

ADMINISTRATIVE LAW: THE NEXT FRONTIER FOR COMPARATIVE LAW

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Abstract It is trite to observe that the past three decades have seen an ‘explosion’ in comparative law. Equally well-worn territory is the fact that constitutional law has been a particular beneficiary of the comparative trend, despite the fact that for much of the twentieth century comparative lawyers tended to avoid public law topics. However, one field of law that has been conspicuously absent from the boom in comparison, at least outside of Europe, is administrative law. This article analyses why the use of comparison has been so vastly different between the two areas of public law. It then surveys some recent developments in administrative law and points to a number of aspects of the field that would benefit from the wider use of comparative methods across the world.

Key words: Administrative Law, Comparative Law, Comparative Constitutionalism, Public Law.

Comparison is the methodology *de rigueur* in legal scholarship today. One need only take a cursory look at the content of articles in leading legal publications or at the curricula of top law schools to find evidence of the ‘comparative law explosion’.¹ The same infatuation with comparison can also be found amongst legal practitioners, judges and policy-makers across the world, who frequently draw guidance and inspiration from foreign and international law. One manifestation of the trend is a greater attention to theory, though many have noted that comparative law remains quite weak in this area.² Another is the expansion of comparative methods into areas of law where comparison had previously been considered impossible or futile, or simply neglected. The most striking of these is the dramatic rise of comparative constitutionalism.

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¹ JM Smits, ‘Preface’ in JM Smits (ed), *The Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing 2006) xvii.

² See eg P Legrand, ‘How to Compare Now’ (1996) 16 *Legal Studies* 235–8; M Reimann, ‘The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century’ (2002) 50 *AmJCompL* 671; G Samuel, ‘Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences’ in M van Hoecke, F Ost and L Wintgens (eds), *Epistemology and Methodology of Comparative Law* (Hart Publishing 2004) 3–78.

One field of law that has been relatively neglected by the boom in comparison is administrative law.³ Although there have been a number of important forays into the field, particularly within the European Union (EU), comparative administrative law remains very much the ‘poor relation’⁴ of comparative constitutional law. This article considers the reasons for the relative inattention to comparison by administrative lawyers, and argues that comparative administrative law is not only a worthwhile area of research, but is critical to understanding important emerging issues in domestic and international law and governance. The first section considers the reasons for the predisposition of modern comparative lawyers to study private law topics before looking at how constitutional law has been able to overcome that bias. The second section examines the main explanations that have been given for the imbalance in the use of comparison between the two areas of public law: the relatively recent development of administrative law; its scope and technical complexity; the continued distinctiveness of national administrative law systems; and the greater importance generally attributed to constitutional law compared with administrative law. It is argued that despite its comparatively modern development, administrative law has rapidly become an important area of law and is at the heart of some of the most significant issues confronting governments and international organizations today. Furthermore, it is suggested that, contrary to conventional views, the local distinctiveness of administrative law does not preclude comparison between jurisdictions, but instead provides compelling reasons for greater attention to comparative administrative law. A number of European examples are relied on in support of this argument.

The third and final section of this article surveys recent developments in administrative law that have resulted in some important convergences in the field. It is argued that some of the same forces that have contributed to the spread of Western constitutional norms have also led to the dissemination of key principles of administrative law. The result is that many systems of administrative law are facing similar questions to one another and tackling shared concerns. Important insights into how to address these questions could be gained by further use of comparative methods.

³ This article uses a broad, functional definition of administrative law encompassing any laws, rules or principles that govern or control the exercise of government or executive power. A functional definition allows administrative law to be analysed using the conventional methodology of comparative law, and avoids some of the difficulties associated with legal taxonomy (see section II). The definition is designed to be sufficiently broad to include systems of governing the exercise of government power that are not premised on the supremacy or rule of law. It is outside the scope of this paper to explore these issues in detail. For a discussion in relation to East Asian law see J Ohnesorge, ‘Administrative Law in East Asia: A Comparative Historical Analysis’ in S Rose-Ackerman and PL Lindseth (eds), *Comparative Administrative Law* (Edward Elgar 2011) 79–82.

⁴ T Ginsburg, ‘Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law’, in Rose-Ackerman and Lindseth (eds), (n 3) 117.

I. THE FALL AND RISE OF COMPARATIVE CONSTITUTIONAL LAW

While a number of important early comparative legal studies were in the field of constitutional law—most notably those of Aristotle and Montesquieu—the modern discipline of comparative law developed a strong bias towards private law.⁵ This bias can be traced back to the 1900 Paris International Congress on Comparative Law—widely considered the birthplace of modern comparative law as an academic discipline.⁶ Although public law was discussed at the Paris Congress, the programme was heavily weighted towards private law, and the conference was ‘dominated by lawyers who were in search of some kind of a *jus commune* in the fields of private law’.⁷ The prevailing concern of most participants was on harmonizing European law by using comparative methods to discover universal legal concepts and principles,⁸ and it was agreed that this key aim of comparative law could not be achieved through studies in public law.⁹ Accordingly, for most of the twentieth century comparative legal studies focussed on private law issues.

A range of arguments have been made as to why comparison is inherently more suited to examining private law issues. The two main arguments relate to the greater contextual complexity of public law and its nationally-specific nature. The first contends that public law is influenced by a far broader range of external, non-legal factors than private law, including politics, history and economics. This is said to make it difficult to conduct meaningful and useful comparative study in public law because comparatists must understand this array of external factors at a sufficient level to undertake informed analysis.¹⁰

⁵ The terms ‘public law’ and ‘private law’ are ambiguous, and mean different things in different jurisdictions. Even within legal systems there is no consensus on what constitutes ‘public law’. See eg H Woolf, ‘The Role of the English Judiciary in Developing Public Law’ (1986) 27 *William and Mary Law Review* 669–71 (in relation to the distinction in English law). In this article the term ‘public law’ is used broadly to refer to laws applying to government bodies (including administrative law, constitutional law, human rights law and criminal law), while ‘private law’ is understood to mean the law regulating relationships between individuals (as well as other non-government entities). More specific terminology is used throughout this article as context requires.

⁶ See eg X Blanc-Jouvan, ‘Centennial World Congress on Comparative Law: Opening Remarks’ (2001) 75 *TullRev* 862; R Sacco, ‘One Hundred Years of Comparative Law’ (2001) 75 *TullRev* 1164; E Örüçü, ‘Methodology of Comparative Law’ in Smits (n 1) 442. There is disagreement amongst comparative lawyers as to whether comparative law is a method or a distinct discipline. This article refers to comparative administrative law as both a method and a discipline, consistent with the approach of Pierre Legrand on the issue: P Legrand, ‘Comparative Legal Studies and Commitment to Theory’ (1995) 58 *ModLRev* 264.

⁷ J Ziller, ‘Public Law’ in Smits (n 1) 603.

⁸ P von Nessen, *The Use of Comparative Law in Australia* (Lawbook Co 2006) 27–30; G Mousourakis, *Perspectives on Comparative Law and Jurisprudence* (Pearson 2006) 24–5; HP Glenn, ‘Aims of Comparative Law’ in Smits (n 1) 57–8; Reimann, ‘The Progress and Failure of Comparative Law’ (n 2) 693.

⁹ D Clarke, ‘Nothing New in 2000? Comparative Law in 1900 and Today’ (2001) 75 *TullRev* 882.

¹⁰ See eg discussions in E Örüçü, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century* (Martinus Nijhoff Publishers 2004) 179; C Saunders, ‘Apples, Oranges and Comparative Administrative Law’ (2006) *Acta Juridica* 426; R Seerden and F Stroink,

The second argument against comparison in public law is that public law is nationally specific, designed to meet the individual needs of a particular government and social structure. This means that public law ‘would not easily allow comparison with, let alone ‘transplants’ from, other systems’,¹¹ and comparative study would accordingly offer no practical benefits. The argument shows comparative lawyers’ preoccupation with functionalist objectives and harmonization in particular. Again, this can be traced back to the Paris Conference and the prevailing concern that studies in comparative law have practical functions, a bias which continues to dominate comparative legal scholarship and has been argued to have stunted its development as a cohesive discipline.¹²

Despite these arguments against the use of comparison in public law, and leaving aside their force for a moment, perhaps the most striking area of comparative law’s expansion over recent decades has been in an area of public law: specifically comparative constitutionalism.¹³ Ran Hirschl has considered the remarkable growth of interest in comparative constitutional law and demonstrated that comparison is now a common feature of constitutional law scholarship and practice.¹⁴ Discussions of foreign legal material are frequently a feature of constitutional judgments in many jurisdictions—most notably in constitutional human rights jurisprudence in South Africa,¹⁵ Canada¹⁶ and the EU,¹⁷ but also increasingly in the United States (US).¹⁸ There has also been a dramatic increase in the number of scholarly books and journals dedicated

‘Comparative Remarks’ in R Seerden and F Stroink (eds), *Administrative Law of the European Union, Its Member States and the United States: A Comparative Analysis* (Intersentia 2002) 345.

¹¹ HP Nehl, ‘Administrative Law’ in Smits (n 1) 18. See also Özücü, *The Enigma of Comparative Law* (n 10) 172.

¹² von Nessen (n 8) 27–30; R Sacco, ‘Legal Formants: A Dynamic Approach to Comparative Law’ (1991) 39 *AmJCompL* 2–6; M Reimann, ‘Stepping Out of the European Shadow: Why Comparative Law in the United States Must Develop Its Own Agenda’ (1998) 46 *AmJCompL* 643–5.

¹³ R Hirschl, ‘The Rise of Comparative Constitutional Law: Thoughts on Substance and Method’ (2008) 2 *Indian Journal of Constitutional Law* 11.

¹⁴ *ibid* 11–13.
¹⁵ The most obvious example is *S v Makwanyane*, 1995 [3] SALR 391 (CC) in which the South African Constitutional Court considered jurisprudence from a range of overseas jurisdictions. Other South African examples are discussed in S Choudhry, ‘Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation’ (1999) 74 *IndLJ* 819.

¹⁶ The Canadian Supreme Court frequently cites judgments of foreign courts, particularly from the European Court of Human Rights, US Supreme Court and UK superior courts. See eg *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567, [90]–[91] and *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350, [124]–[128].

¹⁷ The European Court of Human Rights (ECtHR) frequently refers to Member States’ laws and practices in interpreting the European Convention on Human Rights. See K Dzehtsiarou, ‘Comparative Law in the Reasoning of the European Court of Human Rights’ (2010) 10 *University College Dublin Law Review* 109. Recent examples include *Burden and Burden v United Kingdom* [2008] 47 EHRR 38 [25]–[26] and *K.U. v Finland* [2009] 48 EHRR 52.

¹⁸ See discussion of recent references to foreign constitutional law by the US Supreme Court in DS Law, ‘Generic Constitutional Law’ (2005) 89 *Minnesota Law Review* 653–7.

solely to comparative constitutionalism, and a new focus on comparison in constitutional law courses at many universities.¹⁹

There are undoubtedly numerous forces that have contributed to the surge of interest in comparative constitutional law, but most scholars consider the global spread of constitutionalism and mass transplantation of certain basic constitutional ideas as pivotal.²⁰ Since the end of the Cold War, a substantial number of post-authoritarian regimes in Eastern Europe, Latin America, Asia, and Africa have adopted new written constitutions, or significantly amended existing ones, as part of their transition to democracy.²¹ In doing so, they have borrowed successful elements from the constitutional models of other countries, particularly the US Bill of Rights²² and the Canadian Charter of Rights and Freedoms.²³ During the same period the EU has been engaged in a process of harmonization and ‘constitutionalization’ of human rights, and the European Court of Human Rights has become a leading source of jurisprudence internationally on human rights issues.²⁴

In addition to the frequent inclusion of human rights in modern constitutions, Hirschl has identified four other common features in constitutions adopted since the end of World War II: provisions establishing the key institutions of government and the relationships between them; provisions distributing government power; a method for amending the constitution; and provisions establishing relatively independent courts with jurisdiction over constitutional matters.²⁵ The result has been a substantial degree of harmonization amongst constitutions, which has inevitably led courts to refer to developments in the constitutional law of other, similar jurisdictions in interpreting their own constitutional documents.

These developments raise questions about the dominant view that constitutions emerge from and embody the particular history and political traditions of each nation.²⁶ They also undermine the traditional argument that public law, at least in the case of constitutional law, is too nationally-specific to be capable of comparative law’s functional aims of transplantation and harmonization. The explosion in comparative legal practice and scholarship is evidence that comparative studies in public law are both capable of achieving the traditional functionalist objectives of comparative law, but also of moving beyond them. For example, constitutional scholars have recently grappled with more theoretical questions such as how comparative constitutional studies might inform theories of constitutional interpretation²⁷ and the effect of

¹⁹ Hirschl (n 13) 13.

²⁰ See eg Hirschl (n 13) 14; B Ackerman, ‘The Rise of World Constitutionalism’ (1997) 83 *VaLRev* 772; M Tushnet, ‘The Possibilities of Comparative Constitutional Law’ (1999) 108 *YaleLJ* 1226–8; Law (n 18) 658–9; Choudhry (n 15) 821.

²¹ Hirschl (n 13) 14.

²² United States Constitution amend I–X.

²³ Canada Act 1982 (UK) c 11, sch B Pt 1; Choudhry (n 15) 821–2.

²⁴ Hirschl (n 13) 14.

²⁵ *ibid* 15.

²⁶ Choudhry (n 15) 822.

