The Independent Review of Administrative Law – Call for Evidence

Submissions
from
a group of Oxford University public lawyers

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Four Preliminaries

2. There are four important preliminary points concerning the Ministry of Justice's Call for Evidence as part of the Independent Review of Administrative Law ('IRAL').[1] They are conceptual, empirical and temporal in nature.

Conceptual

3. The Call for Evidence is framed by the following inquiry: '*Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government?*'[2] The conceptual frame underpinning this question is important, but incomplete and hence inadequate, since it makes no mention of Parliament. Judicial review is not purely about contestation between individuals and the executive, wherein the balance is between the rule of law and executive efficiency. Judicial review is there to ensure, *inter alia*, that the executive complies with the limits to its authority that flow from the enabling legislation enacted by Parliament, and from the broader system of parliamentary governance.[3] In this regard, there is no contest between the rule of law and efficiency. The overarching precept ensured by judicial review is the accountability of the executive. Unlawful administrative action forms no part of the business of government. There is no countervailing public interest in letting it go unchallenged, or in making otherwise triable issues non-justiciable.

4. Moreover, judicial review – properly conceived – is concerned with questions relating to legality rather than merits. Lord Kerr, with unanimous Supreme Court support, captured this clearly in *Michalak v General Medical Council*: an appeal

> is a procedure which entails a review of an original decision in all its aspects. Thus, an appeal body or court may examine the basis on which the original

[1] Ministry of Justice, IRAL Secretariat, 'Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government? Call for Evidence' (September 2020) (hereafter 'Call for Evidence').

[2] ibid, 1.

[3] The degree of common ground about this issue is evident in the otherwise strongly-opposed essays concerning the constitutional foundations of judicial review collected in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart 2000). Subsequent contributors to this debate have emphasised the centrality of 'consensus' between the legislature and judiciary, irrespective of one's starting point for analysis, see, eg., Alison Young, *Democratic Dialogue and the Constitution* (OUP 2017).

> decision was made, assess the merits of the conclusions of the body or court from which the appeal was taken and, if it disagrees with those conclusions, substitute its own. Judicial review, by contrast, is, *par excellence*, a proceeding in which the legality of or the procedure by which a decision was reached is challenged.[4]

A successful judicial review claim, even where proportionality was involved, was concerned only with whether the decision had been legally open to the decision-maker: 'the High Court … does not substitute its own decision for that of the decision-maker'.[5]

5. A graphic illustration is provided by *R v Somerset County Council, ex parte Fewings*,[6] a case concerning the legality of restrictions placed by a county authority, within its geographical area of administration, on hunting (at the time, a highly contentious political topic). As Sir Thomas Bingham MR stated in the Court of Appeal:

> The court has no role whatever as an arbiter between those who condemn hunting as barbaric and cruel and those who support it as a traditional country sport more humane in its treatment of deer or foxes … than other methods of destruction such as shooting, snaring, poisoning or trapping. This is of course a question on which most people have views one way or the other. But our personal views are wholly irrelevant to the drier and more technical question which the court is obliged to answer. That is whether the county council acted lawfully in making the decision it did on the grounds it did [by reference to its underpinning statutory powers].[7]

Sir Thomas went on to approve Sir John Laws' observation at first instance that a public authority – in contrast with a private citizen – was permitted to act only as the positive law expressly or impliedly justified, as opposed to possessing a discretion to do all save that which was prohibited;[8] this position is clearly aligned with a desire to ensure the maintenance of the rule of law.

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[4] [2017] UKSC 71, [20].

[5] ibid [22]. See also [21], [30].

[6] [1995] 1 WLR 1037 (Court of Appeal).

[7] ibid, 1042.

[8] ibid, citing Laws J [1995] 1 All ER 513, 523-5.

6. It is important that this conceptual background, directly derived from underlying constitutional precepts, is constantly borne in mind as the IRAL Panel undertakes its evaluative work.

