the statute.'*²³⁹

In the aspect of justification, a similar set of elements of the Australian legal culture as that applied in *S20/2002* and *SZMDs* was referred to in *Li*. The most prominent were Chief Justice French citing Justice Dixon in *Shrimpton v The Commonwealth* that 'Complete freedom from legal control, is a quality which cannot ... be given under our Constitution to a discretion',²⁴⁰ and Justice Gageler's assertion that the court can order relief to compel the performance by the MRT under Section 75(v) of the Constitution.²⁴¹

4.4 Other Elements in the Australian Picture

Up to this point, the relatively fixed doctrinal approaches applied to review administrative discretion in *S20/2002*, *SZMDs* and *Li* have been shown in this section. In essence, the emerging ground of illogicality and irrationality was accepted, but applied rigidly, namely, through the consideration of the relevant statutory construction. Different from the merger of judicial review of the factual issues and the evaluation of unfairness in *E*, the relationship between the grounds, namely illogicality and irrationality, *Wednesbury* and jurisdictional fact, has been categorised in Australia. Unlike the unclear boundary between the ECHR and the English common law, these grounds for an Australian common law judicial review do not interrelate with the ADJR. Rather than various choices of domestic

²³⁹ *ibid* [90]-[92].

²⁴⁰ *ibid* [23].

²⁴¹ *ibid* [104].

law and interrelated legal cultures, proportionality was firmly rejected in the cases. In the same vein, the approaches in the Australian cases did not come with various ways of justification like those in *Kennedy* and *Pham*; instead, they were steadily backed up by a set of distinctive elements of the Australian legal culture, namely the written constitution, the distinction between legality and merits and the separation of powers.

These doctrinal approaches based on the Australian legal culture continued after *Li*. For example, the judgment in *Minister for Immigration and Border Protection v Singh* was as follows;

‘There is a presumption of law that Parliament intends an exercise of power to be reasonable...subject to any impinging Constitutional consideration, the presence of a clear statutory qualification or contrary intention.’²⁴²

Subsequently, in *Fiorentino v Companies Auditors and Liquidators Disciplinary Board*, Justice Wigney further summarised and entrenched the principles in *Li* and *Singh*, for example;

‘Legal unreasonableness can be a conclusion reached by a supervising Court after the identification of an underlying jurisdictional error in the decision-making process...’

The legal standard of reasonableness...will need to be found in the scope, subject and purpose of the particular statutory provisions in issue in any given case.’²⁴³

In terms of proportionality, although there are some arguments for its advantages based on functionality,²⁴⁴ it is still not a separate ground of judicial review in Australia and

²⁴² n 44 at 43.

²⁴³ [2014] FCA 641 [76](a)(b)(f).

²⁴⁴ n 57.

this is clearly because of the Australian legal culture. Apart from Taggart regarding proportionality in Australia as *'a bridge too far'*, it was compared to the English law in a Report of the Law Council of Australia with the following comment;

*'The reason for the UK expansion of judicial review is due to peculiar factors – UK's geopolitical positioning in the EU, the HRA and the absence of a written Constitution which incorporates a strict separation of powers. Due to the nature of Australia's written Constitution it might not be desirable (or even possible) to create rights of review that use a principle such as proportionality.'*²⁴⁵

This clarifies the connection between the approach and legal culture, not only for Australian law, but also English law. The rejection of proportionality in Australia is also parallel to the area of judicial review based on the grounds of substantive legitimate expectations. This is the subject of an analysis in the next chapter.

All the doctrinal approaches in the cases result in that the room for scholars to debate the determination of the scope of judicial review of administrative discretion in Australia is relatively smaller than in England.²⁴⁶ The scope of judicial review of administrative discretion has been confined in the cases. Significantly, almost all the literature emphasises the connection between the approaches and the Australian constitutional orders. Examples of the prominent ones are as follows,²⁴⁷

²⁴⁵ n 162.

²⁴⁶ This does not mean that there are no arguments for the development of judicial review in this area at all (Eg the heightened intensity of review proposed by Justice Kirby in *S20/2002* (n 14)). However, the overall picture of the Australian law in the light of its legal culture is relatively smaller than the English law.

²⁴⁷ See also Brian Preston, 'Judicial Review of Illegality and Irrationality of Administrative Decisions in Australia' (2006) 18 Australian Bar Review 17; Aronson, Groves and Weeks (n 45) [5.10], [6.390], [6.450].

'Because there is a constitutional separation of powers, the High Court has a strongly arguable basis for its conclusion that the making of executive (including administrative discretionary) decisions is not a matter for the judicial arm of government.' (Sir Anthony Mason)²⁴⁸

'...the Australian courts... slowly but surely turn up the intensity of review of factual findings. The effect of this...has clearly been to enhance the integrity of administrative decision-making in this country.' (Farulla)²⁴⁹

4.5 Products of the Australian Legal Culture

In this section, the conclusive label of formalism has been turned into a concrete examination of the determination of the grounds of judicial review related to the substantive exercise of discretion in Australia. The legal reasoning in *S20/2002*, *SZMDs* and *Li* has been unpacked into fixed doctrinal approaches, which further result in other elements in the overall picture of Australian law. A snapshot of the analysis is captured in the table below.

Doctrinal Approaches	Australian Law
Grounds of Judicial Review	<i>Wednesbury</i> unreasonableness Illogicality and irrationality Jurisdictional fact All are covered under jurisdictional error, which does not include proportionality
Relationship between them	Overlapping in nature, but the courts try to clarify the validity and categorisation between them
Application	Fixed Considered from the relevant statutory construction

²⁴⁸ Mason A, 'Mike Taggart and Australian Exceptionalism' in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing 2009) 179-182.

²⁴⁹ Farulla (n 2) 215-216, 232.

Influence of interrelated legal cultures	None
Relationship to the ADJR	Clear separation between common law and an ADJR judicial review
Academic Debates	Some argue for the advantages of the variety of intensities of review, but there are much fewer debates than those in the English law Firm rejection of the concept of deference Strict application of the rule of restraint according to the framework of the separation of powers (Justice Kirby in <i>S20/2002</i>)
Justification	Fixed at the separation of powers, the rule of law, concept of jurisdiction, Section 75(v) of the constitution

Unlike the English law, the influence of the Australian constitutional setting on these distinctive doctrinal approaches is not hidden, but recognised in a volume of literature. There is a distinctive understanding of the rule of law, giving importance to the rigid distinction between legality and merits, based on the framework of the separation of powers prescribed in the written constitution. This goes further in this section by unpacking them from the legal reasoning of *S20/2002*, *SZMDs* and *Li* in order to demonstrate their implication in the courts' determination of the scope of judicial review in practice.

5. Conclusion

'The legality and merits distinction will also continue in Australia to be a strong constraint on the development of unreasonableness ...

*...some English decisions escape the construction of the legality and merits distinction and to declare administrative action to be invalid.'*²⁵⁰

These commonly-recognised differences between the English and Australian courts' determination of the scope of judicial review of administrative discretion were unpacked in this chapter through the framework of deep-water legality and legal culture. In summary,

²⁵⁰ Creyke, McMillan and Smyth (n 11) [14.2.9]-[14.2.10].

the English courts have choices in the determination, ranging from the domestic one like *Wednesbury*, modified rationality, anxious scrutiny, to those adopted from interrelated legal cultures, like proportionality and deference. The applications, justifications and relationship between common law and the ECHR or EU law have been given flexibly by individual judges. These approaches influence other elements in the English picture like various debates among scholars, the relationship between the grounds of judicial review and the various terminologies applied in this area.

On the other hand, the Australian courts apply three main grounds, namely, *Wednesbury*, illogicality and irrationality and jurisdictional fact in determining the scope of judicial review of administrative discretion in common law, which are clearly distinctive from the ADJR. The attempts to categorise the application between them are taken under the central approach of jurisdictional error. The applications of the grounds are fixed at the consideration of the relevant statutory construction without being influenced by an interrelated legal culture.

These different doctrinal approaches have been analysed as products of the differences between English and Australian legal culture. While the fixed approaches in Australia are the result of the rigid framework of the separation of powers prescribed in the written constitution, the flexibility in English law is a product of the balance between the twin concepts of parliamentary sovereignty and the rule of law and the absence of a written constitution. The next chapter will contain a further applicability of the framework of deep-water legality and legal culture to better understand of the determination of an emerging ground of judicial review related to the exercise of discretion, which is substantive legitimate expectations.

VI. CHAPTER SIX

INFLUENCE OF THE LEGAL CULTURES ON LEGITIMATE EXPECTATIONS

1. Introduction

'[The] review of Coughlan...reveals a striking contrast between, on the one hand, the relatively narrow scope of the actual decision in that case and, on the other, the wide ranging and open-ended nature of the legal discussion.' (Lord Carnwath, *United Policyholders Group and others v Attorney General of Trinidad and Tobago*)¹

'Australian courts have not accepted that the concept of legitimate expectations can underpin substantive entitlements as distinct from informing the content of procedural fairness. Indeed, there are those who...call the legitimate expectation in our public law a zombie principle.' (Chief Justice French)²

There is no better way to start this chapter than with the above statements, displaying 'completely' different approaches and conclusions of the determination of substantive legitimate expectations, as an 'emerging' ground of judicial review in English and Australian administrative law.³

¹ [2016] UKPC 17 [110].

² Chief Justice Robert French, 'The Globalisation of Public Law: A Quilting of Legalities' (Public Law Conference, Cambridge, 12 September 2016).

³ When compared to a ground like rationality, substantive legitimate expectations was not developed in English law until the 1990s by cases like *R v Home Secretary, Ex p Khan* [1984] 1 WLR 1337 CA (Civ Div). Besides, it was not fully accepted until *R v North and East Devon Health Authority ex parte Coughlan* [2000] 3 All ER 850 in 2000. In Australian law, although rejected, the ground has not been fully discussed until *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 in 2003.

Legitimate expectations denotes a claim by individuals that he or she has a legitimate expectation to be treated in a certain way based on public administrator's promise, general policy, representation or past practice. When the public administrator changes its decision against such representation, the individual then seeks judicial review to protect his or her expectation.⁴ Two main types of legitimate expectations can be categorised from two kinds of benefit claimed by the individuals. While procedural legitimate expectations is where an individual claims an existence of process right,⁵ substantive legitimate expectations is applied in claiming a particular benefit due to a representation.⁶

On the one hand, the first quotation of Lord Carnwath in the judgment of *United Policyholders Group*⁷ above discusses *Coughlan*⁸ and other cases⁹ as evolving substantive legitimate expectations as a ground of judicial review in England. The courts strike a balance between narrowing and widening the application of the ground. The determination stands on a spectrum allowing the courts to adopt '*a more or less intrusive quality of*

⁴ Peter Cane, *Administrative Law* (5th edn, OUP 2011) 161; Timothy Endicott, *Administrative Law* (4th edn, OUP 2018) 302.

⁵ For example, an opportunity to make a representation before being detained (*Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629). See others in Paul Craig, *Administrative Law* (8th edn, Sweet & Maxwell 2016) [22-001].

⁶ For example, a fishing license for a bigger vessel (*R v Ministry of Agriculture, Fisheries and Food, ex parte Hamble (Off-shore) Fisheries Ltd* [1995] 2 All E R 714).

⁷ n 1. This case was held in the Privy Council, not the UKSC. However, these facts do not detract from its significance in demonstrating influences of English legal culture.

⁸ n 3.

⁹ Discussing the judgments of Lord Justice Laws in *R v Secretary of State for Education and Employment; ex parte Begbie* [2000] ELR 445 and *Nadarajah Abdi v The Secretary of State for the Home Department* [2005] EWCA Civ 1363 as opportunities taken to develop the details of the ground (n 1 [87]).

review'.¹⁰ For example, the judgment recommended 'caution' when applying the ground in a kind of case involving policy issues.¹¹ In such cases, Lord Woolf's approach in *Coughlan*, particularly the third category relying on the abuse of power doctrine,¹² is narrowly interpreted.¹³ On the other hand, the second quotation by Chief Justice French of the HCA reveals that substantive legitimate expectations is not a valid ground of judicial review in Australia. The individual cannot base on the ground in claiming substantive benefit promised by the public administrator.

Indeed, English and Australian judges and scholars recognise the influence of constitutional orders on this difference between the determination of legitimate expectations. For example, Lord Justice Sedley states that '*the development of the law of legitimate expectations has done much to conclude the argument about the moral and jurisprudential foundations of judicial review*'.¹⁴ Lord Carnwath also cites Elliott's analysis¹⁵ in *United Policyholders Group* that '*Constitutional and institutional concerns ought to shape the doctrinal architecture of substantive judicial review*'.¹⁶ At its heart, this

¹⁰ *United Policyholders Group* (n 1) [100] discussing *Begbie* (n 9) (Laws LJ).

¹¹ n 1 [100].

¹² n 3 [57], [70]. This will be analysed in Section 3 below. In short, abuse of power is applied as a doctrine to expand the application of the ground to cover any issue, which the court considers as unlawful.

¹³ n 1 [121].

¹⁴ Stephen Sedley, *Lions Under the Throne : Essays on the History of English Public Law* (CUP 2015) 156.

¹⁵ Mark Elliott, 'From Heresy to Orthodoxy: Substantive Legitimate Expectations in English Public Law' in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing 2016).

¹⁶ n 1 [118].

chapter aims to complete comprehensive understanding on these recognitions through the methodologies of deep-water legality and legal culture. It will unpack legal reasoning of these different doctrinal approaches from the judgments of leading English and Australian cases, and connect them to the English and Australian legal cultures.

The examination will be simply structured. Section 2 will exemplify to what extent legitimate expectations is a focus of this chapter. Section 3 will unpack the legal reasoning in *Coughlan*¹⁷ and a line of English cases before and after it,¹⁸ to reflect the distinctive process that the courts applied flexible justifications and doctrines in determining substantive legitimate expectations as a ground of judicial review. This will be analysed as a product of how legality is deeply understood in the light of the English legal culture. Next, Section 4 will unpack legal reasoning in *Lam* and a line of Australian cases,¹⁹ to demonstrate that the Australian courts have been fixed in rejecting substantive legitimate expectations. Apart from that, it will be demonstrated that the courts' justifications and applications in determining procedural legitimate expectations are not flexible, but relatively fixed. The courts do not adopt influences from interrelated legal cultures in the determination. These doctrinal approaches will be connected to Australian legal culture.

¹⁷ Considered as a leading case in this area (Eg Kirsty Hughes, 'R v North and East Devon Health Authority [2001]: Coughlan and the Development of Public Law' in Satvinder Juss and Maurice Sunkin (eds), *Landmark Cases in Public Law* (Hart Publishing 2017) 181, 201, 203; Elliott (n 15) 217-218).

¹⁸ They are *R v Secretary of State for Transport, ex parte Richmond upon Thames London Borough Council and others* [1994] 1 WLR 74; *Hamble Fisheries* (n 6); *R v Secretary for the Home Department; Ex parte Hargreaves* [1997] 1 WLR 906; *Begbie* (n 9); *Regina (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607; *Nadarajah* (n 9); *United Policyholders Group* (n 1).

¹⁹ They are *Kioa v West* (1985) 159 CLR 550, *Attorney-General (NSW) v Quin* (1990) 170 CLR 1; *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* [1995] HCA 20; *Kaur v Minister for Immigration and Citizenship* (2012) 290 ALR 616.

The final section concludes this, and points out some connections to the previous chapters, for example, how substantive legitimate expectations are complicated with the other grounds like *Wednesbury* and proportionality in England, while the categorisation is continuously systematic in Australia.

2. Legitimate Expectations at Surface and Deep Levels

Parallel to the previous chapters, legitimate expectations is supported as a ground of judicial review by administrative law values namely the individual's autonomy to plan their lives, as a part of the rule of law. However, it is also limited by the values of freedom of administrative autonomy, in the light of the separation of powers. These two sides of values 'generally' appear at the 'surface' level of both English and Australian law. Thereby, the determination of legitimate expectations as a ground of judicial review, particularly the substantive legitimate expectations, becomes controversial and requires legal culture to be explored through the methodology of deep-water legality in clarifying understanding. This section exemplifies this outline and points it out as the focus of analysis.

2.1 General Concepts Supporting and Rejecting the Ground

As discussed in the previous chapters, according to the separation of powers, when public administrators exercise discretions within their boundaries of power given by Parliament,²⁰ the courts should not see themselves as having role to conduct judicial review. This value of administrative autonomy is also explainable in the case of legitimate expectations.

²⁰ The analysis in this chapter is located merely in the case of *intra vires* legitimate expectations, not the case of *ultra vires* legitimate expectations (See Craig (n 5) [22-032]).