²⁷ See eg Choudhry (n 15).

globalized constitutional law on national sovereignty and judicial accountability.²⁸ Comparative constitutional lawyers have also begun to engage with difficult methodological issues, which have generally been avoided in comparative law.²⁹

The rise in comparative constitutional scholarship has also done much to discredit the argument that public law is unsuitable for comparison as a result of the contextual complexity created by external factors such as politics. A number of comparative scholars have pointed out that while this issue may be more pronounced in comparative public law, external factors affect private law as well, so that there is no inherent difference between the two in this respect.³⁰ Pierre Legrand contends that the neglect of social, political, economic, and other external factors has in fact been a major impediment to successful comparative legal analysis in both private and public law.³¹ In a similar vein, Hirschl has argued that contextual complexity has been used in law as an ‘easy excuse for avoiding serious comparative work’.³² He points out that contextual complexity is not an issue unique to law, and is in fact far more pronounced in other disciplines, arguing that:

even the concern with context, meaning and contingencies does not prevent the disciplines of history and social anthropology—two disciplines that often rely on thorough investigations on a single case study—from attempting to advance knowledge in a way that ultimately surpasses their specific case study.³³

In other words, if other social sciences have been capable of developing adequate methods and theoretical frameworks to deal with contextual complexity, there is no reason why law should not be able to do the same. Hirschl joins a host of others in calling for a greater attention to theory and method in order to strengthen comparative law scholarship generally, and comparative constitutionalism in particular.³⁴

²⁸ Law (n 18).

²⁹ K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd edn, Clarendon Press 1998) 33; Reimann, ‘The Progress and Failure of Comparative Law’ (n 2) 687–90. Examples of comparative constitutional lawyers engaging with methodological challenges include: Hirschl (n 13); Tushnet (n 20), in particular his critique of functionalism at 1265–9.

³⁰ See eg Örücü, *The Enigma of Comparative Law* (n 10) 173; JL Mashaw, ‘Explaining Administrative Law: Reflections on Federal Administrative Law in Nineteenth Century America’ in Rose-Ackerman and Lindseth (eds), (n 3) 44.

³¹ Legrand, ‘How to Compare Now’ (n 2) 235–6.

³² Hirschl (n 13) 27.

³³ *ibid* 28.

³⁴ *ibid* 26–37. See also WJ Kamba, ‘Comparative Law: A Theoretical Framework’ (1974) 23 ICLQ 487–8; Legrand, ‘How to Compare Now’ (n 2); B Marquesinis, ‘Comparative Law in Search of an Audience’ (1990) 53 ModLRev 262; Reimann, ‘The Progress and Failure of Comparative Law’ (n 2); Samuel (n 2).

II. NEGLECT OF COMPARATIVE METHODS IN ADMINISTRATIVE LAW

Despite promising beginnings, with important early twentieth-century studies in comparative administrative law by American, English and European scholars,³⁵ there has not been a sustained interest in comparison in administrative law, either in legal scholarship or practice.³⁶ Nor has there been the same worldwide ‘explosion’ in the use of comparative methods as seen in constitutional law, particularly within the judiciary. While comparative constitutional law is clearly now an established discipline, comparative administrative law has been described as ‘relatively young’³⁷ and ‘less advanced’.³⁸ The divide between the two areas of public law is even more stark outside of Europe where comparative studies in administrative law are rare.³⁹ There has been escalating interest in comparison within European administrative law in the past two decades, predominantly due to the establishment and growth of the EU, as will be discussed in the third section of this article.⁴⁰ Though even within Europe, comparative administrative law has been argued to have lagged behind other areas of both public and private law, and considerable scope for comparative research in the discipline has been identified.⁴¹ Thus there remains a significant imbalance in both the quantity and depth of comparative analysis in administrative law compared with constitutional law in both legal scholarship and practice. While constitutional law is becoming ever more comparative, with judges regularly citing each other’s opinions, administrative law remains bound to the nation state.⁴²

There are undoubtedly numerous reasons for the imbalance in the use of comparison between the two areas of public law. Scholars have given a range of explanations, the three most common of which are discussed below: the relatively recent development of administrative law; its technical complexity and scope; and administrative law’s continued national distinctiveness. Each is considered in turn below. A fourth reason, and possibly the main one, though it is rarely acknowledged, is the general perception that constitutional law is more important than administrative law for resolving ‘the great issues of state and

³⁵ Including Maurice Hauriou, Frank Goodnow, Albert Venn Dicey and Otto Mayer.

³⁶ S Rose-Ackerman and P Lindseth, ‘Comparative Administrative Law: Outlining a Field of Study’ (2010) 28 Windsor Yearbook of Access to Justice 435.

³⁷ Nehl (n 11) 18.

³⁸ Ziller (n 7) 604.

³⁹ There are obviously exceptions. The work of the late Michael Taggart, for instance, contained much valuable and insightful comparison, see for example M Taggart, ‘Australian Exceptionalism in Judicial Review’ (2008) 36 Federal Law Review 1. There are also a number of comparative administrative lawyers in North America, many of whom are cited throughout this article.

⁴⁰ The establishment of a number of research groups and forums, including the Research Network on EU Administrative Law (www.reneual.eu) and European Group of Public Law (www.eplo.eu) are evidence of the growing interest in comparison in Europe over the past two decades.

⁴¹ R Caranta, ‘Pleading for European Comparative Law: What is the Place for Comparative Law in Europe?’ (2009) 2 Review of European Administrative Law 168–75; H Hofmann, ‘Seven Challenges for EU Administrative Law’ (2009) 2 Review of European Administrative Law 37–8.

⁴² Ginsburg (n 4) 117.

society'.⁴³ The fourth section in this part argues that the convergence of constitutions to reflect global norms means that administrative law may now provide a better reflection of the ways these 'great issues' are resolved. As such, it is argued that the distinctiveness of administrative law and resulting methodological challenges ought not preclude comparison.

A. The Relatively Recent Development of Administrative Law

A simple explanation for the greater development of comparative constitutional law may be the relative newness of the administrative state and therefore administrative law. Mannori and Sordi have shown that the concept of administrative power and law is a distinctly modern phenomenon, emerging in France and later Germany during the nineteenth century and not developing into a cohesive area of law in the English-speaking world until the twentieth century.⁴⁴ Similarly, Nehl argues that the common law world's resistance to recognizing administrative law as a separate body of law, largely due to Dicey's influence, is one reason for the 'longstanding lack of comparative work on administrative law'.⁴⁵

However, the rapid expansion of modern bureaucracies and the regulatory state during twentieth century has made administrative law at least as important as private law, if not more so, for protecting the rights and interests of individuals in modern societies. As Matthias Reimann has summarized:

American legal discourse in the last few decades has been primarily concerned with judicial review and basic rights, courts and administrative agencies—with welfare, labor, and health law, environmental protection, and immigration issues not far behind.⁴⁶

Reimann's assessment holds true in much of the world. Administrative law has become more important over the past two decades in East Asia as an aspect of democratization processes,⁴⁷ and in Latin America alongside the establishment of numerous US-style independent agencies as a means of regulating infrastructure industries.⁴⁸ Furthermore, since the early 1990s, the regulatory reach of the EU has been significantly extended by the establishment of

⁴³ *ibid.*

⁴⁴ L Mannori and B Sordi, 'Science of Administration and Administrative Law' in P Becchi et al (eds), *A History of the Philosophy of Law in the Civil Law World: 1600–1900* (Springer 2009). Though it should be noted that many elements of the English system of administrative law, such as its traditional remedies, can be traced back to well before the twentieth century. For a history of the origins of the various elements of English administrative law see: L Jaffe and E Henderson, 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 LQR 345.

⁴⁵ Nehl (n 11) 18.

⁴⁶ Reimann, 'Stepping out of the European Shadow' (n 12) 640.

⁴⁷ Ohnesorge (n 3) 89.

⁴⁸ M Mota Prado, 'Presidential Dominance from a Comparative Perspective: The Relationship between the Executive Branch and Regulatory Agencies in Brazil' in Rose-Ackerman and Lindseth (eds), (n 3) 225.

numerous European agencies regulating a diverse range of areas. The growth in EU bureaucracy, and concerns about how EU agencies can be held accountable when they exist outside of the context of the ordinary sovereign state, has highlighted the importance of administrative law and its oversight mechanisms.⁴⁹ So, although administrative law has only evolved as a distinct area of law relatively recently, it has rapidly become an important and prolific area of law.

B. Technical Complexity and Scope of Administrative Law

A second explanation for the lesser development of comparative administrative law is ‘its higher degree of technical complexity due to a much greater amount of regulation and case law to be studied than in constitutional law’.⁵⁰ This is particularly the case now that all but a handful of States have written constitutional texts. While constitutional law frequently extends beyond written texts and their interpretation, to include constitutional conventions⁵¹ and ordinary legislation,⁵² for the most part it revolves around the meaning of a major legal document.⁵³ By contrast, administrative law frequently lacks such a central reference point, and may be found in a large number of acts, regulations, instruments, directions and government policies. In addition, often more bodies will be directly involved in making administrative law than constitutional law.

A brief comparison between constitutional and administrative law in Germany provides a good example. German constitutional law largely involves the interpretation of one instrument—the *Grundgesetz für die Bundesrepublik Deutschland* (Basic Law for the Federal Republic of Germany)—by one court—the *Bundesverfassungsgericht* (Constitutional

⁴⁹ A few of the many discussions of this issue include: P Craig, *EU Administrative Law* (2nd edn, Oxford University Press 2012) ch 1 and 2; E Nieto-Garrido and IM Delgado, *European Administrative Law in the Constitutional Treaty* (Hart Publishing 2007) ch 4; H Hofmann and A Türk, ‘The Development of Integrated Administration in the EU and its Consequences’ (2007) 13 *ELJ* 253; B Kingsbury, N Krisch and RB Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law&ContempProbs* 15. ⁵⁰ Ziller (n 7) 604.

⁵¹ Constitutional conventions play a particularly important role in English constitutional law, which famously lacks a written constitutional text. However, they can also play an important role in countries with written constitutions, such as the United States and the Netherlands: M Claes, ‘Constitutional Law’ in Smits (ed), (n 1) 189.

⁵² For example Canada’s Supreme Court Act, RSC 1985, c S-26 arguably forms part of the Canadian Constitution, but was enacted by Parliament as ordinary legislation. For a discussion of this issue see R Cheffins, ‘The Constitution Act, 1982 and the Amending Formula: Political and Legal Implications’ (1982) 4 *Supreme Court Law Review* 53–4 (who argues that the Supreme Court Act is entrenched in the constitution); P Hogg, *Constitutional Law of Canada* (5th edn, Thompson/Carswell 2010) vol 1, 8-2–8-3, 11-9 (who argues that it is an ordinary act of Parliament).

⁵³ There are exceptions—for instance Canada’s Constitution is not found in one core document, but comprises a series of statutes, amendments, orders and proclamations.

Court). By contrast, German administrative law is found in a range of sources including general legislation relating to administrative procedure,⁵⁴ the procedural rules for administrative courts⁵⁵ which are supplemented by general civil procedure and court rules, and special laws regulating specific subject areas of decision-making. Administrative law matters are determined by a system of administrative tribunals and courts with the *Bundesverwaltungsgericht* (Federal Administrative Court) at their apex. However certain areas of administrative decision-making including taxation, labour law and social security have separate federal courts and procedural rules.

Another issue that may add to the technical complexity of administrative law in some countries is the fact that administrative powers are divided between central and regional or local governments. The implications of federalism for administrative law are unclear and not uniform.⁵⁶ In some federations, such as Belgium, administrative law is not decentralized despite the fact that administrative power is.⁵⁷ In others, such as the US, Canada and Australia, while there is a unified common law and states tend to apply federal administrative law, subtle differences in the wording of general administrative law statutes as well as other legislation can create differences between the law that applies in different states and provinces. For instance in Australia, judicial review statutes that aim to simplify the common law and expand some grounds of review have been adopted at the federal level and in some states and territories, but not others.⁵⁸ This has resulted in subtle differences in judicial review procedure and some of the grounds of review across Australia.⁵⁹ Furthermore two Australian jurisdictions—the Australian Capital Territory and Victoria—have adopted human rights legislation which expressly affects both administrative decision-making and the grounds of review in those jurisdictions.⁶⁰ Within the EU, while each State has its own distinct administrative law, decisions of the European Court of Justice (ECJ) and European Court of Human Rights (ECtHR) prevail over those of national courts with respect to

⁵⁴ *Verwaltungsverfahrensgesetz* [Administrative Procedure Act] (Germany) (VwVfg).

⁵⁵ *Verwaltungsgerichtsordnung* [Administrative Procedure Code] (Germany) (VwVGO).

⁵⁶ Seerden and Stroink (n 10) 347.

⁵⁷ *ibid.*

⁵⁸ General statutes have been adopted at the federal level and in the Australian Capital Territory, Queensland, Tasmania and Victoria: *Administrative Decisions (Judicial Review) Act 1977* (Cth); *Administrative Decisions (Judicial Review) Act 1989* (ACT); *Judicial Review Act 1991* (Qld); *Judicial Review Act 2000* (Tas); *Administrative Law Act 1978* (Vic). There is no general judicial review legislation in New South Wales, South Australia, Western Australia or the Northern Territory.

⁵⁹ For discussion of some of the issues raised by the codification of judicial review in Australia see M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (4th edn, Lawbook Co 2009) 259–65. M Aronson, ‘Is the ADJR Act Hampering the Development of Australian Administrative Law?’ (2004) 15 *Public Law Review* 203; M Groves, ‘Should the *Administrative Law Act 1978* (Vic) Be Repealed?’ (2010) 34 *MelbULReview* 452.

⁶⁰ *Human Rights Act 2004* (ACT), s 40B; *Charter of Human Rights and Responsibilities Act 2006* (Vic), section 38.

EU legislation and treaties, including the European Convention on Human Rights.⁶¹ The result is that the sources of administrative law tend to be many and varied, making it a less manageable body of doctrine to compare between jurisdictions than constitutional law, at least methodologically. However, as argued above, the methodological challenges of comparative study in administrative law as a result of its scope and complexity should not be used as an excuse for avoiding important comparative work.

