The Unity of Public Law?

Doctrinal, Theoretical and Comparative Perspectives

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1

Introduction

MARK ELLIOTT, JASON NE VARUHAS AND SHONA WILSON STARK

THIS COLLECTION ORIGINATES from the second biennial Public Law Conference, a major international conference held at the University of Cambridge Faculty of Law in September 2016. The theme of the conference, from which this volume derives its title, was 'The Unity of Public Law?'.

The 2016 conference was the second in an ongoing series of major international conferences on public law, the first of which was also held in Cambridge in September 2014. This volume follows on from that derived from the first conference, John Bell, Mark Elliott, Jason NE Varuhas and Philip Murray (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford, Hart Publishing Ltd 2016). As recorded in the editors' introduction to that collection, the motivation for founding the Public Law series was to provide a leading forum for common lawyers from a broad range of jurisdictions to discuss and debate the most important public law issues of the day. While the bedrock of commonality among common law systems offers a basis and framework for meaningful engagement—a 'consensus ad idem' of sorts—the shared problems faced by common law systems of public law and the inevitable variations across systems offer a basis for comparison, discussion and debate.

Since its inception the Public Law series has fulfilled this vision, emerging as the pre-eminent forum for the scholarly discussion of public law issues in the common law world. The 2014 conference and the volume deriving from it were very well received. The 2016 conference built upon the foundations laid by the first conference, cementing the importance of the series in facilitating cross-jurisdictional dialogue and debate at the highest level. The 2016 conference brought together over 200 participants drawn from over 20 jurisdictions including Australia, Bangladesh, Barbados, Canada, Egypt, France, Germany, Hong Kong, Ireland, Japan, Kuwait, Mexico, Nepal, New Zealand, Nigeria, Poland, Portugal, Singapore, South Africa, Switzerland, The Netherlands, the United Kingdom and the United States of America. The conference opened with a panel comprised of Robert French, the then Chief Justice of Australia, and Lord Reed, Justice of the UK Supreme Court, who discussed the uses of comparative law by apex courts; the keynote address was delivered by Dame Sian Elias, the Chief Justice of New Zealand. Approximately 60 papers were delivered by leading scholars, practitioners and judges drawn from across the common law world.

Consonant with the intellectual case for the conference series, it was always the intention of the convenors that following the first two conferences held in Cambridge, the third would be held outside the United Kingdom, in another common law jurisdiction. This would enable those in different parts of the world to more easily participate in the conference and focus attention on public law issues pertinent to different regions of the common law world. In this regard we are very pleased that the third biennial Public Law Conference will be held in Australia in July 2018 at Melbourne Law School, to be co-organised by the University of Melbourne and the University of Cambridge.

In common with the previous collection, this volume brings together leading scholars from across the common law world, drawn from the academy and the Bench, to discuss and debate cutting-edge issues in public law. The outstanding essays collected herein provide an invaluable reference point for public lawyers in common law jurisdictions (and civilian lawyers) seeking the views and perspectives of leading scholars and judges on the most important issues facing common law public law systems today. Importantly the essays will also serve to frame and prompt further debate and discussion across common law systems. More generally, the chapters in this book, and the papers presented at the 2016 conference, affirm the strength and vibrancy of public law scholarship in the common law world today and the appetite for, and rich insights to be gained from, scholarly engagement across jurisdictional boundaries.

I. THEME AND BOOK STRUCTURE

The theme of this collection is 'The Unity of Public Law?'. The question mark is quite deliberate, inviting inquiry into the various ways in which public law—itself a term which calls for inquiry—may evince unity or disunity, with the aim that such inquiries will precipitate fresh and insightful perspectives on the nature of public law and emerging issues and recurrent themes in public law.

The spurs for this theme are multifarious. At the level of doctrine certain norms, concepts, values, or methods have increasingly been appealed to and at times claimed to provide a common basis for public law adjudication. These have included, for example, appeals to the rule of law, rights, rationality, deference, proportionality, and balancing. These moves towards unifying concepts, methods etc in turn have prompted responses which seek to emphasise and reinforce the plurality of public law fields, and the normative attractiveness of such plurality.