Although the public agent gives promise to the individual, the discretionary power of the executive delegated from Parliament should not be fettered.²¹ Additionally, it is still the executive's area of expertise to adopt the most appropriate decision for public administration or the individual, especially with the need to quickly respond to changing circumstances.²² The courts' intervention giving the individual what the agent has promised can ossify the development of public administration. These reasons, therefore, limit scope of judicial review on the ground of legitimate expectations because it is the executive's authority rather than the court's.²³

On the other hand, the rule of law supports the courts in conducting judicial review of this kind of circumstance. This is described in various explanations, for example, decision-makers shall not infringe individuals' ability to plan their lives by changing the decision from what he or she has legitimately expected by representation.²⁴ Raz asserts that individuals should be able to know and expect the legal consequences of the public authorities' actions.²⁵ Changing the decision from what the decision-maker has been promised is unfair to the individuals.²⁶ Indeed, this not only means protecting individuals'

²¹ *ibid* [22-009]; William Wade and Christopher Forsyth, *Administrative Law* (11th edn, OUP 2014) 460.

²² Craig (n 5) [22-009]-[22-010].

²³ Again, these reasons could be discussed by the principle of deference.

²⁴ Craig (n 5) [22-002].

²⁵ Joseph Raz, *The Authority of Law* (Clarendon Press 1979) Chapter 11 in *ibid*.

²⁶ This is the basis of how substantive legitimate expectations overlap with the grounds relating to substantive exercise of discretion, analysed in the previous chapter. It will be exemplified in Sections 3 and 4 below.

interests,²⁷ but also the administration itself because the ground enhances administrative efficacy, predictability, formal equality and consistency, legal certainty and reliance and trust in public administration.²⁸ Therefore, the courts should have the role as *'the guardians of longer-term tradition'* in conducting judicial review by this ground in order to protect legitimate expectation of the individuals.²⁹

2.2 Understanding Legitimate Expectations through Legal Culture

These two sides of values are generally explainable at surface level in England and Australia. The tension between them leads to controversy in determining the scope of judicial review of administrative action through the ground of legitimate expectations. As introduced, there are two kinds of legitimate expectations namely procedural and substantive. It shall be clarified that the tension is more directed to substantive legitimate expectations than procedural legitimate expectations. This is because procedural legitimate expectations has natural justice or procedural fairness as a rationale.³⁰ As discussed in Chapter 1, judges generally feel more comfortable to tell public bodies what procedures administrative agents should follow.³¹ They do not need to be evaluated by elected agents

²⁷ Philip Sales and Karen Steyn, 'Legitimate Expectations in English Public law: An Analysis' [2004] PL 564, 569-571.

²⁸ Soren Schonberg, *Legitimate Expectations in Administrative Law* (OUP 2000) Chapter 1; Craig (n 5) [22-005]-[22-008]; Jeffrey Jowell, 'Of Vires and Vacuums: The Constitutional Context of Judicial Review' in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing 2000) 335).

²⁹ Craig (n 5) [22-008].

³⁰ Jowell (n 28) 331-332.

³¹ *ibid* 329.

in a democracy.³² According to the methodology of this thesis, they are generally covered by the surface-water legality. The English and Australian courts have similar understanding that they have a role in conducting judicial review on the ground.³³

This is different from substantive legitimate expectations, which two values are generally more in competition. On the one hand, the courts are limited to intervene into administrative discretion. Although being promised, the administrative agent still has authority given by Parliament to change the decision. On the other hand, the courts are required by the rule of law to protect the individuals who have legitimate expectation from the administrative agent's promise. As demonstrated above, the English and Australian courts have different ways in determining substantive legitimate expectations as a ground of judicial review. While the English courts' determinations have been flexible, the ground has been firmly rejected by the Australian courts.

This difference has been widely studied in English and Australian literature.³⁴ However, most of the papers are based on a comparative analysis of the advantages and disadvantages of the application of the ground in the two countries. On the one hand, the Australian articles consider whether to adopt the ground into the legal system. For

³² Iain Steele, 'Substantive Legitimate Expectations: Striking the Right Balance?' (2005) 121 LQR 300.

³³ See Jowell (n 28) 332; Cane (n 4) 160-164; Mark Elliott, *Administrative Law: Text and Materials* (Mark Elliott and Jason Varuhas eds, 5th edn, OUP 2017) 193-198; Wade and Forsyth (n 21) 450.

³⁴ Eg Sales and Steyn (n 27) and Elliott, 'From Heresy to Orthodoxy: Substantive Legitimate Expectations in English Public Law' (n 15) for English law and Cameron Stewart, 'The Doctrine of Substantive Unfairness and the Review of Substantive Legitimate Expectations' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (CUP 2007); Matthew Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 Melb UL Rev 470; Greg Weeks, 'Holding Government to its Word: Legitimate Expectations and Estoppels in Administrative Law' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (CUP 2014) for Australian law.

example, Aronson, Groves and Weeks assert that the English doctrinal approach of substantive legitimate expectations in *Coughlan* is dangerous to the distinction between legality and merits and could distort legal certainty.³⁵ On the other hand, the English works consider the extent of the application and development of the ground. For example, Sales and Steyn point out the real risk in expanding the ground through the concept of abuse of power as it would damage the distinction between appeal and review.³⁶ It can be seen that these works mainly focus on the ‘outcomes’ of the English legal system’s acceptance and the Australian legal system’s rejection of the ground.

Instead, the following sections point out that the different determinations of substantive legitimate expectations in England and Australia are products of different understandings on how the English and Australian courts will include substantive legitimate expectations into their ‘(deep) understanding of legality’, in which they have a role to conduct judicial review. These arguments will be examined in the following sections by unpacking different doctrinal approaches the courts applied in determining the ground from the legal reasoning of the leading English and Australian cases, and connect them to the English and Australian legal cultures. Additionally, in the Australian section, procedural legitimate expectations will also be examined. This is because there are some aspects requiring deep-water legality in deciding the ground. For example, parallel to the previous chapters, the courts’ applications relying on statutory construction is obviously demonstrate the influence of the Australian legal culture.

³⁵ Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (6 th edn, Thomson Reuters Australia 2017) [7.150].

³⁶ Sales and Steyn (n 27) 589 – 591. See also Steele (n 32).

3. English Doctrinal Approaches

Again, elements of the English legal culture are not directly expressed in the legal reasoning of the aforementioned leading cases. Therefore, it will firstly be demonstrated in this section that the English determination entails a distinctive process, in which the courts strike a balance between the two sides of justification, supporting and rejecting substantive legitimate expectations as a ground of judicial review in the particular case through various doctrines. This process was established by Lord Justice Laws' judgment in *Richmond-Upon-Thames* and further developed by later cases before being fully recognised in *Coughlan*, and continued thereafter. This process will be pointed out as the distinctive operation of English deep-water legality, as influenced by the flexible English mentality.

3.1 Prior to *Coughlan*

Procedural legitimate expectations came to English law in the early 1970s in the form of an extension of the rules of natural justice.³⁷ Since then, there has been a long line of cases in which the courts granted the benefit in terms of procedural right to the claimants.³⁸ As mentioned, both the validity and rationale of this ground have been firmly accepted in these English cases. It is not a focus of this section.

³⁷ *Schmidt and Another v Secretary of State for Home Affairs* [1969] 2 WLR 337 (Lord Denning).

³⁸ Eg *R v Liverpool Corporation; Ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299; *Attorney General of Hong Kong v Ng Yuen Shiu* (n 5).

3.1.1 *Richmond-upon-Thames*

The situation has been different in the case of substantive legitimate expectations, which its acceptance as a ground of judicial review has been controversial since first discussed in *Richmond-upon-Thames*.³⁹ In this case, the Secretary of State for Transport announced a policy to restrict night flying based on the noise produced by the aircraft, but later cancelled it. The claimant argued that this policy generated a legitimate expectation that the restriction would be applied for at least five years.⁴⁰ The claimant then sought judicial review claiming the benefit it would gain from the announced policy.⁴¹ Lord Justice Laws clearly recognised that this case was different from other cases as the claimant requested for ‘*merits*’, not procedural.⁴² The conclusion of the case was that substantive legitimate expectations was valid ground of judicial review.⁴³

This section does not disagree with this conclusion, but points out that substantive legitimate expectations ‘was not fully rejected’ in this case. Based on the big picture methodology, Lord Justice Laws set up a process deciding whether or not the court had a role to play in conducting judicial review or not and there was a step in this process, in which support of substantive legitimate expectations was recognised. However, in a later step, it was overridden by the value rejecting the ground. This process is parallel to the

³⁹ n 18. Indeed, there were some cases on substantive legitimate expectations before *Richmond-upon-Thames*, for example, *Re Preston* [1984] UKHL 5 and *Findlay, Re* [1985] AC 318. However, the validity of substantive legitimate expectations has not been explicitly discussed in them, but in *Richmond-Upon-Thames*.

⁴⁰ n 18, 76D-77C.

⁴¹ *ibid* 92A-D.

⁴² *ibid* 92C-93B.

⁴³ *ibid* 94B-95A.

points of doctrinal approaches namely justifications and doctrines the courts apply in determining status of the ground as follows.

Firstly, Lord Justice Laws established justifications for both accepting and rejecting substantive legitimate expectations as a ground of judicial review. On the one hand, he argued that whether legitimate expectations was procedural or substantive, '*the discipline of fairness*' is needed to be considered, because it prevents decision-makers from breaking their promises.⁴⁴ On the other hand, he observed that substantive legitimate expectations could obstruct the duty and fetter public administrators from using their discretion choosing the most appropriate decision in particular circumstances to fulfil their responsibility.⁴⁵ The analysis of later cases below will clarify that these sides of value are the implication of the twin concepts of parliamentary sovereignty and the rule of law, which are provided in various ways, depending upon individual judges.

Secondly, Lord Justice Laws held that these justifications in supporting and rejecting the ground have to be balanced depending on the particular situation. It was stated that '*The doctrine of legitimate expectation may or should in some circumstances be deployed so as to protect a substantive legitimate expectation of a favourable result in the particular case*'.⁴⁶ The condition to be fulfilled is that the change must be justified by '*the overriding public interest*'.⁴⁷ This legal reasoning demonstrated that although the court decided that the conclusion of this case should be rejecting the ground, another side of

⁴⁴ ibid 92D-93B.

⁴⁵ ibid 93B-F.

⁴⁶ ibid 94D-E.

⁴⁷ ibid 94A-B.

argument accepting the ground was not absolutely abandoned. It actually depends on the context whether the claim of substantive legitimate expectations is included in the meaning of English legality.

Additionally, Lord Justice Laws argued that this process of balancing fairness with public administrator autonomy is an initial duty of the decision-maker,⁴⁸ because public interest will be better served by the change.⁴⁹ However, the change also has to be 'reasonable'.⁵⁰ Although the decision in this case was not unreasonable,⁵¹ his judgment implicitly justified the role of the court to conduct judicial review if the change had been unreasonable.

The third step in Lord Justice Laws' process is that the court defines and applies a doctrine to determine whether the change of decision is reasonable or not, and in this case, it was the *Wednesbury* doctrine.⁵² It will be demonstrated in the later cases that this does not stop at *Wednesbury*, but can be applied flexibly by the individual judges.

In short, Lord Justice Laws' characteristic process for the determination of substantive legitimate expectations in *Richmond-Upon-Thames*, describes two sides of justifications supporting and rejecting the ground and followed with a duty of the public administrator to counter balance these, by enabling the court to review the process. The *Wednesbury* doctrine was applied in this case for the court to determine its scope of judicial

⁴⁸ ibid 94B-C.

⁴⁹ ibid.

⁵⁰ ibid 94C-D.

⁵¹ ibid 94F-H.

⁵² ibid 94C-D.

review. The case was concluded that the decision of the Secretary of State for Transport was not unreasonable.⁵³ Thus, the argument of the claimants was not found to be valid.⁵⁴ When considering the big picture, this process did not fully reject the validity of substantive legitimate expectations as part of the protection of (deep-water) legality. It will be shown below that this is completely different from the Australian law, where substantive legitimate expectations were denied at the point at which it began.⁵⁵ In the later cases, the English courts restarted the consideration with two sides of justifications accepting and rejecting the ground before entering the balancing process again. This was demonstrated in *Hamble Fisheries*, where a similar process was adopted but the conclusion was different. Substantive legitimate expectations was accepted as a ground of judicial review.

3.1.2 *Hamble Fisheries*

The applicants in *Hamble Fisheries* sought judicial review for a license to fish by beam trawler for pressure stock in the North Sea on the basis of several grounds, namely failure to exercise discretion and the breach of legitimate expectation.⁵⁶ On the latter, the claimant clearly expressed that his claim was supported by the value of legal certainty that the new policy would retrospectively strike at his accrued interests.⁵⁷ Lord Justice Sedley began with a clarification that the claim fell under substantive legitimate expectations, not

⁵³ *ibid* 94 F-H.

⁵⁴ *ibid*

⁵⁵ Particularly in *Quin* (n 19).

⁵⁶ n 6 [1]-[23].

⁵⁷ *ibid* [14].

procedural.⁵⁸ There were three points of the legal reasoning in his judgment discussing the distinctive process established by Lord Justice Laws in *Richmond-Upon-Thames*.

Firstly, Lord Justice Sedley added further details in the justifications supporting and rejecting the ground. Apart from the tension between the argument against '*fettering a public body*'⁵⁹ and the upholding of '*fairness in public administration*',⁶⁰ Lord Justice Sedley also described that '*the interest of good administration*' is legal alchemy, which gives an expectation sufficient legitimacy to secure enforcement in public law.⁶¹ These values were recognised as '*the constitutional importance of ministerial freedom to formulate and to reformulate policy*' and '*the interests of those individuals whose expectation*'.⁶² It was also referred to '*the line between individual consideration and inconsistency*'.⁶³ Lord Justice Sedley reinforces this in an extra judicial work that '*It is in the development of the law of legitimate expectation that sensitivity both to policy needs and to individuals' interests is arguably seen at its best*'.⁶⁴ This demonstrates a variety of justifications individual English judges can turn the twin concepts into and apply to determine substantive legitimate expectations.

⁵⁸ *ibid* [23].

⁵⁹ *ibid*.

⁶⁰ *ibid* [25].

⁶¹ *ibid* [42].

⁶² *ibid* [47].

⁶³ *ibid* [19].

⁶⁴ Stephen Sedley, *Ashes and Sparks: Essays on Law and Justice* (CUP 2011) 260.

Additionally, Lord Justice Sedley further explained the balancing process between the two sides of value of this case in his extra-judiciary work that *'There is no set scale... Two [sides of value] cannot usually be quantified in the same manner.'*⁶⁵ He clarifies this co-function between the decision-maker and the court in balancing the values that

*'The balance must in the first instance be for the policy-maker to strike; but if the outcome is challenged by way of judicial review.... While policy is for the policy-maker alone, the fairness of his or her decision not to accommodate reasonable expectations which the policy will thwart remains the court's concern (as of course does the lawfulness of the policy).'*⁶⁶

This part of his legal reasoning clearly connects the consideration of the ground to legality. It means that the claim of substantive legitimate expectations could be considered as part of legality. This logic is implicitly supported by some scholars. For example, Craig argues that proportionality should be used as a test to determine 'the legality of action' that purports to resile from the substantive legitimate expectations.⁶⁷

Secondly, the doctrine Lord Justice Sedley applied in determining the balance was not limited to *Wednesbury*, but expanded to broad concepts like '*rationality, legality and fairness*'.⁶⁸ If the decision is unlawful in any way that obliterates good government, the court is justified in conducting judicial review of it. There is no fixed answer to this; rather, it depends upon individual cases.⁶⁹ In the same way as in the previous chapter, this was a

⁶⁵ *ibid* 261.

⁶⁶ n 6 [47].

⁶⁷ Craig (n 5) [22-020]. This will be exemplified below.

⁶⁸ n 6 [49]-[50].

⁶⁹ *ibid* [50].

gateway for the courts to expand the application of the ground to other doctrines rather than merely *Wednesbury*. The expansion will be more explicit in *Coughlan*, which will be analysed below.

Thirdly, Lord Justice Sedley left room for the ground to be developed according to the influences of interrelated legal culture. He explained that substantive legitimate expectations originated from EU law under the concept of legal certainty.⁷⁰ However, there is no ‘*exhaustive formulation*’ in its application,⁷¹ but a great ‘*variety of approaches and applications*’.⁷² The way Lord Justice Sedley considered a number of EU cases in addressing the present case was the first step of welcoming and allowing interrelated legal cultures to be adapted into the English consideration of the ground. This point will become clearer in the analysis of *Coughlan* and *United Policyholders Group* below.

Up to this point, it has been demonstrated that the conclusions of *Richmond-Upon-Thames* and *Hamble Fisheries* were different. While the ground was not valid in the former, it was in the latter. Some scholars regard this as that Sedley and Laws ‘*sought to push or oppose the development of legitimate expectations*’.⁷³ However, this difference is regarded in this section to be the result of flexibility the courts can apply when determining the status of substantive legitimate expectations as a ground of judicial review. This is further demonstrated in *Hargreaves*, when the *Wednesbury* doctrine was brought back.⁷⁴

⁷⁰ *ibid* [26], [31], [33].

⁷¹ *ibid* [39].