C. Continuing National Specificity of Administrative Law

A third explanation for the imbalance between comparative constitutional and administrative law is that the latter continues to be more jurisdiction-specific.⁶² Two particular aspects of administrative law highlight ongoing divergences amongst jurisdictions: institutional structures; and the boundaries of administrative law.

1. The diverse administrative law institutions

One of the clearest differences between jurisdictions in administrative law is the nature, independence, and constitutional position of the institutions charged with overseeing administrative action in different countries. In France, and many of its former colonies, administrative courts and civil courts remain completely separate. This reflects an interpretation of the separation of powers which requires judicial and administrative power to remain distinct and prevents judges from interfering with the operation of executive bodies.⁶³ The Conseil d'Etat, at the apex of French *droit administratif* (administrative law), is staffed by expert administrators and has the dual functions of advising government and arbitrating disputes about executive power. These dual roles of the Conseil d'Etat have come into conflict with the procedural fairness principles of English administrative law in decisions of the ECtHR. Adopting the aphorism of English law that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done',⁶⁴ the ECtHR has, on a number of occasions, suggested that the Conseil d'Etat may not be perceived as independent.⁶⁵ Yet in fact French administrative courts and tribunals have a long tradition of impartiality and independence guaranteed by rules requiring collegial decision-making, ensuring competitive recruitment and promotion of

⁶¹ Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

⁶² Ziller (n 7) 604.

⁶³ J Bell, *French Administrative Law* (5th edn, Clarendon Press 1998) 44–50.

⁶⁴ *R v Sussex Justices; ex parte McCarthy* [1924] 1 KB 256, 259 (Lord Chief Justice Hewart).

⁶⁵ See eg *Procola v Luxembourg* (1995) 22 EHRR 193; *Kleyn and Ors v The Netherlands* [GC] (ECtHR, nos 39343/98, 39651/98, 43147/98 and 46664/99, 6 May 2003) [190]–[198]; *Sacilor Lormines v France* (ECtHR, no 65411/01, 9 November 2006) [59]–[74].

judges and preventing their removal, as well as a longstanding practice in the Conseil d'Etat that judges not advise and judge on the same matter.⁶⁶

In Scandinavian countries the office of Ombudsman is the primary institution for resolving administrative disputes, although separate administrative courts also play a role.⁶⁷ The institution has its modern origins in Sweden, where the office of the *Justitie-ombudsman*, or Parliamentary Ombudsman, was established in 1809 to provide a simple and effective mechanism for protecting citizens from arbitrary government decision-making. The office of Ombudsman was created by, and reports to, the Parliament as a way of allowing the legislature to monitor the executive. Like the French Conseil d'Etat, Sweden's Ombudsman also reflects the separation of powers as envisaged by Montesquieu.⁶⁸ In contrast to the French Conseil d'Etat, Sweden's Ombudsman does not form part of the executive, but is an aspect of the legislature's oversight of executive agencies. Although the precise functions and powers of the ombudsmen in various jurisdictions differ, they are generally able to investigate complaints directly from the public as well as initiate their own investigations into suspected maladministration. In Sweden, where the Ombudsman finds an action of government to be in violation of law, they can take the matter to court and act as prosecutor. Alternatively, the Ombudsman may recommend disciplinary action or report to Parliament making suggestions for improving administrative processes and structures.⁶⁹

Both of these continental institutions contrast with the common law system of administrative law, which has been heavily influenced by Dicey's interpretation of the rule of law. Dicey was suspicious of the idea of a separate body of administrative law, arguing that the French *droit administratif* 'rests upon ideas foreign to English law'.⁷⁰ He submitted that the rule of law requires that the 'ordinary courts' have jurisdiction to apply the 'ordinary law' to 'every man, whatever be his rank or condition', including ministers and bureaucrats.⁷¹ Accordingly, in England, as in many of its former colonies, ordinary courts are the final arbiters of the lawfulness of executive action. Despite Dicey's warnings, a separate body of administrative law began to develop in England during the early twentieth century, and statutory tribunals became increasingly common. These tribunals were intended to provide more efficient justice than

⁶⁶ See the submissions of the French Government in *Sacilor Lormines v France* (EctHR, no 65411/01, 9 November 2006), paras 52–58; J Bell, *French Administrative Law* (n 63) 66. M Patrick Frydman, 'Administrative Justice in France', (Keynote Address delivered at the 11th Australasian Institute of Judicial Administration Tribunals Conference, Surfers Paradise, 5 June 2008) <<http://www.aat.gov.au/Publications/SpeechesAndPapers.htm>>.

⁶⁷ C Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 EJIL 208.

⁶⁸ Parliamentary Ombudsman, 'History' <<http://www.jo.se>>.

⁶⁹ PT Levin, 'The Swedish Model of Public Administration: Separation of Powers – the Swedish Style' (2009) 4 Journal of Administration and Governance 41.

⁷⁰ AV Dicey, *Introduction to the Study of the Law of the Constitution* (9th edn, MacMillan and Co 1939) 388.

⁷¹ *ibid* 193.

courts in specialized areas, such as social security and taxation decision-making.

The issue of where tribunals fit within the structure of British government has been the subject of some contention. They are established by the legislature, responsible for administering social services, and their members are usually required to conduct themselves in a judicial manner.⁷² In Australia, which adopted the English system of administrative law and tribunals but has a strict separation of judicial power, tribunals fall, at least from a constitutional perspective, within the executive arm of government.⁷³ Yet in the UK, the 1957 report by the Franks Committee rejected this view, finding that ‘tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration’.⁷⁴ The links between tribunals and the judiciary were strengthened following the 2001 Leggatt Report⁷⁵ and a White Paper⁷⁶ accepting many of its recommendations.⁷⁷ There are now a range of mechanisms in UK law which treat tribunal members as judges, and guarantee their independence and impartiality.⁷⁸ The Upper Tribunal, which sits at the apex of the UK’s tribunal system was also established in 2007 as ‘a superior court of the record’, reinforcing the judicial status of tribunals. This means that its decisions are not subject to the same level of oversight through judicial review as decisions made by the executive.⁷⁹

In the United States, most of the action in administrative law centres on the Administrative Procedure Act 1946 (APA), which devotes much of its attention to public participation in the drafting of subordinate legislation. The APA also provides that agencies may appoint ‘administrative law judges’ to adjudicate matters. Administrative law judges are usually embedded within the agency whose decisions they review.⁸⁰ The APA provides a number of safeguards to ensure that administrative law judges enjoy some measure of independence; however, their decisions are subject to review by the relevant agency and can be overturned for legal or policy reasons. This arrangement has attracted much discussion about the position of administrative law judges in the strict tripartite structure of US government, in particular whether administrative law judges exercise the judicial power of the United States, which according to

⁷² G Marshall, ‘The Franks Report on Administrative Tribunals and Enquiries’ (1957) 35 Public Administration 349–50.

⁷³ R Creyke and J McMillan, *Control of Government Action: Text, Cases and Commentary* (2nd edn, LexisNexis Butterworths 2009) 155–9.

⁷⁴ *Report of the Committee on Administrative Tribunals and Enquiries*, Report Cmnd 218, (1957) [40].

⁷⁵ Sir A Leggatt, ‘Tribunals for Users: One System, One Service’ (2001) <www.tribunals-review.org.uk>.

⁷⁶ Department for Constitutional Affairs, ‘Transforming Public Services, Complaints, Redress and Tribunals’, Report Cm 6243 (2004) <www.dca.gov.uk/pubs/adminjust/transformfull.pdf>.

⁷⁷ Sir W Wade and C Forsyth, *Administrative Law* (10th edn, Oxford 2009) 776–7.

⁷⁸ *ibid* 777–8. ⁷⁹ *ibid* 780.

⁸⁰ P Cane, ‘Judicial Review and Merits Review: Comparing Administrative Adjudication by Courts and Tribunals’ in Rose-Ackerman and Lindseth (eds), (n 3) 440.

Article III of the US Constitution may only be vested in the judicial branch.⁸¹ However, a long line of Supreme Court authority permits Congress to delegate certain seemingly judicial functions, including the adjudication of administrative decisions, to ‘legislative courts’ and administrative agencies, subject to certain ‘essential elements’ of some administrative decisions being subject to judicial oversight by an Article III court.⁸² These unique institutional arrangements at the foundation of US administrative law are a direct result of the way in which the bureaucracy developed historically, and of early decisions of the Supreme Court.⁸³

Even from these few examples, all of which come from a relatively similar, broadly ‘Western’ perspective in which administrative law plays the role of policing executive power, it is clear that the institutional arrangements designed to ensure administrative accountability vary significantly between jurisdictions. Fundamental differences exist in the place of administrative law institutions in the structure of government: Sweden’s Ombudsman reports to the legislature; French administrative courts and tribunals form part of the executive; and common-law countries vest ultimate authority over the lawfulness of government action in ordinary courts, but have their own unique arrangements for bodies reviewing administrative action at the lower levels. The functions and powers of administrative institutions also vary significantly. Much depends on the historical development of the bureaucracy, as well as on underlying constitutional principles such as the rule of law and understandings of the separation of powers.

2. The boundaries of administrative law

A second area of variation which poses challenges for comparative administrative law relates to the imprecise and varying boundaries of what is considered to be ‘administrative law’ in different jurisdictions. The lines between administrative law and other areas of law—both public and private law—differ between jurisdictions. Two particularly challenging areas of overlap are with constitutional law and contract law.

The trend towards constitutionalism has highlighted the movable line between constitutional and administrative law, as modern constitutions have taken different approaches to the entrenchment of administrative law and

⁸¹ See generally RH Fallon Jr, ‘Of Legislative Courts, Administrative Agencies, and Article III’, (1988) 101 HarvLR 916–8; RJ Pierce Jr, *Administrative Law Treatise* (5th edn, Wolters Kluwer 2010) 132–45.

⁸² The law on precisely which decisions require judicial oversight, and the level of oversight required is not settled: Fallon *ibid*; Pierce *ibid* 132–45. The requirement for oversight of ‘essential elements’ of administrative decisions by Article III courts, based on the principle established in *Marbury v Madison* 5 US (1 Cranch) 137 (1803), has been influential throughout the common law world: see M Tushnet, ‘Marbury v Madison Around the World’ (2004) 71 TennLRev 251. Yet, interestingly, the exception to this doctrine in the US appears to have largely gone unnoticed elsewhere.⁸⁵ Fallon (n 81).

oversight institutions. For example, Article 33 of South Africa's Constitution⁸⁴ entrenches judicial review of administrative action in the constitution, providing:

1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
2. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
3. National legislation must be enacted to give effect to these rights, and must
 - a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - b. impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - c. promote an efficient administration.

Other constitutions entrench the role of independent agencies in overseeing aspects of bureaucratic action, such as ombudsmen, anti-corruption bodies or electoral agencies.⁸⁵ Such provisions make it difficult to define the boundary between constitutional and administrative law for the purposes of international comparison.

There are similar inconsistencies between jurisdictions on the question of whether administrative law extends to regulate government contracts. Auby has identified three main approaches.⁸⁶ Most common-law jurisdictions treat contracts made by government bodies in the same way as contracts between private parties, dealing with them under the ordinary principles of contract law.⁸⁷ By contrast in various civil law jurisdictions, including France and Spain, many of the contracts made by public bodies are distinguished from contracts between private parties, and are subject to the jurisdiction of administrative courts and the rules of administrative law.⁸⁸ However, other civil law jurisdictions, such as the Netherlands⁸⁹ and, until recently Germany,⁹⁰ treat government contracts theoretically as ordinary private

⁸⁴ Constitution of the Republic of South Africa 1996 (South Africa).

⁸⁵ JM Ackerman, 'Understanding Independent Accountability Agencies' in Rose-Ackerman and Lindseth (eds), (n 3) 271–4.

⁸⁶ J Auby, 'Comparative Approaches to the Rise of Contract in the Public Sphere' (2007) PUBL 40.

⁸⁷ See eg B Jones and K Thompson, 'Administrative Law in the UK' in Seerden and Stroink (eds), (n 10) 218–9 (regarding the English position); N Seddon, *Government Contracts: Federal State and Local* (Federation Press 1995) (regarding the Australian position); P Emmanuelli, *Government Procurement* (2nd edn, Butterworths 2008) (regarding the Canadian position).

⁸⁸ Auby, 'Comparative Approaches to the Rise of Contract in the Public Sphere' (n 86) 46.

⁸⁹ R Seerden and F Stroink, 'Administrative Law in the Netherlands' in Seerden and Stroink (eds) (n 10) 145.

⁹⁰ Since 1998, German law has recognized a relatively small category of administrative contracts which are dealt with in administrative courts. See P Huber, 'The Europeanization of Public Procurement in Germany' (2001) 7 EPL 33.

contracts but attach special rules to a restricted category of government contracts.⁹¹ Auby argues that the way in which legal systems define the boundaries between contract law and administrative law is 'in direct relation to the way each system apprehends the public law/private law divide'.⁹²

These differences have practical implications. They mean that the procedures for dealing with disputes and the availability of remedies will differ across jurisdictions depending on whether an action is classified as a constitutional, administrative, or private law dispute. However, they also signal some fundamental disagreements between major systems of administrative law about the scope and nature of the subject, which can make administrative law difficult to define and thus compare across jurisdictions. Comparing government contracts in a jurisdiction which treats them as part of public law to a jurisdiction which considers them no different from contracts between individuals will be challenging because the law regulating contracts in each of the jurisdictions is designed to achieve different goals. The first is designed to ensure a level of public accountability and fairness in the delivery of government contracts, while the latter is simply concerned with ensuring both contracting parties fulfil their contractual obligations. This can make it difficult for a comparative study to achieve the traditional functionalist goals of comparative legal study.

