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What's So Common about "Common Law" Approaches to Judicial Review?

Swati Jhaveri

1.1 INTRODUCTION

In the field of comparative public law, the focus has typically been on constitutional law.¹ A range of explanations can be offered for this imbalance. Primarily, there may be a concern that meaningful comparison may not be possible in the field of administrative law. Harlow and Rawlings observe that '[b]ehind every theory of administrative law there lies a theory of the state'.² Prospective comparativists might feel that there is too much variance in the make-up of different states for there to be a realistic prospect of comparison in systems of administrative law.³ However, these objections persist even in the field of comparative constitutional law, manifesting, for example, as a concern that the parochially value-laden norms that make-up a particular jurisdictions' domestic constitutional law are not amenable to comparison or transfer.⁴ Nonetheless, comparative constitutional law has been able to overcome these hurdles to thrive much more strongly as a field of study as is evident from the proliferation of research in the field.⁵

¹ The distinction between 'constitutional' and 'administrative' law is complex: see John Gardner, 'Can There Be a Written Constitution?' *Oxford Studies in Philosophy of Law* (Oxford University Press, 2011), chapter 5. There are various ways of formulating the distinction: constitutional as the macro context for the state's powers and administrative as the micro application of the macro; or administrative law as 'applied' or 'concretised' constitutional law. This chapter and the book take as 'administrative law' the norms and institutions that specifically check the executive arm based on common law norms, regulations, or statute (while broadly justified on meta-constitutional ideas like the rule of law or separation of powers).

² Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press, 2009, 3rd edition), 1. See also Cheryl Saunders, 'Apples, Oranges and Comparative Administrative Law' 2006 *Acta Juridica* 423, 424, 426.

³ John Ohnesorge, 'Administrative Law in East Asia: A Comparative Historical Analysis' in Susan Rose-Ackerman and Peter L Lindseth (eds.), *Comparative Administrative Law* (Edward Elgar 2011) 78 at 78–9; Janina Boughey, 'Administrative Law: The Next Frontier for Comparative Law' (2013) 62 *International and Comparative Law Quarterly* 55 at 61–62.

⁴ Cheryl Saunders, 'The Use and Misuse of Comparative Constitutional Law' (2006) 13 *Indiana Journal of Global Legal Studies* 37.

⁵ A further reason offered for the growth of comparative constitutional law as a field of study has been the growth and spread of constitutionalism and judicial review as a tool for the protection and advancement of constitutionalism. The corresponding administrative law 'product' (namely, (a) law as a tool for framing the way individuals and organisations test and challenge the legitimacy of the modern state outside of the electoral process and the constitution; (b) protecting citizens against an enlarged state and to provide checks on the accountability and competence of the state; and (c) most importantly, 'judicial review' as the primary mechanism for achieving these ends of the law) has not been the subject of such widespread export outside the common law. This is largely because of the larger role played by non-law frameworks and mechanisms (politics, internal bureaucratic accountability, civil society, etc.) in achieving these ends of 'administrative law'. The 'constitutionalism' product (at least the Anglo legal-liberal paradigm version of it) is said to be a more contained and adaptable product

This may be changing. There has been renewed interest in undertaking broad comparative administrative law studies across a wider range of jurisdictions on a wider range of issues.⁶ The field has benefited from this renewed interest in understanding the design of different systems of administrative law and justice. However, the scope of comparison remains relatively narrow in the specific context of common law studies. This chapter analyses various existing comparative endeavours in the common law world, with a view to looking at how the field can progress further in its comparative work. It proposes that one area ripe for further study is to refine our understanding of ‘common law’ systems of administrative law. In current comparative studies, common law systems are typically identified as a family of systems that share a range of characteristics. Typically these characteristics include: a role for the ordinary courts in holding executive bodies to account; the nature of the court’s role (review on the grounds of the ‘legality’ versus the ‘merits’ of a decision, with the latter being the preserve of the executive or administrative tribunals); grounds of judicial review that manifest this distinction between legality and merits-based review (jurisdictional error, procedural fairness, ‘legality’)⁷; the institutions outside of the courts used to achieve the ends of administrative law (tribunals, ombudsmen, independent anti-corruption commissions); the aims of administrative law (coalescing around broadly shared understandings of ‘legitimacy’, transparency, compliance with statutory frameworks for decision-making, ‘fair’ and inclusive decision-making processes that engage relevant stakeholders (civic, expert, political)); and a sense of how courts and political branches are supposed to interact in the overall administrative law industry (with different systems plotting themselves along different points of a spectrum in the balance of power between courts and the political branches). There will be differences of opinion on the optimal design of a common law system of administrative law but the designs will, in common, utilise these features.