At a higher level of abstraction, on the plane of theory, scholars have increasingly searched for One Big Idea which might explain public law as a whole or provide a normative vision of a unified public law. These accounts have often sought to identify the distinctiveness of public law as a field, for example by appealing to a distinctive set of functions or a distinctive method or mode of reasoning which gives public law unity. Similarly private lawyers are increasingly engaged in the search for what makes private law, as a whole, distinctive from public law. Arguably this increased search for distinguishing features, and attempts at reassertion of the 'autonomy' of public law and private law, is a response to the reality that any distinction between

the two fields is increasingly difficult to locate, as the public and private spheres of life—and as a consequence, law—become increasingly intermingled.

A further spur for the 'Unity?' theme is comparative. In this regard, questions arise about convergence and divergence among common law systems. To what extent do common law systems of public law share common features, and to what extent are they diverging? To the extent that patterns of convergence or divergence are evident, what are the drivers of change or maintenance of the status quo? Allied to these questions are debates over the limits of comparativism: is it desirable and/or feasible to search for common solutions across different jurisdictions and for one jurisdiction to transplant legal phenomena, ideas, doctrines etc, from another jurisdiction, and if so, in what circumstances? In this regard, do distinctive considerations arise in the context of public law, compared to other fields of law? These issues are of acute importance, not least because of increasing tendencies, spurred in part by the phenomena of 'global administrative law' and 'global constitutional law', to seek to distil common values or principles from across different jurisdictions or develop general explanations or theories of public law or fields of public law, which are claimed to hold across jurisdictions.

The multiple spurs for interrogating the 'Unity?' theme are in turn reflected in the variety of perspectives which the chapters herein bring to bear on the unity question: doctrinal, theoretical and comparative. The chapters are arranged along these lines: Part 1 is comprised of chapters which offer doctrinal and theoretical perspectives, and Part 2 is comprised of chapters which offer comparative perspectives. Dame Sian Elias's chapter, the first substantive chapter, offers a critical introduction to both strands of inquiry.

Those chapters in Part 1 focus on specific doctrinal issues that arise in particular jurisdictions and/or specific theoretical questions. Albeit these chapters are not explicitly comparative in their orientation, they do often engage with case law from different jurisdictions and address issues which find their analogues in other jurisdictions. As such the chapters will be of relevance and importance across jurisdictions. Varuhas's chapter examines the plurality of public law through the method of legal taxonomy. Chapters by Daly and Rock consider core values that are said to underpin public law. A number of chapters consider the theme of unity in the context of particular doctrines or trends. Hoexter examines difficulties faced by courts in distinguishing public from private power for the purposes of delineating the scope of review. Wilberg identifies plurality in the types of interpretive presumptions utilised by courts in public law. Masterman and Wheatle explore the themes of unity and disunity in the context of contemporary common law constitutionalist trends in the UK. Macklin's chapter explores the intersection of administrative and human rights law, focusing on judicial method in substantive review. Stratas's chapter serves as a concluding chapter for Part 1. He focuses on the decline of doctrine in judicial review, offering a critique of trends towards a more 'intuitive' judicial approach to public law adjudication.

Those chapters in Part 2 are more explicitly comparative in orientation. The first three chapters by French, Reed and Saunders consider issues in comparative common law in more general terms, the chapters by French and Reed examining the use of foreign legal material by common law courts and inter-jurisdictional dialogue

while Saunders considers the phenomenon of legal transplants in public law. The remaining chapters consider particular topics from a comparative perspective. These include divergence among the jurisdictions of the UK (McHarg); consideration of the Commonwealth model of rights-protection (Geiringer); damages for breaches of constitutional rights (Chan); standing rules in new constitutional orders (O'Loughlin); the courts' approach to fact-finding in the context of proportionality analysis (Carter); and jurisdictional error (Boughey and Crawford).