D. The Hierarchy of Public Law

A final reason for the imbalance between the quantity and depth of comparative study in constitutional and administrative law is the fact that the former is widely regarded as the superior field of public law. The argument has been both made and rebutted by American Professor Tom Ginsburg, who explains that constitutional law is perceived as being concerned with 'the highest norms of the state, while administrative law governs sub-legislative action, somewhat lower in the hierarchy of sources and hence in importance'.⁹³ Thus he describes administrative law as the 'poor relation of public law; the hard-working, unglamorous cousin laboring in the shadow of constitutional law'.⁹⁴ Hofmann makes a similar point, suggesting that administrative law has been sidelined for many years in the EU as a result of European public lawyers' preoccupation with the constitutionalization of EU laws.⁹⁵ Although this hierarchy in public law is seldom acknowledged openly, it is likely to have contributed to the relative inattention to comparative administrative law compared with comparative constitutional law.

However, Ginsburg has also provided a number of reasons for why the traditional perception that constitutional law is more important than

⁹¹ 'Comparative Approaches to the Rise of Contract in the Public Sphere' (n 86) 47–8.

⁹² *ibid* 48.

⁹³ Ginsburg (n 4) 117.

⁹⁴ *ibid* 117.

⁹⁵ Hofmann (n 41) 37–8.

administrative law in displaying and forming the relationship between government and the citizenry is no longer accurate. He argues that as constitutions have converged, in large part as a result of the normative influence of international and regional human rights treaties, administrative law institutions may now provide a better reflection of domestic governance arrangements than constitutions.⁹⁶ Furthermore, Ginsburg shows that administrative law has proven to be more enduring than constitutions, reinforcing the argument that it may better indicate the development of ideas about the relationship between citizens and government.⁹⁷ In other words, administrative law has in some ways become ‘more constitutional than constitutional law’.⁹⁸ The result is that, contrary to the traditional arguments against comparative public law, the distinctiveness of administrative law actually provides some compelling reasons for comparison.

Various factors have contributed to the global spread of constitutionalism, but constitutional scholars are generally in agreement about the significance of the normative influence of international treaties and organizations.⁹⁹ During the past 60 years, following the establishment of the United Nations, written constitutions ‘have become so important for state legitimacy in the world system that some social scientists characterize them as universal requirements’.¹⁰⁰ The global community dictates that written constitutions should embody certain fundamental ideas and principles—including democracy, the rule of law, and respect for human rights—which has caused written constitutions to converge.¹⁰¹ This is particularly true of the expression of human rights in modern constitutions, which tend to follow the norms set out in major international and regional human rights treaties.¹⁰² As a result, it has been argued, written constitutions are more a symbol of legitimacy and modernity to the international community than a reflection of domestic governance arrangements.¹⁰³

In contrast, administrative law and the institutions that enforce it are rarely ascribed symbolic value:

Few are willing to die for the principle that expert regulators ought to hold a public hearing before deciding how many parts per million of a pollutant can be released by a smokestack, or that an individual has a right to pre-deprivation hearing regarding loss of social security eligibility.¹⁰⁴

⁹⁶ Ginsburg (n 4) 119–21.

⁹⁷ *ibid* 121–3.

⁹⁸ *ibid* 117.

⁹⁹ *ibid* 119.

¹⁰⁰ J Go, ‘Globalizing Constitutionalism? Views from the Postcolony, 1945–2000’ (2003) 18 *International Sociology* 91.

¹⁰¹ *ibid* 80–1.

¹⁰² Z Elkins, T Ginsburg and B Simmons, ‘Constitutional Convergence in Human Rights? The Reciprocal Relationship Between Human Rights Treaties and National Constitutions’ (Bar-Ilan University Conference, ‘60 Years Since the Adoption of the Universal Declaration of Human Rights and Genocide Convention: Evaluating the Record’, December 2008) <www.globallawforum.org>.

¹⁰³ Ginsburg (n 4) 119.

¹⁰⁴ *ibid* 123.

Administrative law has been ‘built around a series of open-ended standards or adjustable parameters’¹⁰⁵ from which it can be difficult to extricate normative values. The absence, or at least obscurity, of the values underpinning administrative law may have acted as a deterrent against comparative analysis in the field. Yet administrative law’s relative lack of symbolic value is also one of the features that has allowed it to retain distinctive local qualities.¹⁰⁶ The very fact that administrative law’s institutions and principles are not outward displays of norms, but inward reflections of governance values, make them in some ways a far better reflection of the negotiated relationship between government and citizen than its written constitution.

An example might be found in the comparison of human rights between jurisdictions. While virtually all constitutions enacted since World War II contain human rights protections,¹⁰⁷ the actual extent to which human rights are upheld in any given country varies substantially.¹⁰⁸ An enormous range of factors will obviously influence the extent to which human rights are upheld in any jurisdiction, however one important factor is the administrative law structures charged with holding the government to account. The strength and independence of institutions responsible for ensuring that governments act within the lawful limits of their power and do not abuse their discretion, the remedies they are capable of enforcing, and the ability of individuals to access those institutions and remedies all play a pivotal role in determining the practical extent to which human rights are guaranteed. As Woodrow Wilson famously quoted from Reinhold Niebuhr, ‘liberty depends incomparably more upon administration than upon constitution’.¹⁰⁹ Therefore, comparing administrative law and its institutional frameworks across jurisdictions will assist public lawyers to explain the gaps and limits of written constitutions.

The second argument Ginsburg makes for why administrative law can provide a more accurate picture of the relationship between government and citizen than constitutional law, warranting greater attention to comparison, is the relative endurance and entrenchment of administrative law.¹¹⁰ Ginsburg explains that entrenchment and endurance are usually features attributed to constitutions. Constitutionalism is premised on the idea that the higher law of constitutions is more entrenched than ordinary law, so that constitutions ordinarily require a greater level of consensus to amend than ordinary legislation. This also presupposes that constitutions will be more enduring than ordinary law. Yet France has had 11 constitutions since 1791 all of which its

¹⁰⁵ A Vermeule, ‘Our Schmittian Administrative Law’ (2009) 122 *HarvLRev* 1097.

¹⁰⁶ Ginsburg (n 4) 119. ¹⁰⁷ Go (n 100) 80.

¹⁰⁸ See generally US State Department, ‘Country Reports on Human Rights Practices 2010’ <<http://www.state.gov/j/drl/rls/hrrpt/2010/index.htm>>; Amnesty International, ‘Report 2011: The State of the World’s Human Rights’ <<http://www.amnesty.org/en/annual-report/2011/downloads>>.

¹⁰⁹ W Wilson, ‘The Study of Administration’ (1887) 2 *PolSciQ* 211, quoting Barthold Niebuhr (no reference provided). ¹¹⁰ Ginsburg (n 4) 122.

administrative law institutions have endured. Historically, the Swedish Ombudsman, German *Bundesverwaltungsgericht*, Thai Council of State, and Soviet Procuracy have all survived similar significant constitutional instability. Ginsburg concludes that in many cases, administrative law has proven more enduring and entrenched than constitutions.¹¹¹

Ongoing divergences between jurisdictions with respect to both the institutions and principles of administrative law may make comparison more challenging than in areas of law where there has been greater harmonization. Overcoming these challenges will require careful attention to methodology and theory within the discipline. However, these concerns are not unique to comparative administrative law. Many have argued that comparative law generally needs to develop more coherent methodological and theoretical frameworks.¹¹² Furthermore, the divergences in administrative law do not mean that comparison will be futile. To the contrary, as Ginsburg has shown, while constitutions may spell out important legal structures and principles, in large part for the purposes of conforming to the expectations of the international community, administrative law structures determine the extent to which constitutional norms in fact form a part of the law in any jurisdiction. The latter have also proven more stable and enduring in many cases. Accordingly, analysing the institutional framework and principles of administrative law will provide comparative public lawyers with a more sophisticated picture of the enduring norms that dictate the relationship between the people and the State than comparing written constitutions alone.

III. CONVERGENCES IN ADMINISTRATIVE LAW

While administrative law may not have experienced the same degree of global convergence as constitutions have, there has nevertheless been some harmonization of values caused by the spread of certain key European and Anglo-American administrative law institutions and principles in recent decades.¹¹³ There has also been a significant degree of harmonization in the administrative law of EU Member States, particularly over the past two decades. This not only demonstrates that the traditional objectives of comparative legal study do translate to administrative law, but also means that the major systems of administrative law now share ‘a large array of common discussions, similar techniques and converging theoretical approaches’.¹¹⁴ This section examines some of these convergences and

¹¹¹ *ibid* 117.

¹¹² See eg Hirschl (n 13) 26; Legrand, ‘How to Compare Now’ (n 2); Reimann, ‘The Progress and Failure of Comparative Law’ (n 2); Samuel (n 2).

¹¹³ This article makes no judgment as to the desirability or otherwise of the global diffusion of this particular Western administrative law model. For such a discussion see Harlow (n 67) 207–14.

¹¹⁴ Auby, ‘Comparative Approaches to the Rise of Contract in the Public Sphere’ (n 86) 40.

considers three trends in administrative law that would benefit from further comparative study.

Several forces have contributed to administrative law institutions and structures being borrowed and transplanted from one jurisdiction to another. Colonization led to the spread of French, English and Dutch systems of administrative law throughout Africa and Asia.¹¹⁵ Other countries deliberately sought out systems of administrative law on which to model their own reforms. For example, John Ohnesorge has examined the adoption of German administrative law institutions in East Asia throughout the late nineteenth and twentieth centuries.¹¹⁶ His analysis shows that both Japan and China borrowed heavily from German and later US administrative law, establishing separate administrative courts with an emphasis on overseeing independent regulatory bodies, and spread this tradition throughout the region through colonization.¹¹⁷ Esin Örücü has similarly surveyed the influence of French administrative law in Turkey.¹¹⁸ There are also more recent examples of deliberate borrowing of foreign best-practice models in administrative law. For example, the Swedish institution of the Ombudsman has spread rapidly throughout the world, with over 120 countries having established some form of the office.¹¹⁹

However, over the past 20 years the same forces that have led to the spread of constitutionalism have also resulted in some important convergences in administrative law values and principles. A particularly important force has been the growth of regional and international agencies, and the development of a 'global administrative law'.¹²⁰ The best examples are found in the EU, which has been described as 'a vast regulatory enterprise' that is now engaged in rule-making and decision-making on a wide range of issues including pharmaceutical regulation, the environment, aviation safety, and intellectual property law.¹²¹ In order to regulate these issues, the EU has set up numerous independent agencies, including the Office for Harmonization in the Internal Market (Trade Marks and Designs), the Community Fisheries Control Agency, and the European Aviation Safety Agency, to name a few.¹²² The EU has developed a variety of oversight structures for these independent agencies including: Council regulations, which set out procedural requirements for

¹¹⁵ JM Galabert, 'The Influence of the Conseil D'Etat outside France' (2000) 49 ICLQ 704–5.

¹¹⁶ Ohnesorge (n 3) 78–91.

¹¹⁷ *ibid* 82–9.

¹¹⁸ E Örücü, 'Conseil D'Etat: The French Layer of Turkish Administrative Law' (2000) 49 ICLQ 679.

¹¹⁹ Creyke and McMillan (n 73) 245.

¹²⁰ Kingsbury, Krisch and Stewart (n 49); E Chiti, 'EU and Global Administrative Organizations' in E Chiti and BG Mattarella (eds), *Global Administrative Law and EU Administrative Law: Relationships, Legal Issues and Comparison* (Springer, 2011).

¹²¹ GA Bermann, 'A Restatement of European Administrative Law: Problems and Prospects' in Rose-Ackerman and Lindseth (eds), (n 3) 595.

¹²² See generally European Union, 'Agencies' <http://europa.eu/agencies/regulatory_agencies_bodies/index_en.htm>.

specific agencies;¹²³ the conferral of judicial review functions on the ECJ;¹²⁴ and creating a European Ombudsman.¹²⁵

In establishing these oversight mechanisms, the EU drew from national systems of administrative law.¹²⁶ French law was particularly influential in the early stages of the development of EU administrative law, reflected in the wording of Article 263 of the Treaty on the Functioning of the European Union (TFEU).¹²⁷ Article 263 of the TFEU sets out four grounds on which the ECJ can review the lawfulness of the acts of EU agencies which mirror those available under French law: lack of competence; infringement of an essential procedural requirement; infringement of the Treaties or of any rule of law relating to its application; and misuse of powers.¹²⁸ However, in developing these grounds and the general principles of European administrative law, particularly in more recent years, the ECJ has been influenced by administrative law principles in other European nations. For instance German law has contributed to the adoption of the proportionality principle in EU administrative law and English law to the development of procedural rights and guarantees.¹²⁹

The influence of Scandinavian administrative law on EU law is also evident both in the ECJ's recognition of transparency as a principle of European administrative law¹³⁰ and in the establishment of the European Ombudsman. The European Ombudsman investigates complaints of maladministration in EU bodies, including independent agencies, and has developed the non-binding *European Code of Good Administrative Behaviour*, which was adopted by the Council in 2001.¹³¹ The Code draws from the domestic laws of various EU countries and judgments of the ECJ and ECtHR, particularly on Article 41 of the European Charter of Fundamental Rights guaranteeing a right to fair administration.

¹²³ See eg Council Regulation 58/2003 of December 19, 2002, which sets out procedural and operational rules for executive agencies responsible for operating Community programmes, including reporting structures (Articles 8 and 9), auditing (Article 20) and public access to documents (Article 23).

¹²⁴ Treaty on the Functioning of the European Union (adopted 7 February 1992, entered into force 1 November 1993) [2009] OJ C 115/119, Articles 263–267.