The aim of this volume is to push back on the view that common law systems tend to coalesce around this group of concepts and ideas.⁸ There is a significant amount of variance that it is necessary to explore and which only becomes apparent when specifically considered from the perspective of divergence. This volume specifically considers the issue of divergence by asking how far different common law jurisdictions have deviated from their original English law roots of administrative law. The contributors to this volume investigate the continued utilisation of English law across common law systems that traditionally imported,

capable of such widespread export. See, e.g., Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014), especially chapter 5.

⁶ See, e.g., Tom Ginsburg and Albert H. Y. Chen, *Administrative Law and Governance in Asia* (Routledge 2009); Susan Rose-Ackerman and Peter L Lindseth (eds.), *Comparative Administrative Law* (Edward Elgar 2011 and 2017); John Bell, Mark Elliott, Jason N. E. Varuhas, and Philip Murray (eds.), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing 2016), and Mark Elliott, Jason N. E. Varuhas, and Shona Wilson Stark (eds.), *The Unity of Public Law: Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing 2018); Peter Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge University Press 2016); Boughey, above n 2; Hugh Corder, ‘Comparing Administrative Justice across the Commonwealth: A First Scan’ 2006 *Acta Juridica* 1; Peter Cane, Peter Lindseth, and Herwig Hoffman (eds.), *The Oxford Handbook of Comparative Administrative Law* (Oxford University Press, forthcoming).

⁷ On which, see S. Jhaveri, ‘Revisiting Taxonomies and Truisms in Administrative Law in Singapore’ (2019) *Singapore Journal of Legal Studies* 351–76.

⁸ A common observation in Peter Cane, ‘Theory and Values in Public Law’ in Paul Craig and Richard Rawlings (eds.), *Law and Administration in Europe: Essays for Carol Harlow* (Oxford: Oxford University Press 2003); Paul Daly, ‘Administrative Law: A Values-Based Approach’ in John Bell, Mark Elliott, Jason N. E. Varuhas, and Philip Murray (eds.), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing 2016), especially at 24–31; and Cheryl Saunders, ‘Common Law Public Law: Comparative Reflections’ in John Bell, Mark Elliott, Jason N. E. Varuhas, and Philip Murray (eds.), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing 2016) at 354.

or were modelled on, English law. The contributors consider the origins of English law within the jurisdiction (doctrines, concepts, structures, constitutional underpinnings); the range of adaptations made to English law and the autochthonous forces that influenced this adaptive process. The objective is to evaluate not just the continuing impact of the English law transplant in a multitude of common law jurisdictions, but also the broad range of causal factors and agents that influence the development of the common law. This conversation will be assisted with input from the perspective of a wide range of common law jurisdictions, including those outside the traditional focus of comparative administrative law in the common law world (outside Australia, New Zealand, England, US, and Canada to include South Africa, India, Singapore, Malaysia, Israel, Bangladesh, Scotland, Kenya, Republic of Ireland, and Hong Kong).