⁷² *ibid* [33]-[39].

⁷³ Hughes (n 17) 182-183, 188-189.

⁷⁴ n 18, 920F-921F, 923F-G (Hirst LJ), 924H-925B, 925D-E (Pill LJ).

3.1.3 *Hargreaves*

In *Hargreaves*, the Home Secretary announced a policy whereby prisoners would be entitled to home leave when they had served one-third of their sentence. Later, such policy was changed and restricted to prisoners who had served at least one-half of their sentence. The applicants then sought judicial review of the Home Secretary's decision claiming the benefit of home leave as their legitimate expectation. The judgments, particularly by Lord Justice Hirst, clearly regarded Lord Justice Sedley's approach in *Hamble Fisheries* as 'Heresy'.⁷⁵

However, the bigger picture reveals that the heresy accused by *Hargreaves* was not a complete heresy. It was just that rejecting substantive legitimate expectations as a ground of judicial review was concluded for this particular case. *Hargreaves* applied *Wednesbury* as a doctrine to determine the ground due to nature of subject matter in the case, involving penal policy related to national security.⁷⁶ As Jowell argues, the court usually applies *Wednesbury* as a way to deny its scope of judicial review.⁷⁷ This can be seen from the legal reasoning in the case itself that '*The court must bear in mind the context of the respondent's decision... which is a matter of great public concern, namely penal policy*'.⁷⁸

This demonstrates that the English courts have flexibility in determining whether the claim on substantive legitimate expectations in the particular case shall be covered by

⁷⁵ ibid 921D-F (Hirst LJ).

⁷⁶ ibid 909C-F.

⁷⁷ Jowell (n 28) 334.

⁷⁸ n 18, 925AB (Pill LJ).

(deep-water) legality. Rather than rejecting substantive legitimate protection, ‘*slow, incremental steps*’ were made in most English cases.⁷⁹ The core case confirming this flexible mentality is *Coughlan*, where Lord Woolf categorised all possible doctrines in determining substantive legitimate expectations as a ground of judicial review.

3.2 *Coughlan*

The claimant in *Coughlan* requested a benefit that she could live in a supported living house for life on the ground of substantive legitimate expectations as it was promised by the local health authority.⁸⁰ Like the previous cases, the court undertook the distinctive process of balancing two conflicting values. As Lord Woolf stated,

*‘The court’s task in all these cases is not to impede executive activity but to reconcile its continuing need to initiate or respond to change with the legitimate interests or expectations of citizens or strangers who have relied, and have been justified in relying, on a current policy or an extant promise.’*⁸¹

Added from the previous cases, Lord Woolf divided the available doctrines the court could apply in determining the scope of judicial review into three categories;

(a) The court may decide... giving it the weight it thinks right... Here the court is confined to reviewing the decision on Wednesbury grounds...

(b)...the court itself will require the opportunity for consultation to be given unless there is an overriding reason to resile from it...

(c) Where the court considers...substantive [legitimate expectations],...the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power... the court will have the task of weighing the requirements of

⁷⁹ Weeks (n 34) 233-234.

⁸⁰ n 3 [3], [50], [53].

⁸¹ *ibid* [65].

*fairness against any overriding interest relied upon for the change of policy.*⁸²

Lord Woolf significantly explained that the court will play a different role in these categories.⁸³ While the second category related to procedural legitimate expectations, the first and third categories related to substantive legitimate expectations.⁸⁴ Lord Woolf used *Hargreaves* and *Findlay* as cases in which the court applied *Wednesbury* in determining the ground of substantive legitimate expectations. Furthermore, this first category was open to other traditional grounds like relevant and irrelevant considerations.⁸⁵ These categorises clearly demonstrate flexibility of the English courts in perceiving their role when determining the scope of judicial review.

Importantly, the third category further enabled the court to consider the validity of the ground through the doctrine of abuse of power.⁸⁶ Lord Woolf asserted that ‘...*the court is there to ensure that the power to make and alter policy has not been abused by unfairly frustrating legitimate individual expectations*’.⁸⁷ This doctrine was a key device allowing the court to be flexible in determining substantive legitimate expectations. The explanation of the abuse of power could be fashioned in whatever way the court would like the outcome

⁸² *ibid* [57].

⁸³ *ibid* [58].

⁸⁴ *ibid*.

⁸⁵ *ibid* [57].

⁸⁶ *ibid*.

⁸⁷ *ibid* [66].

to be. In other words, the courts have flexibility in perceiving whether the claim in the particular case is covered by legality or not.

Despite that, Lord Woolf also cautioned that *'abuse of power may take many forms'*.⁸⁸ *'The court's power of supervision'* should be limited to the aspect of the decision, *'which is equally the concern of the law'*.⁸⁹ Additionally, the court should limit its role to cases *'where the expectation is confined to one person or a few people, giving the promise or representation the character of a contract'*.⁹⁰ This part of the legal reasoning has two functions. Firstly, it confirmed that the process of the English court, which was holding the two sides of justifications before balancing them dependent on the particular situation, has been continuously applied. On the one hand, Lord Woolf supported the position of the court as the final arbiter to consider whether the decision amounted to an abuse of power.⁹¹ On the other hand, Lord Woolf reminded that its adjudicative role was limited to ensuring fairness to the individuals.⁹² He further asserted that *'The limits to its (legitimate expectation) role have yet to be finally determined by the courts. Its application is still being developed on a case-by-case basis'*.⁹³

Secondly, it was the affirmation that the consideration of the ground was an operation of legality. Lord Woolf explicitly pointed out that whether the administrative

⁸⁸ *ibid* [69].

⁸⁹ *ibid* [65].

⁹⁰ *ibid* [59].

⁹¹ *ibid* [69].

⁹² *ibid* [82].

⁹³ *ibid* [71].

agent chose to follow the promise or change the decision, these were *'two lawful exercises of power'*⁹⁴. Both *'the promise'* and *'the policy change'* are flexibly included in the English courts' understanding of legality. It will be seen below that this is completely different from the Australian law, in which the courts have a fixed way in understanding and determining substantive legitimate expectations as not part of their role in protecting legality.

Also noteworthy is that the judgment of Lord Woolf in *Coughlan* demonstrated that it is possible for the court to adopt influences from interrelated legal culture in determining substantive legitimate expectations. To justify that the respondent's decision was an abuse of power,⁹⁵ Lord Woolf considered that the public authority was obliged by article 8(1) and not justified by article 8(2) of the ECHR.⁹⁶ Although the HRA had not come into force at the time of the case, Lord Woolf made the following assertion;

*'Once the Human Rights Act 1998 is in force it will be the obligation of the court as a public authority to give effect to this value, except to the extent that statutory provision makes this impossible.'*⁹⁷

As will be seen below, influence of interrelated legal cultures is difficult to be adopted in Australian law because the courts have to be aware that they may not fit the rigid framework of separation of powers prescribed in the written constitution.

⁹⁴ *ibid* [66].

⁹⁵ *ibid* [89], Conclusion (c).

⁹⁶ *ibid* [90], Conclusion (c).

⁹⁷ *ibid*.

In summary, Lord Woolf's judgment in *Coughlan* demonstrates that various justifications and doctrines can be applied by different judges in determining substantive legitimate expectations in the particular case. It was found in *Coughlan* that the administrative decision was an abuse of power, contrary to its existence in law; therefore, the court had the role to conduct judicial review.⁹⁸ This was different to the courts in *Hargreaves* applying *Wednesbury* as the first category because the contexts of the cases were different.⁹⁹

3.3 After *Coughlan*

After *Coughlan*, the flexibility of justifications and doctrines in considering the status of substantive legitimate expectations as a ground of judicial review has continued.¹⁰⁰ A few of the most important cases are illustrated as follow.¹⁰¹ The first example was *Begbie*, where Lord Justice Laws described the first and third categories in *Coughlan* as '*not hermetically sealed*'.¹⁰² All the grounds of judicial review, i.e. illegality, *Wednesbury* and proportionality actually come from the same root, which is the concept of abuse of power,¹⁰³ appearing in various forms.¹⁰⁴ The consideration of scope of judicial review constitutes '*a sliding scale of review, more or less intrusive according to the nature and*

⁹⁸ ibid [81], [89], Conclusion (c).

⁹⁹ ibid [76].

¹⁰⁰ Hughes (n 17) 200.

¹⁰¹ ibid 193-197.

¹⁰² n 9 [80].

¹⁰³ ibid [76].

¹⁰⁴ ibid [78].

gravity of what is at stake'.¹⁰⁵ The nature of the case was an important part of the consideration. For example, in the case of a general policy that affected the public at large, called a macro-political field, judges shall have '*no position*' to adjudicate.¹⁰⁶ There will be less opportunity for the court to supervise the administrative decision.¹⁰⁷ Therefore, the *Wednesbury* principle should be applied to control the administrator's action.¹⁰⁸ The courts perceive themselves as having no ability to wear '*the garb of a policy-maker*'.¹⁰⁹ On the other hand, in the case of fewer and certainly identifiable players like *Coughlan*, the court can be more intrusive in reviewing the administrative action.¹¹⁰ In contrast to Lord Justice Laws, even Lord Justice Sedley supported the ground greatly in *Hamble Fisheries*, his judgment in *Begbie* was limited.¹¹¹

The flexibility of English doctrinal approaches in determining substantive legitimate expectations was also confirmed in *Bibi*, when Lord Justice Schiemann discussed that '*the categories of unfairness (in Coughlan) are not closed, and precedent should act as a guide and not as a cage*'.¹¹² This opened up possibilities for the courts to search for the scope of legality in a flexible manner for the particular case. In this case, a

¹⁰⁵ *ibid.*

¹⁰⁶ *ibid* [82].

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid* [80].

¹⁰⁹ *ibid* [80].

¹¹⁰ *ibid* [81].

¹¹¹ Hughes (n 17) 199.

¹¹² n 18 [27].

traditional ground like relevant consideration was applied to conclude that the claimant had a legitimate expectation.¹¹³

Another noteworthy case is *Nadarajah*, in which Lord Justice Laws explained the concept of good administration as justification in determining the court's jurisdiction.¹¹⁴ The flexibility in terms of doctrine was confirmed in that '*the three categories of case by Lord Woolf represent [that]...varying scenarios... may call for different answers*'.¹¹⁵ Following *Begbie*, Lord Justice Laws described in this case that the consideration of the nature of a case that contained a macro-political issue is merely a '*pointer*', not a rule.¹¹⁶ The process of balancing is not precisely calculable and its measurement is not exact.¹¹⁷ There is no checklist for legality.¹¹⁸ Parallel to the analysis in the previous chapter, Lord Justice Laws flexibly applied proportionality, as a doctrine adopted from an interrelated legal culture to decide the scope of judicial review in this case.¹¹⁹

It can also draw back to the judgment of Lord Carnwath in *United Policyholders Group* at the beginning of this chapter entailing discussions on flexibility in *Begbie* and *Nadarajah*. The courts shall be cautious when intervening in cases related to the macro-

¹¹³ *ibid* [49].

¹¹⁴ n 9 [52], [68]-[70].

¹¹⁵ *ibid* [70].

¹¹⁶ *ibid* [69].

¹¹⁷ *ibid*.

¹¹⁸ *ibid* [67].

¹¹⁹ *ibid* [69].

political field. The approach in *Coughlan* should be interpreted in a narrow manner.¹²⁰ Another notable point in the legal reasoning of *United Policyholders Group* is Lord Carnwath's statement that '*Laws LJ's search for a constitutional foundation for the principle of legitimate expectation [in *Begbie*]*' echoes '*the rule of law principle of legal certainty*'.¹²¹ Originally a European concept,¹²² legal certainty has been used in shaping the administrative laws of many countries in Europe, including England, since the 1970s.¹²³ For example, as shown above, it was claimed in *Hamble Fisheries* that '*the effect of the new policy is to strike retrospectively at accrued interests of the applicants, offending against the principle of legal certainty which is closely bound up (at least in European law) with the doctrine of legitimate expectation*'.¹²⁴ The legal reasoning in *United Policyholders Group* was a recent reintroduction of the concept of legal certainty to be a justification for the courts to determine substantive legitimate expectations as a ground of judicial review. This demonstrates another product of the English legal culture whereby the English courts can flexibly integrate or reintroduce interrelated legal culture to their determination of the scope of judicial review. There is no such flexibility in Australia, as will be seen in the next section.

¹²⁰ See also the discussion in Elliott, 'From Heresy to Orthodoxy: Substantive Legitimate Expectations in English Public Law' (n 15) 234-243 and Wade and Forsyth (n 21) 460-461.

¹²¹ *United Policyholders Group* (n 1) [118].

¹²² It is mostly explained along with the rule of law. See Paul Craig, *EU Administrative Law* (2nd edn, OUP 2012) Chapter 18; J Schwarze, *European Administrative Law* (Sweet & Maxwell 1992) Chapter 6.

¹²³ Craig, *Administrative Law* (n 5) [22-003]. See also P Reynolds, 'Legitimate Expectations and the Protection of Trust in Public Officials' [2011] Public Law 330 and Elliott, *Administrative Law* (n 33) 187-189.

¹²⁴ n 6 [14].

3.4 Products of the English Legal Culture

This section has demonstrated flexibility of the doctrinal approaches the English courts apply in determining substantive legitimate expectations as a ground of judicial review. As mentioned, English scholars willingly recognise this flexibility, for example, Williams observes different types of cases in the area of legitimate expectations.¹²⁵ Parallel to the previous chapters, this flexibility can be explained as an example of the idea of pragmatism. Elliott argues that the orthodoxy of the English law is distinctive as the courts calibrate the nature and intensity of a substantive review.¹²⁶ This convergence appears in cases analysed in the previous chapter like *Pham*, as well as *Coughlan* analysed in this chapter. The flexibility also leads to wide debates on the application of the ground, for example the choice between the doctrines.¹²⁷ Lord Carnwath expresses a kind of conclusory notion in *United Policyholders Group* that ‘*Similarly wide ranging has been the intense judicial and academic controversy ... remains unresolved more than 15 years later*’.¹²⁸

Rather than giving a solution for the variation, the analysis in this section unpacks the flexible doctrinal approaches the English courts can apply to determine substantive legitimate expectations from the legal reasoning in the leading cases. A table below provides a snapshot of this.

¹²⁵ Rebecca Williams, ‘The Multiple Doctrines of Legitimate Expectations’ (2016) 132 LQR 639.

¹²⁶ Elliott, ‘From Heresy to Orthodoxy: Substantive Legitimate Expectations in English Public Law’ (n 15) 234-243.

¹²⁷ In particular on proportionality (See Hughes (n 17) and Section 3 of Chapter 5).

¹²⁸ n 1 [110].

English Doctrinal Approaches		
Justifications	Various	
	To intervene	Not to intervene
	Discipline of fairness (<i>Richmond-Upon-Thames</i>) Individual consideration (<i>Hamble Fisheries</i>) Legality (<i>Coughlan</i>) Concept of good administration (<i>Nadarajah</i>)	Fettering a public body (<i>Richmond-Upon-Thames</i>) Inconsistency and Legal certainty (<i>Hamble Fisheries</i>) Legality (<i>Coughlan</i>)
Doctrines	Various and Flexible	
	<i>Wednesbury</i> (<i>Richmond-Upon-Thames</i>) Rationality, legality and fairness (<i>Hamble Fisheries</i>) 3 Categories; <i>Wednesbury</i> , Procedural fairness and Abuse of Power (<i>Coughlan</i>) The categories are 'not hermetically sealed' and 'not closed'. A Traditional ground like relevant and irrelevant considerations can be included (<i>Begbie and Bibi</i>) Proportionality (<i>Nadarajah</i>)	
Influences from Interrelated Legal Culture	Possible for the court to adopt	
	Legitimate expectations comes from EU law, but is not 'exhaustive formulation' (<i>Hamble Fisheries</i>) The court could adopt the ECHR through the HRA into the determination (<i>Coughlan</i>) Adopting proportionality as a doctrine in determining the ground (<i>Nadarajah</i>) Flexibility to apply the concept of legal certainty (originally the European concept) as justification for the court to conduct judicial review (<i>United Policyholders Group</i>)	
Status as the Grounds of Judicial Review	Procedural legitimate expectations	Substantive legitimate expectations¹²⁹
	Accepted	Flexible and Fluctuated whether to accept (<i>Hamble Fisheries, Coughlan</i> and the later cases) or reject (<i>Richmond-Upon-Thames</i> and <i>Hargreaves</i>)

¹²⁹

It should be noted that the conclusion of the ground does not always parallel with the outcome of the case. For example, while Lord Justice Sedley accepted substantive legitimate expectations in *Hamble Fisheries*, he held that the claimant's expectation was not legitimate (n 6 [59]-[60]). This is in contrast with the Australian law which the conclusion of the ground and outcome of the cases always go into the same direction as being rejected.

