

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION ACROSS THE COMMON LAW WORLD

Research on comparative administrative law, in contrast to comparative constitutional law, remains largely underdeveloped. This book plugs that gap. It considers how a wide range of common law systems have received and adapted English common law to the needs of their own socio-political context. Readers will be given complex insights into a wide range of common law systems of administrative law, which they may not otherwise have access to given how difficult it would be to research all of the systems covered in the volume single-handedly. The book covers Scotland, Ireland, the USA, Canada, Israel, South Africa, Kenya, Malaysia, Singapore, Hong Kong SAR, India, Bangladesh, Australia and New Zealand. Comparative public lawyers will have a much greater range of common law models of administrative law – either to pursue conversations about their own common law system or to sophisticate their comparison of their system (civil law or otherwise) with common law systems.

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Judicial Review of Administrative Action across the Common Law World

ORIGINS AND ADAPTATION

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Contents

<i>List of Contributors</i>	<i>page</i> viii
<i>Foreword</i>	
Professor Susan Rose-Ackerman, Yale Law School	xiii
<i>Acknowledgments</i>	xv
<i>Table of Cases</i>	xvi
<i>Table of Legislation</i>	xxxix
<i>List of Abbreviations</i>	liii
PART I INTRODUCTION	
1 What’s So Common about “Common Law” Approaches to Judicial Review?	3
Swati Jhaveri	
PART II ORIGINS AND ADAPTATIONS OF JUDICIAL REVIEW IN ENGLAND	
2 English Administrative Law History: Perception and Reality	27
Paul Craig	
3 Modern Threats to English Administrative Law and Implications for Its Export	46
Christopher Forsyth	
4 International Influences on English Judicial Review and Implications for the Exportability of English Law	60
Michael Ramsden	
PART III ORIGINS AND ADAPTATIONS IN THE BRITISH ISLES	
5 The Influence of English Judicial Review on Scots Judicial Review: A Tale of Resemblance and Distinctiveness	81
Stephen Thomson	
6 The Constitutionalisation of English Judicial Review in Ireland: Continuity and Change	98
Paul Daly	

PART IV ORIGINS AND ADAPTATIONS IN NORTH AMERICA AND CANADA		
7	Divided by the Common Law: Controlling Administrative Power in England and the United States Peter Cane	117
8	Divergence and Convergence in English and Canadian Administrative Law Paul Daly	138
PART V ORIGINS AND ADAPTATIONS IN THE MIDDLE EAST AND AFRICA		
9	English Administrative Law in the Holy Land: Tradition and Independence Daphne Barak-Erez	159
10	From Pale Reflection to Guiding Light: The Indigenisation of Judicial Review in South Africa Cora Hoexter	171
11	Judicial Review in Kenya: The Ambivalent Legacy of English Law Migai Akech	191
PART VI ORIGINS AND ADAPTATIONS IN ASIA		
12	The Evolution of Administrative Law in Singapore: From Adoption to Autochthonous Adaptation Swati Jhaveri	215
13	Indigenous Interactions: Administrative Law and Syariah Law in Malaysia Dian A. H. Shah and Kevin Y. L. Tan	234
14	English Administrative Law in Post-Handover Hong Kong Michael Ramsden	255
15	Deconstitutionalising and Localising Administrative Law in India Farrah Ahmed and Swati Jhaveri	273
16	Decolonizing Administrative Action: Judicial Review and the Travails of the Bangladesh Supreme Court Cynthia Farid	289
PART VII ORIGINS AND ADAPTATIONS IN AUSTRALASIA		
17	The Creation of Australian Administrative Law: The Constitution and Its Judicial Gate-Keepers Matthew Groves and Greg Weeks	309

	<i>Contents</i>	vii
18	English Administrative Law in Aotearoa New Zealand Hanna Wilberg and Kris Gledhill	327
	PART VIII CONCLUSION: INTERROGATING “COMMON LAW” APPROACHES TO JUDICIAL REVIEW	
19	What Is Left of ‘Common Law’ Administrative Law? Concluding Remarks and a Layout of Future Paths Margit Cohn	349
	<i>Index</i>	374

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Foreword

Comparative law is an exercise in finding similarity in difference and difference in similarity. This volume is an excellent example of both. Focusing on judicial review of administrative action, the book illustrates the complex legacy of the English common law as it spread and metastasized across the British colonies and their independent successor states. With the exception of Ireland, Israel, and the United States, the countries covered are all currently part of the Commonwealth. In all cases, the connection to the UK has both historical and present-day roots. Yet, in each country the heritage of the English common law, as filtered through history and current political and social conditions, is complex. A great merit of this volume is that it does not try to squeeze that diversity into a single narrative about legal influence. Such a reductive effort would have been particularly troublesome given the open-ended and shape-shifting nature of the common law itself even in England, its point of origin.