While this division between Parts 1 and 2 was adopted for organisational purposes, the boundary between the Parts is not impermeable nor is it intended to be. Indeed there are significant, sometimes surprising, synergies between chapters in each Part. For example Saunders' chapter on transplants in public law raises similar methodological questions, albeit in a different context, to Varuhas's chapter on taxonomy and public law, each exploring issues that arise when legal phenomena are extracted from their original 'home' context and imported into a new 'destination' context. Boughey and Crawford's chapter offering comparative perspectives on jurisdictional error, and Carter's chapter offering a comparative analysis of the judicial approach to fact-finding in proportionality analysis have natural synergies with a number of those chapters in Part 1 which address core issues in judicial review within single systems. Similarly both Chan's chapter in Part 2 and Rock's chapter in Part 1 address issues in public authority liability, the former from a comparative perspective and the latter from a doctrinal and theoretical perspective. Chapters in Part 1 which seek to offer a unifying account of the values underlying administrative law, such as Daly's, have points of contact with those chapters in Part 2 which address the extent of variation in the nature of administrative law systems and doctrines across jurisdictions. More generally an interesting and perhaps unexpected recurring theme among the chapters in Part 1 is exploration of the legitimacy of judicial methods in contemporary public law, and concerns over intuitive or subjective judicial decision-making. Given that the chapters examine a range of different issues in the context of different common law jurisdictions, the emergence of this recurring theme may be suggestive of a certain unity across the public law systems of different jurisdictions in that they face a common set of emergent issues related to judicial decision-making and method in public law adjudication. There are many further interconnections to be explored.

II. THE CHAPTERS

The chapter by Dame Sian Elias derives from her keynote address at the Conference. It offers an important analysis of the different dimensions of the question with which this volume is concerned: the extent to which public law evinces unity. In so doing the chapter serves as a critical introduction to core issues and themes addressed by the chapters in this volume. The chapter considers a number of important issues in public law today from a comparative perspective. In a stimulating survey Elias examines convergence and divergence in the ways that different common law jurisdictions have approached and resolved key issues such as the role of judicial review in the context of other administrative justice mechanisms. The Chief Justice considers the

nature of administrative law today, reiterating the discretionary nature of the field, and questioning the role of rigid legal classification and binary distinctions or labels such as law and merits and jurisdictional and non-jurisdictional error. The chapter then examines judicial supervision of discretion, observing the intimate connection between judicial review and constitutional values and traditions, which in turn helps to explain why common law systems may diverge in their approaches to controlling discretion, a theme also interrogated in the context of deference on questions of law and reasonableness review. The Chief Justice's chapter ends with a provocative question: despite the illumination provided by good scholarship in this area, is the search for better doctrine ultimately doomed? Scholarly work keeps everyone up to the mark, but perhaps too much is expected of overarching theories: 'Public law has unity and disparity and much of it is untidy and tentative'.

These questions posed by the Chief Justice's chapter offer the ideal prompt for the chapters in Part 1 which engage with the 'Unity' theme from doctrinal and theoretical perspectives.

Jason NE Varuhas's chapter takes the first steps towards developing a legal taxonomy of public law fields, systematically identifying, mapping and explaining different categories of law that are typically identified with English public law. Varuhas argues that legal categorisation is fundamental to full understanding of the law, rigorous and complete legal analysis and coherent and rational legal development. Yet legal taxonomy and debates over legal categorisation have not been a significant feature of public law scholarship, in contrast to contemporary private law scholarship. Varuhas's chapter begins by exploring the reasons for this general absence of work in legal categorisation in public law. It proceeds to make the case for why legal categorisation is of fundamental importance in public law, and explains that such work is of peculiar significance today in the light of trends towards open-ended balancing in public law adjudication which threaten to radically undermine the rational ordering of the legal system and render coherent legal development impossible. The chapter begins the mapping process. The chapter rejects the division between public law and private law as a starting point for legal categorisation, placing no normative weight on that putative divide. Rather it seeks to simply categorise different fields of law, often associated with the label 'public law', according to their primary functions. The chapter identifies and explains two distinct categories: (1) the law relating to regulation of public power in the public interest; (2) the law relating to protection and vindication of basic individual rights. Having taken the first steps towards legal categorisation the chapter proceeds to demonstrate how identification of discrete fields has a bearing on analysis of contemporary legal issues, examining the question of whether the proportionality method developed in human rights law ought to be read across to the common law of judicial review.

