Introduction

I had the honour of delivering the Hamlyn Lectures in 2014. The three lectures that comprise the Hamlyn series were delivered in November–December 2014 and dealt with the following topics: 'Foundations of UK Administrative Law: The Common Law Method, Values and Contestation'; 'Foundations of EU Administrative Law: Treaty Foundations, Judicial Creativity and the Hierarchy of Norms'; and 'Foundations of Global Administrative Law: Governance, Regulatory Power beyond the State and Administrative Legality'.

A unifying theme running through the three lectures was therefore that they dealt with aspects of the foundations of UK, EU and global administrative law respectively. The word 'aspects' should be emphasized in this context, because this book is not simply the product of the three lectures duly polished for publication. The reality was that the lectures covered only part of the material concerning the foundations of administrative law in the three legal systems, on average circa 25–30 per cent, and did not touch the analysis of the challenges faced by each system.

The book seeks to do what it says 'on the tin', viz. address the foundations and challenges of administrative law in and between these three systems. It is not a literature review. It does not seek systematically to expound the state of the art in relation to all issues discussed. It does explicate the background to the discussion, providing sufficient

information for the reader to understand what follows, as exemplified by the treatment of the foundational material on global administrative law, with which many readers will be less familiar. The book also examines the views of particular scholars where that is pertinent to the inquiry. The overall objective is nonetheless to advance the debate on contentious issues, not to provide some potted version of the status quo. The choice of the three legal orders is reflective of the fact that administrative law functions at the national, regional and global level.

It is axiomatic that there is a developed regime of administrative law in the UK and in the EU. The reality is that there is also a growing body of administrative law at the global level. This material is less well known and less well understood than that in the UK and the EU, but it exists and not just as an aspiration, or a matter of academic speculation. There is already a considerable body of administrative law developed by, for example, the adjudicative organs of the World Trade Organization (WTO), and bodies such as the IMF Administrative Tribunal. The extent to which such precepts currently exist does, however, vary between different international and transnational bodies, and there is considerable academic discourse as to the desirability of expanding these principles further.

It is also axiomatic that there is much 'vertical interaction' between the national, the regional and the global that impacts on the subject matter of administrative law broadly conceived, including the doctrines of judicial review, regulatory competence and individual decisions. EU law is the foundation for much regulatory activity that affects the UK,

in areas ranging from the environment to telecommunications, from energy to consumer protection and from competition to intellectual property. The UK is bound by the general principles of EU law when it acts within the sphere covered by the EU, and these principles embody the precepts of judicial review, such as proportionality, legitimate expectations, fundamental rights, equality, legal certainty and the like. There is, however, also 'vertical interaction' between the global level and the regional and national levels. This includes high-profile individual cases such as the *Kadi* litigation, but the interaction is far more extensive than this. It is exemplified by the activities of a diverse range of international and transnational bodies such as the World Trade Organization, the International Organization for Standardization, the International Accounting Standards Board, the World Health Organization, the Codex Alimentarius Commission and the Basel Committee on Banking Supervision. These bodies are merely the tip of the iceberg in terms of numbers, which have been estimated to be in the order of 2,000 international and transnational regulatory regimes. The reality is that many regulatory choices that bind the EU and the UK emanate de jure or de facto from the global level, although the extent of this impact perforce varies.

The sense of 'foundations' used in the three relevant chapters is broad. It includes the conceptual, judicial, theoretical, administrative and regulatory foundations of UK, EU and global administrative law, although the relevance of each perforce varies. The literature used reflects this breadth. This is a law book, but the analysis is nonetheless informed by a broad range of primary and secondary sources in addition

to classic legal materials. The sources include material from history, economics, political science, international political economy, legal theory and political theory.

While there is, of course, discussion concerning the foundations of administrative law in the three systems, there is nonetheless much that is imperfectly understood. There is indeed an inverse relationship between the longevity of the legal orders considered in this book and our understanding of their respective foundations. We understand least about the foundations of UK administrative law, notwithstanding its being the oldest of the systems studied by approximately 400 years; we know rather more about the foundations for EU administrative law although there is much that has not been unpacked; and we know the most about the foundations for global administrative law notwithstanding its relative novelty and notwithstanding the fact that it may be contentious. A word is necessary by way of explanation for this paradox.