In summary, four connecting points can be drawn as follows. Firstly, different judges can provide various justifications for accepting or rejecting the ground. The next section will demonstrate that the Australian courts do not have this variety of justifications, but the relatively fixed according to the analysed elements of Australian legal culture. Additionally, it is recognised that the English courts need to justify themselves clearly in claiming or rejecting its jurisdiction. This is because of a lack of documented provisions, so that the courts have to avoid being accused of infringing either of the two values. If they refuse to conduct judicial review, they could be accused of not protecting the rule of law. Conversely, if they intervene in an executive's decision, they could be accused of lacking respect for the sovereignty of parliament. Therefore, the English courts have to hold two sides of justifications at the start of each case. While accepting the ground, they caution limitation in intervening in administrative actions and, while rejecting the ground, they state the values supporting the ground.

Secondly, the two mentioned features in English legal culture enable the courts to flexibly apply various doctrines in determining the ground. Parallel to the previous chapter, the discrepancy ranges from *Wednesbury*, relevant and irrelevant considerations, abuse of power to proportionality. This is clearly different from Australian law, where the courts firmly reject abuse of power, and apply jurisdictional error as the central approach in determining the scope of judicial review in all grounds, including procedural and substantive legitimate expectations. Thirdly, the English courts can integrate factors from interrelated legal cultures into their consideration of the ground. This is clearly different from Australian law, where it is difficult to import interrelated legal cultures into the courts' consideration of the ground, because clear frameworks are prescribed in a

document. According to these three points, the status of substantive legitimate expectations as a ground of judicial review (the fourth point) therefore has been flexible and has fluctuated.

Importantly, this section demonstrates that this flexibility is inevitable because they are products of the flexible English legal culture. Parallel to Chapter 4 and 5, these are in relation to two main elements. Firstly, the balancing process between the two sides of justifications in accepting and rejecting the ground reflects the balance between the twin concepts of parliamentary sovereignty and the rule of law. Although have not been explicitly expressed,¹³⁰ the above analysis demonstrates that they permeate in all the analysed judgements. On the one hand, in the light of the rule of law, the courts have a role to protect the lawfulness of administrative decisions. This side of justification in accepting the ground represent the situations in which the rule of law overrides parliamentary sovereignty. Thus, through the ground, the courts have role to conduct judicial review. On the other hand, the side of limitation rejecting the ground characterises the conclusion of balancing that parliamentary sovereignty is preferred over rule of law. In these cases, the courts have no role to conduct judicial review because the claims are not considered as a part of legality.

Secondly, the framework of the unwritten Constitution in English law also has an impact on flexibility. As Jowell argues that;

¹³⁰ Only Lord Justice Laws's judgment in *Nadarajah* (n 9) [67] stated the rule of law.

*It is an inescapable feature of an unwritten constitution that its dimensions emerge in the course of concrete decisions raising questions about the appropriate balance of power between instruments of government...*¹³¹

Similar to the logic of the previous chapter, this will be obvious when it is compared to Australian law, which has a written Constitution to prescribe and entrench the jurisdiction of the courts when conducting judicial review. These two significant elements of English legal culture, namely, the nature of balancing conflicting values and the absence of a documentary prescription of the court's jurisdiction make the determinations to be flexible.

4. Australian Doctrinal Approaches

Completely different from English law, this section reveals that the Australian courts regard themselves clearly as not having a role to conduct judicial review through substantive legitimate expectations. In other words, the ground is not included in their (deep) understanding of legality.¹³² Additionally, the determination of procedural legitimate expectations is fixed with a clear set of rules, limiting the courts to fully adopt influences from interrelated legal culture into the consideration. These doctrinal approaches will be unpacked from legal reasoning of *Kioa v West*, *Quin*, *Teoh* and *Lam*. Importantly, it will be demonstrated that the distinctive elements of Australian legal culture like the written Constitution and rigid framework of the federal separation of powers are explicitly mentioned in them.

¹³¹ Jowell (n 28) 339.

¹³² This section has to repeat this status of the grounds for many times in order to show stability of the Australian doctrinal approaches.

4.1 Prior to *Lam*

The first case discussed here is *Kioa v West*, an immigration case where the applicants were deported by the Minister for Immigration and Ethnic Affairs' decision under the MA. In seeking judicial review, the applicants claimed that they had legitimate expectation that their daughter was entitled to be heard before the decision was made.¹³³ In the HCA's judgments, there are two main points demonstrating the connections between the determination of legitimate expectations and Australian legal culture.

4.1.1 *Kioa v West*

First, in terms of justification, the court relied on legality in accepting procedural legitimate expectations as a ground of judicial review. All the judgments asserted that the courts shall generally protect the requirements of natural justice or procedural fairness, regarded as a matter of law.¹³⁴ For example, Justice Mason viewed the protection of procedural legitimate expectations as '*a fundamental rule of the common law doctrine of natural justice*',¹³⁵ which has been associated with procedures followed by '*courts of law*'.¹³⁶ It is '*a common law duty to act fairly*' in accordance with procedural fairness, in the making of administrative decisions.¹³⁷ Justice Deane also stated that '*standards of procedural*

¹³³ Explicitly pointed out by at n 19 [9] (Deane J).

¹³⁴ *ibid* [16], [19] (Gibb J) [28], [30]-[31] (Mason J), [21] (Wilson J), [9] (Brennan J), [2] (Deane J).

¹³⁵ *ibid* [28].

¹³⁶ *ibid* [30].

¹³⁷ *ibid* [31].

fairness...are recognised as fundamental by the common law'.¹³⁸ Justice Brennan explained this in terms of the rule of law encouraging the courts to declare the validity or invalidity of executive action by judicial review.¹³⁹ All of these justifications are part of the surface-water legality. As described above, procedural legitimate expectations mainly requires general administrative law values in support.

However, the influence of deep-water legality was more obvious in terms of application on how the Australian courts determine procedural legitimate expectations. A set of rules directing the determination of the scope of judicial review to the separation of powers was established. The scope of judicial review in a particular case is considered according to the nature of the power exercised and the statutory provisions governing its exercise.¹⁴⁰ Justice Brennan explained that the court has jurisdiction to declare a supposed exercise of statutory power invalid for its failure to comply with the procedural requirements prescribed by the statute.¹⁴¹ This is the duty of the court based on the *'judicial construction of the statute'*.¹⁴² The courts can only intervene if there is a clear manifestation of an intention that is contrary to the statute.¹⁴³ In a situation in which the legislative intent is unclear, the court must consider the claim based on the concept of procedural fairness

¹³⁸ *ibid* [2]. See also [9] (Brennan J).

¹³⁹ *ibid* [12].

¹⁴⁰ *ibid* [12] (Gibbs J), [32] (Mason J), [7] (Deane J).

¹⁴¹ *ibid* [12].

¹⁴² *ibid* [9].

¹⁴³ *ibid* [31], [34] (Mason J).

and reasonableness.¹⁴⁴ Justice Brennan mentioned that this concept of fairness may lead the court *'to place itself in the shoes of the repository of the power to determine whether the procedure adopted was reasonable and fair'*.¹⁴⁵ However, this action has to limit this role to a narrow scope because of the rigid distinction between legality and merits. The merits were for the executive to consider and the courts were ill-suited to trespass into this field.¹⁴⁶

These rules demonstrate that the Australian courts have a relatively fixed way in operating (deep-water) legality. They determine the ground of procedural legitimate expectations based on the statutory construction. They will be able to intervene when there is clear manifestation of an intention that is contrary to the statute. If it is not clear, prima facie is that it is in the area of merits, not legality. The scope of the judicial review becomes narrow only when the decision is unfair. Parallel to the previous chapters, this application is compatible to the rigid legal mentality of Australian judicial review constitutionalism namely the rigid framework of separation of powers. In comparison, these rules are not much mentioned in the determination of procedural legitimate expectations in the English law.¹⁴⁷ Without the framework of separation of powers prescribed in a written constitution, the English courts have flexibility to search for the scope of judicial review.

¹⁴⁴ *ibid* [34].

¹⁴⁵ *ibid* [35].

¹⁴⁶ *ibid* [27].

¹⁴⁷ See nn 37-38.

4.1.2 *Quin*

The particular Australian court's approach, in determining procedural legitimate expectations in the light of Australian legal culture was confirmed by *Quin*. In that case, the applicants were magistrates in NSW under the Justices Act 1902 (NSW). Thereafter, they were invited by the Attorney-General to make an application for appointment under the (new) Local Courts Act 1982 (NSW). The applicants claimed that these proceedings had been denied procedural fairness as they had a legitimate expectation that they would be given an opportunity to answer the allegations in the consideration of their applications for appointment.¹⁴⁸ Three points of doctrinal approaches influenced by the rigid Australian mentality can be discussed as follows.

Firstly, in terms of justification, Justice Brennan clearly connected the determination of the scope of judicial review to the premise of legality by asserting that '*at common law judicial review ... consists... in a determination of the legality of the exercise or purported exercise of the power*'.¹⁴⁹ He further added that '*this case raises...the question whether...to protect a legitimate expectation against the exercise of an executive or administrative power which otherwise accords with law*'.¹⁵⁰ Again, procedural legitimate expectations is simply justified by the surface water legality.

Secondly, more directed to the deep-water legality, the judgments in *Quin* confirmed that the Australian courts' application in determining legitimate expectations

¹⁴⁸ n 19 [11] (Mason CJ).

¹⁴⁹ *ibid* [3].

¹⁵⁰ *ibid* [16].

was influenced by the Australian legal culture. For example, Justice Mason directly gave importance to the separation of powers, which delegates the executive the discretion to change a new policy.¹⁵¹ It cannot ‘*disable itself from performing a statutory duty*’.¹⁵² This was reinforced by the fact that the executive is an expert in a particular field of public administration.¹⁵³ Therefore, judicial review will be available only when ‘*the purported exercise of power is excessive or otherwise unlawful*’.¹⁵⁴ The court has a role to declare and enforce the law affecting the extent and exercise of power.¹⁵⁵ He stated that

*‘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.’*¹⁵⁶

Despite the courts having jurisdiction to conduct judicial review in some situations based on the statutory construction, Justice Brennan stated that they must be wary of trespassing into the merits of the decision.¹⁵⁷

Thirdly, the Australian law cannot flexibly use various doctrines in determining procedural legitimate expectations as a ground of judicial review, like the ways in which it is done in England. The courts have no sliding scale for the court to be more or less

¹⁵¹ *ibid* [23].

¹⁵² *ibid*.

¹⁵³ *ibid* [26].

¹⁵⁴ *ibid* [17] (Brennan J).

¹⁵⁵ *ibid* [20].

¹⁵⁶ *ibid* [17]. This statement has been widely cited in the determination of other grounds of judicial review. This demonstrates that the law is systematic and mature.

¹⁵⁷ *ibid* [20].

intrusive. Justice Brennan clearly contended that the judiciary has no authority ‘to balance the interests of the community against the interests of an individual’.¹⁵⁸ The scope of judicial review was determined by relying on the ‘concrete’ statutory construction. The prima facie is that this is an area of merits. Thus, it is the duty of the executive to decide.¹⁵⁹ The court is allowed to intervene in the narrowest manner. Justice Brennan clearly applied *Wednesbury* doctrine in this case.¹⁶⁰

All these doctrinal approaches were clearly connected to the distinctive elements of Australian legal culture, such as the rigid separation of powers, statutory construction and the distinction between legality and merits. Apart from the ground of procedural legitimate expectations, *Quin* triggered a discussion on substantive legitimate expectations. This was not raised directly by the claimant, but from the judgment.¹⁶¹ For example, Justice Mason mentioned that a claim of legitimate expectations may take the form of ‘a substantive right, privilege or benefit or of a procedural right, advantage or opportunity’.¹⁶² Furthermore, he argued that, although procedural legitimate expectations was claimed in this case, it had the characteristics of substantive legitimate expectations.¹⁶³

¹⁵⁸ ibid.

¹⁵⁹ ibid.

¹⁶⁰ ibid [19] (Brennan J).

¹⁶¹ ibid [34] (Mason J).

¹⁶² ibid [32] (Mason J).

¹⁶³ ibid [33].

This was mentioned in comparison to the English cases¹⁶⁴ debating whether the scope of legality should be expanded for substantive benefit or not.¹⁶⁵

However, all the judgments in *Quin* rejected substantive legitimate expectations as part of (deep-water) legality in Australian law. The legal reasoning demonstrates this straightforwardly by explaining elements of the Australian legal culture such as the separation of powers and the distinction between legality and merits. For example, Justice Mason explained that substantive legitimate expectations will entail curial interference with administrative decisions on the merits. This would preclude decision-makers from making a decision they considered to be the most appropriate in the circumstances.¹⁶⁶ The court was discussed as ‘*some advocates of judicial intervention which encourages the courts to expand the scope and purpose of judicial review*’.¹⁶⁷ Justice Brennan firmly asserted that this advocacy was misplaced and that the courts have to protect legality by considering the separation of powers;

*‘The courts have a duty to uphold and apply the law which recognises the autonomy of the three branches of government within their respective spheres of competence and which recognises the legal effectiveness of the due exercise of power by the Executive Government and other repositories of administrative power.’*¹⁶⁸

¹⁶⁴ *Khan* (n 3); *R v Secretary of State for the Home Department; Ex parte Ruddock* (1987) 1 WLR 1482.

¹⁶⁵ n 19 [35].

¹⁶⁶ *ibid* [37].

¹⁶⁷ *ibid* [21] (Brennan J).

¹⁶⁸ *ibid*.

If they trespass on the merits, they themselves are not following the rule of separation of power and their own legitimacy.¹⁶⁹

Interestingly, Justice Brennan mentioned clearly that this exclusion of substantive legitimate expectations in Australian (deep) understandings of legality is a product of how the rule of law is understood. In his words, '*legality depends ... on their fidelity to the rule of law, exhibited by the articulation of general principles*'.¹⁷⁰ The gate through which the court can step to review the merits has not been unlocked.¹⁷¹ If the court exceeded this jurisdiction, it would '*become a stalking horse for excesses of judicial power*'.¹⁷² Additionally, Justice Brennan tied the determination to the idea of pragmatism and formalism that, if the courts were given flexibility in conducting judicial review, they would be '*adrift on a featureless sea of pragmatism*'.¹⁷³ He further explained that '*the notion of a legitimate expectation is too nebulous to form a basis for invalidating the exercise of a power when its exercise otherwise accords with law*'.¹⁷⁴

4.1.3 Teoh

These fixed approaches in determining the ground as influenced by Australian legal culture will be affirmed in *Lam* in the next section. Before that, *Teoh* will be discussed as another case demonstrating further influence of the Australian legal culture on the courts' approach

¹⁶⁹ ibid [22].

¹⁷⁰ ibid.

¹⁷¹ ibid [26].

¹⁷² ibid [24].

¹⁷³ ibid [22].

¹⁷⁴ Ibid.

to procedural legitimate expectations.¹⁷⁵ In *Teoh*, the applicant was a foreign national applying for a permanent entry permit into Australia. The application was refused on the ground that he was convicted of drug offences and sentenced to imprisonment, therefore he did not meet the policy requirement for residential status be of good character. However, the applicant claimed that the rejection of the resident status would lead the applicant's wife and young children, who were in Australia, to face a bleak future. This was not in compliance with article 3(1) of the ratified United Nations Convention on the Rights of the Child. It gave rise to a legitimate expectation that the Minister would act in conformity with it and treat the best interest of the applicant's children as a primary consideration.

While the analysis of *Coughlan* above showed that a factor from an interrelated legal culture, namely the provision of an international treaty, could possibly be flexibly integrated into the English court's consideration of the ground, the judgments in *Teoh* demonstrate it is not the case in Australian law. It is difficult to claim that the provision gives rise to procedural legitimate expectations in Australian law. The treaty cannot operate as a direct source of individuals' rights and obligations in the country,¹⁷⁶ unless it is stipulated in a statute.¹⁷⁷ The reason was clear from the way the separation of powers is particularly understood in Australian legal culture.

With that said, the courts could recognise the significance of an international treaty. The majority of judgments accept that a ratified provision is capable of giving rise to the

¹⁷⁵ n 19.

¹⁷⁶ *ibid* [25] (Mason and Deane JJ), [20] (Toohey J), [35] (McHugh J).

¹⁷⁷ *ibid* [25] (Mason and Deane JJ).

legitimate expectations of the claimant. Justices Mason and Deane held that the courts should favour the construction of a ratified treaty.¹⁷⁸ The reasoning was that *'it is because Parliament, prima facie, intends to give effect to Australia's obligations under international law'*.¹⁷⁹ Therefore, international treaties can play a part in the courts' development of the common law.¹⁸⁰

Nonetheless, this importation of a norm from interrelated legal cultures into the consideration of the court has two main limitations, the first of which is that the courts can do this *'with due circumspection'*, only *'when the Parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law'*.¹⁸¹ The logic of the separation of powers considers that the *'judicial development of the common law must not be seen as a backdoor means to create the law'*.¹⁸² It is the main duty of parliament, not the court, to incorporate conventions into the domestic law. The court was reminded that legitimate expectation is not a binding rule of law.¹⁸³ Secondly, the judgments emphasised that the importation of international treaties to consider legitimate expectation is only valid in the aspect of procedural fairness.¹⁸⁴ Unlike the English law, the courts cannot take a factor into account when considering the ground of substantive legitimate expectations.