Such a conversation will help develop a much more refined and robust understanding of 'common law' administrative law that is not skewed towards an understanding coming out of the usual jurisdictions of comparison, especially for the benefit of 'newer' common law jurisdictions which are undergoing a more nascent development of administrative law and looking for inspiration on modes of development. It will also provide a more refined definition of 'common law' approaches to judicial review for studies cutting across the common law and civil law divide, which have until now tended to be driven by a 'unitary' or narrow understanding of 'common law' systems as a, more or less, unified group of systems with certain shared characteristics.⁹ This chapter first engages with these restrictions in existing studies. It then moves on to look at specific questions that may be used to explore the degree of difference and diversity in approaches to judicial review in the common law world. The chapter concludes that multiple categories of common law systems are apparent once common law systems are studied from the perspective of divergence. While common law systems may share a common vocabulary, there is greater variance and nuance in the approach to judicial review that needs to be appreciated. The conclusion maps out a possible typology of common law systems.

1.2 LIMITATIONS OF EXISTING COMPARATIVE ADMINISTRATIVE LAW STUDIES ACROSS THE COMMON LAW WORLD

This section outlines four existing major 'centres' for comparative administrative law in the common law world. It highlights what may be gained by these studies, but also the significant gaps.

1.2.1 *Comparative Studies of Common Law Systems*

Hugh Corder organised a comparative administrative law workshop motivated by the need to develop post-apartheid South African administrative law and to 'examine trends in administrative law, compare problems and solutions, learn from each other and develop a collaborative agenda for the future'.¹⁰ This was one of the first major studies on the nature of common law administrative law since the work of Dicey¹¹ and

⁹ See, for example, Rose-Ackerman and Lindseth, above n 6, chapter 1.

¹⁰ Saunders, above n 3, 424.

¹¹ Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan Press 1959, 10th edition). Dicey's focus is to use English 'administrative law' (or rather the absence thereof) to critique administrative law of France.

Goodnow.¹² There was broad coverage from across the Commonwealth, with parts of Africa and the Caribbean being the only omissions.¹³ The comparative work stretched across five broad areas: (a) a broad outline of the powers and modes of accountability of the executive within each system; (b) the impact of ‘administrative justice’ on the working of democratic government within the systems;¹⁴ (c) access to judicial review (whether through setting boundaries of reviewability or rules of standing); (d) the scope of judicial review (including discussions of review versus appeal and bearing in mind the growth in administrative tribunals engaging in merits review); and (e) analysis of the grounds of review, including codified grounds.¹⁵

In a reflective piece on the contributions to the workshop, Cheryl Saunders acknowledged the concern that comparison is inhibited in administrative law by the difficulties of understanding other systems at the level of their institutional and political set-up and against their particular socio-economic and political backgrounds.¹⁶ However, Saunders also observed that unlike comparison across legal families as is the case in the European Union and across cultural families (African, Asian, Islamic, European, or Western), comparison across the Commonwealth is less inhibited through the use of a shared legal language (including concepts, principles and procedures) with broadly shared understandings on these matters as a matter of historical development and theory. While there are such shared similarities, Saunders also celebrates the plurality of the commonwealth systems that make comparison nonetheless fascinating or of interest to comparative lawyers and this is possible because of the broad geographical spread of Commonwealth systems.¹⁷ Divergence is also apparent in the historical conditions that influenced the development of administrative law, once it was received from, its parent jurisdiction to the home jurisdiction.¹⁸ However, despite these observations, Corder’s own conclusion from the study was that there still exists a substantial degree of overlap in the contours of administrative law in the various national systems, despite their independence from the English legal system for a generally significant period of time. All systems appear to adopt varying degrees of judicial review that are expanded or contracted flexibly by courts in response to political conditions (such as the health of democracy and performance legitimacy on the part of the legislature and executive). This could be the result of an increasing use of precedent from other jurisdictions across the Commonwealth.¹⁹ While an ambitious study in its comparative approach, the work did not continue. This is where Section 1.3 of this chapter picks up and proposes continuing comparative work across the common law world, as will be further discussed in the following section. In particular, Section 1.3 seeks to interrogate this view of overall convergence.