The study of global administrative law began in earnest towards the end of the millennium. It was undertaken by scholars who investigated the challenges posed by global regulation and the role that precepts of administrative law could play in addressing them. There was an intense burst of scholarly activity, fuelled in part by the recognition that the foundations for global administrative law were not self-evident and had therefore to be explicated. The result was a considerable body of high-quality literature, although there are, as will be seen in Chapter 5, a number of key foundational issues that require further inquiry.

The study of EU administrative law dates back to the 1970s. It has attracted considerably more scholarly attention

since the new millennium, although the amount of scholarship relative to some other aspects of EU law is still relatively small. The foundations of EU administrative law nonetheless remain imperfectly understood, in part at least because much of the scholarly attention has been directed towards particular problems of the here and now, rather than its formal, substantive and regulatory foundations. The challenges of the present must assuredly be addressed, although so too must the very foundations of the subject. There is, as will be seen in Chapter 3, much room for further inquiry as to the formal, substantive and regulatory foundations of the subject, and their interaction. Nor are the issues that require further inquiry minor or interstitial. To the contrary, they go to the very heart of EU administrative law and are of significance more generally for EU law. This is exemplified by the category of general principles of law, which constitutes the foundation for core precepts of EU administrative law, and shapes many substantive areas of EU law. There is, as will be seen, much concerning the textual and juridical foundations for such principles that has not been comprehended, and this story forms part of Chapter 3.

The foundations of UK administrative law date from the mid-sixteenth century. There is challenging scholarship on modern UK administrative law, but this is not matched by understanding of its conceptual, judicial or administrative foundations. Indeed the more that I study the subject, the more do I realize the limits of our understanding. The limitations in this respect relate to central dimensions of the subject, not matters that are peripheral or secondary. Thus many presuppose that there was 'not much' judicial review judged

quantitatively, and that the range of doctrinal grounds for such review was very limited. It is often assumed that the quantitative limits on judicial review were reflective of the fact that there was 'not much' regulatory or administrative activity in the sixteenth through to the nineteenth centuries. There is a further presupposition that when courts did engage in such review it was underpinned by the need to hem in 'dangerous' manifestations of the administrative state. None of these assumptions reflects the historical reality in judicial or administrative terms. The story is, as will be seen in Chapter 1, much richer and more interesting. Mistaken presuppositions as to the judicial, regulatory and administrative foundations of administrative law in turn shape, explicitly and implicitly, theoretical constructs that inform the subject.

The three chapters on foundations are matched by three chapters dealing with the challenges faced by the respective systems. A challenge in writing these chapters has been to choose what to cover and what to leave out. That is my choice and it will be for others to judge the wisdom thereof, or not, as the case may be. What I would emphasize is that each chapter seeks to address a range of issues that cuts across administrative law broadly conceived, including practical challenges of caseload, central issues in procedural and substantive review, and issues of regulatory design. The challenges thus addressed are both 'horizontal', in the sense of internal to that legal order, and 'vertical', in the sense of how national, regional and global legal orders interact in the sphere of administrative law.

The horizontal challenges are eclectic. They are in part temporally contingent, as exemplified by the problems

posed for all three legal orders by the need to respond to post-9/11 legislation or executive action that has serious implications for process rights. They are also in part endemic to any legal order, such as the intensity of substantive review, which raises perennial concerns as to the proper balance between judicial supervision and freedom of political choice. This issue features prominently in all three legal orders. There is extensive judicial and academic commentary on it in the UK, it is the subject of scholarship in the EU, and it features also in the case law of bodies such as the WTO and the commentary thereon. While the issue is endemic, its resolution is shaped by an admixture of normative and practical considerations that may be particular to that legal order. Thus the common law approach to substantive review is informed by background precepts concerning the legitimate boundaries of judicial intervention that are not necessarily accepted to the same degree by those schooled in a civil law tradition. The way in which the issue plays out at the global level may be different yet again, in part because the body being supervised will normally not have democratic credentials.