Empirical I

7. The IRAL Terms of Reference state in Note C that statutory codification might '*increase public trust and confidence in JR* [judicial review]'.[9] The viability of codification will be considered below in Section 2. Suffice it to say here that insofar as the Terms of Reference imply that there is currently a lack of public trust and confidence in judicial review, there is no empirical evidence to sustain such a proposition. None is presented, and there is no such evidence. The IRAL should not therefore proceed on the basis that public confidence is lacking, unless it can demonstrate empirically that this is the case.

Empirical II

8. It is axiomatic that the Panel's deliberations should be properly informed by empirical data about judicial review. This is acknowledged in the Call for Evidence.[10] There is an important dimension to this: numbers matter. There is a tendency for those opposed to judicial review to fasten on particular high-profile cases that they believe to be wrong, and then extrapolate therefrom, the assumption being that such decisions characterise the entirety of judicial review and demonstrate a need for systemic reform.

9. This entails a leap from the particular to the general and is problematic for the following reasons.

    9.1. To fasten on certain high-profile decisions presents a misleading aggregate picture of the practical reality of judicial review – most of the daily business of which is routine – when seen across a longer time span such as a year, or a decade.

    9.2. A central feature of the precedent-driven system of common law decision-making in England and Wales is that case law from past decades or centuries plays an authoritative role, sometimes in light of reinterpretation, in contemporary

[9] Ministry of Justice, 'Terms of Reference for the Independent Review of Administrative Law' (31 July 2020) (hereafter 'Terms of Reference').

[10] Call for Evidence (n 1) 4.

judgments. Precedent emerges from across the judicial review field, and plausible analyses need to reflect this – as opposed to such occasional high-profile decisions. Put bluntly, to treat the outcome in a controversial case as proof of a general malaise in public law is a *non sequitur*, and invites a cure worse than any identifiable disease.

10. To be balanced and persuasive, it is important that any conclusions be informed by empirical data about the daily business of judicial review over a judicial year or years. This includes the number of claims, success rates, the grounds on which claims succeeded or failed, and another important dimension, judicial construction of the enabling legislation on which the executive acted. A common assumption is that courts routinely crab and confine the executive. This is not reality. When courts find against claimants, they routinely interpret the legislation purposively, so as best to effectuate the legislative schema, broadly interpreting and clarifying the executive power accorded by statute.

11. These concerns about empirical data are underscored when the Call for Evidence's Questionnaire is considered. First, understanding how the grounds and procedures of judicial review (question 1) and the prospect of being judicially reviewed (question 2) influence administrative decision-making is important in understanding how judicial review contributes to effective *and* legal government. More judicial review does not *prima facie* lead to more ineffective government.[11] For there to be the 'proper and effective discharge' of administrative functions (question 1), decision-makers must be competent — and to be competent they must act within their legal powers.

12. While a questionnaire to government departments can yield some limited information about the influence of judicial review on administrative decision-making, it cannot provide a comprehensive evidence base for consideration of the issue. There is a small, but important, literature on the impact of judicial review on administrative decision-

[11] Elizabeth Fisher and Sidney Shapiro, *Administrative Competence: Rethinking Administrative Law* (CUP 2020) ch 1.

making in England and Wales.[12] There is also research that underscores the legal stability that judicial review brings to decision-making.[13] There are studies that point to the contribution of judicial review to good decision-making.[14] Other studies have pointed to the barriers that block the influence of judicial review on decision-makers.[15]

13. Any further work in this space would also need to take into account the following.

13.1. Judicial review is just one of several ways in which administrative decisions can be challenged in courts, tribunals or other adjudicatory forums. Any analysis of the impact of judicial review should be compared to these other forms of review and accountability.[16] Many statutes create purpose-built procedural routes through which applicants can challenge decisions. Examples include the many rights of appeal to the First-tier Tribunal, and challenges to appeal decisions by the Planning Inspectorate/Secretary of State under section 288 of the Town and Country Planning Act 1990.

