**INTRODUCTION**

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Across the common law world, the role of facts in public law adjudication has become increasingly significant. Yet, while the topic of judicial review—a key judicial mechanism through which individuals can challenge governmental action—continues to generate sustained interest amongst constitutional and administrative lawyers, there has been little attention given to matters of facts and evidence. For the most part, the focus continues to be on legal principles and their underlying normative foundations, rather than questions of evidence and fact-finding. This is so despite such determinations of fact often being salient to the outcomes and impacts of public law adjudication. A failure to address the role of facts and evidence systematically risks courts making factual assessments in intuitive and inconsistent ways. Equally, it risks important legal protections being misapplied, weakened, or even undermined through judicial decisions about facts. It also means that public law scholarship is routinely blinkered to a critical part of its subject matter. It is against this backdrop that this book explores how courts engage with questions of fact, the role of evidence, and the procedures by which these facts are established.

The central objective of this book is to explore critical questions about how courts engage with questions of fact in public law adjudication. This involves considering the relevance of facts to public law disputes, the nature of these facts, the role of the courts, and the types of evidence that might assist courts in determining legal issues that are often underpinned by complex and contested social or policy questions. The book also raises questions about whether the existing laws and practices surrounding evidence are sufficient, and how the insights of other disciplines might assist legal thinkers in untangling these knotty issues. More specifically, by inviting a diverse range of scholars from across the common law world to contribute to this objective through writing chapters, we hoped to achieve three main goals. First, to provide a substantial original contribution to the emerging area of scholarly debate about the role of facts and evidence in public law adjudication. Second, to reconnect the important questions of evidence that arise in relation to facts in practice with the lively academic debate on judicial review in the common law world. Third, to speak to practical issues in the conduct of judicial review proceedings and government policy-making that are highly important but subject to limited extended analysis.

The chapters within this book address interrelated themes. Before we turn to set out those themes, we first introduce the chapters themselves across the three broad areas around which we have organised the book: facts in constitutional law adjudication; facts in administrative law; and facts in broader perspective.

**Facts in constitutional adjudication**

The first part of the book concentrates on the role of facts in constitutional adjudication. The chapters in this part are all concerned, in varying ways, with how facts might inform constitutional interpretation or the resolution of constitutional disputes. Each of the chapters takes a different focus, ranging from a broad overview of the ways facts arise in different adjudicative contexts (Daly and Kudischeva), to honing in on the discrete issue of citizenship in the Australian setting (Thwaites). Other chapters in this part concern the role of facts about the institutions that underpin constitutional mandates (Emerton and Nadarajalingam) and how courts might evaluate the fact-finding and deliberations of governments (Appleby and Carter). These chapters in this part show that facts can intersect with constitutional law at various stages and in a number of ways, and that decisions as to facts can be critical not only to individual decisions but also to the robustness of constitutional mandates themselves.

Daly and Kudischeva’s chapter, which adopts a broad analytical perspective, provides an ideal starting point for this volume. Focusing predominantly on Canadian and English law, they chart the rise of facts in public law across four areas: judicial review of administrative action, judicial review of legislation, systemic challenges to the legality of regulatory regimes, and constitutional causes of action. They illustrate that, despite some historical reluctance to grapple with factual issues, common law courts are increasingly called upon to engage with facts. Daly and Kudischeva identify various reasons that explain this increasing turn towards facts, and they also set out a number of difficulties which arise across the four areas. Their analysis illuminates the range of factual assessments that arise across the public law domain, and also the various judicial techniques and devices that have been adopted by judges in response.

In contrast to this broad analytic review, Patrick Emerton and Jayani Nadarajalingam focus on a more specific role of facts: facts about the institutions that are referred to by the constitutional text and to which it gives rise. Where a constitution, such as the Australian Constitution, refers to complex social and institutional arrangements, constitutional interpretation depends on courts having knowledge of those arrangements. In this way, the facts with which Emerton and Nadarajalingam are concerned exist prior to exercises of legislative and executive power. Emerton and Nadarajalingam explain the tensions that arise in adjudicating institutional mandates, particularly around the appropriate limits of the judicial role. Drawing on two cases from the High Court of Australia, they illustrate how the Court has (or has not) taken account of the relevant factual conditions. This analysis reveals that if the Court operates in an ‘idealised vacuum’ it risks eroding the very mandates it is obliged to uphold.