Writing on substantive review, Audrey Macklin engages critically with Supreme Court of Canada decisions which have imported the strong notion of judicial deference found in ordinary Canadian administrative law into decisions concerning the Canadian Charter of Rights and Freedoms. Such deference is arguably inappropriate for cases where constitutionally protected interests are at stake and has resulted in the erosion of Charter rights. Where fundamental rights are concerned, Macklin calls for less fixation on labels such as reasonableness and proportionality—a 'proxy war

between administrative law and human rights law'—and more transparent reasoning focusing on the context of each particular case. She therefore proposes certain considerations which should be borne in mind by courts when evaluating exercises of administrative discretion which engage fundamental rights. These include: giving appropriate weight to Charter rights as compared to other interests; giving more consideration to the nature of the decision-maker (specifically considering closeness to the political world as a potential reason for being less, rather than more, deferential); and the court not supplying its own reasons for a decision-maker's actions. Such considerations seem eminently suitable for adoption or adaption beyond Canada and her chapter reads as a 'cautionary tale' to other jurisdictions.

The impetus for Paul Daly's chapter is the very substantial growth in the scope and intensity of judicial review in English law in recent decades. As Daly observes, the question arises whether such developments amount to 'an illegitimate power grab'. Answering that question in the negative, Daly draws upon, and develops, some of his earlier work in which he argues that modern administrative law is structured and animated by four interacting values, namely: the rule of law, good administration, democracy and separation of powers. Using that earlier, interpretive work as a foundation, Daly seeks to demonstrate the relevance of his four values to the broader question of administrative law's legitimacy. In particular, he argues that the legitimacy—in its democratic and normative, as distinct from its sociological and procedural, senses—of contemporary expansions of judicial review can be established by reference to those four values. This follows, he suggests, because the four values lend administrative law—including in its modern, extended form—coherence, and because the values are legal in nature. Critically, argues Daly, these characteristics of the values that drive administrative law's development serve to shield judges from (what are on this view) unwarranted charges of improper activism.

In their chapter, Roger Masterman and Se-shauna Wheatle examine contemporary trends in UK public law from the particular perspective of the common law. They observe that in recent decades, the common law has acquired new prominence as a legal-constitutional medium in the UK, thanks to (among other things) the development of the notion of common law constitutional rights, the identification—by the common law—of 'constitutional statutes', judicial deployment of the principle of legality, and curial invocation of the common law as a potential constraint upon Parliament's legislative authority. Masterman and Wheatle argue that while such developments have the potential to destabilise the domestic constitution—and the common law's place within it—such risks may be obviated provided that judges proceed with sufficient sensitivity to relevant aspects of the common law tradition. Among other things, they argue, this requires: adherence to the incrementalism that is characteristic of the common law's developmental trajectory; transparent judicial articulation and curation of the body of constitutional principle to which effect is increasingly given at common law, such that the relationship between principle and its application in particular cases is more carefully and clearly drawn; and an openness to inter-jurisdictional dialogue that might serve to make up for UK judges' relative inexperience when it comes to more fully fledged forms of constitutional adjudication. Masterman and Wheatle conclude that proceeding in this way is not

merely desirable: it may be essential if judges are to avoid charges of subjectivity and overreach.

Cora Hoexter's chapter examines the vexed distinction (and relationship) between the notions of public and private power. Hoexter observes that the need to make such a distinction—so as to determine amenability to judicial review—arises in many common law jurisdictions, and that the drawing of the line is rarely unproblematic. Hoexter's focus, however, is on the issues to which the demarcation of public powers has given rise in the particular context of South Africa, where the carrying out of public functions is critical to the availability of judicial review. A key difficulty, observes Hoexter, is that attempts to characterise activities as public or private in any inherent or abstract sense are generally doomed to failure, while senses of where the boundary ought to be placed are liable to shift over time. As a result, the identification of that boundary risks collapsing into an intuitive, instinctive exercise. Hoexter explores these issues through detailed examination of the South African case law in a number of relevant contexts, including the amenability to judicial review of sports regulatory bodies and public actors' exercises of contractual power. She concludes that the approach of South African courts—like that of courts in some other parts of the common law world—is unsatisfactory, and that judicial identification of public functions too often reduces to little more than a question of 'feel'.