A second centre of study has been the work of Susan Rose-Ackerman and Peter Lindseth’s. The aims of their study are twofold: to encourage research across jurisdictions and to stimulate research across disciplines in the comparative endeavour (most notably economics, law, and political science).²⁰ The former is ambitious in stretching across comparative divides (common law versus civil law; regional versus domestic systems).

¹² Frank Goodnow, *Comparative Administrative Law: An Analysis of the Administrative Systems, National and Local, of the United States, England, France and Germany* (G. P. Putnam’s Sons 1893).

¹³ Corder, above n 6, 5.

¹⁴ Corder, above n 6, 2.

¹⁵ Corder, above n 6, 7–8.

¹⁶ Saunders, above n 3, 424, 426.

¹⁷ Saunders, above n 3, 427–8.

¹⁸ *Ibid.*

¹⁹ Corder, above n 6, 8.

²⁰ Rose-Ackerman and Lindseth, above n 6. See also Peter Cane, Peter Lindseth, and Herwig Hofmann (eds.), *Oxford Handbook of Comparative Administrative Law* (Oxford University Press, 2019).

The contributors are drawn from a broad range of jurisdictions: Europe (East and West); East Asia (China, Japan, South Korea, and Taiwan), the major jurisdictions in Africa; South Africa; South America; North America (extending to Mexico); and Canada. They identify a number of comparative topics for investigation, bearing in mind their preference for an inter-disciplinary approach to study: (a) administrative law's historical development across continental and Anglo-American traditions, and Eastern and Western systems; (b) the interplay and interaction between constitutional texts and structures and administrative law (acknowledging that this may not give a complete picture of administrative justice in a system given the largely invisible constitutional identity of the administrative state); (c) the issue of administrative independence and administrative law and particularly the tension between the design and structure of modern administration (its use of independent agencies and bureaucracy-level organs of decision-making) and traditional democratic sources of legitimacy via elections; (d) the issue of control over policy content and choices as well as participation in policy-making (contrasting the approach under the Administrative Procedure Act in the US with that in common law systems where there is little *legal control* versus political input on policy choices); (e) the issue of caution or deference when exercising control via administrative law²¹; (f) the role of the judiciary in reviewing policy-making activities, recognising that a key concern in designing the judicial role is the tension between achieving the ends of justice and facilitating administration²²; (g) the boundaries of the state and the distinction between public and private law and the specific challenges posed to the task of drawing this boundary as a result of privatisation and contracting out of traditionally state-run government tasks;²³ and (h) the boundaries of the state in the context of transnational regulatory bodies which have regulatory authority within a state but originate outside of the state (such as the EU, WTO, and GATT).

The breadth of their comparative enterprise is prompted by observations on the growing complexity of the work of the state and government policy-making, the growth of the regulatory state (and the resultant growth in political mechanisms of rule-making and accountability), and the increasing fragmentation of the work of the state domestically (between public and private spheres) and between domestic and transitional realms, in a way that means law cannot avoid confronting politics. They intentionally adopt a 'broad conception' of the field to facilitate a rich exchange across jurisdictions and disciplines.²⁴

However, a real concern here is that, in its ambition for geographical breadth and inter-disciplinarity, it is perhaps over-broad. This is apparent from a consideration of the chapters in the volumes coming out of the conference. Few chapters in the volume breach the divide between common law and civil law or between disciplinary methods of study.²⁵ Without this inter-linking between the chapters – either jurisdictionally or from a disciplinary perspective – it is difficult to extract themes or trends or understand how discussions in certain jurisdictional contexts or certain categories of legal system are illuminating of others. The collection, therefore, provides an excellent array of comparators but without a yardstick to draw the various comparators together.

²¹ Susan Rose-Ackerman and Peter L Lindseth, 'Comparative Administrative Law: Outlining a Field of Study' 28 *Windsor Yearbook of Access to Justice* 435 (2010) at 442.

