Albeit only in the last chapter, Poole's book provides the occasion for public lawyers and philosophers to scrutinise the challenges that reason of state poses to the rule of law. Poole's apology for the model of rule of men should remind those who cherish the rule of law that it may be suspended to ensure *salus populi*. The challenge is to acknowledge the limits of the rule of law while not allowing it to be used as a fig leaf by the model of rule of men.

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Public Law Adjudication in Common Law Systems: Process and Substance. By JOHN BELL, MARK ELLIOTT, JASON N.E. VARUHAS and PHILIP MURRAY (eds.) [Oxford: Hart Publishing, 2016. liii + 390 pp. Hardback £75. ISBN 978-1-849-46991-3.]

Comparative law comes in a variety of forms. This excellent publication comprises a set of essays on administrative law by distinguished writers from a range of countries in the common law world.

The papers were first presented at an inspiring conference organised by public lawyers from the University of Cambridge with the support of the publisher, Hart Publishing, in September 2014. A second conference in the proposed series will have been held by the time this review is published. Nevertheless, the papers in this book will undoubtedly hold their value for many years to come.

The subtitle of the book refers to "Process and Substance": there is an irony underlying that juxtaposition. Much of the growth in the reach, and in the uncertainty as to the scope, of judicial review has flowed from unsatisfactory distinctions between merit review and judicial review, and between error of law and error of fact. The book's title invites a discussion of another pair of contrasting concepts. Most of the authors agree that there is no bright-line distinction between process and substance.

Like private lawyers, public lawyers are accustomed to think in terms of Sir Henry Maine's aphorism that substantive law appears to be secreted in the interstices of procedure, which, in the case of public law, used to be found largely in the common law prerogative writs. Nevertheless, Jason Varuhas is keen to emphasise the separation of public law from private law in the UK. He argues that procedural change has continued the regulation of public power in the public interest and according to precepts of good administration. Varuhas locates a critical impetus in procedural reforms in the 1970s – a process that finds reflection in Australian statutory law reform. He is anxious to maintain an understanding of the history (developed in a separate essay by Philip Murray) to resist public law being diverted by superimposed measures providing for compensation to affected individuals. At the same time, he points to the diversity of the fields subject to public administration. The arguments are well made, but may not give sufficient weight to the drivers of case law development: generally judicial review cases are brought by individuals seeking to maintain their own interests; the courts' job is to apply public law principles to the individual claim.

Phillip Murray's historical approach remarks on the differential developments of certiorari as a procedure for reviewing the criminal jurisdiction of justices of the peace (seen as a derogation from trial by jury) and for reviewing administrative orders made by justices. This functional analysis is reflected in current developments.

An analysis of the cases supports the view that courts are becoming more interventionist. The responses of government and public authorities, as Carol Harlow and Richard Rawlings describe them, reflect a largely negative view of judicial "interference". It is important to understand such responses even if they be based, as suggested by Maurice Sunkin and Varda Bondy, on a perception of (1) a significant level of abuse by claimants, (2) review that impedes rather than promotes good administration and (3) review that achieves quite limited substantive benefits for claimants.

There can be little doubt that, in terms of absolute numbers, the volume of cases reflects the growth of state bureaucracies. However, as Sunkin and Bondy note of the UK figures – a point almost certainly replicated in other countries – much of the growth is to be found in the area of immigration and asylum seeking. They also note that the UK Government's claim that only 1% of cases lodged reach a favourable outcome at a final hearing is remarkably close to the comparable figure for success on the part of public authorities, namely 2%. While there are still consequences to be identified flowing from an increased willingness on the part of superior courts to expand the grounds of judicial review, the consequences at the administrative level are yet to be clearly identified.

There can also be little doubt that the growth of judicial review is a function of the major expansion of the obligation to publish reasons. Jerry L. Mashaw argues that "[a]uthority without reason is literally dehumanising". However, he sees the requirement to give reasons as a triumph of procedural rationality, without guaranteeing the reasonableness of the outcome.

Paul Daly from Montreal identifies a set of "values" that he sees as properly reflected in the development of judicial review. On the other hand, Christopher Forsyth and David Feldman express concerns as to the dangers in having courts decide cases by applying underlying values, rather than established legal principle. Forsyth says that the UK Supreme Court has abandoned doctrinal analysis for a "pragmatic" approach which renders the scope of judicial review discretionary. In a chapter entitled "Blasphemy against Basics", Forsyth asserts that the abandonment of established principle for the shifting sands of pragmatism is likely to lead to "deleterious uncertainty".

One can empathise with this concern; however, the question remains: how should courts deal with those cases within the fuzzy field where the fact/law and substance/process distinctions are inherently manipulable? The truth may lie in the relationship between principles and values but, if the principles are to be applied coherently, the courts need to develop a clearer understanding of underlying values. Each of these papers raises issues that should feed into judicial analysis of claims for judicial review, but rarely do.

The primary stimulants of active growth in the case law have been unreasonableness and procedural fairness. Mark Aronson, the doyen of current Australian administrative lawyers, addresses the standard of unreasonableness as an indicator of the expansionist trend of review. Aronson sees *Wednesbury* unreasonableness as traditionally the only "overtly substantive" basis for judicial review and as, then, limited to the exercise of discretion. It is now directed to fact-finding, reasoning and outcomes. However, even unreasonableness review can be portrayed as boundary-riding, by implying a limit on the conferral of power – that is, the power is only to be exercised reasonably and rationally and not arbitrarily or capriciously.

Aronson rightly notes the difficulties in maintaining a bright line between fact and law but, apart from general law principles, it is firmly entrenched in statute. To reject the distinction requires attention to principles of statutory interpretation.