¹²⁵ Bermann (n 121) 598.

¹²⁶ See discussions in J Schwarze 'European Administrative Law in the Light of the Treaty of Lisbon' (2012) 18 EPL 287–8; R Caranta, 'Evolving Patterns and Change in the EU Governance and their Consequences on Judicial Protection' in R Caranta and A Gerbrandy (eds), *Traditions and Change in European Administrative Law* (Europa Law Publishing 2011) 21–3; R Widdershoven, 'European Administrative Law' in Seerden and Stroink (eds) (n 10) 260.

¹²⁷ Treaty on the Functioning of the European Union (adopted 7 February 1992, entered into force 1 November 1993) [2009] OJ C 115/119, Articles 263–7.

¹²⁸ Caranta, 'Evolving Patterns' (n 126) 21–2; Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (5th edn, Oxford University Press 2011) ch 15; Widdershoven (n 126) 278–86. ¹²⁹ Schwarze (n 126) 288. ¹³⁰ *ibid.*

¹³¹ European Ombudsman, 'The European Code of Good Administrative Behaviour' (2005) <<http://www.ombudsman.europa.eu/resources/code.faces>>. See also ME De Leeuw, 'The European Ombudsman's Role as a Developer of Norms of Good Administration' (2011) 17 EPL 349.

This new EU administrative law has also influenced developments in the domestic law of EU Member States:

In other words, after having been formed by a comparison of administrative law principles of the Member States, this new European Law itself started to reflect back on the national law, influencing and modifying it.¹³²

Schwarze explains that this process has taken place via three means: EU legislation; ECJ decisions on the administration of EU law; and the ‘voluntary adoption of European standards into national administrative law in its autonomous scope of application’.¹³³ Good examples are found in English administrative law’s adoption of a proportionality ground of review for decisions which limit human rights and changes to the test for bias, both of which were designed to reflect ECtHR case law.¹³⁴ Similar examples can be found across the EU.¹³⁵ The result has been a remarkable convergence in administrative law in Europe—described variously as the ‘Europeanization’ of administrative law and the development of a *jus commune*—a process which has been examined on many occasions by European administrative lawyers.¹³⁶

Similar attempts at imposing administrative law principles on transnational agencies can be found in other regions, as well as at the global level. For instance there have been a number of efforts to impose ‘good governance’ principles on the IMF and WTO, particularly in areas where those bodies exercise powers that may be regarded as punitive.¹³⁷ The UN Security Council has also imposed procedural requirements on itself when making decisions about the imposition of sanctions.¹³⁸ Although these developments do not amount to anything like the level of coordinated oversight of transnational administrative action that has occurred in the EU, the increasing attention to accountability at the international level has been argued to signal the acceptance of some basic legal principles and procedural requirements comprising a ‘global administrative law’.¹³⁹

A second force that has led to recent convergences in administrative law values is the global spread of human rights. Key administrative law principles, such as procedural fairness and transparency, have been incorporated into a number of major international human rights treaties, and are included in the list

¹³² Schwarze (n 126) 289.

¹³³ *ibid.*

¹³⁴ See C Hilson, ‘The Europeanization of English Administrative Law: Judicial Review and Convergence’ (2003) 9 EPL 125.

¹³⁵ See eg M Eliantonio, *Europeanisation of Administrative Justice? The Influence of the ECJ’s Case Law in Italy, Germany and England* (Europa 2009).

¹³⁶ For further references on this issue see Caranta, ‘Pleading for European Comparative Administrative Law’ (n 41) 155–7.

¹³⁷ See generally Harlow (n 67) 198–204; Kingsbury, Krisch and Stewart (n 49) 34.

¹³⁸ Kingsbury, Krisch and Stewart *ibid.* ¹³⁹ *ibid.* 37.

of constitutionally protected rights in many countries. For instance, Article 10 of the United Nations Universal Declaration of Human Rights provides that:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 41 of the Charter of Fundamental Rights of the European Union (ChFR)¹⁴⁰ goes even further, providing:

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.
2. This right includes:
 - the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
 - the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
 - the obligation of the administration to give reasons for its decisions.

Article 42 of the ChFR further guarantees the right of EU citizens and residents to access documents of the European Parliament, Council and Commission. A range of other hearing and procedural rights are contained in various other EU documents. This has necessitated a conversation in Europe about what amounts to ‘good administration’, which has both drawn from and influenced national laws.¹⁴¹ A number of domestic constitutions have also incorporated a right to fair administrative procedure,¹⁴² including those of South Africa;¹⁴³ Ghana;¹⁴⁴ Iran;¹⁴⁵ and Cambodia.¹⁴⁶ Several others contain a right to access government documents.¹⁴⁷ The result is that certain fundamental principles of administrative law, in particular the right to administrative justice, are arguably on their way to becoming international human rights norms.¹⁴⁸

¹⁴⁰ [2000] OJ C 364. The ChFR was given the same legal value as Treaties of the EU by the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (adopted 13 December 1997, entered into force 1 December 2009) [2007] OJ C 306/1, Article 6(1).

¹⁴¹ See further J Wakefield, *The Right to Good Administration* (Kluwer Law 2007).

¹⁴² This section is based on the data compiled by Z Elkins, T Ginsburg and J Melton, ‘Comparative Constitutions Project’ <<http://www.comparativeconstitutionsproject.org/data.htm>>.

¹⁴³ Constitution of the Republic of South Africa 1996 (South Africa), section 33.

¹⁴⁴ Constitution of the Republic of Ghana 1992 (Ghana), section 19(13).

¹⁴⁵ Constitution of the Islamic Republic of Iran 1979 (Iran), sections 138(1) and 156(3).

¹⁴⁶ Constitution of the Kingdom of Cambodia 1993 (Cambodia), Article 39.

¹⁴⁷ ‘Comparative Constitutions Project’ (n 142).

¹⁴⁸ For a discussion of this point see Harlow (n 67) 204–7; AW Bradley, ‘Administrative Justice: A Developing Human Right?’ (1995) 1 EPL 347; Wakefield (n 141).

Finally, one of the central ideals of modern constitutionalism that has spread throughout the world is the notion that governments should be subject to the law, and that their actions should be controlled. Written constitutions necessarily require some mechanism for resolving disputes about their meaning and determining the limits of the powers they confer on various government bodies. This role is commonly (though not necessarily¹⁴⁹) given to the judiciary, either expressly,¹⁵⁰ or by necessary implication.¹⁵¹ Ran Hirschl's research has found that most constitutions adopted since World War II include 'provisions that establish a relatively independent judiciary armed with the authority to review executive practices, administrative decrees and laws enacted by legislatures, and to declare these unconstitutional on the grounds that they conflict with fundamental principles protected by the constitution'.¹⁵² In other words, modern constitutions generally establish at least a limited version of judicial review of administrative action over constitutional questions. Thus, the fundamental administrative law notion that government power is limited, has spread through the global constitutionalization trend.

These examples of harmonization and transplants in administrative law, while perhaps more limited than those evident in constitutional law, demonstrate that the traditional comparative law aims of harmonization and transplantation are possible in administrative law. Furthermore, the recent movement towards a *jus commune* of administrative law in Europe, and global convergences in some of the fundamental values of administrative law, mean that while institutional structures may continue to differ, the various systems of administrative law are increasingly seeking to address the same questions of 'balancing, proportionality and procedural transparency'.¹⁵³ Accordingly, it is possible to identify a number of common issues in administrative law which would benefit from greater attention to comparison between jurisdictions. There are a great many such topics, many of which have been identified or examined to varying degrees, predominantly within Europe and between Europe and the US. For instance, Caranta has identified a broad range of

¹⁴⁹ The UK is an obvious example of a jurisdiction where the courts do not have the power to declare legislation unconstitutional, though in recent years a minority of the House of Lords has hinted that the traditional doctrine of parliamentary sovereignty may be subject to limits in 'exceptional circumstances': see *Jackson v Attorney-General* [2006] 1 AC 262, [102] (Lord Steyn), [104] (Lord Hope); [159] (Baroness Hale). For discussion of the possible wider implications of the minority views in *Jackson* see T Mullen, 'Reflections on *Jackson v Attorney General*: questioning sovereignty' (2007) 27 *Legal Studies* 15.

¹⁵⁰ 'Comparative Constitutions Project' (n 142).

¹⁵¹ The best example is the US Supreme Court's decision in *Marbury v Madison* 5 US (1 Cranch) 137 (1803). Similar decisions establishing the supremacy of the courts in matters of constitutional interpretation were made in Germany (*Southwest*, Bundesverfassungsgericht [German Constitutional Court], (1951) 1 BVerfGE 14; France (Conseil Constitutionnel [French Constitutional Court], decision n° 71-44 DC, July 16, 1971; and the EU (*NV Algemene Transporten Expeditie Onderneming van Gend en Loose v Nederlandse Administratie der Belastingen* (C-26/62) [1963] ECR 1: Hirschl (n 13) 15–6.

¹⁵² Hirschl (n 13) 15.
¹⁵³ Ginsburg (n 4) 120. See also C Harlow and R Rawlings, *Law and Administration* (3rd edn, Cambridge University Press 2009) 46.

matters in need of further comparative analysis within Europe, including: judicial protection; the proportionality and precautionary principles; rights; discretion; institutional structures; procedural rights; fraud; competition policy; and public procurement.¹⁵⁴ This article considers, in a little more detail, three particular trends in administrative law that would benefit from greater attention to comparison: how public law can respond to privatization and outsourcing; the interactions between administrative law and domestic human rights laws; and the level of deference administrative courts should give to administrative decision-makers.

A. Private Bodies Performing 'Public' Functions

The extent to which administrative law is capable of regulating the actions of private organizations has been a pressing concern for public lawyers in many jurisdictions for some time.¹⁵⁵ Modern administration involves a mix of public and private bodies with relationships between the two governed by various combinations of contract, legislation, and informal arrangements. The rise of privatization, deregulation, and contracting-out has affected virtually every industrialized State over the past 40 years.¹⁵⁶ More recently it has also become an issue for regional and international bodies, for example, with UN agencies increasingly engaging private organizations, both non-profit and for-profit, to deliver humanitarian aid, development assistance, and post-conflict reconstruction.¹⁵⁷ Accordingly, questions about the reach of 'public law values' and the extent to which administrative law is capable of holding private actors accountable are global concerns.

The importance of this issue, and the potential for solutions to be found in other jurisdictions, is reflected in the fact that one aspect of mixed administration—public contracting—is probably the most compared topic in administrative law. Indeed there exists a major international comparative research group dedicated solely to that issue,¹⁵⁸ and it was recently the topic of a significant treatise comparing the law of 28 countries.¹⁵⁹ As with much comparative administrative law, studies to date have largely been based and focussed on Europe. There have also been a number of comparative studies over many years of the public/private divide more broadly between English and French law, as well as comparisons between civil law systems. The work

¹⁵⁴ Caranta, 'Pleading for European Comparative Administrative Law' (n 41) 170–1.

¹⁵⁵ See generally M Taggart, 'The Province of Administrative Law Determined?' in M Taggart (ed), *The Province of Administrative Law* (Hart Publishing 1997) 1.

¹⁵⁶ J Auby, 'Contracting Out and 'Public Values': A Theoretical and Comparative Approach' in Rose-Ackerman and Lindseth (eds), (n 3) 512.

¹⁵⁷ LA Dickinson, 'Public Law Values in a Privatized World' (2006) 31 *YaleJIntL* 383.

¹⁵⁸ 'Public Contracts in Legal Globalization', <www.public-contracts.net>.

¹⁵⁹ R Nogueuou and U Stelkens (eds), *Droit comparé des Contrats Publics* (Bruylant 2010).

of John Bell is particularly notable in this respect.¹⁶⁰ However, as an issue of now global concern, on which such a wide divide exists between major legal systems, Caranta rightly identifies it as an issue that would benefit from further comparative work,¹⁶¹ particularly outside of Europe.

The common law seems to have found it exceptionally difficult to find a consistent, workable method of addressing the accountability deficit resulting from mixed administration. The difficulties in many common-law jurisdictions are traceable to some of the central tenets of Dicey's constitutional theory. Two elements are particularly important. The first is Dicey's model of the rule of law which requires the government and its officials to be subject to the same law as private individuals. Where government is performing functions that private individuals also perform—such as dealing in property, or entering into contracts—it will be subject to the ordinary rules of private property or contract law. The second principle that has shaped the common-law approach to the scope of administrative law is parliamentary sovereignty. For the first half of the twentieth century, administrative law in England reflected the Diceyan model under which the constitutional basis for judicial review was the sovereignty of Parliament. The jurisdiction of the courts was restricted to reviewing decisions made under statute, and determining whether the decision was *ultra vires* the powers granted to the decision-maker by the Parliament. In other words, courts only had the power to review executive acts where the power to perform those acts was conferred on the executive via legislation. It was the source, rather than the nature of power that determined when administrative law applied.

A series of cases beginning in the 1960s expanded the scope of the courts' jurisdiction beyond decision-makers whose powers were sourced in statute, to government decision-makers exercising non-statutory, prerogative power.¹⁶² These decisions laid the groundwork for the extension of judicial review during the 1980s onwards, to cover certain decisions by non-government bodies in the context of mixed administration.¹⁶³ In *R v Panel on Take-overs and Mergers ex parte Datafin plc (Datafin)*¹⁶⁴ the Court of Appeal held that decisions by the Takeover Panel, a government–industry partnership which was not established under statute, prerogative power or contract so was 'without visible means of legal support'¹⁶⁵ were subject to judicial review.

¹⁶⁰ See for instance J Bell, *French Administrative Law* (n 63); J Bell, *French Legal Cultures* (Butterworths 2001); J Bell, 'Administrative Law' in J Bell, S Boyron and S Whittaker, *Principles of French Law* (2nd edn, Oxford University Press 2008).