13.2. Given these many other routes, judicial review is often very much a remedy of 'last resort,' when there are no other routes of challenge.[17] If judicial review is used routinely for particular clusters of decision, this may be an indication that legislation has failed to provide for an alternate adequate route of challenge.

[12] See, eg, Varda Bondy, Lucinda Platt, and Maurice Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences* (Public Law Project 2015) and Lucinda Platt, Maurice Sunkin, and Kerman Calvo, 'Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales' (2010) 20 (Supp 2) J of Public Administration Research and Theory i243.

[13] See, eg Elizabeth Fisher, 'Law and Energy Transitions: Wind Turbines and Planning Law in the UK' (2018) 38 OJLS 528.

[14] Richard Kirkham and Elizabeth A. O'Loughlin, 'Judicial Review and Ombuds: a Systematic Analysis' [2020] PL 680; Jerry Mashaw, *Reasoned Administration and Democratic Legitimacy: How Administrative Law Supports Democratic Government* (CUP 2018); and Elizabeth Fisher, Pasky Pascual and Wendy Wagner, 'Rethinking Judicial Review of Expert Agencies' (2015) 93 Texas Law Rev 1681 (survey of how 45 years of judicial review improved EPA Clean Air standard setting).

[15] Simon Halliday, *Judicial Review and Compliance with Administrative Law* (Hart 2004).

[16] See also studies of Chris Gill and others, 'Dysfunctional Accountability in Complaint Systems: the Effects of Complaints on Public Service Employees' [2019] PL 644.

[17] Joanna Bell and Elizabeth Fisher, 'Exploring A Year of Administrative Law Adjudication in the Administrative Court (Working Paper, 21 September 2020) [Appendix A to these submissions].

13.3. Question 1 asked about particular grounds of review, but the relevance of any ground will depend on the legislative frameworks for those decisions, and the issues at stake.

13.4. Analysis should look at the overall process of bringing judicial review actions, including the role of the Pre-Action Protocol.[18]

Temporal

14. The time frame for this inquiry is very short, and the questions posed are far-reaching. The danger is that conclusions will be reached that are not informed by data that withstand serious scrutiny. The remit of both significant Law Commission inquiries into public law matters was significantly narrower than that of IRAL, but nonetheless each lasted much longer. The Commission's highly-regarded (and influential) 1976 report on *Remedies in Administrative Law* concerned only procedural matters and resulted from a process lasting over six years.[19] The 1994 Report, *Administrative Law: Judicial Review and Statutory Appeals* emerged from a process lasting two years, despite excluding the substantive grounds for judicial review to which the IRAL Panel is additionally required to pay attention.[20]

15. Given the complexity of the issues discussed under the following four headings, the authors of this submission invite the Panel to reflect carefully on the ambit of the task they have been assigned, particularly given the very limited data available to them.

[18] eg, Robert Thomas and Joe Tomlinson, *Immigration Judicial Reviews: An Empirical Study* (Nuffield Foundation 2019) ch 5.

[19] (Law Com No 73, Cmnd 6407, 1976). The remit and history is discussed in paras [3]-[5] of the report.

[20] (Law Com No 226, HC 669, 1994). The remit is discussed in Part I of the report.

Part 1: Codification

16. The first issue in the Terms of Reference concerns codification: '*Whether the amenability of public law decisions to judicial review by the courts and the grounds of public law illegality should be codified in statute*'.[21] The Call for Evidence, in turn, asks whether there is '*a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?*'[22]

17. Judicial review has been 'codified' in some other jurisdictions and is a process closely tied to regularising administrative process and procedure.[23] Codification can be valuable in providing a clear framework for review (just as section 31 of the Senior Courts Act 1981 and Part 54 of the Civil Procedure Rules might be said to have done, within more limited remits).

18. The IRAL is said to be especially interested in experience in Australia and other common law jurisdictions. Professor Saunders and Professor O'Regan (the latter a signatory to this submission) have submitted evidence concerning the detailed workings of the statutory regimes in Australia and South Africa respectively, about which they have considerable expertise. The members of this group endorse the submissions that they have made.[24]

19. What follows in this section is designed to address four more general considerations when thinking about codification. Supporting examples from the UK and elsewhere are used where relevant.