The volume's focus on judicial review of administrative action required the authors to look beyond the resolution of private disputes in common-law courts. For public law disputes, the judiciary cannot rely only on principles derived from the common law. It must apply and interpret statutes, constitutional texts, and treaties. Even though the UK continues to operate without a written constitution, most of the other countries discussed here have written constitutions or, at least, founding documents. Even the UK has moved toward the use of legal texts for foundational matters, most importantly the Human Rights Act. Furthermore, in some countries indigenous legal traditions remain important, sometimes reflected in a parallel system of dispute resolution.

These essays both recognize the continuing vitality of the common law and acknowledge the way that local traditions interact with each country's legal system as interpreted by its courts. Of course, cross-country differences lead one to ask if common threads remain on which to draw. The authors point to some such threads, but the question cannot be answered without the addition of countries whose colonial history differs from those studied. In particular, the nations of Latin America and Francophone Africa draw on the public law traditions of France, sometimes by way of Spain. Public law in other countries, such as Japan, embodies a strong German influence. Others, again mostly in Latin America, operate under constitutions derived from the US model. Today, the public law of most former parts of the British Empire diverges from the UK's Westminster model in fundamental ways. A central claim of this volume is the diverse experience and present day situation of these former parts of the Empire and others under British influence. This volume's fascinating overview will, I hope, inspire comparative law scholars to extend these comparisons to countries with diverse legal traditions that go cannot simply be characterized as "common" law or "civil" law, full stop. The contributions decisively refute overly simple claims for the countries in the common law family. I assume that similar patterns of diversity and overlap are also characteristic of the public law of nations influenced by continental European models.

The value of remaining within the common law framework allows the authors to focus on how legal borrowing from one source has produced different results. In the colonial context, a key tension is between British efforts both to control and to shape colonial governments as well as exporting the common law. The result, as outlined in several chapters, was to use English law in the service of an executive-led government dominated by the British Governor General. These authorities controlled the British colonies, with the franchise limited to white settlers, often a small minority of the population. As the chapter on Kenya makes especially clear, the legacy of strong executive dominance of the legislature and the judiciary then carried over into a strong presidential government after independence. Another aspect of the colonial legacy is the co-existence in some countries of dual systems of law, one based on indigenous practices and the other derived from British law. Conflicts between traditional law and English common law have been an ongoing feature of these jurisdictions, both as colonies and as independent states trying to balance competing traditions.

The development of judicial review in the settler colonies that gained independence from Britain in the eighteenth and nineteenth centuries does not present a uniform pattern. Some adopted constitutional structures close to the UK's parliamentary model, that is, Canada, Australia, and New Zealand. However, the legal systems in all three have had to accommodate the interests of indigenous populations that have had a history of exclusion dating to the colonial period, and in some, a history of slavery. Furthermore, the case of Canada is more complex because of French-influenced law in Quebec. The United States, in contrast, adopted a separation-of-powers presidential system, as outlined in the chapters by Paul Craig and Peter Cane. The US history of slavery and discrimination against minorities continue to influence state-society relations and the role of the courts. Under its presidential, separation-of-powers system, US administrative law relies heavily on statutes, especially the 1946 Administrative Procedure Act with its provisions for notice-and-comment rulemaking. Other countries with a common-law heritage have not copied its provisions for judicial review of rulemaking processes, but everywhere there is pressure for more public consultation on secondary norms and greater access to the courts for public-interest claims. In the US, the common law's reliance on case law has carried over to judicial opinions that interpret statutes. Judicial review of administrative action has led to common-law-like evolution over time. It is this developmental feature of common law adjudication, rather than its established doctrines, that have survived the shift to a quite different form of government.

Taken as a whole this volume is a valuable addition to comparative public law. It follows the thread of influence of the English common law across a wide range of disparate political, economic, and social situations and into geographical locations with widely varying histories. The result is a fine addition to comparative public law. It will enlighten readers about the fascinating ways in which legal borrowing occurs, about resistance from local inhabitants, both indigenous people and settlers, and it shows how similar legal doctrines can have dramatically different effects depending upon the soil in which they are planted.