Accountability is often taken for granted as a 'core public law value'. But Ellen Rock's chapter reveals that some deeper thought is needed as to what accountability actually means in this context and, consequently, what its functions are and whether it fulfils them. Rock identifies four functions accountability may serve: (1) to ensure transparent decision making; (2) to control the legality of exercises of public power; (3) to punish abuse of power; and (4) to provide restoration to those who suffer such abuses. Accountability currently, however, only performs the first two of those four functions in public law, thus undermining its supposed centrality to the area. Rock focuses on the current deficiencies of public law remedies to punish and to restore. Specifically, Rock's inquiry relates to the relevance of a decision-maker's state of mind to her accountability. She argues that we need to move away from the fallacy that public law exhibits a strict liability attitude to fault, and towards accepting that certain public law principles already recognise that a decision-maker's motives, knowledge or intention may be relevant to her consequent fault. As such, her chapter should provoke a discussion as to whether remedies could be adapted to serve all four functions of accountability without radically altering public law's underlying foundations.

Hanna Wilberg's chapter focuses on the role of 'interpretive presumptions' as means of giving effect to such things as fundamental rights, constitutional principles and international obligations. Into this interpretive category Wilberg places not only presumptions as to legislative intent *per se*, such as the principle of legality and rules of strict construction, but also interpretive instructions contained in statutory bills of rights, whereby courts are directed to favour constructions that are consistent with human rights. Against this background, Wilberg distinguishes 'weak' and 'moderate' from 'assertive' uses of such presumptions, evidence of the latter being discernible, she argues, in the case law of Australia, New Zealand and the UK. Wilberg takes as her guiding criterion a default requirement, rooted in democracy,

that those who interpret legislation should, in doing so, respect the intention of the enacting institution. It is this normative point of departure that leads Wilberg to single out 'assertive' uses of interpretive presumptions for special treatment, the defining characteristic of such uses, within Wilberg's taxonomy, being that they involve assigning constructions to statutory provisions that fail to respect legislators' likely understanding of their meaning. Wilberg does not say that such constructions are inevitably improper, but does contend that departure from the underlying normative requirement to respect legislators' understanding means that assertive uses of interpretive presumptions call for special justification. She goes on to argue that in identifying the assertive-use category, established approaches—which focus upon such matters as whether the provision is ambiguous or whether express words have been used to override the protected right or value—are unsatisfactory, and cannot adequately substitute for more direct judicial engagement with questions about legislators' likely understandings.

David Stratas's chapter stems from his remarks offered during the closing plenary session of the conference, and serves as a concluding chapter for Part 1 of the book. His chapter reflects on the unity theme in the light of the doctrinal and theoretical perspectives advanced by the chapters in Part 1, and the themes that emerge from those chapters and which emerged from the conference more generally. His chapter issues a clarion call for the reassertion of doctrine in judicial review, and a rejection of approaches which eschew a framework of principle in favour of an approach which rests on case-by-case analysis of whether judicial intervention is warranted according to all the circumstances of the case. He takes as his focus the administrative law jurisprudence of the Supreme Court of Canada but his analysis and the arguments he advances have wider implications for the administrative law systems of all common law jurisdictions. He observes that an approach that eschews a framework of principle, and rests more on individual judges' exercises of discretion, has led to a fraught and unsatisfactory administrative law jurisprudence in Canada. This raises a host of issues. For instance, Stratas argues that public confidence in the judiciary can be diminished if it is perceived that decisions rest on the individual judge's sense of right and wrong, that it will be difficult to maintain equal treatment under the law, and that predictability may be compromised. Such concerns lead him to call for greater articulation of the principles that underpin judicial decisions. In this regard he sees the chapters in Part 1 as offering key insights into the path forward.