¹⁶¹ Caranta, 'Pleading for European Comparative Law' (n 41) 171.

¹⁶² *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864 (*Lain*) (decisions by a government board, established under the prerogative power, which exercised non-statutory power were held to be reviewable); *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (*CCSU*) (the Prime Minister exercise of non-statutory, prerogative powers in the form of an order banning union membership was found to be reviewable—although in this case the decision was not justiciable).

¹⁶³ See generally M Hunt, 'Constitutionalism and Contractualisation of Government in the United Kingdom' in Taggart (n 155) 27–8.

¹⁶⁴ [1987] QB 815.

¹⁶⁵ *ibid* 824.

The Panel was responsible for developing and enforcing a set of self-regulatory rules. A finding by the Panel that a company had breached these rules had significant consequences, including the company losing their licence or being de-listed from the stock exchange. In holding that the Panel exercised power that was public in nature, all three judges drew on the decisions in *Lain* and *CCSU* as authority for the proposition that the source of a body's power is not the sole determinant of whether it exercises a public duty.¹⁶⁶ Lord Donaldson MR emphasized the importance of recognizing 'the realities of executive power' in a mixed administration.¹⁶⁷

The *Datafin* decision sparked hope amongst English public lawyers that the courts might be in the process of developing a coherent test to determine when public duties apply in a mixed administration, based on more than a 'fictional attribution of derivative status to the body's powers'.¹⁶⁸ However, in subsequent decisions the courts have proven reluctant to move away from their reliance on the source of a body's powers to determine whether its decisions are subject to judicial oversight, and have struggled to apply *Datafin* in a consistent way.¹⁶⁹ Courts have also refused to extend *Datafin* to the actions of private companies exercising power under government contracts on the basis that their power derives from a 'purely commercial' relationship and lacks sufficient statutory underpinning.¹⁷⁰ This is despite the fact that the nature of the power exercised by private providers under contract is often more 'public' in its nature, and more strongly underpinned by statute than that exercised by the Takeover Panel.¹⁷¹ In *R (Tucker) v Director General of the National Crime Squad*,¹⁷² Scott Baker LJ for the Court of Appeal admitted that:

The boundary between public law and private law is not capable of precise definition, and whether a decision has a sufficient public law element to justify the intervention of the Administrative Court by judicial review is often as much a matter of feel, as deciding whether any particular criteria are met.¹⁷³

Datafin has prompted courts in other common-law jurisdictions to explore questions about the appropriate scope of judicial review, and has been

¹⁶⁶ *ibid* 838 (Donaldson MR); 847 (Lloyd LJ); 850 (Nichols LJ).

¹⁶⁷ *ibid* 838 (Donaldson MR).

¹⁶⁸ Hunt (n 163) 32. See also H Woolf, 'Droit Public—English Style' (1995) *PubIL* 62–4.

¹⁶⁹ See eg *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 2 All ER 853. See generally Hunt (n 163) 33; C Campbell, 'The Nature of Power as Public in English Judicial Review' (2009) 68 *CLJ* 90. *Datafin* has also influenced the approach that UK courts have taken to the phrase 'public authority' and the scope of the Human Rights Act 1998 (UK) (HRA). The cautious approach to applying *Datafin* is also reflected in HRA cases: see *R (Beer) v Hampshire Farmers' Markets Ltd* [2004] 1 *WLR* 233.

¹⁷⁰ *R v Servite Houses and the London Borough of Wandsworth Council, ex p Goldsmith and Chatting* (2000) 2 *LGLR* 997, 1021.

¹⁷¹ See eg P Craig, 'Contracting Out, the Human Rights Act and the Scope of Judicial Review' (2002) 118 *LQR* 566. ¹⁷² [2003] *ICR* 599. ¹⁷³ *ibid* [13].

influential in their analysis of what amounts to a public function or power.¹⁷⁴ However, the issue can be further complicated by the constitutional entrenchment or codification of aspects of judicial review, as is the case in Australia. A number of superior state courts have expressly or impliedly accepted *Datafin* in Australian common law.¹⁷⁵ However at the federal level, the jurisdiction of Australia's superior federal courts is entrenched in the Constitution and codified in the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act). The wording of these instruments place different limits on the scope of superior federal courts' jurisdiction to review administrative decisions, which may differ from the scope of the common law applied in state and territory superior courts. Section 75(v) of the Australian Constitution and section 39B of the Judiciary Act 1903 (Cth) confer original jurisdiction on the High Court of Australia and Federal Court of Australia respectively to review matters in which public law remedies are sought 'against an officer of the Commonwealth'. To date, the High Court has avoided defining the phrase 'officer of the Commonwealth' in the context of the public-private divide despite, or perhaps because of, the fact that the Australian Government has relied on a narrow definition of the phrase in introducing some controversial policies in recent years. Of particular note are Australia's arrangements for processing asylum seekers who arrive by boat to an 'excised offshore place'. All such arrivals are mandatorily detained in facilities managed by private contractors. Initial assessments of the refugee status of these 'offshore entry persons' are made by immigration officials, but the review of those initial assessments has also been contracted out.¹⁷⁶ The government has argued that the courts have no jurisdiction to examine the decisions made by the private contractors as they are not 'officers of the Commonwealth'.¹⁷⁷

Leading Australian commentators have presented strong legal and policy arguments that the phrase 'officer of the Commonwealth' should not be

¹⁷⁴ See eg the recent discussion in Canada's Federal Court of Appeal of these issues: *Air Canada v Toronto Port Authority* [2011] FCA 347, [53]–[60].

¹⁷⁵ For a discussion of cases see Aronson, Dyer and Groves (n 59) 146–9. Australian state and territory supreme courts all have the inherent power at common law to engage in judicial review of administrative action by their respective state and territory governments. However, as the jurisdiction of state supreme courts remains unwritten, there is no equivalent to the 'officer of the Commonwealth' restriction that applies to the High Court's jurisdiction under the *Australian Constitution*.

¹⁷⁶ Though it should be noted that the Migration Act 1958 (Cth), section 46A provides that 'offshore entry persons' are not entitled to apply for a visa unless the Minister has made a written determination that it is in the public interest for them to do so. As a result the process described is largely based on policies and is not set out in legislation.

¹⁷⁷ In a 2010 case the High Court avoided addressing this question by construing the review process as a part of the Minister's decision-making process under the Migration Act 1958 (Cth). This meant that the review process was required to be conducted in accordance with the principles of natural justice and that it was amenable to judicial review under section 75(v); see *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319. For further discussion see M Groves, 'Outsourcing and section 75(v) of the Constitution' (2011) 22 Public Law Review 3.

interpreted in a way that allows government to insulate decisions from the reach of section 75(v) by outsourcing them or corporatizing the agencies that make decisions.¹⁷⁸ Matthew Groves has also noted that it would:

be ironic if the common law supervisory jurisdiction exercised by the State Supreme Courts which the High Court has recently placed on a stronger constitutional foundation proved more flexible and adaptive than the High Court's own constitutionally entrenched judicial review jurisdiction.

Yet, if Federal Court authority on the issue is approved by the High Court, the scope of judicial review under the Constitution would be narrower and less flexible than the common-law jurisdiction exercised by state courts.¹⁷⁹

The ADJR Act attempted to simplify the complex processes involved in applying for relief via the judicial review remedies available under the Constitution. It codifies the grounds of review, remedies and application process involved in judicial review. However, jurisdiction under the ADJR Act is limited to decisions 'made under an enactment', which the courts have interpreted narrowly as requiring that a decision be 'expressly or impliedly required or authorised by the enactment' and that it 'confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment'.¹⁸⁰ In other words, the statute appears to entrench a similar restriction on the scope of review to that found in early English decisions. Again, the High Court has deliberately avoided directly answering the question of whether a private company can ever be subject to judicial review,¹⁸¹ but based on the majority's comments in *NEAT Domestic Trading Pty Ltd v AWB Ltd*¹⁸² and interpretation of 'under an enactment' in *Griffith University v Tang*,¹⁸³ it seems unlikely that the review under the ADJR Act could be extended through *Datafin*-type reasoning. Thus, at present judicial review in Australia is complex and fragmented in the extent to which it applies to non-government bodies exercising 'public power', and recent High Court decisions offer little hope that the situation will improve in the near future.

To some extent distinctions between the approaches that jurisdictions have taken to the issue of public law in a mixed administration can be explained by the historical and philosophical context in which administrative law developed. For example, the US with its small-government ideology has routinely used independent agencies created by government to regulate private industry. Most accounts of US administrative law begin with the establishment of the Interstate Commerce Commission (ICC) in 1887, the first major national

¹⁷⁸ Aronson, Dyer and Groves (n 59) 40; Groves (n 177) 9.

¹⁷⁹ For a list of bodies that the Federal Court has found to be beyond the scope of judicial review under section 75(v) see Aronson, Dyer and Groves (n 59) 38.

¹⁸⁰ *Griffith University v Tang* (2005) 221 CLR 99, 130–1 [89] (Gummow, Callinan and Heydon JJ).

¹⁸¹ Aronson, Dyer and Groves (n 59) 146, 149.

¹⁸² (2003) 216 CLR 277, [54]–[64] (McHugh, Hayne and Callinan JJ).

¹⁸³ (2005) 221 CLR 99, 130–1 [89] (Gummow, Callinan and Heydon JJ).

regulatory agency. As a result American administrative law is familiar with this aspect of mixed administration, but has been less equipped to deal with contracting-out arrangements.¹⁸⁴ The contracting-out of formerly public functions, such as prison management, health services, and education, allows the contracting agency to retain a greater level of control over the service than complete privatization would.¹⁸⁵ Yet it also brings provision of the service outside of the ambit of the APA, which only applies to the actions of agencies, and within the ambit of the private law of contract.¹⁸⁶ While the US Supreme Court has found limited exceptions in instances where a private actor performs an ‘exclusively public function’,¹⁸⁷ usually the only way of ensuring that private organizations provide services in the public interest is via government enforcement of appropriate contractual terms, or via legislation. Under US law, contracting out effectively removes the capacity of individuals adversely affected by the actions of service providers to hold the provider directly accountable. Accordingly there has been a great deal of concern about the threat that contracting out poses to democratic accountability in the US.¹⁸⁸

The problems that contracting-out has posed for administrative law in the UK, Australia and US, seem to have proven a little less troubling for some civil law jurisdictions where a notion of public or administrative law contracts is accepted, such as France and Spain.¹⁸⁹ The scope of administrative law in France is generally broader than it is under the common law because of the fact that it rests on a clear distinction between the State and individuals.¹⁹⁰ The jurisdiction of French administrative courts does not depend on whether a body was exercising statutory or prerogative power, but is based on the notion of public service—whether the body whose actions are disputed was ‘set up in the public interest to carry out a public service function’.¹⁹¹ Thus a contract will be dealt with by the administrative courts where it: relates to a public service duty; or contains a clause that is not typical of a private contract.¹⁹² Different laws apply to administrative contracts and private law contracts. In recognition of the fact that the former are made in the public interest, administrative courts

¹⁸⁴ For detailed discussion of the problems presented by contracting out in the US see J Freeman, ‘The Contracting State’ (2000) 28 Florida State University Law Review 155.

¹⁸⁵ And indeed in the US, the constitution has been found to require that control over certain aspects of some services remain within the control of agencies. See J Freeman, ‘Private Parties, Public Functions and the New Administrative Law’ (2000) 52 Administrative Law Review 813, 823–4. ¹⁸⁶ *ibid* 825.

¹⁸⁷ For discussion of case law on this point see D Guttman, ‘Public Purpose and Private Service: the Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty’ (2000) 52 Administrative Law Review 891–926.

¹⁸⁸ See eg GE Metzger, ‘Privatization as Delegation’ (2003) 103 Columbia Law Review 1367; Freeman, ‘The Contracting State’ (n 184).

¹⁸⁹ Auby, ‘Contracting Out and Public Values’ (n 156) 522.

¹⁹⁰ Bell, ‘Administrative Law’ (n 160) 172.

¹⁹¹ *ibid*. Public authorities in France can also enter into private law contracts.

¹⁹² G Bermann and E Picard, ‘Administrative Law’ in G Bermann and E Picard (eds), *Introduction to French Law* (Wolters Kluwer 2008) 86.

apply the procedural and substantive rules of administrative law to administrative contracts.¹⁹³ In other words even prior to the modern phenomena of outsourcing and contracting French administrative law applied some public law values to the activities of government that were done via contract.

This is not to say that the application of public law values to mixed administration has been without difficulty in France. Although administrative courts will apply public law to administrative contracts, it can be difficult to ensure that these public law obligations are enforced.¹⁹⁴ Generally only parties to an administrative law contract have standing to challenge the contract before the courts, meaning that the citizens using an outsourced service must rely on the relevant public authority to enforce public law contractual obligations against the contractor. However, the Conseil d'Etat has long provided what Auby describes as a 'partial remedy' whereby if an agency refuses to enforce a contractual obligation users of the service may challenge the agency's decision in an administrative court.¹⁹⁵ The types of contracts that became popular during the 1980s in France also did not fit particularly well within the traditional subcategories of administrative contracts. Traditionally the legal instrument used by government to outsource public functions was the concession, which required users to pay the contractor for the service. However, the more recent outsourcing contracts frequently involved the public authority paying the contractor directly for the service, leading to difficulties in categorizing these contracts. The legislature ultimately provided a solution, creating two new types of administrative contract: *délégations de service public* which encompass both concessions and contracts where the public authority pays for all or part of an outsourced service; and *contrats de partenariat*, or public-private partnership contracts.¹⁹⁶

It is clear from this brief summary of the position in just four jurisdictions that different legal systems around the world continue to struggle with issues surrounding accountability in a mixed administration. One of the central challenges appears to be in defining the boundaries of the State itself. In response to these concerns, some jurisdictions have developed a set of 'core' government functions which cannot be contracted out or delegated. In France this has been done through the courts, and the core functions include 'what French administrative law calls *police administrative*, which includes, more or less, those activities that entail command-and-control regulation, excluding those situations where offences have been committed'.¹⁹⁷ The *Datafin* decision appeared to offer the possibility of a similar approach in the common law world, whereby powers or functions which were inherently 'public' could have been identified and protected from the accountability deficit that can result

¹⁹³ Auby, 'Contracting Out and Public Values' (n 156) 522.