¹⁷⁸ *ibid* [26].

¹⁷⁹ *ibid*.

¹⁸⁰ *ibid* [27]-[28] (Mason and Deane JJ), [22]-[23], [32] (McHugh J).

¹⁸¹ *ibid* [28] (Mason and Deane JJ).

¹⁸² *ibid*

¹⁸³ *ibid* [36] (Mason and Deane JJ).

¹⁸⁴ *ibid* [37] (Mason and Deane JJ), [26] (Toohey J).

On the other hand, Justice McHugh gave a dissenting opinion that the ratification of a convention can be part of the consideration of the court, but by no means, did not give any rise to legitimate expectation, whether procedural or substantive.¹⁸⁵ This was a different conclusion from the majority, but it was based on a similar kind of reasoning. It was justified by the separation of powers in that the executive does not have a duty to make the effect of the treaty a domestic law. Justice McHugh asserted that;

*'If the result of ratifying an international convention was to give rise to a legitimate expectation...,the Executive government of the Commonwealth would have effectively amended the law of this country.... If the expectation were held to apply to decisions made by State officials, it would mean that the Executive government's action in ratifying a convention had also altered the duties of State government officials.'*¹⁸⁶

This legal reasoning in *Teoh* demonstrated that the court had limited access to interrelated legal culture in the determination of legitimate expectations as a ground of judicial review. Although the possibility was accepted by the majority, it came with limitations. This approach was clearly determined through the premise of the rigid separation of powers, which is distinctively understood in Australian legal culture. Justice McHugh relied on a similar kind of reasoning, but reached a different conclusion that the interrelated legal culture could never give rise to legitimate expectation.

4.2 *Lam*

So far, an attempt has been made to point out that there are relatively fixed ways in considering whether the category of legitimate expectations is covered by the Australian

¹⁸⁵ *ibid* [3] (McHugh J).

¹⁸⁶ *ibid* [38].

deep-water legality or not. While procedural legitimate expectations is included on the condition of clear manifestation of a contrary statutory intention, substantive legitimate expectations is completely excluded. The legal reasoning of *Kioa v West*, *Quin* and *Teoh* demonstrate that these are influenced by the Australian legal culture. It was affirmed and further discussed in *Lam*.

In the case, the claimant's visa application was cancelled because he failed to pass the character test. The decision-maker had informed the claimant that it would seek information from a third party (the children's carer), before the cancellation. However, the decision-maker did not do so. In seeking judicial review, the claimant argued that the decision-maker failed to apply procedural fairness to the case.¹⁸⁷ In the judgments of the HCA, the notion that substantive legitimate expectations should be protected in Australia, was firmly rejected for the foreseeable future.¹⁸⁸ The legal reasoning of this argument in the light of the Australian legal culture is examined in depth below.

Beginning with the judgment of Chief Justice Gleeson, Australian law generally accepts procedural legitimate expectations as a ground for judicial review.¹⁸⁹ He used English cases like *Attorney General of Hong Kong v Ng Yuen Shiu* to illustrate that the meaning of legality includes procedural fairness.¹⁹⁰ In relation to the application, while judgments in English law flexibly applies to various categories like abuse of power, Chief Justice Gleeson claimed that this was a '*practical matter*' in Australian law. Similar to

¹⁸⁷ n 3 [2]-[3], [23]-[24], [40], [109]-[111], [125]-[128].

¹⁸⁸ This was supported by Weeks (n 34) 243-244.

¹⁸⁹ n 3 [33].

¹⁹⁰ *ibid* [31].

Kioa v West and *Quin*, whether the court had jurisdiction or not could be considered from the perspective of the statutory framework and separation of powers.¹⁹¹ By this determination, Chief Justice Gleeson held that there was ‘*no practical injustice*’ in the present case.¹⁹²

Apart from that, Chief Justice Gleeson also applied the doctrine of jurisdictional error as the central approach when he considered the court’s jurisdiction in this case. If the administrative action contains a jurisdictional error, the court has the jurisdiction to conduct judicial review. However, he held that the applicant in this case had not lost any opportunity to advance his case. Hence, there was no procedural unfairness.¹⁹³ The court then did not have the jurisdiction to conduct judicial review because there was no jurisdictional error occurring. This usage of the jurisdictional error doctrine is another distinctive element of the Australian legal culture, giving rigidity to the separation of powers.

In terms of substantive legitimate expectations, Chief Justice Gleeson admitted that there was no clear-cut distinction between a substantive and procedural expectation. The applicant’s claim could convert a procedural expectation into something substantive.¹⁹⁴ However, he affirmed that the ground was applied far too broadly.¹⁹⁵ The claim required

¹⁹¹ *ibid* [27].

¹⁹² *ibid* [38].

¹⁹³ *ibid*.

¹⁹⁴ *ibid* [28].

¹⁹⁵ *ibid* [25].

the concept of legitimate expectations to carry more weight than it could bear.¹⁹⁶ It could have a negative effect by raising judicial review of an administrative action to ‘*a level of high and arid technicality*’.¹⁹⁷ The Australian understanding of deep-water legality does not include the expansion of legitimate expectation to protect substance.

This was entrenched by the judgments of Justices McHugh and Gummow. The important issue for procedural legitimate expectations is the prohibition in adopting an interrelated legal culture into the consideration of the court. The judges gave a dissenting opinion in *Teoh* that the ratification of international treaties did not impose liability on the executive.¹⁹⁸ Such an obligation is not a relevant mandatory consideration.¹⁹⁹ Significantly, the separation of powers was the reason for this approach. The executive is granted discretionary powers to fulfil its task of executing and maintaining the statutory law; therefore, the judicial branch has no jurisdiction to add or vary the content of those powers based on a particular view of the executive’s handling of an international affair.²⁰⁰ Compared to English law, doctrine influenced from interrelated legal culture will not be applied by the Australian courts because it conflicts with the landscape of their legal culture.

As for substantive legitimate expectations, Justices McHugh and Gummow began by questioning whether the rejection of substantive legitimate expectations gives rise to a

¹⁹⁶ *ibid.*

¹⁹⁷ *ibid.*

¹⁹⁸ *ibid* [81].

¹⁹⁹ *ibid* [99]-[101].

²⁰⁰ *ibid* [102].

jurisdictional error or not.²⁰¹ They explained the status in English law whereby the ground was accepted,²⁰² but held the position in *Quin* that the ground shall be rejected and retained in this case.²⁰³ It was clear from their legal reasoning that this rejection is influenced by Australian legal culture. For example, Justices McHugh and Gummow asserted that the Australian courts should conduct judicial review based on ‘*the purpose of structuring and regulating the achievement of public objectives*’.²⁰⁴ In other words, they have to consider the structure and framework of separation of powers and the federal system when deciding the scope of judicial review.²⁰⁵ The approach in *Coughlan*, where the ground was determined based on the concept of abuse of power, or the principle of proportionality, was therefore rejected because it would have given the court the authority to decide the merits, which would have infringed the separation of power.²⁰⁶ Furthermore, Justices McHugh and Gummow connected the jurisdiction of the court to the provisions in the written constitution and made the following assertion;

‘An aspect of the rule of law under the Constitution is that the role or function of Chapter III courts does not extend to the performance of the legislative function of translating policy into statutory form or the executive function of administration.’²⁰⁷

²⁰¹ *ibid* [65].

²⁰² *ibid* [66].

²⁰³ *ibid* [67].

²⁰⁴ *ibid* [75] citing *The Commonwealth v Mewett* (1997) 191 CLR 471, 546.

²⁰⁵ *ibid* [72]-[73].

²⁰⁶ *ibid* [73].

²⁰⁷ *ibid* [76].

Similar to the other grounds relating to substantive exercise of discretion analysed in the previous chapter, Justices McHugh and Gummow linked the determination of legitimate expectation to the doctrine of jurisdictional error. They contended that whether the court should conduct judicial review or not '*is manifested in the distinction between jurisdictional and non-jurisdictional error*'.²⁰⁸ The courts have a duty to conduct judicial review if a jurisdictional error occurs, but they have no jurisdiction to do so in the absence of such an error. If they trespass into the merits, this will infringe the separation of powers.

Apart from Justices Gleeson and McHugh and Gummow, other judges took a similar approach. For example, Justice Hayne argued that the abuse of power is in danger of being used without the carefully articulation of its content.²⁰⁹ In addition, Justice Callinan stated that '*legitimate expectation is an unfortunate one and apt to mislead*'.²¹⁰ In short, all the judgments in *Lam* affirmed the approaches of the Australian law in accepting procedural legitimate expectations as a matter of law, but with clear applications and limitations. However, they rejected substantive legitimate expectations as a valid ground of judicial review. All of these factors demonstrate that the elements of Australian legal culture play a role in all the court's processes to determine the scope of judicial review. The conversation in the transcript of legal argument of *Lam* fits this end very well and shows that they are clearly different from English law.

²⁰⁸ *ibid* [77].

²⁰⁹ *ibid* [119].

²¹⁰ *ibid* [140].

4.3 After *Lam*

After *Lam*, the approaches remained stable. There were cases in which procedural legitimate expectations was accepted as part of legality; for example, *NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*,²¹¹ and cases in which the claimant attempted to rely on *Coughlan*'s approach in terms of expanding the scope of judicial review to protect substantive legitimate expectations; for example, *McWilliam v Civil Aviation Safety Authority*.²¹² However, they all failed.²¹³ Justices Gummow, Hayne, Crennan and Bell made it clear in *Kaur* that '*legitimate expectation was an unfortunate expression which should be disregarded in the field of public law*'.²¹⁴

Not only being entrenched in judgments, these doctrinal approaches in determining legitimate expectations as ground of judicial review are less debated in Australia. Two arguments have been firmly admitted. Firstly, legitimate expectations is adopted in cases of alleged procedural unfairness with limitations.²¹⁵ The approach in *Teoh* to give greater effect to international treaties was rejected.²¹⁶ Secondly, whether with the doctrine of

²¹¹ (2004) 221 CLR 1 (See more in Alison Duxbury, 'The Impact and Significance of *Teoh* and *Lam*' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (CUP 2007) 312-315).

²¹² [2004] FCA 1701.

²¹³ *Stewart* (n 34) 295-297.

²¹⁴ *Kaur* (n 19) [65].

²¹⁵ Groves (n 34); Anthony Mason, 'Procedural Fairness: Its Development and Continuing Role of Legitimate Expectation' (2005) 12 *Australian Journal of Administrative Law* 103.

²¹⁶ Michael Taggart, 'Australian Exceptionalism in Judicial Review' (2008) 36 *Federal Law Review* 1, 14-15; Duxbury (n 211) 307-310.

proportionality or not, substantive legitimate expectations is firmly rejected.²¹⁷ These are clearly embedded in the Australian legal culture.²¹⁸ The ground has not been developed on the substance of the decision as it has in English law.²¹⁹

4.4 Products of the Australian Legal Culture

In the same vein as the the discussion of formalism in the previous chapters, these entrenchments in the determination of legitimate expectations in Australia was drawn into a kind of conclusory statement. For example, Groves asserts that ‘*many judges and commentators reject the doctrine [of substantive legitimate expectations] on the simple basis that it is incompatible with the Australian doctrine of separation of powers.*’²²⁰ This section goes deeper by unpacking legal reasoning of the leading cases demonstrating entrenchment of doctrinal approaches the Australian courts apply in determining procedural and substantive legitimate expectations as grounds of judicial review. A table below provides a snapshot of this.

²¹⁷ Taggart (n 216) 24-25.

²¹⁸ Groves (n 34); Weeks (n 34) 226-229, 241-246.

²¹⁹ Aronson, Groves and Weeks (n 35) [7.150].

²²⁰ Groves (n 34) 516.

Australian Doctrinal Approaches		
Justifications	Entrenched and Systematic	
	Procedural Legitimate Expectations	Substantive Legitimate Expectations
	Mainly justified by Surface-water legality (<i>Kioa v West, Quin</i>)	Rejected by the rule of law, separation of powers and distinction between legality and merit (<i>Quin, Lam</i>)
Applications	Clear rules based on the separation of powers and statutory construction (<i>Kioa v West, Quin</i>) Considered as practical matter (<i>Lam</i>)	Rejected 'adrift on a featureless sea of pragmatism' (<i>Quin, Lam</i>)
Doctrines	Limited to the narrow scope of judicial review without balancing process in the similar way with <i>Wednesbury</i> (<i>Quin</i>) Linked with jurisdictional error (<i>Lam</i>)	Not part of jurisdictional error (<i>Lam</i>)
Influences from Interrelated Legal Cultures	Limited access to interrelated legal culture in the determination of procedural legitimate expectations (<i>Teoh</i>)	Prohibited to be adopted into the consideration of the court (<i>Teoh, Lam</i>)
The status of the grounds	Limitedly accepted as a valid ground of judicial review	Completely rejected

Rather than repeating such elements, the aim of this section is merely to show their integrity. Importantly, these doctrinal approaches are connected to the rigid legal mentality of Australian judicial review constitutionalism. Firstly, procedural legitimate expectations is accepted as a ground of judicial review. The court considers the scope of legality in the particular case based on statutory construction under the framework of the separation of powers. The distinction between legality and merits is cautionary. Access to an interrelated legal culture to consider the ground is limited because this could infringe the framework between legislative and judiciary. The ground is determined based on the doctrine of jurisdictional error. If the executive does not exceed its boundary of power, there is no jurisdictional error; therefore, the court has no jurisdiction to conduct judicial review.

Substantive legitimate expectations has been rejected as part of (deep-water) legality in the Australian law based on a similar mentality concerning constitutional structures. It is perceived as being in the area of merits, which is for the executive to decide rather than the courts. This approach can be understood by the separation of powers framed in the written Constitution. Since the courts regard the ground as not making a jurisdictional error, they have no jurisdiction to conduct judicial review. The Australian law does not give the courts the same flexibility as the English law gives to their counterparts. Instead, they have to consider and follow the constitutional structure when determining the scope of review.

5. Conclusion

A quotation by Justice Mason of the HCA in his discussion on the courts' legitimacy conducting judicial review on the ground of procedural legitimate expectations is a fitting contribution claimed at this point here, namely, that *'the adoption of the English approach would require a revolution in Australian judicial thinking'*.²²¹

The justifications and doctrines applied by the English and Australian courts in their determination of legitimate expectations as a ground of judicial review have been demonstrated in this chapter through the methodology of deep-water legality and legal culture. On the one hand, as a product of flexible legal mentality, the English courts have flexibility in considering the ground. On the other hand, the Australian courts firmly reject it as it does not fit with the rigid legal mentality. Parallel to Chapter 3 to 6, these differences are two ways in operating deep-water legality. Rather than arguing for or against one over

²²¹

Mason (n 215) 108.

the other, this area of legitimate expectations confirms the general statement of this thesis that the determination of the grounds of judicial review can be understood in the light of legal culture.

Apart from that, the analysis above can also be connected to the previous chapter. On the one hand, apart from the overlaps between the grounds over factual issues and the grounds relating to substantive exercise of discretion, *Wednesbury* and proportionality were adopted as a doctrine in the determination of substantive legitimate expectations in England. Scholars thereby discuss the relationships between these grounds. On the other hand, the categorisation of grounds remains clear in Australian law. While objective fact is reviewed through jurisdictional fact, subjective discretion is reviewed through illogicality and irrationality and *Wednesbury* is regarded as a safety net in determining the scope of judicial review. They are all included in jurisdictional error. Conversely, proportionality and substantive legitimate expectations are not the part of jurisdictional error. These flexible and fixed relationships between the grounds in England and Australia also demonstrate influences of the English and Australian legal culture respectively.

VII. CHAPTER SEVEN

CONCLUSION

1. Mapping the Thesis in Administrative Law Scholarship

The Latin quotation, '*Ubi societas, ibi ius*', which translates as '*wherever there is society, there is law*',¹ is one of the very first things learned in studying law. It reflects '*hermetical sealing*' that the law must change to meet the needs of society. It also forms the basis of a comparative legal study of the way the law is particularly conditioned by social facts in the different legal systems of the world.² It is generally recognised that different legal systems have different ways of interpreting and applying their laws and administrative law is no exception. For instance, Bell asserts that

*'...it is not possible for administrative lawyers to assume that there is a single, universal function that the law serves in most countries. Administrative law is closely bound up with national institutions and traditions, as well as national constitutional values and ways of operating.'*³

Ackerman and Lindseth also observe that '*it [administrative law] frames the interaction between law and politics; it provides the conceptual vocabulary for their transformation*

¹ Aaron X Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (OUP 2009).

² Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (3rd edn, OUP 1998) 2, 4, 15, 21; Mathias Reimann, 'Comparative Law and Neighbouring Disciplines' in Mark Elliott and David Feldman (eds), *The Cambridge Companion to Public Law* (CUP 2015) 13-14.