The chapters in Part 2 offer comparative perspectives on the unity of public law. The focus of Robert French's chapter is cross-jurisdictional, or inter-jurisdictional, dialogue. He argues that while such dialogue can be beneficial, it is necessary to be alive to its limits. Far from being a mechanism for delivering uniformity across different jurisdictions, dialogue is instead a technique that enables 'learning by comparison'. It follows, argues French, that we should not necessarily expect unity—either in the full sense of that term, or in the more diffuse form of 'convergence'—to be dialogue's product. It is also the case, he points out, that dialogue in the public law sphere is complicated (and limited) by constitutional diversity—and that for all that a given country's written constitution may borrow or take inspiration from other such documents, each constitution is inevitably shaped by local conditions, both in initial design and subsequent operation. In the light of this, French draws upon the

metaphor of a 'quilt of legalities'—a phrase coined by Boaventura de Sousa Santos to describe legal pluralism in Brazil—as a means of capturing both the potential and the limits of dialogue. On this view, while such dialogue may be valuable, proper attention to jurisdictional (including constitutional) diversity necessarily constrains its practical application. 'Unity', argues French, 'is a mirage', and inter-institutional dialogue should not be entered upon in the expectation of arriving at such a mythical destination.

An invaluable first-hand account of the use of foreign jurisprudence in public law cases is provided by Robert Reed's chapter. As one of the two Scottish Justices on the UK Supreme Court, Lord Reed recalls some resistance towards comparativism during his own legal education—at least when English law was the comparator. Pockets of resistance can also be seen, for example, in the United States, fuelled by the late Justice Scalia. Reed's own view is very different. Our increasingly globalised society has caused a shift in the issues the Supreme Court hears, with more cases concerning, for example, national security, data sharing, immigration and human rights. As judges increasingly 'face problems which transcend national boundaries' looking to other countries for guidance can promote harmony and avoid conflict of law issues. Even where no such issues necessarily arise, Reed positively endorses looking at foreign jurisprudence as part of a constant comparative process to ensure that UK laws are fit for purpose. He notes, however, that looking to other common law countries for inspiration is less prevalent in public law cases due to the increasing European influence on UK public law. Reed nevertheless argues that British judges should not limit themselves to European sources—an argument which will have even more force now that the European influence may be waning.

Cheryl Saunders examines the increasingly common and important phenomenon of transplants, that is the movement of relatively structured legal phenomena across jurisdictional boundaries. Saunders considers issues raised by transplants specifically in relation to public law in common law systems, though her analysis has broader implications. She articulates an important and valuable analytical framework for considering transplants, identifying and considering issues in relation to three phases of any decision about a transplant. First, identification of a possible transplant, utilising the case study of proposals for establishing a Constitutional Court for the United Kingdom. Second, evaluation of whether the transplant should proceed, taking as an illustrative example the introduction of statutory bills of rights into Australian jurisdictions. Third, any adaptation to the transplant in its original form that is deemed appropriate, focusing on the historic adoption of the referendum procedure to govern constitutional change in Australia. Through this analysis Saunders emphasises and illustrates the importance of taking context into account in making decisions about transplants—the context of both the 'donor' jurisdiction and the 'recipient' jurisdiction. In turn she raises important questions about practices and theories that encourage transplants divorced from considerations of relevant contexts. Saunders concludes with a series of valuable observations on the implications of transplants for the unity of public law across common law systems.

Issues of unity and disunity have not only been evident internationally but, increasingly, within the UK itself. Aileen McHarg's chapter on the UK's territorial constitution is, therefore, extremely timely. She notes that the UK has always had

greater diversity in its governance than the average unitary state. Developments (such as increasing devolution, English Votes for English Laws, the 2014 Scottish independence referendum and, perhaps above all else, sharply differing attitudes to Brexit across the UK's constituent territories) reflect such diversity, but have also increased it. Despite the UK constitution having always accommodated a certain amount of divergence between its constituent parts, recent developments beg the question of how much divergence a constitution can endure. To combat such constitutional drift, calls have been heard for a unifying framework 'to bind the UK state together'. Such a framework would render the UK a federal state, or at least give it a more federal character. After examining the need for greater unity in the territorial constitution from four different perspectives—empirical, conceptual, normative and political—McHarg is pessimistic about the future of the UK. The most likely eventual way out of the current fractured territorial constitution is, she suspects, a clean break rather than a repair.