In their chapter, Gabrielle Appleby and Anne Carter look in more detail at the Australian context. They investigate how the adoption by the High Court of an explicit, structured test of proportionality to assess limitations on constitutional freedoms presents fresh challenges for the relationship between courts and parliaments. This development, they show, prompts consideration of whether, and how, the courts can assess and rely upon, or defer to, the fact-finding and deliberations of parliaments. For their analysis, they specifically examine the nature of parliamentary deliberation and what counts as what they term ‘fair deliberation’ by parliaments. Appleby and Carter propose a series of criteria or standards by which courts might review the robustness of parliamentary inquiries, which have been designed with a view to deepening parliamentary deliberations about constitutional freedoms and their limitations, rather than formalising or judicialising the legislative process.

Still focusing on Australia, Rayner Thwaites explores the multiple issues relating to facts and public law arising out of the Australian government’s denial of citizenship to an individual, which was grounded in a construal of the citizenship arrangements attending Papua New Guinea’s independence. These issues include how the use of historical materials and how the legal dispute proceeded from the interpretation and application of provisions of the Papua New Guinea Constitution and transnational arrangements, both of which were treated as questions of fact. Ultimately, it shows how a person’s rights and status – in this case, their citizenship – depend upon constitutional facts.

**Facts in administrative law**

In the second part of the book, the focus shifts more squarely to administrative law. While some of these issues overlap with those that arise in the judicial review of legislation, there are also some distinct issues and challenges that arise stemming from the nature and history of judicial review of administrative action. Some of these issues were foreshadowed in the chapter by Daly and Kudischeva, but in this part of the collection they assume a more prominent place.

Jason Varuhas surveys the developing role of facts in administrative law adjudication. He begins by introducing the ‘standard account’ of the treatment of facts and evidence within the English judicial review procedure, whereby judicial review is regarded as an inappropriate forum for testing evidence and resolving disputed questions of fact. Under this standard account, the only evidence generally relevant to a review claim is that which was before the administrative decision-maker, and thus forms part of the historical decision-making record. Varuhas further shows how judicial review procedures reflect this standard approach. The chapter goes on to show the growing tension between how, despite the courts continuing to repeat the standard account as mantra, the reality has become increasingly complex. Vaurhas suggests a key driver of complexity in this respect has been changes to substantive law, and he focuses in particular on the UK’s Human Rights Act 1998.

Liz Fisher and Joanna Bell consider judicial review of what they call ‘fact work’. They start with the observation that, despite the common mantra that judicial review is more centrally concerned with law, judicial review often deals with disputes about facts, the processes used to find them, and the use made of them, by decision-makers. They suggest that literature on this aspect of judicial review has been concerned primarily with how the distinction between law and fact is to be drawn in judicial review (and if it is to be drawn at all) and when a court will and should intervene to correct an error of fact. But they encourage lawyers to move beyond the law/fact distinction, and in particular ask the question: what roles do courts play in overseeing the various forms of ‘fact work’ which is required in public administration? Their chapter seeks to answer to this question by mapping three ways in which courts oversee the ‘fact work’ done in public administration.

In their chapter on the treatment of facts in South African administrative law, Glenn Penfold and Core Hoexter look closely at two of the most contested areas of fact-finding in judicial review in that jurisdiction. First, when courts are required to scrutinise the impact of an administrative act – its expected benefits and costs – or the administrator’s consideration of that impact. Second, when the factual context is relevant to a court’s exercise of its discretion to decide upon a just and equitable remedy. Through their close analysis of key cases in each of these domains, they show the importance of facts within South African administrative law, but also that the treatment of relevance and treatment of facts in individual cases can vary considerably.

Hanna Wilberg considers the position in New Zealand and England on whether mistakes of fact should give rise to a ground of judicial review. She examines the leading case of *E v Secretary of State for the Home Department*.[[1]](#footnote-1) While the status of the case is mixed and, with developments in other areas of judicial review, it may ‘seem redundant, and perhaps a little quaint’. However, Wilberg argues that the ground in *E* should be approved, and she questions whether it is redundant as the limits set out in *E* respond to the objections to mistake of fact as a ground. Wilberg concludes that mistake of fact ought to apply in cases that are not clearly covered by the broader move towards greater scrutiny of factual determinations.