²² Rose-Ackerman, above n 21, 444.

²³ Rose-Ackerman, above n 21, 445.

²⁴ Rose-Ackerman, above n 21, 448–9.

²⁵ One exception being, for example, Paul Craig's chapter in the 2nd edition in 2017: looking at judicial review in Canada, England, the US, and the EU ('Judicial Review on Questions of Law: A Comparative Perspective').

A third centre of comparative study across common law systems comes out of the series of thematically oriented biennial conferences organised by the Centre for Public Law at the University of Cambridge. Introduced in 2012, the conferences aimed at bringing together common lawyers from a range of jurisdictions.²⁶ Each biennial conference focused on a central theme. The first explored the divide between process and substance and, in particular, the way in which distinctions between the two sound in public law adjudication across common law systems. Authors sought to address this from a theoretical perspective (including, for example, whether administrative law can be gathered around certain substantive²⁷ or procedural²⁸ ideals or values) and more doctrinal approaches (looking at different grounds of judicial review).²⁹ The second conference considered the theme of the ‘unity’ (or otherwise) of public law. The volume included contributions engaging with the theme again from both a doctrinal and theoretical perspectives.³⁰ Chapters considered the possibility of identifying an overarching framework for public law, with others tackling the need to recognise plurality in the field of public law. A number of chapters analysed the idea of unity more topically, considering the possibility of identifying taxonomies for standing, proportionality, human rights, and remedies. While the programme of the Conference indicated some consideration of systems beyond domestic common law systems to look at the work of regional, subnational, and international bodies, the focus was squarely on the former.³¹ Indeed while ambitious in scope, the resulting volume of papers published from the two conferences focused on England, Australia, Canada, US and New Zealand.

As noted by Saunders in reflecting on the most recent volume, broadening the comparative base beyond these key jurisdictions would ‘introduce a more complex set of variables into the endeavour to understand the current state of common law public law: more diverse constitutional settings; other mixed legal systems; new social, economic, political and cultural conditions. . . . [T]here is a case for being more ambitious, in terms of both jurisdictions and the range of issues covered.’³² Feldman further reflects in the volume that ‘[t]here is a superficial similarity between the structures of judicial review in England and Wales, Scotland, Canada, Australia and other parts of the world which came under the sway of English common law. They share concepts such as jurisdictional error, natural justice and unreasonableness. On the other hand, there is a difference between concepts, which are general, and conceptions, which are a particular . . . system’s articulation or instantiation of the concept.’³³ These comments point to broadening the base for comparison to add complexity to the concepts, pushing past superficial similarities. This is the ambition of this volume.

²⁶ John Bell, Mark Elliott, Jason N. E. Varuhas, and Philip Murray, ‘Introduction’ in John Bell et al., above n 6 at p1.

²⁷ Daly, above n 7.

²⁸ Jerry L. Mashaw, ‘Public Reason and Administrative Legitimacy’ and Jason N. E. Varuhas, ‘The Public Interest Conception of Public Law: Its Procedural Origins and Substantive Implications’ in Bell et al., above n 6.

²⁹ For example, Philip Murray, ‘Process, Substance and the History of Error of Law Review’ and Alan Robertson, ‘Is Judicial Review Qualitative’ in John Bell, Mark Elliott, Jason N. E. Varuhas, and Philip Murray (eds.), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing 2016).

³⁰ Elliott et al., above n 6.

³¹ https://resources.law.cam.ac.uk/public_law_conference/PLC_full_programme_2016.pdf (last accessed 19 October 2017).

³² See Saunders, above n 7 at 354, 364–5.

³³ David Feldman, ‘Comparison, Realism and Theory in Public Law’ in John Bell, Mark Elliott, Jason N. E. Varuhas, and Philip Murray (eds.), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing 2016) at 374.