³ John Bell, 'Comparative Administrative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 1260.

over time in response to social change'.⁴ Specifically, it is commonly acknowledged that the courts in different legal systems determine the scope of judicial review in diverse ways based on their different constitutional orders. Apart from Craig's statement quoted at the very beginning of this thesis, Aronson also asserts the following;

*'...whilst every country therefore accepts the need for lines [to be drawn to determine the scope of judicial review], each uses different terminology and techniques to express how they will set these margins.'*⁵

This has generated a range of comparative studies of the different ways the scope of judicial review is determined between legal systems, especially those of England and Australia, which have a similar root, but were developed differently. Aronson referred to this when he made the following statement;

*'Everyone in fact agrees that it would be dysfunctional to allow judicial review of all legal errors, but different legal systems have different ways of filtering out unwanted or unnecessary challenges. England's filtration system is different from ours [Australian law].'*⁶

It has been shown throughout this thesis that the existing works mainly apply a *'functional method'* to compare the advantages and disadvantages of the determination of

⁴ Susan R Ackerman and Peter L Lindseth, 'Comparative Administrative Law: An Introduction' in Susan R Ackerman and Peter L Lindseth (eds), *Research handbooks in comparative law* (Edward Elgar 2010) 18.

⁵ Mark Aronson, 'Jurisdictional Error and Beyond' in Matthew Groves (ed), *Modern Administrative Law in Australia* (CUP 2014) 262. See similar kind of recognitions in William Wade and Christopher Forsyth, *Administrative Law* (11th edn, OUP 2014) 212-213; Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action; Text, Cases and Commentary* (4th edn, LexisNexis Butterworths 2017) [2.3.2].

⁶ Aronson (n 5) 263.

the grounds of judicial review within and between the English and Australian laws.⁷ Some of them connect different approaches to the constitutional orders of the legal systems using a variety of methodologies. This is stated clearly by Groves and Weeks that, in the case of legitimate expectations,

*‘The differences in approach between Australia and the UK are significant...There are compelling constitutional reasons for courts in reach jurisdiction to decide matters regarding legitimate expectations as they do...’*⁸

The framework is also explored in recent work by Daly, in which he connects *‘the core values revealed by the practice of administrative law’*, namely the rule of law, good administration, democracy and the separation of powers with *‘the courts’ doctrinal choices’* in the areas of process, substance and remedial discretion.⁹

This thesis goes beyond the aforementioned works, not only by diving deeper and broadening the constitutional orders and determination of the grounds of judicial review, but also systematising them using the methodology of deep-water legality by means of comparing the English and Australian law. For example, according to Taggart,

*‘...in my view, with some of the Australian responses to substantive legitimate expectations...is the claim of exceptionalism...there is something about the Australian Constitution or separation of powers that answers the question without more’.*¹⁰

⁷ See more in Ralf Michaels, ‘Functional Method’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006).

⁸ Matthew Groves and Greg Weeks, ‘The Legitimacy of Expectations About Fairness: Can Process and Substance be Untangled?’ in John Bell and others (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing 2016) 187.

⁹ Paul Daly, ‘Administrative Law: A Values-based Approach’ in John Bell and others (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing 2016).

¹⁰ Michael Taggart, ‘Australian Exceptionalism in Judicial Review’ (2008) 36 *Federal Law Review*.

The ‘*Australian responses [rejection] to substantive legitimate expectations*’ have been unpacked in this thesis based on a detailed examination of the legal reasoning given in leading Australian cases. They have been connected as a product of the Australian legal culture, particularly in terms of the Australian courts’ rigid adherence to the ‘*framework of separation of powers prescribed in the written constitution*’ in their determination of the scope of judicial review. The term ‘*exceptionalism*’ was also unpacked by comparing the Australia’s firm rejection of the substantive legitimate expectations approach with the variety of doctrinal approaches the English courts can flexibly use in determining the ground. This and other differences between England and Australia, namely between the fluctuation and entrenchment of jurisdictional error and jurisdictional fact and between the variation and firm rejection of proportionality and deference, have been systematically untangled based on the methodological approaches of deep-water legality and legal culture. In short, this thesis demonstrates what ‘*Ubi societas, ibi ius*’ means in detail for the scope of judicial review doctrines in England and Australia. Although important and obvious, this kind of exercise has never been undertaken into this depth and detail before.

In summary, the differences between English and Australian judicial review have been unpacked based on a particular form of legal culture, namely ‘legal mentality of judicial review constitutionalism’, which refers to the shared legal thinking of the individual judges in understanding their role in conducting judicial review according to distinctive constitutional orders. On the one hand, the nature of the balancing process between the twin concepts of parliamentary sovereignty and the rule of law and the absence of a written constitution to clearly prescribe the court’s jurisdiction, lead the English courts to understand that their role in conducting judicial review in a flexible way. On the other

hand, the Australian courts understand their role as being relatively rigid by following the constitutional guidelines, namely the federal framework of the separation of powers prescribed in the written constitution. These means of legal thinking were extracted from the judgments, secondary works and speeches of individual English and Australian judges in Chapter 2. Most prominently, while Lord Mance of the UKSC stated that the role of the English court is *'best left unanswered'*, in other words, flexible and open,¹¹ Chief Justice Gleeson of the HCA made the following statement;

*'...The Constitution, the legislation governing judicial review, and the relevant principles of the common law, define the limits of the authority of courts to override administrative decisions.'*¹²

These diverse legal cultures produce a different substantive understanding of the English and Australian courts of the 'law' or 'legal question', regarded as 'deep-water legality'. However, in practice, barristers cannot appear in court and argue that the administrative action does not comply with the principle of legality; hence, it needs to be brought through ground of judicial review. The influence of these two legal systems' deep-water legality on the determination of the controversial grounds of judicial review was examined and compared in Chapters 3 to 6. The different doctrinal approaches were unpacked in these chapters, namely the status of the grounds, justifications, applications, doctrines, as well as the integration of the interrelated legal culture in the courts'

¹¹ See Section 3 of Chapter 2.

¹² Chief Justice Gleeson, 'Judicial Legitimacy' (Australian Bar Association Conference, New York, 2 July 2000).

determination of the grounds of judicial review, from the legal reasoning of leading English and Australian cases.

The demonstration began in Chapter 3 with central and traditional grounds, such as error of law and jurisdictional error before proceeding to the grounds of factual issues in Chapter 4, particularly jurisdictional fact. The most controversial area, namely the grounds relating to the substantive exercise of discretion, was discussed in Chapter 5, before addressing emerging ground like substantive legitimate expectations in Chapter 6. The different determinations of these grounds of judicial review were gradually revealed as being influenced by the English and Australian legal cultures, from the different approaches, but the same conclusion in Chapter 3 to the different approaches and perhaps different conclusion in Chapter 4, and the completely different approaches and conclusions in Chapters 5 and 6. The described three themes, namely, legal culture, deep-water legality and the determination of the grounds of judicial review, have been connected and become a framework of this thesis.

2. English Law Standing on the Edge of Two Boats

Apart from demonstrating the different dimensions of the English and Australian judicial review, some overall themes concerning the English and Australian determination of the scope of judicial review can also be identified. On the one hand, the English courts have the flexibility to apply various doctrinal approaches in their determination of the grounds of judicial review. They can provide malleable explanations in justifying or limiting their jurisdictions, from the direct reference to parliamentary sovereignty, the rule of law and the common law theory in *Cart*, to the interest of justice and the principle of finality in *E*, the concept of limited jurisdiction and the appropriate process of judicialisation in *R (A) v*

Croydon, the expertise and consistency of the tribunal system in *Jones*, fairness in *Richmond-Upon-Thames*, individual consideration, inconsistency and legal certainty in *Hamble Fisheries* and the concept of good administration in *Nadarajah*. In the same vein, various doctrines, namely, jurisdictional error, judicial policy and second-tier appeal in *Cart*, four criteria leading factual determination to unfairness in *E, Wednesbury* in *Richmond-Upon-Thames* and *Hargreaves*, abuse of power in *Coughlan* and proportionality in *Kennedy, Pham* and *Nadarajah*, have been flexibly elaborated, applied and adapted by individual judges in their determination of the scope of judicial review. Additionally, it is possible for the courts to adopt norms from interrelated legal cultures in their consideration, for example, the ECHR through the HRA.¹³

This variety of doctrinal approaches leads to the grounds of judicial review having a fluctuating status in English law. For example, error of law was flexibly adapted in the area of judicial review of the decisions of tribunals and inferior courts. The jurisdictional fact doctrine was implicitly abandoned in *Anisminic*, but recurred as a valid ground for the court to review the precedent fact in *Khawaja*, and then being debated as to whether it should be replaced by the approach in *E*. However, it was clearly stated as a valid ground in *R (A) v Croydon* and *Jones*. The grounds relating to the substantive exercise of discretion, namely, *Wednesbury* unreasonableness, modified rationality and proportionality overlap. Also, whether and to what extent to accept substantive legitimate expectations as a ground of judicial review was fluctuating.

¹³ The citations of these cases in this paragraph were reiterated throughout the previous chapters. In the interests of saving space, they will not be repeated here.

Apart from the legal reasoning, approaches and conclusions of the determination of the grounds of judicial review in these cases, the English deep-water understanding of legality has also led to an extensive academic discussion. As shown throughout the previous chapters, scholars have attempted to find descriptors of the flexibility of the courts' determination of grounds; for example, the conclusory labels of pragmatic reasoning and pragmatism, the concept of deference, as well as Gelborn and Robinson's seedless grape of the scope of judicial review.¹⁴

Rather than preferring or arguing with one of these doctrinal approaches and academic concepts, it is pointed out in this thesis that they are all rooted in the flexible nature of the English legal culture. Based on the metaphor of sailing boats, the approaches of the English courts when determining the grounds of judicial review are reminiscent of the traditional Thai saying, '*having one's legs on the edge of two (separate) boats*'. This implies a situation in which it is difficult to clearly decide which way to go between two possible choices that are very different and cannot function together.¹⁵ It is equivalent to standing with a leg on each of two boats that are drifting apart. The English courts have the flexibility to choose (and sail) whichever of the two boats they consider to be the most appropriate, which will expand or narrow the grounds of judicial review. On a surface level, it seems that the choice of these two boats is inconsistent because the lines between reviewable and non-reviewable are swirling. However, this inconsistency is not necessarily

¹⁴ E Gellhorn and G Robinson, 'Perspectives on Administrative Law' (1975) 75 Columbia Law Review 771, 780-781.

¹⁵ *Thai Dictionary (Royal Society Version) B E 2554* <<http://www.royin.go.th/dictionary/>> accessed 3 March 2018.

problematic from a deep-water perspective; in fact, it is merely the result of the geographical features of an English river.

3. Australian Law's Choice of One Boat for a Journey

On the other hand, it has been demonstrated by the examination that the Australian doctrinal approaches are relatively confined, since the courts determine their jurisdiction based on the rigid framework of the separation of powers, prescribed in the written constitution and statutory construction. It is difficult for the Australian courts to consider factors from interrelated legal cultures because they are aware that those factors may infringe this rigid framework of the constitutional setting.

These doctrinal approaches lead the grounds of judicial review to have clear and systematic status. In *Craig and Kirk*, jurisdictional error was regarded as a central approach in all areas of the determination of the scope of judicial review. It was also firmly held in *Timbarra*, *Enfield*, *Anvil Hill* and *M70/2011* that jurisdictional fact was an entrenched subset of jurisdictional error. While illogicality and irrationality was used for the subjective exercise of discretion in *SZMDs*, *S20/2002* and *Li*, *Wednesbury* was considered as a safety net for the courts' review of administrative discretion. Procedural legitimate expectations is accepted with limitations in *Kioa v West* and *Teoh*, while proportionality was firmly rejected, either as a ground for reviewing discretion or as a doctrine for substantive legitimate expectations in *Quin* and *Lam*.

Apart from Taggart's Australian Exceptionalism, this unpacking and exploration of the doctrinal approaches in the courts' determination of the grounds of judicial review is a full detailed picture of the conclusory labels of formalistic reasoning, formalism and

the firm rejection of deference. They are all demonstrated to be products of the Australian courts' perception of their role as rigid based on their legal culture.

In contrast to the English law, it seems that the Australian courts choose to jump into a boat for the journey, whether to accept or reject, expand or narrow the grounds of judicial review and they steer the boat by adopting clear sailing protocols. It is difficult for the Australian courts to borrow a sailing technique or tool from a neighbour (interrelated legal culture), since they are aware that those techniques or tools may not accommodate the natural features under their rivers. The lines between reviewable and non-reviewable are consistent, seen through clear water.

4. Further Implications of Deep-water Legality and Legal Culture

Apart from diving deep, broadening and mapping the framework of the determination of the scope of judicial review in the light of the English and Australian legal cultures, the additional aim of this thesis is to argue that the methodological approaches of deep-water legality and legal culture can be applied to understand the determination of the grounds of judicial review in other legal systems, apart from England and Australia. For example, the French system does not have proportionality as a general head of judicial review,¹⁶ but has an equivalent approach called 'Maximum Control', which entails the Conseil d'Etat extensively reviewing the merits of a decision by providing suggestions and frameworks to the administration.¹⁷ Besides, the Conseil d'État is able to intervene in administrative

¹⁶ Neville Brown and John Bell, *French Administrative Law* (5th edn, Clarendon Press 1998) 239-267.

¹⁷ John Bell, Sophie Boyron and Simon Whittaker, *Principles of French Law* (2nd edn, OUP 2008) 186-188.

action under the broad scope of legality.¹⁸ As Bell and Brown that ‘*The general principles of law... have been imported into the principle of legality through a broadening of the notion of loi, a breach of which is a ground of judicial review*’.¹⁹ This approach may be problematic because of the separation of powers, if considered in the context of English and Australian law. However, the consideration of French legal culture lessens this problem,²⁰ because the judges are former administrative civil servants, who have knowledge and experience and are trained as experts in the field of public administration.²¹ Having spent time within the administration, they are less likely to be swayed by arguments of relative expertise.²² In short, there must be a distinct connection between legal culture, legality and the determination of the grounds of judicial review in French law. However, this connection must be the subject of future research, since it requires a considerable space for a detailed examination.

Apart from the scope of judicial review, the influence of legal culture on other administrative law doctrines in England and Australia was revealed in the earlier chapters. For example, as shown in Chapter 2 and 3, while the flexibility on the distinction between tribunals and the courts is distinguished in English law, there is a clear and rigid framework

¹⁸ The only exception in which the court will not substitute an administrative decision is on the ground of assessment of the facts. When it comes to the area of discretionary power, the courts would only substitute judgment if it is a manifest error (ibid).

¹⁹ ibid 216.

²⁰ I also pointed out this issue in a reflective essay namely, Voraphol Malsukhum, ‘Is Anything Lost by not Having Proportionality as a General Head of Judicial Review of Administrative Action?: A Comparative Study of English, European Union and French Administrative Law’, forthcoming.

²¹ John Bell, *French Legal Cultures* (2nd edn, CUP 2008) 157-159, 196-198.

²² ibid 191-195.

in Australian law based on the provisions in the written constitution, particularly Chapter III and Section 72. This also results in different kinds of privative clause systems in England and Australia. In Chapter 5, while the relationship between a judicial review in the HRA and the common law in England is flexible and debatable, the relationship between judicial review in the ADJR and common law in Australia is clearer and systematic. Indeed, there are a number of other administrative law doctrines that can be proposed as examples of being navigated by deep-water legality and legal culture. A great deal of case analysis has been undertaken in this thesis. Rather than conducting more, it is considered to be better to conclude this thesis by emphasising its spirit and proclaiming the necessity to dive deeply into the legal mentality of the legal system in order to fully understand any legal doctrine.