[21] Terms of Reference (n 9) point 1.

[22] Call for Evidence (n 1), Questionnaire, Section 2 (Codification and Clarity), question 3.

[23] Administrative Procedure Act 1946 (United States).

[24] Catherine O'Regan and Cheryl Saunders AO, 'Submission by the Bonavero Institute of Human Rights, University of Oxford and the Centre for Comparative Constitutional Studies, University of Melbourne' (October 2020).

Purpose

20. Codification of a given area of law might be attempted for a number of purposes, ranging from setting out existing rights and duties in clear form (a legal certainty-focused objective) or interpretation thereof in light of contemporary circumstances, through to ossification of the law's substantive development, limitation of its reach, or evisceration of its content.[25] Given this spectrum of possible objectives, it is important to be clear at the outset about the purpose in play.

21. Note C of the Terms of Reference is couched in terms of clarification, but it appears ambiguous and can be read in different ways.

22. The ambiguity arises in the following way. The opening sentence of Note C refers to the Supreme Court's recognition in *Michalak* (and, earlier, in *Cart*) that the foundations of judicial review lie in the common law, meaning that the substantive review jurisdiction, including the grounds, would remain even if the Senior Courts Act 1981 – which gives a statutory footing to the procedure – were to be repealed.[26] However, by then asking whether substantive public law could be placed on a statutory footing to promote clarity, Note C may also imply that it would be possible for codification to *overturn* the common law foundations, such that if a codification statute were later repealed or seriously curtailed, the scope of substantive judicial review would be commensurately reduced. Obviously, this latter understanding would run counter to the principle in *Michalak*, and beg the question whether legislation could operate in the fashion anticipated.

23. If the correct reading of Note C is in fact that it simply *notes* the unanimous decision in *Michalak*, a practical question arises concerning the usefulness of expending legislative time on a detailed codification exercise concerning principles which already exist. As a general point, the modern body of public law, complex as it is, has both a foundation of principle and a coherence of substance that it would be unwise to disturb.

[25] Stephen Cretney 'The Politics of Law Reform - A View From the Inside' (1985) 48 MLR 493.

[26] *Michalak v General Medical Council* [2017] UKSC 71, [31]-[35]. See also *R (Cart) v Upper Tribunal* [2011] UKSC 28, [37] (Baroness Hale).

24. More specifically, codification involves layering a general abstract legislative provision on top of existing legal doctrine and the legislative frameworks under which judicial decisions are made. That layering process is a complex one, and would not necessarily result in clarity, certainly not in the short term.

25. With regard to doctrine, while scholars and textbooks structure judicial review around a set of broad, general substantive grounds (such as that power must be exercised 'fairly' and 'reasonably'), in many areas the courts have developed more refined versions of these tests which they apply in particular categories of commonly occurring judicial review challenges. This provides greater clarity. It also ensures that review is appropriately tailored to the decision in question, the relevant competence of the decision-maker, and the relative expertise of the court. Layering a new framework *on top of* that doctrine does not remove the value of that tailoring, but rather must interact with it.

26. Meanwhile, in regard to legislative frameworks, a survey of legal reasoning in judicial review cases in the Administrative Court in 2017 (undertaken by two of the signatories to this submission, and annexed as Appendix A) found that the legislation under which a decision was made dominated legal reasoning.[27] Out of 283 judgments, 131 were directly concerned with legal errors in statutory construction, and the vast majority of grounds relating to process and procedure also turned on the framework for decision-making created by the statute. Layering codified grounds of review would add a further layer of legal inquiry to these established review processes.

