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Edited by Swati Jhaveri , Michael Ramsden
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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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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.

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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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