¹⁹⁴ *ibid* 520.

¹⁹⁵ *ibid*, citing Conseil d'Etat, *Syndicat des propriétaires et contribuables du quartier Croix-de-Seguey-Tivoli*, 21 December 1906, Rec p 962.

¹⁹⁶ Auby, 'Comparative Approaches to the Rise of Contract in the Public Sphere' (n 86) 48.

¹⁹⁷ Auby, 'Contracting Out and Public Values' (n 156) 515.

from outsourcing and privatization. However, as discussed, UK law has not developed in this direction. In some jurisdictions legislatures have acted to address concerns about the contracting-out of ‘core’ government functions. For example, the Deregulation and Contracting Out Act 1994 (UK) and Federal Activities Inventory Reform Act 1998 (USA) each set out core functions that cannot be performed by private organizations.¹⁹⁸ Both include functions affecting the liberty of individuals.¹⁹⁹ Supreme Court decisions in the US suggest that the list of non-delegable government functions may also extend beyond this to activities such as tax collection, and police and fire protection.²⁰⁰ The concern with these purely statutory models of protecting ‘core’ government functions is, of course, their impermanence. The laws may be overridden by subsequent legislation and, due to their flexibility, are also relatively easy for governments to avoid.²⁰¹

A range of other less systematic attempts have been made to impose ‘public law values’ on non-government entities engaged in ‘public’ functions. Some jurisdictions impose contractual terms requiring a private organization to comply with government standards, or through legislation. Australia has attempted to address some of the deficits in the scope of federal judicial review through legislation—for instance in 2005 the Commonwealth Ombudsman was given the authority to investigate certain actions of companies contracted to government.²⁰² These attempts have had varying degrees of success.²⁰³ Auby’s examination of the various attempts in Europe and the United States at insulating certain government functions from delegation, and imposing administrative law values on private companies contracted to government demonstrates the benefits that comparison may have in finding useful solutions for jurisdictions struggling with these issues.²⁰⁴ He points out that there have already been significant convergences and borrowings in this area, which he argues are likely to increase as international organizations look to ways of

¹⁹⁸ *ibid.*

¹⁹⁹ Deregulation and Contracting Out Act 1994 (UK), s 71 lists functions that cannot be contracted out, including: judicial functions; functions that interfere with or otherwise affect individual liberty; powers to enter, search or seize property; and the power to make subordinate legislation. Federal Activities Inventory Reform Act of 1998 Pub L No 105-270, 112 Stat 2382 (USA), section 5(2) defines ‘inherently governmental functions’, as ‘a function that is so intimately related to the public interest as to require performance by Federal Government employees’, including: interpreting and executing the law so as to bind the government; actions determining the interests of the US by military or diplomatic action, civil or criminal judicial proceedings; actions that significantly affect the life, liberty or property of private persons; the appointment of officials; and actions affecting government property.

²⁰⁰ Auby, ‘Contracting Out and Public Values’ (n 156) 515.

²⁰¹ *ibid.*

²⁰² Ombudsman Act 1976 (Cth), section 3BA.

²⁰³ Auby, ‘Contracting Out and Public Values’ (n 156) 518–9.

²⁰⁴ *ibid.*

addressing the 'democracy deficit'²⁰⁵ created by delegating functions to private organizations:

National legal systems are in real competition to influence these [international] systems of law, and therefore, they are placed in a position of reciprocal influence, which reduces their national peculiarities or at least leads them to converge on some common questioning.²⁰⁶

Accordingly, further comparison has the potential to significantly enhance this particular area of administrative law.

B. The Interaction between Human Rights and Administrative Law

A second emerging issue for administrative law around the world is its interaction with domestic human rights instruments. As noted above, human rights are protected by the vast majority of national constitutions written after World War II, and numerous other jurisdictions have incorporated human rights guarantees in legislation. Other States automatically incorporate international human rights treaties into national law upon ratification. It is clear that domestic human rights protections, whatever their constitutional status, can have a significant effect on the development of administrative law. It is less clear exactly what that effect is, and what factors will influence the interaction between the two areas of law.

Numerous commentators and judges have argued that a bill of rights will have the effect of expanding administrative law. Peter Hogg has argued that this has been the major effect of Canada's Charter of Rights and Freedoms,²⁰⁷ which he says 'has ushered in a period of extraordinarily active judicial review'.²⁰⁸ There are a number of ways in which expansion may occur. One is by enumerating new grounds on which administrative action may be invalidated. For example, section 26 of South Africa's constitutional bill of rights provides that 'everyone has the right to adequate housing', and that 'the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right'.²⁰⁹ Section 26 has been used by the Constitutional Court to invalidate government action (as well as inaction) that the Court thought fell short of its obligations.²¹⁰

Some decisions from New Zealand indicate that the New Zealand Bill of Rights Act 1990 has had a similar effect. On a number of occasions, courts have found that the rights listed in the legislation are mandatory considerations in the making of administrative decisions, and that any failure to take them into

²⁰⁵ AC Aman, 'Privatization, Prisons, Democracy and Human Rights: the Need to Extend the Province of Administrative Law' (2005) 12 *Indiana Journal of Global Legal Studies* 519.

²⁰⁶ Auby, 'Comparative Approaches to the Rise of Contract in the Public Sphere' (n 86) 41.

²⁰⁷ Canada Act 1982 (UK) c 11, sch B pt 1. ²⁰⁸ Hogg (n 52) 36–9.

²⁰⁹ *Constitution of the Republic of South Africa 1996* (South Africa), ch 2.

²¹⁰ See eg *Government of the Republic of South Africa and Others v Grootboom and Others* [2001] 1 SA 46 (Constitutional Court).

account is a reviewable error of law.²¹¹ In this way, human rights have become additional grounds upon which administrative decisions may be invalidated by the courts, but only if the government fails to give reasonable consideration to them. This is more deferential to government decision-makers than the South African approach, which requires administrative action to comply with rights based on a more objective standard.

In addition to expanding the grounds on which a decision may be invalid, human rights legislation usually requires courts to subject government action to a more probing standard of review than might otherwise be the case. The most popular method of achieving this has been via the adoption of proportionality as a principle of administrative law. The principle has its origins in German administrative law (not constitutional law, despite the fact that it is now a popular method of adjudicating constitutional rights matters around the world).²¹² In the late nineteenth century German administrative courts were striking down police measures that encroached on individual rights or property in a way that was disproportionate to the ends sought to be achieved by the police. In determining whether a measure was disproportionate, German administrative courts would ask whether there was a less intrusive or restrictive means of achieving the relevant objective.²¹³ The test later spread to German constitutional law, though as Sweet and Mathews and Grimm have explained, sat much less comfortably in that context.²¹⁴

The proportionality principle was one of German law's great contributions to EU administrative law, and has been described as 'perhaps the most important principle of Community law'.²¹⁵ The ECJ first recognized the unwritten principle as part of (then) EC law in 1970²¹⁶ and has subsequently been codified in Article 54 of the ChFR, which provides:

Any limitation on the exercise of rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.

Through the 'Europeanization' processes discussed above, the proportionality principle has now spread throughout the EU as the preferred method of balancing human rights and State or public interests. It has also spread well beyond Europe and is used by courts in New Zealand, South Africa, Israel, and

²¹¹ See eg *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (NZCA); *Mil Mohamed v Minister of Immigration* [1997] NZAR 223 at 228 (High Court).

²¹² AS Sweet and J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *ColumJTransnatlL* 98–111. ²¹³ *ibid* 101.

²¹⁴ *ibid* 102–10; D Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 *University of Toronto Law Journal* 385–7.

²¹⁵ R Widdershoven (n 126) 280.

²¹⁶ Sweet and Mathews (n 212) 139, citing *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle fur Getreide und Futtermittel* (C-11/70) [1970] ECR 1125, 1146.

possibly now Canada²¹⁷ to resolve human rights based challenges to administrative action. Although the proportionality tests in these jurisdictions are not identical, they are all designed to achieve the same balancing objective. Dieter Grimm has identified that in honing these tests, courts may find guidance from the experience of the proportionality principle in other jurisdictions.²¹⁸

The adoption of proportionality in English law is an example of how the Human Rights Act 1998 (UK) (HRA) has expanded administrative law in this way, well beyond its traditional scope, causing Lord Cooke to remark that ‘the common law of England is becoming gradually less English’.²¹⁹ Prior to the adoption of the HRA, courts applied the deferential *Wednesbury* unreasonableness test to determining the legality of administrative decisions: that is a decision had to be so unreasonable that no reasonable decision-maker would have made it.²²⁰ Proportionality was thought to be based on such foreign, civil law principles as to be incapable of transplantation into English law.²²¹ However, following the ECtHR’s criticism that the *Wednesbury* test was inadequate to protect human rights,²²² a proportionality standard has been incorporated into English law.²²³ In essence the proportionality test allows for a ‘somewhat greater’ intensity of judicial review,²²⁴ requiring that limits placed on rights by administrators go no further than necessary to accomplish justifiable legislative objectives.²²⁵ In other words, English courts have accepted that the protection of human rights requires a more intrusive standard of review than *Wednesbury* provided, thereby expanding the scope of judicial review.

Other public lawyers have argued that domestic human rights instruments may have the opposite effect of stifling the development of administrative law. For example, Tom Hickman has argued that the common law in the UK has ultimately not been able to keep up with the development of human rights jurisprudence, leading to increasing divergences between the two.²²⁶ He finds

²¹⁷ The Supreme Court of Canada’s decision in *Doré v Barreau du Québec* (2012) SCC 12 indicates Canada’s ‘reasonableness’ standard of review may develop into a proportionality standard whenever Charter rights are involved.

²¹⁸ Grimm (n 14), discussing what Canadian courts might learn from the German experience of proportionality.

²¹⁹ R Cooke, ‘The Road Ahead for the Common Law’ (2004) 53 ICLQ 274.

²²⁰ That test arose from *Associated Provincial Picture Houses v Wednesbury Corporation* [1947] 1 KB 223.

²²¹ See S Boyron, ‘Proportionality in English Administrative Law: A Faulty Translation’ (1992) 12 OJLS 237.

²²² *Smith and Grady v UK* (1999) 29 EHRR 493.

²²³ T Poole, ‘Between the Devil and the Deep Blue Sea: Administrative Law in an Age of Rights’ in L Pearson, C Harlow and M Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing 2008) 35.

²²⁴ *R v Secretary of State for the Home Department, ex p Daly* [2001] AC 532.

²²⁵ See eg *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, [19]; *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368, [20].

²²⁶ Hickman, *Public Law after the Human Rights Act* (Hart Publishing 2010) 52–4.

that as judges have not been able to extend the common law to provide a remedy for a breach of rights ‘the common law has increasingly been put to one side, and its development postponed, in favour of the Human Rights Act’.²²⁷ A number of Canadian judges and academics have expressed similar concerns about the effect of the Charter of Rights and Freedoms,²²⁸ arguing that reliance on Charter remedies by advocates in challenging administrative decisions that limit rights ‘would be a recipe for freezing and sterilizing the natural and necessary evolution of the common law and of the civil law in this country’.²²⁹

The extent to which this has in fact occurred in Canada remains unclear. Different judges have taken different approaches to the interaction between the Charter and the principles of administrative law under Canadian law. Some have indeed preferred to rely on substantive Charter remedies where they are available, arguing that the administrative law standard of review is less onerous than the Charter, and that the administrative law standards are not capable of the substantive values inquiries that the Charter requires.²³⁰ Other decisions have used a more ‘mixed approach’,²³¹ considering administrative law remedies first, and only turning to a Charter analysis where otherwise lawful decisions are argued to have impinged a Charter right.²³² Yet other Canadian Supreme Court justices have expressed the view, based on the wording in the French version of the Charter, that the Charter has no application in challenging administrative decisions.²³³ Most recently, the Canadian Supreme Court has said that it will review administrative decisions impugned on human rights grounds using administrative law’s reasonableness standard, but indicated that this standard may need to be adapted into a more intrusive test akin to proportionality.²³⁴

Research from the UK and New Zealand shows that the interactions between human rights legislation and administrative law are equally unclear.²³⁵ What is clear is that as the prevalence of human rights instruments has grown, administrative courts and tribunals in many jurisdictions are struggling with

²²⁷ *ibid* 55.

²²⁸ Canada Act 1982 (UK) c 11, sch B pt 1.

²²⁹ *Blencoe v British Columbia (Human Rights Commission)* [2000] 2 SCR 307, 407–7 [189] (LeBel J). See also similar concerns expressed earlier by JM Evans, ‘The Principles of Fundamental Justice: The Constitution and the Common Law’ (1991) 29 *OsgoodeHallLJ* 73.

²³⁰ *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038, 1049 (Dickson CJ for Wilson, LaForest and L’Heureux-Dubé JJ).

²³¹ E Fox-Decent, ‘The Charter and Administrative Law: Cross-Fertilization in Public Law’ in C Flood and L Sossin (eds), *Administrative Law in Context*, (Edmond Montgomery Publications 2008) 182.