Emily Hammond’s chapter concentrates on Australian judicial review, and she looks specifically at legality in fact-finding by executive decision-makers. She opens by observing that the executive branch of government routinely engages in the adjudication of individual rights and liabilities, and that the consequences of such determinations might be very similar to a judicial order. Yet, as Hammond notes, the systemic constitutional safeguards could not be more different. Her chapter focuses on whether judicial review imposes meaningful qualitative controls on executive fact-finding, and she charts a shift in the Australian jurisprudence (at least among intermediate appellate authorities) towards reasonableness review of any findings — as a matter of law or fact – that are material. Hammond situates her analysis in the constitutional basis for judicial review of executive action and explains this evolution in the scope of reasonableness review in terms of the inherent incapacity of the executive to unilaterally alter the legal position of subjects. Although focusing on Australia, Hammond’s chapter makes some broader observations about the extent to which her approach will increase qualitative control over executive fact-finding, and the pertinence of her analysis in other common law jurisdictions.

Joe Tomlinson and Cassandra Somers-Joce approach the question of facts in public law from a different angle: that of public officials. They look specifically at the duties that public law places on public bodies to collect systemic data on the operation and impact of policies and schemes. By reviewing the existing case-law, they argue that the duty of inquiry should have a broader application: it should not be limited to individualised administrative decisions, but can be, should be, and has been applied at the level of systemic administrative decisions. Their argument is that there is an important application gap in practice, and that there is no reason in principle why the duty of inquiry should not operate at a systemic level. Tomlinson and Somers-Joce demonstrate this broader application by reference to the EU Settlement Scheme, and suggest there was a deficit in the collection of data by the UK government. This deficit curtailed a comprehensive assessment of the unequal effects of the scheme, which therefore has implications in terms of the ability to scrutinise and improve public policy administration.

**Facts in broader perspective**

The third part of the book considers facts from a broader perspective. By looking at facts in different contexts, and from other disciplinary perspectives, the chapters in this part of the volume challenge the traditional or ‘legal’ approaches to facts. While the chapters in this part traverse a range of topics, they each prompt us to see the shortfalls in traditional adjudicative processes and approaches to facts.

Hilary Evans Cameron evaluates the critical question of how the traditional common law approach to evidence law can, or cannot, accommodate indigenous historical knowledge. Her focus is on Canada’s treatment of indigenous people and how the Supreme Court, recognising the injustice of the traditional approach, has responded with changes to the law of evidence designed to ensure that Indigenous oral history evidence receives ‘equal and due treatment’ in Canadian courts. Evans Cameron uses an error burden framework to evaluate the Supreme Court’s changes. She argues that the common law’s ‘default fact-finding structures’ are means to achieve normative outcomes, and courts must be open to modifying them as needed when their effect is normatively misaligned.

Zim Nwokora and Jayani Nadarajalingam tackle the intersection between political science and law. In particular, they investigate the various ways in which political science might be used in the context of the courtroom. Importantly, Nwokora and Nadarajalingam articulate what is meant by ‘political science’ and some of the challenges that arise when such knowledge is used in the legal domain. They argue that in Australian courts the utilisation of specialist political science knowledge, or expertise, remains low, and such evidence has traditionally featured rarely in constitutional adjudication. They advance a number of reasons for this, such as the tensions between the two disciplines and also the perception that such evidence is not comparable to evidence from the natural or health sciences or from other social sciences such as economics. Nwokora and Nadarajalingam argue that political science evidence should be used more extensively to ‘boost the range of facts available to courts’. They demonstrate that such evidence is often germane to the legal questions to be resolved but is rarely used or adequately engaged with. They also address the practical vehicles by which such evidence can be integrated into the legal process, and some of the obstacles that need to be overcome if such evidence is to be more routinely used.