Comparative human rights law is the focus of Claudia Geiringer's chapter, specifically the so-called new 'Commonwealth model' of human rights protection found in Canada, New Zealand, the UK, Victoria and the Australian Capital Territory. Geiringer finds the existing scholarship on the new Commonwealth model 'radically incomplete'. Gaps have been caused by Commonwealth model scholars' preoccupation with the distinctiveness of the new Commonwealth model as compared to the American model of constitutionalised human rights protection. That, in turn, has caused those scholars to unduly fixate on the tension between parliamentary sovereignty and the judicial role in upholding rights. This chapter starts the process of filling those gaps, the most glaring of which is the lack of consideration as to the Commonwealth model's role in controlling the functions of the executive, caused by the hitherto fixation on the parliamentary sovereignty/judicial supremacy dichotomy. Geiringer also gives further thought to the important variations between the various Commonwealth instruments (including issues as fundamental as which rights are protected) and the reasons for those variations. In so doing, a more complete picture of the Commonwealth model begins to emerge.

In his chapter, Johannes Chan addresses the topic of remedies for violation of constitutional rights. He observes that in the public law sphere, the focus tends to be upon questions of validity, meaning that, at the remedial level, there is a corresponding emphasis upon devices—such as declarations and quashing orders—that serve to clarify or determine the legal status of impugned measures. In contrast, argues Chan, damages in this context is (or at least has, until recently, been) a relatively neglected area. He goes on to argue that greater attention should be paid to questions of damages for public law wrongs, and, in particular, that there are compelling arguments in favour of making available 'vindicatory' or 'constitutional' damages when constitutional rights are violated. Breaches of such rights, Chan contends, should be treated as independent wrongs. Chan's approach to these questions is comparative, Canada, New Zealand, South Africa and the United Kingdom being his chosen comparator jurisdictions. Chan argues that, in empirical terms, a degree of convergence towards the approach favoured in Canada can be discerned (the UK being an outlier) and that, in normative terms, this is to be welcomed, not least because the 'composite approach' preferred in Canada brings together the public and private

law dimensions of damages for human rights violations. Chan does not, however, consider the Canadian model to be a panacea, arguing that there are several respects in which it could—and should—be improved upon.

In English administrative law, the liberalisation of public interest standing has allowed for the vindication of the rule of law in cases where an illegality might otherwise have been allowed to go unchallenged for want of another claimant. In her chapter, Elizabeth O'Loughlin highlights a similar—but even more judicially creative—trend in post-colonial settings. Using Kenya as her main case study (but also discussing, for example, Tanzania and Uganda), O'Loughlin argues that a generous approach to standing is all the more important in developing countries. Public interest standing allows for the 'maturation and diffusion' of new constitutional orders in line with indigenous rights in a way that a stricter standing test would prohibit, given that high levels of poverty and illiteracy in the general population hinder access to the courts. A trend for such a liberal approach to standing started in India and spread throughout South and East Africa. Such 'transnational judicial dialogue' has in turn allowed an individualised approach for each jurisdiction to mould its own constitution to its own values, and to respond to each nation's specific challenges. Without an ability to bring cases in the public interest, courts in developing countries would be deprived of the steady stream of case law necessary to flesh out new constitutions.

In her chapter, Anne Carter compares proportionality reasoning in the UK and Australia. Carter argues that although the proportionality test might be more firmly and clearly established in the UK, issues raised by the factual nature of the court's proportionality inquiry are comparatively unresolved in both countries. She therefore suggests that, despite certain important differences in the reception to, and methodology of, proportionality itself, the countries might profitably learn from each other with regard to the court's fact-finding role. A dialogue in three particular areas is recommended: (1) in terms of defining more clearly different types of 'fact'; (2) in ascertaining what types of material the courts should look at in making proportionality assessments; and (3) in terms of the meaning and role of deference. In these three areas the two countries have much to learn from each other, and the relationship is a symbiotic one since neither country has the perfect solution across all three areas. For example, different types of fact are more clearly distinguished in Australia, whereas the concept of deference is more developed in the UK after a 'lively' debate there. Greater communication may help to clarify matters in both countries, even if the eventual solution may not be precisely the same.