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Table of Cases

AUSTRALIA

- Annetts v. McCann (1990) 170 CLR 596
 Attorney-General (NSW) v. Quin (1990) 170 CLR 1
 Australian Broadcasting Tribunal v. Bond (1990) 170 CLR 321
 Bodruddaza v. Minister for Immigration and Multicultural Affairs (2007) 228 CLR 651
 Brandy v. Human Rights and Equal Opportunity Commission (1995) 183 CLR 245
 Chan v. Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379
 Colonial Bank of Australasia v. Willan (1874) LR 5 PC 417
 Craig v. South Australia (1990) 184 CLR 163
 Cunliffe v. Commonwealth (1994) 182 CLR 272
 D'Amore v. Independent Commission for Corruption (2013) 303 ALR 242
 Director of Housing v. Sudi (2011) 33 VR 559
 Drake v. Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577
 Electrolux Home Products Pty Ltd v. Australian Workers' Union (2004) 221 CLR 309
 Farah Constructions Pty Ltd v. Say-Dee Pty Ltd (2007) 230 CLR 89
 Graham v. Minister for Immigration and Border Protection (2017) 91 ALJR 890
 Greyhound Racing Authority (NSW) v. Bragg (2003) NSWCA 388
 Haoucher v. Minister for Immigration and Ethnic Affairs (1990) 169 CLR 648
 International Finance Trust Co Ltd v. New South Wales Crimes Commission (2009) 240
 CLR 319
 Kable v. Director of Public Prosecutions (NSW) (1996) 189 CLR 51
 Kioa v. West (1985) 150 CLR 550
 Kirk v. Industrial Court (New South Wales) (2010) 239 CLR 531
 McCawley v. R [1920] AC 619
 Minister for Immigration and Border Protection v. WZARH (2015) 256 CLR 326
 Minister for Immigration and Citizenship v. Li (2013) 249 CLR 332
 Minister for Immigration and Citizenship v. SZMDS (2010) 240 CLR 611
 Minister for Immigration and Ethnic Affairs v. Teoh (1995) 183 CLR 273
 Momcilovic v. R [2011] HCA 34
 Plaintiff M61/2010E v. Commonwealth (Offshore Processing Case) (2010) 243 CLR 319
 Plaintiff M64/2015 v. Minister for Immigration and Border Protection (2015) 258 CLR 173
 Plaintiff M79/2012 v. Minister for Immigration and Citizenship (2013) 252 CLR 336
 Plaintiff S10/2011 v. Minister for Immigration and Citizenship (2012) 246 CLR 636

- Plaintiff S157/2002 v. Commonwealth (2003) 211 CLR 476
 Potter v. Minahan (1908) 7 CLR 277
 Public Service Association (SA) v. Federated Clerks' Union (1991) 173 CLR 132
 Public Service Board (NSW) v. Osmond (1986) 159 CLR 656
 R v. Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254
 R v. Richards; Ex parte Fitzpatrick and Browne (1955) 92 CLR 157
 Re Becker and Minister for Immigration and Ethnic Affairs (1979) 1 ALD 158
 Re Judiciary and Navigation Acts (1921) 29 CLR 257
 Re Minister for Immigration and Multicultural Affairs; ex parte Miah (2001) 206 CLR 57
 Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam (2003) 214 CLR 1, 195 ALR 502
 Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82
 Saeed v. Minister for Immigration and Citizenship (2010) 241 CLR 252
 Shi v. Migration Agents Registration Authority (2008) 235 CLR 286
 State of New South Wales v. Kable (2013) 252 CLR 118
 Toy v. Musgrove (1888) 14 VLR 349
 Toy v. Musgrove [1891] AC 272
 Union Steamship Co of Australia Pty Ltd v. King (1988) 166 CLR 1
 Wilson v. Minister for Aboriginal and Torres Strait Islanders Affairs (1996) 183 CLR 1

BANGLADESH

- Abdul Bari Sarkar v. Bangladesh (1994) 46 DLR (AD) 37
 Abdul Latif Mirza v. Government of Bangladesh 31 DLR (AD) 33
 Abdul Mannan Bhuiyan v. State (2008) 60 DLR (AD)
 Abdul Mannan Khan v. Bangladesh, Civil Appeal No 139 of 2005
 Abdul Mannan Khan v. Bangladesh [2012] 64 DLR (AD) 169
 Agrani Bank v. Khandoker Badrudduza (2004) 56 DLR 136
 Akbar Ali v. Raziur Rahman (1966) 18 DLR (SC) 426
 Aminul Haque Helal v. Justice Sultan Hossain Khan (2007) 15 BLT 1
 Anisul Islam Mahmud v. Bangladesh (1992) 44 DLR
 Anwar Hossain Chowdhury v. Bangladesh (1989) BLD (Spl) (AD) 1
 Anwar Hossain Khan v. Speaker Jativa Sangsad (Parliament Boycott) 47 DLR (1995) 42
 Arif Sultan v. DESA (2008) 60 DLR (HCD) 431
 Aruna Sen v. Government of Bangladesh (1975) 27 DLR (HCD) 122
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