Alan Robertson, a Federal Court judge in Australia, whilst not accepting that the intensity of review has achieved the same level in Australia as in the UK, frankly acknowledges that conventional forms of classification into errors of fact, law and discretion alone provide inadequate guidance. He understands that a "qualitative" judgment must be made as to the seriousness of the error, but having regard to the categories of fact, law and discretion. As Robertson notes, the courts tend to focus on what may justify intervention, without articulating the characteristics of the area of unreviewable choices left to the decision-maker, which, by default, becomes a residual category.

Matthew Groves and Greg Weeks assess the manner in which the ground of procedural unfairness has expanded to encompass unfair outcomes in the UK, but not in Australia. They ask whether legitimate expectations, or some public law version of estoppel, can constrain fair governmental action.

A theme of several chapters is the institutional context of judicial review. These include constitutional factors, but here differences in terminology are significant. To address the institutional context is to think in ways familiar to political science; to address constitutional factors is to invoke the language of the law.

In countries with a written constitution including a separation of powers, the courts could view their roles as more confined than do courts working with an unwritten constitution. Judges are comfortable with written instruments; thus, a constitution that defines the respective roles of the courts, the executive and the legislature may naturally result in a greater focus on those relationships and on the constitutional significance of statutory interpretation in defining the limits of judicial review. Aronson notes a diminishing reliance in Australia on the separation of powers doctrine as a constitutional principle defining the scope of judicial review; but it may be that a similar effect is achieved through a focus on statutory interpretation, which can also be seen to have a constitutional basis.

Institutional considerations loom large in challenges to delegated legislation that in Australia, as Andrew Edgar explains, are open, perhaps ironically, to proportionality review but not procedural challenge. Edgar adverts to "deference" as an element in UK human rights cases, but not to the US concept of *Chevron* deference, which arguably contains more conventional principle than other common law courts are willing to give it credit for.

Kent Roach from Toronto addresses the relief available in public law proceedings where the validity of a statute is in question. Roach notes the willingness of UK courts to read down statutes that could otherwise create "unfair trials" in a way he sees as a blunt instrument for adjusting policy outcomes when the challenge is brought on human rights grounds. He discusses the options in the context of the inaptly labelled "rape shield laws" (which seek to protect victims from cross-examination about prior sexual conduct), prohibitions on same-sex marriage and the topical challenge to assisted suicide. Roach's theme is that, when reviewing legislation, the courts should take a measured approach, stopping short of declaring a statute generally invalid.

The book ends with two essays that provide internal reviews by truly eminent scholars: Cheryl Saunders from Melbourne and David Feldman from Cambridge. Their contributions provide powerful and disparate views as to the current state of public law in the common law world.

As Feldman rightly notes, the lessons to be drawn from such a comparative study require caution and intellectual rigour. The adoption of common expressions may reflect the lawyer's commitment to certainty and predictability, based in a search for precedent. It may also reveal an affirmation of what are believed to be commonly

held values – a point developed by Saunders. However, as Feldman warns, common linguistic expressions may conceal a degree of conceptual variation.

The underlying theme of the book, reflected in the unsatisfactory distinction between process and substance, is the tendency through much of the common law world for the scope of judicial review to expand from a constrained focus on procedural error and policing the boundaries of legality into the substance or qualitative assessment of the actual decision. The value of the essays, primarily focusing on the UK, Canada and Australia, is not so much the recognition of that development, as the analysis of scholars with deep experience of the various jurisdictions as to why the trend is occurring and in what sense the incentives are common.

There are, inevitably, omissions and topics lightly touched, including financial and commercial regulation. The regulation of collective action depends on values that differ from those affecting individual autonomy. Daly makes a similar point in seeking to distinguish between "rule of law" values and the principle of good administration. Passing references to "*Chevron* deference" are dismissive, although Mashaw's paper, which deals with reasoning under the US Administrative Procedure Act and from a European perspective, is a valuable counterbalance. Further, it would have been useful to have had a comparative review of the effects of the Canadian Charter and the UK's Human Rights Act 1998 on judicial review of administrative decision-making. The values underlying judicial review and human rights protection are closely related; the relationship is arguably important to understanding the proper scope (and limits) of judicial review – a topic addressed in the Canadian context by Mary Liston. In Australia, without a bill of rights, similar results have been achieved by applying the "principle of legality" as a principle of statutory interpretation. As the bulk of judicial review occurs in the context of powers conferred by statute, there is also room for closer analysis of principles of statutory interpretation, which are themselves an integral part of public law. Cheryl Saunders gives a list of other areas for exploration.

In an age that has seen the publication of a number of books of essays on administrative law, this publication stands above the crowd, by reason of its coherent development of themes and the uniformly high quality of the essays. The authors and the publisher are to be congratulated.

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Defences in Unjust Enrichment. By ANDREW DYSON, JAMES GOUDKAMP and FREDERICK WILMOT-SMITH (eds.) [Oxford: Hart Publishing, 2016. xxxi + 328 pp. Hardback £75. ISBN 978-1-84946-725-4.]

One puzzle about the law of unjust enrichment is that we know many things about the law of unjust enrichment, but find it hard to explain *why* we know them. For example, we know that, if I pay you £100 by mistake, not only *will* you be liable to pay me £100, but you *should* be held liable to pay me £100. But if we are pressed to explain *why* you should be held liable to me in this case, we start to flounder. Similarly, if – having received my mistaken payment of £100 – you make a donation that you would not otherwise have made of £20 to a charity, we all know that your liability to me *should* go down to £80; in other words, you should have a defence of change of position. But if we are asked to explain *why* you should have a defence of change of position in this case although (for example) no such defence will be given