A fourth centre of study is the recent work of Peter Cane. In *Controlling Administrative Power: An Historical Comparison*,³⁴ Cane compares the administrative justice systems of the US (at the federal level), Australia (also at the federal level), and England and Wales. In doing so, Cane reverses his usual starting point ('providing an account of administrative law as a normative framework for public administration') to consider 'the idea of public administration as the institutional framework or context of administrative law'.³⁵ Cane posits that similarities and differences between 'control regimes' (i.e., institutions, norms and practices concerned with controlling public administrative power) are partly explained by similarities and differences in 'systems of government' (i.e., institutions, norms and practices concerned with the allocation and distribution of public power, including administrative power). Cane does not purport to offer a prescriptive tool of how things ought to be or even a causal tool to demonstrate that if 'x' conditions exist, then 'y' system will exist in a particular jurisdiction. Rather, his own claim is to provide a tool that can be used to describe and understand particular set-ups with a jurisdiction.³⁶ Cane identifies particular aspects of the control regimes within those jurisdictions to undertake the comparative work – not to achieve a comprehensive coverage of the system – but rather because those aspects present especially pronounced forums for understanding points of similarity and difference that can help illuminate the relationship between control regimes and systems of government that Cane is interested in studying.

Cane's schema has two metrics for comparing administrative justice systems. First, the system of government (there being two identifiable models of distributing power: diffusion and concentration³⁷). Second, the kind of control regimes (there being two kinds of regimes: 'checks and balances' based and 'accountability' based). With respect to systems of government, 'diffusion' refers to the division of power between various institutions, giving each one a share in the exercise of power. Concentration, on the other hand, involves a more complete division of power between institutions whereby each one then exercises power unilaterally without the need for consent or action on the part of any other institution (although not without being accountable to the others). In studying control regimes, Cane looks at political, legal, and bureaucratic controls of administrative power. In his words, '[p]olitical control is concerned with the policy objectives and outcomes of administration; legal control addresses the question of whether or not administration is being conducted in accordance with law; and the concerns of bureaucratic control may be summarised in the classic "three Es" of public auditing (economy, efficiency and effectiveness), and process values such as fairness, consistency and responsiveness'.³⁸ With respect to control regimes, the typical regime for diffusion-based systems is, Cane observes, a horizontal, mostly prospective, multipolar system of 'checks-and-balances' among and between other power sharers checking the other in terms of progress and on the exercise of their power. Contrastingly, with concentration-based systems, control is typically through a vertical, bipolar and largely, retrospective form of 'accountability'. Cane's thesis is thus that there is an interrelationship between the two metrics – whether a system of government is based on a diffusion or concentration of power is determinative of whether the control regime will be one based on the idea of 'checks-

³⁴ Cane, above n 6.

³⁵ Cane, above n 6, xiii.

³⁶ Cane, above n 6, p 6 fn 15.

³⁷ Cane, above n 6 at 6. Cane here departs from his own use of the separation of powers as a normative tool of analysis in comparison in an earlier work: Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing 2010).

³⁸ Cane, above n 6, at 147.

and-balances' or 'accountability'. A few caveats apply: Cane himself acknowledges that these are not watertight categories. Therefore, for example, any system of government may contain elements of both diffusion and concentration of power. As Cane puts it, '[t]he two constitutional techniques are better envisaged as two coordinates of a field in which various systems of government can be located according to the particular combinations of the two techniques that they display'.³⁹

Cane describes his approach in various ways: (a) 'structural' in its approach to comparison (looking at the structure of systems of government and control regimes)⁴⁰ versus comparative on the basis of 'normative preferences and cultural and ideological values . . . constitutional and political values, and cultural and intellectual trends'⁴¹; (b) 'descriptive and explanatory, not evaluative';⁴² (c) one that is focused not on administrative law as the vantage point but on public administration as the relevant vantage point;⁴³ 'historical institutionalism'⁴⁴ with the 'methodological assumption [being] that every system is a unique product of its history . . . the value of the historical approach lies partly in its capacity to reveal how deeply embedded in society and culture ("path-dependent" or "sticky") certain governmental characteristics can become over long periods of time';⁴⁵ (d) 'formal-legalist . . . comparative, historical and inductive';⁴⁶ and (e) 'formalist and realist'⁴⁷ in its focus on both the formal aspects of institutions and systems and the actual practical operation of those institutions.