Caitlin Goss also explores how other disciplines, namely history, can inform constitutional law. In her chapter she undertakes a mapping exercise, looking at the various ways history and historical evidence intersect with constitutional texts and adjudication. The first category she identifies is where history is expressly invoked in constitutional texts, such as to bolster a constitution’s legitimacy or to endorse or reflect a particular period of history. The second category is where history is used to resolve constitutional disputes. Within this category she identifies a number of different ways in which courts can and do make reference to history, drawing on examples from a range of jurisdictions. Like Nwokora and Nadarajalingam, Goss identifies a number of challenges that arise when courts rely on expertise from other disciplines, including tensions between the roles of lawyers and historians. Goss’s chapter invites us to consider the many ways, both explicit and more subtle, in which history is used in constitutional adjudication. It is clear that the role of history extends far beyond the (occasional) use of historians as expert witnesses and instead that history can permeate constitutional adjudication in multi-faceted ways.

Shiri Krebs also focuses on the contingent nature of legal facts, and she does so by examining Israeli Supreme Court cases on preventive detention. Her chapter draws upon the ontological and epistemological constraints of legal fact-finding in general, combined with specific challenges that arise in the context of counterterrorism cases. Krebs focuses on preventive detention cases, and she contrasts the ‘judicial management’ model developed in Israel with the ‘special advocate’ model used in the UK and Canada. As Krebs shows, both models have severe limitations in terms of fact-finding. Krebs illustrates the weaknesses of the ‘judicial management’ model by reference to two Israeli decisions, and demonstrates that – in both ‘template’-type decisions and more fully reasoned decisions – the result has been a ‘defactualisation’ of justice, where a dominant security narrative serves to hamper meaningful fact-finding by courts.

**Towards a public law of evidence?**

The diverse chapters in this book together point to a range of emerging crosscutting themes, upon which they have shed much light but which also require further study. Five such themes are, in our view, particularly worthy of attention.

First, it is a recurring theme in this book that facts and evidence are often somewhat hidden beneath the surface of the legal. This state of affairs can be the product of a lack of attention being directed to facts, including by scholars, but it can also be the result of institutional practices. It is noticeable, for example, that court judgments can present a highly variable record of the treatment of facts and evidence in a particular matter. Much will depend not only on how the matter came to court, how it was argued, and what material was before the court, but also how much of this detail finds it way into the final judgment. For scholars interested in advancing knowledge in this domain, one of the hurdles will be in terms of excavation and data collection, as often the judicial record is incomplete.

Second, and linked to the hidden nature of facts and evidence, is the concern about the inconsistent treatment of facts by courts. While there are some established frameworks and procedures for handling factual disputes in the judicial review of administrative action and constitutional adjudication, they leave a large amount of discretion in the hands of judges and, as a result, scope for inconsistency in how facts play into public law adjudication. There is a principled concern here about equal treatment, but also a concern about what effects such inconsistency might have on the operation of public law itself. This grey area is one that can cover up excesses of judicial power but also acts of judicial avoidance.

Third, the distinction between questions of law and questions of fact is deeply contested in common law jurisdictions. It is clear from the chapters in this book that it remains difficult to define and apply. In addition, as Bell and Fisher suggest, there is a question about whether this distinction is helpful at all. What is clear, is that role of evidence and facts in judicial review raises questions which go far beyond this matter. It seems a fundamental doctrinal question ripe for questioning in new ways.

Fourth, it is striking that much of the context for factual determination in public law adjudication is shaped and coloured by the particular policy domain it relates to (e.g. social security, immigration, national security *etc*). The chapters in this book have hinted at the possibility that questions of facts and evidence may well get handled differently in different contexts. Like much of public law, there is much to be gained by revisiting the subject through the prism of public policy functions.

Finally, it is quite clear that, on questions of fact and evidence in judicial review, public lawyers can benefit from other disciplines. Other disciplines, such as history and political science, are capable of providing insights and frameworks for how certain questions might be handled, and also of exposing failures and injustices that may have ossified in traditional public law approaches and procedures.

We hope the chapters in this book provoke further discussion about the role of facts in public law adjudication, and the emerging crosscutting themes to which the authors have pointed. In our view, while some of the issues raised are common to other fields of law, there are some distinct evidential issues that arise when the legality of government action is before the courts. The lack of attention given to such issues means that public law is deficient in this respect, especially when compared to other legal fields such as criminal law. Much of the law of public law evidence still needs to be written.

1. [2004] EWCA Civ 49. [↑](#footnote-ref-1)