²³² See eg *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, 832 [11] (L’Heureux-Dubé J for Gonthier, McLachlin, Bastarache and Binnie JJ).

²³³ *Multani v Commission scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256, 310–11 [113] (Deschamps and Abella JJ).

²³⁴ *Doré v Barreau du Québec* (2012) SCC 12. The effect of this decision on the reasonableness standard is an issue that will need to be clarified in future Canadian decisions.

²³⁵ Hickman (n 226) 52–6; PA Joseph and T Joseph, ‘Human Rights in the New Zealand Courts’ (2011) 18 *Australian Journal of Administrative Law* 80.

this issue. As David Mullan has already identified, the impact of human rights on administrative law is an issue in need of ‘detailed and sophisticated comparative work’.²³⁶ Comparative analysis would assist courts to navigate difficult questions about how the two areas of law interact, to find solutions and to develop workable legal tests and principles. It would be useful for policy-makers to understand the implications of their human rights choices, which are currently shrouded in ambiguity.²³⁷

C. The Extent to Which Courts Should Interfere in Discretionary Administrative Decision-Making

A third, related issue of wide concern in administrative law that could benefit from greater attention to comparison is that of deference. The effort to balance the tensions between judicial oversight, administrative discretion and legislative delegation is an ongoing concern for many, if not all systems of administrative law.²³⁸ On one hand ‘red light theorists’ see the administrative State as dangerous and needing to be controlled by law through adjudication, and on the other ‘green light theorists’ believe that the administrative State is positive and that too much judicial intervention may stifle progress. Harlow and Rawlings have argued that the struggle between red and green light theories of administrative law is a recurring one, at the heart of many of the most important debates in a range of administrative law systems across the globe.²³⁹ The development of various administrative law principles can be viewed as attempts to find the appropriate balance between allowing courts to be the ultimate arbiters of law and allowing delegated administrative decision-makers the latitude to exercise discretion in the manner intended by the legislature. For example, the common-law principle that courts only review the lawfulness of administrative decisions and not the factual findings of decision-makers (the ‘law/fact distinction’) can be seen as an attempt to give

²³⁶ D Mullan, ‘The Canadian Charter of Rights and Freedoms: a ‘Direct Driver’ of Judicial Review of Administrative Action in Canada?’ in Pearson, Harlow and Taggart (eds), (n 223) 145.

²³⁷ A good example of this is the Australian National Human Rights Consultation, the report on which barely considered the implications of a bill of rights for administrative law, nor the role of administrative law in enforcing human rights in Australia in the absence of statutory protections: see ‘National Human Rights Consultation Committee Report’ (Brennan Report) (2009) <<http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf>>. In response to the Brennan Report, the Australian government has introduced a number of human rights measures which have the potential to influence administrative decision-making as well as the content of federal legislation. These include the appointment of the President of the Australian Human Rights Commission an ex officio member of the Administrative Review Council (which makes recommendations to the Attorney-General on administrative law in Australia) and the enactment of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) which establishes various mechanisms for parliamentary oversight of the human rights implications of new bills.

²³⁸ C Huang, ‘Judicial Deference to Legislative Delegation and Administrative Discretion in New Democracies: Recent Evidence From Poland, Taiwan, and South Africa’ in Rose-Ackerman and Lindseth (eds), (n 3) 466; Ginsburg (n 4) 120.

²³⁹ Harlow and Rawlings (n 153) ch 1.

effect to the intention of the elected parliament to delegate the discretion to ascertain facts to administrative decision-makers, while at the same time upholding the place of courts as the ultimate arbiters of law.²⁴⁰

It seems that the notion of deference has become an increasingly popular balancing tool. This is perhaps not surprising given that in some ways it provides a counterbalance to the move towards the relatively intrusive proportionality standards of review where human rights are concerned.²⁴¹ In the common law world, deference has its foundations in the law/fact distinction, but goes further towards restraining courts and expanding the power of both the legislature and executive. The doctrine takes different forms. In the US, the well-developed doctrine was most famously articulated in *Chevron USA Inc v Natural Resources Defense Council Inc*,²⁴² although it developed well before that case.²⁴³ The Supreme Court in *Chevron* held that in undertaking judicial review of agency decisions, courts should not only defer to the expert agency on findings of fact, but also on reasonable interpretations of ambiguous phrases in legislation.

The Canadian ‘standard of review’ analysis, established in *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corporation*²⁴⁴ and most recently refined in *Dunsmuir v New Brunswick*,²⁴⁵ allows the courts to apply different levels of deference depending on the nature of the decision being reviewed. Courts will review administrative decisions (or aspects thereof) on either a ‘correctness’ standard, which affords no deference, or a ‘reasonableness’ standard. The latter is in essence intended to give effect to the concept of deference, and respect ‘legislative choices to leave some matters in the hands of administrative decision-makers’ while maintaining the ‘different roles of the courts and administrative bodies within the Canadian constitutional system’.²⁴⁶ In determining which standard to apply, Canadian courts apply a ‘standard of review’ (formerly known as ‘pragmatic and functional’) analysis which asks which standard the legislature intended to apply by considering:

- the terms of the statute, and particularly whether there is a privative or ouster clause;²⁴⁷

²⁴⁰ There are a few exceptions to this principle, such as jurisdictional fact doctrine and the no-evidence rule, however the law-fact distinction applies as a general rule to limit the scope of review by courts. See generally Aronson, Dyer and Groves (n 59) ch 4.

²⁴¹ M Taggart, ‘Proportionality, Deference, Wednesbury’ (2008) *New Zealand Law Review* 425. ²⁴² 467 US 837 (1984).

²⁴³ MC Tolley, ‘Judicial Review of Agency Interpretation of Statutes: Deference Doctrines in Comparative Perspective’ (2003) 31 *The Policy Studies Journal* 424–5.

²⁴⁴ [1979] 2 SCR 227. ²⁴⁵ [2008] 1 SCR 190 (*Dunsmuir*).

²⁴⁶ *Dunsmuir* [2008] 1 SCR 190, 221–2 [49] (Bastarache and LeBel JJ, for McLachlin CJ and Fish and Abella JJ). The majority also restated that the jurisdiction of superior courts to review the actions and decisions of administrative bodies is constitutionally entrenched: at 212–13 [31].

²⁴⁷ *Pushpanathan v Canada (Minister for Citizenship and Immigration)* [1998] 1 SCR 982, 1006 [30]–[31] (Bastarache J for L’Heureux-Dubé, Gonthier and McLachlin JJ).

- the expertise of the administrative decision-maker;²⁴⁸
- the purposes of the legislation as a whole;²⁴⁹ and
- the ‘nature of the problem’, whether the impugned aspect of the decision was more a question of law or fact.²⁵⁰

As Paul Craig has observed, while it has no case equivalent to *Chevron* or *New Brunswick Liquor*, the ECJ has, in some cases taken a deferential attitude to review of contested treaty terms.²⁵¹ While it has not articulated a general approach to the issue, the ECJ has in effect applied differing standards of review when called upon to assess whether a Member State has breached EU treaty law. When applying deferential standards, the ECJ has:

done so for the same type of reasons that have influenced national courts in this respect. The nature of the subject matter, the relative expertise of the initial decision-maker and the specificity of the jurisdictional condition have been of particular importance in this respect.²⁵²

Craig gives the example of the ECJ’s decision in *Philip Morris Holland BV v Commission*.²⁵³ The case involved the Dutch government giving subsidies, or ‘state aid’, to a tobacco manufacturer. Article 87 of the Treaty Establishing the European Community provides that any State aid which distorts competition is incompatible with the common market. However, certain exceptions are provided, including in paragraph (3)(a): ‘aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment’. The European Commission found that the aid given to the tobacco manufacturer did not fall within this exception, and the Dutch government challenged that decision. The Dutch government argued, among other things, that the Commission was wrong in finding that the standard of living in the area was not abnormally low and that there was not serious underemployment.²⁵⁴ In rejecting the argument, the ECJ held that the Commission had provided good reasons for assessing the lawfulness of the aid based on the European averages rather than the Dutch national averages.²⁵⁵ It found that the Commission was entitled to exercise discretion in deciding

²⁴⁸ *Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 748, 773 [50]. See also *Pushpanathan v Canada (Minister for Citizenship and Immigration)* [1998] 1 SCR 982, 1006–8 [32]–[35] (Bastarache J for L’Heureux-Dubé, Gonthier and McLachlin JJ); *United Brotherhood of Carpenters and Joiners of America, Local 579 v Bradco Construction Ltd* [1993] 2 SCR 316, 335 (Sopinka J for L’Heureux-Dubé, Gonthier and McLachlin JJ).

²⁴⁹ *National Corn Growers Association v Canada (Import Tribunal)* [1990] 2 SCR 1324, 1336 (Wilson J for Dickson CJ and Lamer CJ).

²⁵⁰ *Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 748, 773 [37].

²⁵¹ P Craig, ‘Judicial Review, Intensity and Deference in EU Law’ in D Dyzenhaus (ed), *The Unity of Public Law* (Hart Publishing 2004) 339–42. ²⁵² *ibid* 340.

²⁵³ *Philip Morris Holland BV v Commission (C-730/79)* [1980] ECR 2671.

²⁵⁴ *ibid* [19]. ²⁵⁵ *ibid* [25].

these jurisdictional questions.²⁵⁶ Other ECJ decisions use similar reasoning to give the Commission latitude in its interpretation of treaty provisions.²⁵⁷

While deference is far from a universal doctrine in administrative law,²⁵⁸ it does appear to be an increasingly common way of balancing some of administrative law's core tensions. Cheng-Yi Huang has found that the trend to judicial self-restraint is even present in certain post-transitional countries with a history of overly broad legislative delegations to the executive and abuse of administrative power, including Poland, South Africa and Taiwan.²⁵⁹ As in the EU, the doctrine is in its early stages in the countries examined by Huang. Even in Canada and the United States, where it is more established, it has been shown to be in a state of flux. For example, in Canada, the number of standards of review was recently reduced from three to two,²⁶⁰ while in the US the circumstances in which mandatory *Chevron*-like deference will apply have been narrowed by more recent decisions.²⁶¹ The appropriate circumstances in which to defer to agency interpretations of law is evidently an ongoing concern for many courts around the world. Comparison may assist in developing more coherent tests.

IV. CONCLUSION

For the greater part of the twentieth century, the modern discipline of comparative law largely neglected public law, arguing that public law was too nationally specific and contextually complex to allow for useful comparison. Yet since the mid-1980s, one area of public law—constitutional law—has experienced a remarkable ‘comparative turn’²⁶² which has enriched practice, scholarship and learning in constitutional law. The dramatic growth of interest in comparative constitutionalism is generally attributed to the global convergence in constitutions, driven by international organizations and treaties. These developments undermine traditional arguments against comparison in public law and demonstrate that areas of public law are capable of achieving the traditional functionalist aims of comparative law—such as transplantation and harmonization.

Despite the traditional arguments against the utility of comparison in public law having been discredited by comparative constitutionalism, another area of public law—administrative law—has not benefited from the same level and depth of scholarly and judicial attention to comparison. One reason for this is

²⁵⁶ *ibid* [24].

²⁵⁷ Craig (n 251) 340–1.

²⁵⁸ For instance Australia's High Court has expressly rejected the doctrine: *Enfield City Corp v Development Assessment Commission* (2000) 199 CLR 135. Justice Hayne has argued extrajudicially that the concept of deference is both unhelpful and incompatible with Australia's constitutional structure: see KM Hayne, ‘Deference—An Australian Perspective’ (2011) *Public Law* 75.

²⁵⁹ Huang (n 238).

²⁶⁰ *Dunsmuir* [2008] 1 SCR 190.

²⁶¹ *United States v Mead Corporation*, 533 US 218 (2001).

²⁶² Hirschl (n 13) 11.

the relative 'newness' of administrative law, which only emerged during the nineteenth century in continental Europe and the early twentieth-century in the common law world. Other reasons that have been suggested for comparative administrative law having lagged behind its public law counterpart are that the discipline is more contextually complex, technical and nationally specific than constitutional law. While it is acknowledged that these factors may make comparative administrative law more difficult methodologically, and require greater attention to theory, than other comparative law topics, this article has argued that they do not prohibit useful comparison. To the contrary, this article has drawn on Tom Ginsburg's arguments to suggest that the greater local distinctiveness of administrative law reflects the fact that its principles and institutions are not required to operate as a symbol of modern statehood in the way that constitutions are. Thus they have been more enduring than constitutions. These factors mean that administrative law often provides a better reflection of the true relationship between government and citizens than constitutions. Accordingly the comparison of administrative law structures may provide useful insights into the limitations and enforcement of constitutions.

Finally, this article has surveyed some important developments common to many systems of administrative law and argued that those topics would benefit from the wider use of comparative methods. While administrative law remains more locally distinctive than constitutions, a number of important convergences have occurred in the field. In particular, similar forces that have led constitutions to converge have also led to the spread of key administrative law values including fairness, transparency, accountability and the basic principle of limited government. As a result, there is more uniformity in terms of the fundamental aims of administrative law, which means that different systems may be better able to learn from each others' approaches to shared concerns through the use of comparative methods. This seems to have occurred to a greater degree within the EU than elsewhere, where national administrative law systems have become somewhat 'Europeanized'. European administrative lawyers have accordingly increased their attention to comparison over recent years, and demonstrating the utility of comparative methods in the field.

Three current concerns for administrative law were identified, which it was suggested would benefit from further comparative analysis, particularly outside of Europe: the ability of administrative law to constrain 'public power' exercised by private bodies; the interaction between administrative law and human rights; and the related issue of the appropriate degree of deference for administrative courts to give to government decision-makers. It was argued that each issue presents common challenges for a variety of administrative law systems, for which comparison may provide useful solutions.