Cane's comparative methodology is applied to what he calls '*sufficiently similar*' yet '*sufficiently different*' systems: namely, federal US, federal Australia, and England.⁴⁸ The similarity in question is their membership of the common law family of legal systems with a shared heritage that has impacted on the development of their contemporary systems of government and corresponding control regimes. A further similarity is a shared political environment of '*two-party competition rather than multi-party consensus*'.⁴⁹ The sufficient differences between the three jurisdictions come from their constitutional modes of distributing power: variances in whether they adopt a diffusion or concentration model with the US system apparently being strongly diffusive and the English system being highly concentrated and the Australian a hybrid of the two (in Cane's view). From this starting point, Cane proceeds to analyse a number of features of the control regimes of the three jurisdictions: judicial control of statutory interpretation, judicial review of fact-finding and policy-making; administrative rule-making; administrative adjudication; private law controls such as tort and contract law; and freedom of information within government and between the government and the public. In Cane's own words, his hypothesis about the connections between systems of government (diffusion versus concentration of power) and control regimes (checks-and-balances versus accountability) do not necessarily explain the make-up of all of the features. For example, the relationship does not bear out in the context of freedom of information

³⁹ Cane, above n 6, 6.

⁴⁰ Cane, above n 6, 2.

⁴¹ Cane, above n 6, 11.

⁴² Cane, above n 6, 6, 18.

⁴³ Cane, above n 6, xiii.

⁴⁴ Cane, above n 6, 13, 507.

⁴⁵ Cane, above n 6, p 12, fn 26, 19. See also at 510.

⁴⁶ Cane, above n 6, 14, 507.

⁴⁷ Cane, above n 6, 15.

⁴⁸ Cane, above n 6, 13, following the approach suggested in comparative constitutionalism (see Ran Hirschl on 'the "most similar cases" logic': 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53 *American Journal of Comparative Law* 125, 133–9).

⁴⁹ Cane, above n 6, 13.

between government and the public where the three jurisdictions are quite similar despite their different systems of government.⁵⁰ As with the Cambridge forum, Cane's comparative study is a significant advance in the field, especially from a methodological perspective and its coverage of all aspects of a system of administrative justice. However, given its comparative base of the standard catchment of jurisdictions (Australia, UK, and US), it needs to be built on and tested across a broader range of systems.

1.2.2 Conclusion

This volume picks up on the specific issue of breadth across the common law world in the studies conducted thus far. It takes as its aim the need to interrogate the use of 'common law' as a description of a family of administrative law systems (to contrast such systems with, for example, 'civil law' systems).⁵¹ Even when comparing across such common law systems, academics highlight in the above studies that there is a degree of assumed 'doctrinal and institutional similarity' based on an adherence to 'the essentials of the common law' with a shared language and the use of similar legal concepts.⁵² This volume starts with the opposing assumption: that despite such a shared heritage and similarity, there is much diversity in common law systems that is worth exploring for a richer understanding of the plurality of 'common law administrative law'. Section 1.3 broadens the comparative base from the studies considered above, looking in particular at how doctrine and ideas of administrative law from English law have been treated on its export to and import by a number of systems.