5. Concluding Remarks

The administrative law of many legal systems has continually been criticised based on the grounds that the courts excessively extend their power to intervene in any administrative action of their choosing, which leads to the indeterminable and improper scope of judicial review and judicial legitimacy.²³ Most scholars simply connect this situation to some constitutional orders of the legal system, for example, the written constitution is accredited with influencing Australian law, English flexible approach is chastised as disadvantageous. Rather than focusing on these final outcomes, this thesis illuminates that the connection between the determination of the scope of judicial review, deep-water legality and the legal

²³ See various publications in ‘Judicial Power Project’ <<http://judicialpowerproject.org.uk/>> accessed 3 March 2018.

system's legal culture can be explored at a more detail and in-depth level. Although, at the end of the day, the courts still determine the grounds of judicial review using their own volition, their approaches are not just random. The principle of legality is not just a fig-leaf, but is deeply embedded in the legal system's legal culture, and thereby, dictates the way courts empower, justify, constrain or limit their scope of judicial review. It is anticipated that this framework of legal culture and legality will be a useful tool to navigate the process of determining the scope of judicial review in the English and Australian legal systems, and by extension, other legal systems. The entire process can be compared to one who sails a boat with a compass, showing the direction relative to the geography. After all,

'He who loves practice without theory is like the sailor who boards ship without a rudder and compass and never knows where he may cast'

(Leonardo da Vinci, 1453-1519)

BIBLIOGRAPHY

Textbooks

- Appleby G, Reilly A and Grenfell L, *Australian Public Law* (2nd edn, OUP 2014)
- Aronson M, Groves M and Weeks G, *Judicial Review of Administrative Action and Government Liability* (6th edn, Thomson Reuters Australia 2017)
- Arthurs HW, *Without the Law; Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press 1985)
- Atiyah PS and Summers RS, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press 1996)
- Bagehot W, *The Collected Works of Walter Bagehot*, vol 5 (St John-Stevas N ed, The Economist 1974)
- Barendt E, *An Introduction to Constitutional Law* (OUP 1998)
- Bauman Z, *Culture as Praxis* (Sage 1999)
- Bell J, *French Legal Cultures* (2nd edn, CUP 2008)
- Bell J, Boyron S and Whittaker S, *Principles of French Law* (2nd edn, OUP 2008)
- Blackstone W, *An Analysis of the Laws of England*, vol 1 (The Clarendon Press 1771)
- Blankenburg E and Bruinsma F, *Dutch Legal Culture* (2nd edn, Kluwer Law International 1995)
- Brandy ADP, *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (CUP 2012)
- Brown N and Bell J, *French Administrative Law* (5th edn, Clarendon Press 1998)
- Cane P, *Administrative Tribunals and Adjudication* (Hart Publishing 2010)
- , *Administrative Law* (5th edn, OUP 2011)
- , *Controlling Administrative Power: An Historical Comparison* (CUP 2016)
- Cane P and McDonald L, *Principles of Administrative Law: Legal Regulation of Governance* (3rd edn, OUP 2018)
- Connolly AJ, *The Foundations of Australian Public Law: State, Power, Accountability* (CUP 2017)
- Cotterell R, *Law's Community: Legal Theory in Sociological Perspective* (OUP 1995)
- Craig P, *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon Press 1990)
- , *EU Administrative Law* (2nd edn, OUP 2012)

—, *The Hamlyn Lectures: UK, EU and Global Administrative Law* (CUP 2015)

—, *Administrative Law* (8th edn, Sweet & Maxwell 2016)

Crawford L, *The Rule of Law and the Australian Constitution* (The Federation Press 2017)

Creyke R, McMillan J and Smyth M, *Control of Government Action; Text, Cases and Commentary* (4th edn, LexisNexis Butterworths 2017)

Daly P, *A Theory of Deference in Administrative Law : Basis, Application and Scope* (CUP 2012)

De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens & Sons Limited 1958)

Dicey AV, *Introduction to the Study of the Law of the Constitution* (7th edn, Macmillan 1908)

—, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1959)

Dworkin R, *Taking Rights Seriously* (Bloomsbury Academic 2013)

Dyzenhaus D, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (Clarendon Press 1997)

Elliott M, *Administrative Law: Text and Materials* (Elliott M and Varuhas J eds, 5th edn, OUP 2017)

Endicott T, *Administrative Law* (4th edn, OUP 2018)

Fellmeth AX and Horwitz M, *Guide to Latin in International Law* (OUP 2009)

Fisher E, *Risk Regulation and Administrative Constitutionalism* (Hart Publishing 2007)

Fordham M, *Judicial Review Handbook* (6th edn, Hart Publishing 2012)

Friedman L, *The Legal System: A Social Science Perspective* (Russell Sage Foundation 1975)

—, *The Republic of Choice: Law, Authority and Culture* (Harvard University Press 1990)

Geertz C, *The Interpretation of Cultures: Selected Essays* (Basic Books 1973)

Geertz C, *The Interpretation of Cultures* (2nd edn, Basic Books 1993)

Gleeson M, *The Rule of Law and the Constitution* (ABC Books 2000)

Goldsworthy J, *Australia: Devotion to Legalism in Interpreting Constitutions: A Comparative Study* (Oxford Constitutions of the World 2007)

Henderson E G, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Harvard University Press 1963)

Hewart, *The New Despotism* (London Ernest Benn Ltd 1928)

Irving H, *To Constitute a Nation : A Cultural History of Australia's Constitution* (CUP 1997)

Jaffe LL, *Judicial Control of Administrative Action* (Little, Brown 1965)

Johnson D, *The Japanese Way of Justice: Prosecuting Crime in Japan* (OUP 2002)

Josev T, *The Campaign against the Courts: A History of the Judicial Activism Debate* (The Federation Press 2017)

Lazarus L, *Contrasting Prisoners' Rights: A Comparative Examination of Germany and England* (OUP 2004)

Leeming M, *Authority to Decide: the Law of Jurisdiction in Australia* (The Federation Press 2012)

Lewans M, *Administrative Law and Judicial Deference* (Hart Publishing 2016)

Leyland P, *The Constitution of the United Kingdom : A Contextual Analysis* (2nd edn, Hart Publishing 2012)

Lloyd GER, *Demystifying Mentalities* (CUP 1990)

Loughlin M, *Foundations of Public Law* (OUP 2012)

McLean J, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (CUP 2012)

Oliver D, *Common Values and the Public-Private Divide* (Butterworths 1999)

Parkinson P, *Tradition and Change in Australian Law* (5th edn, Thomson Reuters 2013)

Raz J, *The Authority of Law* (Clarendon Press 1979)

Robson WA, *Justice and Administrative law: A Study of the British Constitution* (3rd edn, Stevens & Amp 1951)

Saunders C, *The Constitution of Australia: A Contextual Analysis* (Hart Publishing 2011)

Schonberg S, *Legitimate Expectations in Administrative Law* (OUP 2000)

Schwarze J, *European Administrative Law* (Sweet & Maxwell 1992)

Searle J R, *The Social Construction of Reality* (London 1995)

Sedley S, *Ashes and Sparks: Essays on Law and Justice* (CUP 2011)

—, *Lions Under the Throne : Essays on the History of English Public Law* (CUP 2015)

Shapiro S, *Legality* (Belknap Press of Harvard University Press 2011)

Stebbins C, *Legal Foundations of Tribunals in Nineteenth Century England* (CUP 2006)

Stellios J, *The Federal Judicature* (LexisNexis 2010)

Turpin C and Tomkins A, *British Government and the Constitution* (7th edn, CUP 2012)

Tushnet M, *The New Constitutional Order* (Princeton University Press 2009)

Wade H, *Towards Administrative Justice* (University of Michigan Press 1963)
Wade W and Forsyth C, *Administrative Law* (11th edn, OUP 2014)
Zweigert K and Kötz H, *Introduction to Comparative Law* (3rd edn, OUP 1998)

Contribution to Edited Books

Ackerman SR and Lindseth PL, 'Comparative Administrative Law: An Introduction' in Ackerman SR and Lindseth PL (eds), *Research handbooks in comparative law* (Edward Elgar 2010)

Airo-Farulla G, 'Reasonableness, Rationality and Proportionality' in Groves M and Lee HP (eds), *Australian Administrative Law* (CUP 2007)

Allan T, 'The Rule of Law as the Foundation of Judicial Review' in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing 2000).

Aroney N, 'The Justification of Judicial Review: Text, Structure, History and Principle', in Rosalind Dixon (eds) *Australian Constitutional Values* (Hart 2018)

Aronson M, 'Jurisdictional Error without the tears' in Groves M and Lee HP (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (CUP 2007)

—, 'Jurisdictional Error and Beyond' in Groves M (ed), *Modern Administrative Law in Australia* (CUP 2014)

—, 'The Growth of Substantive Review' in Bell J and others (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing 2016)

Bell J, 'Comparative Administrative Law' in Reimann M and Zimmermann R (eds), *The Oxford Handbook of Comparative Law* (OUP 2006)

—, 'Administrative Law in a Comparative Perspective' in Örüçü E and Nelken D (eds), *Comparative Law: A Handbook* (Hart Publishing 2007)

Bignami F, 'Comparative Administrative Law' in Elliott M and Feldman D (eds), *The Cambridge Companion to Public Law* (CUP 2015)

Cane P, 'Understanding Administrative Adjudication' in Pearson L, Harlow C and Taggart M (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing 2008)

Carnwath R, 'No Need for a single Foundation' in Forsyth C (ed), *Judicial Review and the Constitution* (Hart Publishing 2000)

Cotterrell R, 'The Concept of Legal Culture' in Nelken D (ed), *Comparing Legal Cultures* (Dartmouth 1997)

—, 'Comparative Law and Legal Culture' in Reimann M and Zimmermann R (eds), *The Oxford Handbook of Comparative Law* (OUP 2006)

Craig P, 'Jurisdiction, Judicial Control and Agency Autonomy, A Special Relationship' in Loveland I (ed), *American Influences on Public Law in the UK* (OUP 1995)

- Craig P, 'Unreasonableness and Proportionality in UK Law' in Ellis E (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing 1999)
- , 'Jurisdiction, Judicial Control and Agency Autonomy, A Special Relationship' in Ian Loveland (ed), *American Influences on Public Law in the UK* (OUP 1995)
- , 'Judicial Review of Questions of Law: A Comparative Perspective' in Rose-Ackerman S and Lindseth PL (eds), *Comparative Administrative Law* (Edward Elgar 2011)
- Crawford L and Goldsworthy J, 'Constitutionalism' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (OUP 2018)
- Daly P, 'Administrative Law: A Values-based Approach' in Bell J and others (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing 2016)
- Dannemann G, 'Comparative Law: Study of Similarities or Differences?' in Reimann M and Zimmermann R (eds), *The Oxford Handbook of Comparative Law* (OUP 2006)
- Duxbury A, 'The Impact and Significance of Teoh and Lam' in Groves M and Lee HP (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (CUP 2007)
- Elias D S, 'The Unity of Public Law?', in Mark Elliott, Jason Varuhas and Shona Stark (eds), *The Unity of Public Law?: Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing 2018)
- Elliott M, 'From Heresy to Orthodoxy: Substantive Legitimate Expectations in English Public Law' in Groves M and Weeks G (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing 2016)
- Feldman D, 'Anisminic Ltd v Foreign Compensation Commission [1968]: In Perspective' in Juss S and Sunkin M (eds), *Landmark Cases in Public Law* (Hart Publishing 2017)
- Foster M, 'The Separation of Judicial Power' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (OUP 2018)
- French R, 'Administrative Law in Australia: Themes and Values Revisited' in Groves M (ed), *Modern Administrative Law in Australia: Concepts and Context* (CUP 2014)
- Friedman L, 'The Concept of Legal Culture: A Reply' in Nelken D (ed), *Comparing Legal Cultures* (Dartmouth 1997)
- , 'The Place of Legal Culture in the Sociology of Law' in Freeman M (ed), *Law and Sociology* (OUP 2006)
- Gageler S, 'Legalism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion the High Court of Australian* (OUP 2001)
- Gageler S, 'The Constitutional Dimension' in Groves M (ed), *Modern Administrative Law in Australia: Concepts and Context* (CUP 2014)

- Groves M and Boughey J, 'Administrative Law in the Australian Environment' in Groves M (ed), *Modern Administrative Law in Australia: Concepts and Context* (CUP 2014)
- Groves M and Lee HP, 'Australian Administrative Law: The Constitutional and Legal Matrix' in Groves M and Lee HP (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (CUP 2007)
- Groves M and Weeks G, 'Modern Extensions of Substantive Review: A Survey of Themes in Taggart's Work and in the Wider Literature' in Wilberg H and Elliott M (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing 2015)
- , 'The Legitimacy of Expectations About Fairness: Can Process and Substance be Untangled?' in Bell J and others (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing 2016)
- Gummow W, 'Common Law' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (2018 OUP)
- Hayne K, 'Rule of Law' in Cheryl Saunders and Adrienne Stone (eds) *The Oxford Handbook of the Australian Constitution* (OUP 2018)
- Hirst J, 'Nation Building, 1901-14' in Bashford A and Macintyre S (eds), *The Cambridge History of Australia Volume 2: The Commonwealth of Australia* (CUP 2013)
- Hughes K, 'R v North and East Devon Health Authority [2001]: Coughan and the Development of Public Law' in Juss S and Sunkin M (eds), *Landmark Cases in Public Law* (Hart Publishing 2017)
- Hunt M, 'Sovereignty's Blight: Why Contemporary Public Law needs the Concept of 'Due Deference'' in Bamforth N and Leyland P (eds), *Public Law in a Multi-layered Constitution* (Hart Publishing 2003)
- Jackson V, 'Comparative Constitutional Law: Methodologies' in Rosenfeld M and Shašo A (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012)
- Jansen N, 'Comparative Law and Comparative Knowledge' in Reimann M and Zimmermann R (eds), *The Oxford Handbook of Comparative Law* (OUP 2006)
- Jeffrey J, 'Proportionality and Unreasonableness: Neither Merger nor Takeover' in Wilberg H and Elliott M (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing 2015)
- , 'The Rule of Law' in Jowell, Oliver and O'Connell (eds), *The Changing Constitution* (OUP 2015)
- Jowell J, 'Of Vires and Vacuums: The Constitutional Context of Judicial Review' in Forsyth C (ed), *Judicial Review and the Constitution* (Hart Publishing 2000)
- , 'Administrative Law' in Bogdanor V (ed), *The British Constitution in the Twentieth Century* (OUP 2003)

- , ‘The Rule of Law Today’ in Jowell J and Oliver D (eds), *The Changing Constitution* (6th edn, OUP 2007)
- King M, ‘Comparing Legal Cultures in the Quest for Law's Identity’ in Nelken D (ed), *Comparing Legal Cultures* (Dartmouth 1997)
- Krygier M, ‘The Hart-Fuller Debate: Transitional Societies and the Rule of Law’ in Cane P (ed), *The Hart-Fuller Debate in the Twenty-first Century* (Hart Publishing 2010)
- Laws J, ‘Wednesbury’ in Hare Fa (ed), *The Golden Metwand and the Crooked Cord* (Hart Publishing 1998)
- , ‘Illegality: The Problem of Jurisdiction’ in Forsyth C (ed), *Judicial Review and the Constitution* (Hart Publishing 2000)
- Lee HP, ‘Improper Purpose’ in Groves M and Lee HP (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (CUP 2007)
- Legrand P, ‘What "Legal Transplants"?’ in Nelken D and Feets J (eds), *Adapting Legal Cultures* (Hart Publishing 2001)
- Loughlin M, ‘Why the History of English Administrative Law is not Written’ in Dyzenhaus D, Hunt M and Huscroft G (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing 2009)
- Maitland W, ‘The Shallows and Silences of Real Life’ in H A L Fisher (ed), *Collected Papers* (CUP 1911)
- Malsukhum V, ‘Is Anything Lost by not Having Proportionality as a General Head of Judicial Review of Administrative Action?: A Comparative Study of English, European Union and French Administrative Law’ in *A Collection of Essays in the Honour of Assistant Professor Piruna Tingsabadh*, forthcoming
- Mason A, ‘The Evolving Role and Function of the High Court’ in Wheeler Oa (ed), *The Australian Federal Judicial System* (Melbourne University Press 2000)
- Mason A, ‘Mike Taggart and Australian Exceptionalism’ in Dyzenhaus D, Hunt M and Huscroft G (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing 2009)
- Merry S E, ‘What is Legal Culture’ in David Nelken (eds), *Using of Legal Culture* (Wildy, Simmonds & Hill Publishing 2012)
- Michaels R, ‘Functional Method’ in Reimann M and Zimmermann R (eds), *The Oxford Handbook of Comparative Law* (OUP 2006)
- Mortimer D, ‘The Constitutionalisation of Administrative Law’, in Cheryl Saunders and Adrienne Stone (eds) *The Oxford Handbook of the Australian Constitution* (OUP 2018)
- Nelken D, ‘Towards a Sociology of Legal Adaption’ in Nelken D and Feest J (eds), *Adapting Legal Cultures* (Hart Publishing 2001)
- , ‘Comparative Sociology of Law’ in Benakar R and Travers M (eds), *Introduction to Law and Social Theory* (Hart Publishing 2002)