The horizontal challenges may also be more specific to a particular legal order, and that is especially so when we think about administrative law at the global level. Thus while there may be good foundational justification for arguing that principles of administrative law should inform the global level, that still leaves a plethora of issues as to the way in which we transpose principles designed within a statal or regional framework to the different institutional reality that prevails at the global level. These issues are still relatively underexplored, and are addressed in Chapter 6.

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The vertical challenges between legal orders are manifest in various ways. Such challenges can arise at the regulatory level, the most obvious manifestation being where regulatory competence to enact measures for one legal order is exercised de jure or de facto by another legal order. This can generate a plethora of problems, including the difficulties of ensuring regulatory efficacy and the dangers that administrative law safeguards valued by a legal order may be undermined or bypassed when the relevant norms are made by another legal order.

Vertical challenges can, however, also assume a more overtly judicial dimension. The courts are not the sole architects of the terms on which a legal order will engage with other legal orders. The legislature may well have something to say on the matter, but the courts are nonetheless principal players in this respect. They determine the conditions for legitimate interchange, more especially when what is at stake is the acceptance of norms made elsewhere, which include not merely substantive regulatory norms, but doctrinal public law precepts and rival interpretations of rights. It is the courts that act as the prime gatekeepers. They shape the relative autonomy of the legal order, and in doing so protect what they conceive as its important autochthonous values. The conception of autonomy and autochthony may be relatively thin or relatively thick, and the choice will have a marked impact on the legal system's willingness to be open to norms made elsewhere. Autochthony can be juridically manifest in three different ways, which I term status, source and substantive autochthony, the meanings of which are explicated in Chapter 2. There is, moreover, increasing evidence of this,

especially within the UK and the EU jurisprudence. This is not fortuitous. It is the increased vertical interaction between the national, EU and global levels that prompts courts to react and think hard about the terms on which they are willing to accept 'external' norms. To be sure, there is a sense in which courts have been doing this for hundreds of years, as attested to by the developed jurisprudence concerning the relationship between national and international law. There is nonetheless little doubt that sensibilities have been heightened by the creation of the EU and the ECHR, both of which demand of contracting states a degree of acceptance over and beyond what is demanded by most international treaties. There is equally little doubt that the tensions have become more acute because of increased globalization, which has the consequence that many rules that bind at national level de jure or de facto emanate from international and transnational bodies.

The vertical challenge is addressed within each of the relevant Chapters, viz. 2, 4 and 6. It is not hived off for discussion within a single separate chapter. This choice was driven by a number of related considerations. There is, as will be seen, an interplay between horizontal and vertical challenges that would be lost if the latter were dealt with in a wholly separate chapter. A separate chapter would also risk losing important insights about how a particular legal system conceives of its relationship with a variety of other legal orders, as exemplified by the discussion in Chapter 2, which analyses the sense of autochthony that informs the UK courts' conception of the relationship between national law, EU law, the ECHR, and international and transnational law. There are therefore three different 'takes' on the vertical challenge

as perceived from the perspective of UK, EU and global administrative law.

I have learned a great deal in writing this book, and it has generated more new research ideas than I can realistically complete. I hope that it will be found useful by others, whether they are interested to learn more about one of the legal orders considered in this book; whether they are interested by the interaction between the national, EU and global level; or whether they are just interested.

For the sake of clarity it should be noted that there are some differences in administrative law as it pertains in Scotland, and to a lesser extent in Wales and Northern Ireland. Exigencies of space preclude detailed treatment of these. There is nonetheless very considerable commonality in the procedural and substantive principles of administrative law across the UK, more especially in the light of the Human Rights Act 1998. Moreover, judges from both Scotland and Northern Ireland have made notable contributions to the development of such principles in the House of Lords and Supreme Court. The concept of UK administrative law as used in this work connotes the general principles of administrative law that prevail across the UK, without thereby diminishing distinctive legal features that are present within a particular part of the UK.