Janina Boughey and Lisa Burton Crawford examine the extent to which the centrality of jurisdictional error in Australian administrative law renders Australia exceptional among common law systems of public law. At first blush the centrality of jurisdictional error as the organising principle of Australian administrative law does mark Australia out as distinct compared to other common law jurisdictions such as Canada and the United Kingdom. However, Boughey and Crawford demonstrate that this surface-level divergence distracts attention from important points of unity between Australia and these other common law jurisdictions. They examine and reject those rationales propounded by the High Court of Australia for maintenance of jurisdictional error as an organising concept. However, they

argue the concept can nonetheless be justified and that it performs the important constitutional role of distinguishing those errors of law Parliament has authorised from those it has not. This distinction is necessitated by the concept of parliamentary supremacy: it is open to Parliament to insulate decisions vitiated by certain legal errors from invalidity. In turn this reveals an important point of commonality between Australia, Canada and the United Kingdom. Although there are marked differences in terminology and approach, each system provides for some mechanism to distinguish legal errors which lead to invalidity from those that do not. Such mechanisms follow from the principle of legislative supremacy, which is common to all three systems, albeit there may be variations across jurisdictions as to the scope Parliament has, constitutionally, to prescribe that unlawful administrative acts shall not be invalid.

III. ACKNOWLEDGEMENTS

In organising the conference on which this collection is based, and in preparing this volume for publication, we have received assistance and support from a number of sources.

We are particularly grateful to John Bell. He was a co-convenor of the 2016 conference, and of the inaugural conference in 2014, during this time also serving as Director of the Centre for Public Law at Cambridge. We, and the conference series, have greatly benefited from his involvement in, and contributions to, the organisation of the conferences and the setting up of the conference series. In particular we have greatly benefited from his insights as one of the leading comparative lawyers in the common law world, and he has consistently been a source of wisdom in respect of the practical aspects of conference organisation, in the light of his significant experience in this regard. It is therefore fitting that John has written the preface to this collection.

We are grateful to the group of students at the Faculty of Law in Cambridge who served as assistants at the conference: Jason Allen, Darragh Coffey, Trina Malone, Alex Schäfer and Barry Solaiman. We have also appreciated the support and advice of the members of the Conference Advisory Board in our planning of the conference. The members of the Board for the 2016 conference were: Professor Mark Aronson (UNSW), Professor David Feldman (Cambridge), Professor Carol Harlow (LSE), Mr Richard Hart (Founder, Hart Publishing Ltd), Professor Cora Hoexter (Witwatersrand), Professor Janet McLean (Auckland), Lord Reed (UK Supreme Court), Professor Cheryl Saunders (Melbourne) and Professor Robert Thomas (Manchester).

We are grateful to Hart Publishing Ltd, the exclusive sponsor of the Public Law Conference, for their ongoing commitment to, and support of, the conference series. Hart has been heavily involved in the conference series from its inception, having played a significant role in the founding of the series. We have also greatly benefited from the more general support and advice of those at Hart, specifically Sinead Moloney and Bill Asquith, in respect of the planning of the conference and preparation of this volume.

The 2016 conference marked a number of innovations designed to further encourage the involvement of early career scholars. These innovations included the introduction of dedicated panels for doctoral students to present their work, which were a tremendous success and a highlight of the 2016 conference. These panels will be maintained for the 2018 conference in Melbourne. The 2016 conference also marked the establishment of the Richard Hart Prize for the best paper delivered by an early career scholar. We are very grateful to Richard Hart, the founder of Hart Publishing Ltd, who had a significant role in the establishment of the conference series, for kindly donating the prize. The inaugural winner of the prize was Jennifer Raso, a doctoral student at the University of Toronto, for her paper entitled, 'Unity in the Eye of the Beholder? Reasons for Decision in Theory and Practice'. Two papers were highly commended by the judging panel: Anne Carter's paper, 'Constitutional Convergence? Some Lessons from Proportionality' (chapter eighteen in this collection) and Janina Boughey and Lisa Burton Crawford's paper, 'Jurisdictional Error: Do We Really Need It?' (chapter nineteen in this collection). We are very grateful to the members of the judging panel: Professor David Feldman (Cambridge), Professor Carol Harlow (LSE) and Lord Reed (UK Supreme Court). The Prize will be offered again at the 2018 conference.

More information on the Public Law Conference series, including video-recordings of the plenary sessions at the 2016 Conference, can be found at the conference website: www.publiclawconference.law.cam.ac.uk.