- , ‘Comparative Law and Comparative Legal Studies’ in Esin Ö and Nelken D (eds), *Comparative Law: A Handbook* (Hart Publishing 2007)
- , ‘Defining and Using the Concept of Legal Culture’ in Esin Ö and Nelken D (eds), *Comparative Law: A Handbook* (Hart Publishing 2007)
- Owens N, ‘The Judicature’, in Cheryl Saunders and Adrienne Stone (eds) *The Oxford Handbook of the Australian Constitution* (OUP 2018)
- Pennisi C, ‘Sociological Uses of the Concept of Legal Culture’ in Nelken D (ed), *Comparing Legal Cultures* (Dartmouth 1997)
- Poole T, ‘Between the Devil and the Deep Blue Sea’ in Pearson L, Taggart M and Harlow C (eds), *Administrative Law in A Changing State: Essays in Honour of Mark Aronson* (Hart Publishing 2008)
- Reimann M, ‘Comparative Law and Neighbouring Disciplines’ in Elliott M and Feldman D (eds), *The Cambridge Companion to Public Law* (CUP 2015)
- Sidebotham N, ‘Relevant and Irrelevant Considerations’ in Groves M and Lee HP (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (CUP 2007)
- Stewart C, ‘The Doctrine of Substantive Unfairness and the Review of Substantive Legitimate Expectations’ in Groves M and Lee HP (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (CUP 2007)
- Taggart M, ‘Reinventing Administrative Law’ in Bamforth and Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing 2003)
- Weeks G, ‘Holding Government to its Word: Legitimate Expectations and Estoppels in Administrative Law’ in Groves M (ed), *Modern Administrative Law in Australia: Concepts and Context* (CUP 2014)
- Young S, ‘Privative Clauses: Politics, Legality and the Constitutional Dimension’ in *Modern Administrative Law in Australia: Concepts and Context* (CUP 2014)

Journal Articles

- Airo-Farulla G, ‘Rationality and Judicial Review of Administrative Action’ (2000) 24 Melbourne University Law Review 543
- Allan T, ‘Legislative Intent and Legislative Supremacy: A Reply to Professor Craig’ (2004) 24 OJLS 563
- , ‘The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?’ (2002) 61 CLJ 87
- , ‘Constitutional Dialogue and the Justification of Judicial review’ (2003) 23 OJLS 563
- , ‘Questions of Legality and Legitimacy: Form and Substance in British Constitutionalism’ (2011) 9 International Journal of Constitutional Law 155

Aronson M, 'The Resurgence of Jurisdictional Facts' (2001) 12 Public Law Review 17

Arthurs HW, 'Rethinking Administrative Law: A Slightly Dicey Business' (1979) 17 Osgoode Hall LJ 1

Biehler H, 'Legitimate Expectation - An Odyssey' (2013) 50 Irish Jurist N S 40

Bouhey J and Crawford LB, 'Reconsidering R (on the application of Cart) v Upper Tribunal and the Rationale for Jurisdictional Error' PL 592

Brennan G, 'Courts, Democracy and the Law' (1991) 17 Commonwealth Law Bulletin 696

Brian P, 'The Enduring Importance of the Rule of Law in Times of Change' (2012) 86 Australian Law Journal 175

Bullen E, 'Legislative Limits on Environmental Decision-making: The Application of the Administrative Law Doctrines of Jurisdictional Fact and Ultra Vires' (2006) 23 EPLJ 265

Buxbaum HL, 'German Legal Culture and the Globalisation of Competition Law: A Historical Perspective on the Expansion of Private Antitrust Enforcement' (2005) 23 Berkeley Journal of International Law 474

Cane P, 'The Making of Australian Administrative Law' (2003) 24 Australian Bar Review 114

—, 'Judicial Review in the Age of Tribunals' [2009] PL 479

Craig P, 'Legislative Intent and Legislative Supremacy: A Reply to Professor Allan' (2004) 24 OJLS 585

—, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] PL 467

—, 'Ultra Vires and the Foundations of Judicial Review' (1998) 57 CLJ 63

—, 'The Common Law, Shared Power and Judicial Review' (2004) 24 OJLS 237

—, 'Judicial Review, Appeal and Factual Error' [2004] PL 788

Craig P, 'Proportionality, Rationality and Review' [2010] NZLR 265

Craig P, 'The Nature of Reasonableness Review' (2013) 66 Current Legal Problems 131

—, 'Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application' [2015] PL 60

Dixon O, 'The Law and the Constitution' (1935) 51 LQR 590

—, 'Aspects of Australian Federalism' (1944) 5 The University of Toronto Law Journal 241

—, 'Judicial Method' [1956] 29 ALJ 468

Dworkin R, 'Hart's Postscript and the Character of Political Philosophical' (2004) 24 OJLS 23

Elliott M, 'The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law' (1999) 58 CLJ 129

Elliott M and Thomas R, 'Tribunal Justice and Proportionate Dispute Resolution' (2012) 71 CLJ 297

Endicott T, 'Questions of Law' (1998) 114 LQR 292

Fallon R, 'The Rule of Law as a Concept in Constitutional Discourse' (1997) 97 Columbia Law Review 1

Feldman D, 'The Nature of Legal Scholarship' (1989) 52 MLR 498

Finn C, 'Constitutionalising Supervisory Review at State Level: The End of Hickman?' [2010] Public Law Review 92

Fisher E, 'Food Safety Crises as Crises in Administrative Constitutionalism' (2010) 20 Health Matrix 55

—, '"Jurisdictional" Facts and "Hot" Facts: Legal Formalism, Legal Pluralism, and the Nature of Australian Administrative Law' (2015) 38 Melbourne University Law Review 968

—, 'Environmental Law as "Hot Law"' (2013) 25 Journal of Environmental Law 347

Forsyth C, 'The Provenance and Protection of Legitimate Expectations' [1988] CLJ 238

—, 'Of Fig Leaves and Fairy Tales: the Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 55 CLJ 122

Friedman L, 'Is there a Modern Legal Culture?' (1994) 7 Ratio Juris 117

Fuller L, 'The Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 353

Gageler S, 'The Underpinnings of Judicial Review of Administrative Action' (2000) 28 Federal Law Review 303

Galligan D, 'Judicial Review and the Textbook Writers' (1982) 2 OJLS 257

Gellhorn E and Robinson G, 'Perspectives on Administrative Law' (1975) 75 Columbia Law Review 771

Gordon S, 'The Relation of Facts to Jurisdiction' (1929) 45 QLR 458

Gould B, 'Anisminic and Jurisdictional Review' [1970] PL 358

Groves M, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 Melb UL Rev 470

Hammond, 'The Judiciary and the Executive' (1991) 1 Journal of Judicial Administration 81

Harlow C, 'Changing the Mindset: The Place of Theory in English Administrative Law' (1994) 14 OJLS 419

Hayne K, 'Deference: An Australian Perspective' [2010] PL 75

Heydon D, 'Judicial Activism and the Death of the Rule of Law' 10 Otago L Rev 493

Hickman T, 'Problems for Proportionality' [2010] *New Zealand Law Review* 303

Jaffe L and Henderson E, 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 *Quarterly Review*

Josev T, 'The Late Arrival of the "Judicial Activism" Debate in Australian Public Discourse' (2013) 24 *Public Law Review* 17

Jowell J, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] *PL* 671

Kirby M, 'Judicial Activism: Power without Responsibility-No, Appropriate Activism Conforming to Duty' (2006) 30 *Melb UL Rev* 576

Knight CJS, 'The Rule of law, Parliamentary Sovereignty and the Ministerial Veto' (2015) 131 *The Law Quarterly Review* 547

Krygier M, 'Law as Tradition' (1986) 5 *Law and Philosophy*

Laborde C, 'The Concept of the State in British and French Political Thought' (2000) 48 *Political Studies* 540

Lindell G, 'Why is Australia's Constitution Binding?' (1986) 16 *Federal Law Review* 29

Mason A, 'Administrative Review – The Experience of the First Twelve Years' (1989) 18 *Federal Law Review* 122

Mason A, 'Procedural Fairness: Its Development and Continuing Role of Legitimate Expectation' (2005) 12 *Australian Journal of Administrative Law* 103

Mason B, 'Jurisdictional Facts after Plaintiff M70' (2013) 24 *PLR* 37

Metzger G, 'Administrative Law as the New Federalism' [2008] *Duke Law Journal* 2023

—, 'Administrative Constitutionalism' (2012) 91 *Texas Law Review* 1897

Nelken D, 'Disclosing/ Invoking Legal Culture: An Introduction' (1995) 4 *Social & Legal Studies* 435

—, 'Using the Concept of Legal Culture' (2004) 29 *Austl J Leg Phil* 1

Oliver D, 'Is the 'Ultra Vires' Rule the Basis of Judicial Review?' [1987] *PL* 543

Pearson L, 'Jurisdictional Fact: a Dilemma for the Courts' (2000) 17 *Environmental and Planning Law Journal* 453

Preston B, 'Judicial Review of Illegality and Irrationality of Administrative Decisions in Australia' (2006) 18 *Australian Bar Review* 17

Raz J, 'The Rule of Law and its Viture' (1977) 93 *LQR* 195

Reynolds P, 'Legitimate Expectations and the Protection of Trust in Public Officials' [2011] *Public Law* 330

Rivers J, 'Proportionality and Variable Intensity of Review' (2006) 65 *CLJ* 174

Sackville, 'The Limits of Judicial Review of Executive Action - Some Compensations between Australia and the US' (2000) 28 *Federal Law Review* 331

Sales P and Steyn K, 'Legitimate Expectations in English Public law: An Analysis' [2004] PL 564

Samuel G, 'Can Legal Reasoning Demystified?' (2009) 29 Legal Studies 181

Saunders C, 'Constitution as Catalyst: Different Paths within Australian Administrative Law' (2012) 10 NZJPIL 154

Sawer, 'Error of Law on the Face of an Administrative Record' (1956) 3 University of Western Australia Annual Law Review 24

Scott L, 'Evolution of Public Law' 14 J Comp Legis & Int'l L 163

Sedley S, 'Human Rights: a Twenty-First Century Agenda' [1995] PL 386

Selway B, 'The Principle behind Common Law Judicial Review of Administrative Action – The Search Continues' (2002) 30 Federal Law Review

Shapiro S, Fisher E and Wagner W, 'The Enlightenment of Administrative Law: Looking inside the Agency for Legitimacy' (2012) 47 Wake Forest Law Review 463

Spencer T, 'An Australian Rule of Law' (2014) 21 Australian Journal of Administrative Law 98

Spigelman J, 'The Integrity Branch of Government' 78 Australian Law Journal 724

—, 'The Centrality of Jurisdictional Error' 21 Public Law Review 77

Steele I, 'Substantive Legitimate Expectations: Striking the Right Balance?' (2005) 121 Law Quarterly Review 300

Stellios J, 'Concepts of Judicial Review: Commentary on Dixon' (2015) 43 Federal Law Review 511

Sunstein CR and Vermeule A, 'The New Coke: On the Plural Aims of Administrative Law' (2016) 2015.1 The Supreme Court Review 41

Taggart M, 'Australian Exceptionalism in Judicial Review' (2008) 36 Federal Law Review 1

—, 'Proportionality, Deference, Wednesbury' [2008] NZL Rev 423

Wait M, 'The Slumbering Sovereign: Sir Owen Dixon's Common Law Constitution Revisited' (2001) 29 Federal Law Review 57

Webber J, 'Culture, Legal Culture, and Legal Reasoning: A Comment on Nelken' (2004) 29 Austl J Leg Phil 27

Williams R, 'When is an Error not an Error? Reform of Jurisdictional Review of Error of Law and Fact' [2007] PL 793

—, 'The Multiple Doctrines of Legitimate Expectations' (2016) 132 LQR 639

—, 'Structuring Substantive Review' [2017] PL 99

Woolf L, 'Droit Public- English Style' [1995] PL 57

—, ‘Judicial Review- The Tensions Between the Executive and the Judiciary’ (1998) 114 LQR 579

Young A, ‘In Defence of Due Deference’ (2009) 72 MLR 554

Speeches

Chief Justice French, ‘Australia's Constitutional Evolution’ (John Fordham Law School Constitutional Law Master Class, 20 January 2010)

—, ‘Courts in a Representative Democracy’ (University of Southern Queensland, Toowoomba, 25 June 2010)

—, ‘The Courts and the Parliament’ (Queensland Supreme Court Seminar, Brisbane, 4 August 2012)

—, ‘The Rule of Law as a Many Coloured Dream Coat’ (20th Annual Lecture Singapore Academy of Law, 18 September 2013, Singapore)

—, ‘Common Law Constitutionalism’ (Robin Cooke Lecture, Wellington, New Zealand, 27 November 2014)

—, ‘Statutory Interpretation and Rationality in Administrative Law’ (National Administrative Law Lecture, Canberra, 23 July 2015)

—, ‘The Globalisation of Public Law: A Quilting of Legalities’ (Public Law Conference, Cambridge, 12 September 2016)

Chief Justice Gleeson, ‘Legality: Spirit and Principle’ (The Second Magna Carta Lecture, New South Wales Parliament House, Sydney, 20 November 2003)

—, ‘Judicial Legitimacy’ (Australian Bar Association Conference, New York, 2 July 2000)

—, ‘Courts and the Rule of Law’ (The Rule of Law Series, Melbourne University, 7 November 2001)

—, ‘The Role of a Judge in a Representative Democracy’ (Judiciary of the Commonwealth of the Bahamas, 4 January 2008)

Justice Gageler, ‘What is a Question of Law?’ (The National Conference of Tax Institute Justice Hill Memorial Lecture, March 2014)

Justice Hayne, ‘“Concerning Judicial Method”- Fifty Years on’ (The Fourteenth Lucinda Lecture, Monash University, 17 October 2006)

Justice Kirby, ‘Judicial Activism’ (The Bar Association of India Lecture, New Delhi, 6 January 1997)

Justice McHugh, ‘Tensions between the Executive and the Judiciary’ (Australian Bar Association Conference, Paris, 10 July 2002)

- , ‘Judicial Method’ (Democracy and the Law, the Australian Bar Association Conference, London, 5 July 1998)
- Lady Hale, ‘The Supreme Court in the United Kingdom Constitution’ (The Bryce Lecture 2015, Oxford, 5 February 2015)
- , ‘UK Constitutionalism on the March?’ (The Constitutional and Administrative Law Bar Association Conference, 12 July 2014)
- , ‘Who Guards the Guardians?’ (Public Law Project Conference, 14 October 2013)
- Lord Carnwath, ‘From Judicial Outrage to Sliding Scales: Where Next for Wednesbury’ (the ALBA Annual Lecture, 12 November 2013)
- Lord Hope, ‘The Role of the Supreme Court in Protecting the Rights of the Individual in a Jurisdiction with no Written Constitution’ (Remarks made to introduce the Glasgow Bar Association Seminar, 9 December 2011)
- Lord Mance, ‘The Rule of Law - Common Traditions and Common Issues’ (175th Anniversary of Founding of Hoge Raad, the Netherlands, 1 October 2013)
- Lord Neuberger, ‘The Role of Judges in Human Rights Jurisprudence: A Comparison of the Australian and UK experience’ (Conference at the Supreme Court of Victoria, Melbourne, 8 August 2014)
- , ‘The Supreme Court and the Rule of Law’ (The Conkerton Lecture, 9 October 2014)
- , ‘The UK Constitutional Settlement and the Role of the UK Supreme Court’ (The Legal Wales Conference, 10 October 2014)
- Lord Phillips, ‘Judicial Independence and Accountability: A View from the Supreme Court’ (The Politics of Judicial Independence, 8 February 2011)
- Lord Sumption, ‘Anxious Scrutiny’ (Bar Association Annual Lecture, 4 November 2014)
- Murray P, ‘Process, Substance and the History of Error of Law Review’ (Cambridge Public Law Conference, September 2014)
- Sir Brennan, ‘The Parliament, the Executive and the Courts: Roles and Immunities’ (School of Law, Bond University, 21 February 1998)
- Spigelman J, ‘Jurisdictional Integrity’ (2nd Lecture National Lecture Series for the Australian Institute of Administrative Law, 5 August 2004)

Conference Papers and Websites

- Drewry G, ‘The Judicialisation of “Administrative” Tribunals in the UK: From Hewart to Leggatt’ (2009) 28 TRAS <<http://rtsa.ro/tras/index.php/tras/article/view/27>>
- Fisher L, ‘Challenging Land Use Decisions in the UK and Australia: Three Overlapping Narratives’ (Cityscapes: A Conference on Comparative Land Use Law, Yale Law School, 1-2 April 2016)

Gardner J, 'Can there be a Written Constitution?'
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1401244>

Panikabutara Coorey P, 'The Evolution of the Rule of Law in Thailand: The Thai Constitutions' UNSW Law Research Paper No 2008-45
<<https://ssrn.com/abstract=1398586>>

Waluchow W, 'Constitutionalism' The Stanford Encyclopedia of Philosophy
<<https://plato.stanford.edu/archives/spr2014/entries/constitutionalism/>>

Policy Documents

Australian Commonwealth Administrative Review Committee Report, *Kerr Report* (Parliamentary Paper no 144/1972, August 1971)

Administrative Review Council Federal Judicial Review in Australia, *Report No 50* (2012)

Committee on Administrative Tribunals and Enquiries, *Report 1957*

Committee on Ministers' Powers, *Report 1932*

Review of Administrative Law in the United Kingdom, *Discussion Paper April 1981*

Review of Tribunals by Sir Andrew Leggatt, *Tribunals for users: One system, One service 2001*

The Law Commission, *A Consultation Paper No. 180 on Housing: Proportionate Dispute Resolution - The Role of Tribunals*

Others

Thai Dictionary (Royal Society Version) B.E. 2554

Oxford Advance Learner's Dictionary (9th edn, OUP 2015)