There are several points to note about the proposed methodology of the volume. First, it is impossible to survey all of the common law jurisdictions in a single study.⁵³ The focus, therefore, is on comprehensive *variance* versus comprehensiveness per se in the coverage of common law jurisdictions. The chapter looks at a spread across Asian versus non-Asian jurisdictions; mixed legal systems versus 'pure' common law systems; Westminster versus non-Westminster constitutional systems; relatively recently decolonised systems versus long-standing decolonised systems. Converse to the problem of not going too far into the common law world is the usual methodological concern in comparative studies of selecting systems that, while different, have enough in common to allow meaningful comparison. It is for this reason that the jurisdictions studied have been selected on the basis that they are all systems that have inherited or modelled judicial review on English administrative law with a study of their journey from that inception point. The systems selected as 'common law' are on the basis that they have received the system of common law precedent; judicial decision-making as a source of law; the way in which the courts and the executive engage and interact with each other (with a general shared understanding of barriers to the courts' role, for example, in the review of the merits or content of decision-making) and a sense of what legitimacy (as judged through judicial review) involves (compliance with legislation and/or concepts grounded in the rule of law). It is the variance in the use of these concepts that is the subject of study.

⁵⁰ Cane, above n 6, 22.

⁵¹ Mark Van Hoecke and Mark Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 *International and Comparative Law Quarterly* 495.

⁵² Saunders, above n 3, 427.

⁵³ As to these systems, see: <http://saint-claire.org/wp-content/uploads/2016/01/Legal-Systems-of-the-World.pdf> (last accessed 11 October 2017).

Second, to ensure coherence across the study, the chapters use the same yardstick question for comparison: namely, the continuing use of English law principles of judicial review. The paper takes as ‘English grounds of judicial review’ the original and classic grounds,⁵⁴ as well as evolutions in those grounds (including, for example, proportionality and the doctrine of substantive legitimate expectations). So temporally, English law is taken holistically to mean past, present positions as received and adopted and then abandoned or indigenised in the various systems. Some of the jurisdictions studied have tracked the ‘classic’ grounds of review (illegality, irrationality, and procedural fairness) from *GCHQ* much more closely but not the subsequent developments in English law (instead, devising their own alternative grounds of review). Other jurisdictions have referred to those concepts (e.g., ‘reasonableness’) but without the same conscious adoption of structure and content of those ‘classic’ grounds or subsequent developments.

Third, the comparative focus is on the grounds of review used by courts to judicially review executive action under statute. This could be criticised for being a narrow focus for a comparative ‘administrative law’ study in not extending to broader aspects of the administrative justice system.⁵⁵ A lot can be gleaned from looking at the balance struck between the different tools of accountability in different jurisdictions. The precise design of a system of administrative justice can be viewed as a product of the trade-offs made by a system in electing to balance the system in a particular way between the different models of administrative decision-making. The scope of judicial review is an important vantage point for understanding these trade-offs in different jurisdictions. The ambition of this project lies in its comparative base rather than its coverage of system-wide issues across each jurisdiction.

1.3 TOPICS FOR COMPARISON ACROSS COMMON LAW SYSTEMS

This section proposes multiple metrics that can be used to help understand the degree of divergence and departure from English law in different common law systems’ approach to judicial review.⁵⁶ Our understanding of these issues needs to be refined across a broader base of systems to better understand the diversity of approaches to judicial review inherent in common law systems of administrative law.

1.3.1 *Relationship between ‘the C(c)onstitution’ and Administrative Law*

There are several issues explored on this theme in the various chapters. First, the precise constitutional principles that inform a particular system’s approach to administrative law are now more varied between different common law jurisdictions. Second, there are points of difference in the extent to which constitutional law norms and values fertilise administrative law (and, in particular, the impact of human rights norms) in the different jurisdictions. Third, the advent of the constitutional entrenchment of judicial review in a written constitution has also had an impact on the content and operation of common law administrative law principles.

⁵⁴ *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 at pp. 407–13 (namely, illegality, irrationality, and procedural impropriety).

⁵⁵ Even the definition of ‘judicial review’ is increasingly pluralising: for example, Richard Rawlings, ‘Modelling Judicial Review’ 61 (2008) *Current Legal Problems* 95.

⁵⁶ The chapters in the volume discuss these in more detail.