27. Codification in the UK more than likely would lead to a rise in judicial review challenges and appeals. The study of the Administrative Court's work in 2017 revealed that in at least 50 of the cases, the legislative framework had changed since 2010 and in a further 83 cases since 2000.[28] Legislative and policy reform inevitably begets legal uncertainty and thus litigation. Lessons can be learned in this regard from elsewhere in the law. Examples abound from private and criminal law of common law and equitable principles

[27] Bell and Fisher (n 17).

[28] ibid.

which have been found to continue to exist, notwithstanding the creation of regulatory schemes by legislation, with consequent lack of clarity.[29]

28. Whether the purpose of codification is clarification or limitation (for example, by including restraints on circumstances in which substantive review can operate, or by encouraging interpretive restraint on the part of courts), one need only take a cursory glance at United States (US) constitutional jurisprudence to see that neither of the above is guaranteed.[30] Although the US Constitution is perhaps the paradigm case of codification, it cannot be accurately understood without reference to over-arching principles, which are simply not present on the face of the text. Judicially developed principles central to the understanding of the instrument include the 'separation of powers', 'checks and balances', and the 'rule of law'. References to such principles are contained within large bodies of jurisprudence generated by the interpretation of individual Articles of the constitution. Without such principles, it would be impossible to capture accurately how the US Constitution (or indeed any common law system) mediates questions of constitutional or public law.[31]

29. To bring the issue closer to home, a 2005 empirical study by Le Sueur on the head of judicial review known as 'unreasonableness' (or 'irrationality') demonstrated that generally well-understood heads of review had to be recalibrated across a range of contexts by altering the precise wording of the tests. Such recalibrations often used significantly different language from the original expressions in case law.[32] For example, unreasonableness has been recast as 'anxious scrutiny'[33] 'perversity'[34] or even non-justiciability[35] according to the demands of the context. It is difficult to imagine how

[29] Classic examples in private law relate to the 1925 law of property legislation: for a detailed study, see J Stuart Anderson, *Lawyers and the Making of English Land Law, 1832-1940* (Clarendon 1992). Within judicial review, examples are provided by argument concerning the respective ambits of statute and prerogative: see, eg, *R v Secretary of State for the Home Department, ex p. Northumbria Police Authority* [1989] QB 26.

[30] See Akhil Reed Ahmar, *America's Unwritten Constitution* (Yale UP 2012), Introduction.

[31] ibid.

[32] Andrew Le Sueur, 'The Rise and Ruin of Unreasonableness?' (2005) 10(1) JR 32.

[33] *Bugdaycay v Home Secretary* [1987] AC 514.

[34] *Secretary of State for the Home Department v Lord Alton of Liverpool & Ors (in the matter of the People's Mojahedeen Organisation of Iran)* [2008] EWCA Civ 443.

[35] *Campaign for Nuclear Disarmament v Prime Minister* [2002] EWHC 2777 (Admin).

such a complex reality might be accurately captured by a statute or code of practice without significant omissions, undue vagueness or even confusion. In short, 'clause bound literalism cannot provide the infallible constitutional compass we crave'.[36] Neither would it ease the interpretive burdens which befall administrative lawyers.

Scope I

30. The impact of codification is also dependent on whether the codified statute contains the entirety of the regime of judicial review. It is noteworthy that in Australia, South Africa, and the US the statutes dealing with the grounds of judicial review subsist in legal systems wherein there is some foundation for judicial review that flows from the Constitution. The constitutional provision differs in the three jurisdictions, but the very existence of such a provision means that the comparative lessons that can be gleaned from such jurisdictions is thereby diminished. The statutory codification is therefore only ever telling part of the story.

Scope II

31. The Terms of Reference in relation to codification include consideration of whether the *'amenability'* of public law decisions to judicial review, as well as the grounds of such review, should be codified.[37] It is unclear what precisely is intended by the term 'amenability'. It could capture all or any of the following: justiciability; standing; ripeness; mootness; permission; time limits; or scope of public law procedures. The viability of any codification exercise will depend crucially on the more particular meaning that is ascribed to 'amenability'. Clarity in this respect is therefore essential.

Abstraction v Specificity

32. A further important consideration when thinking about the value and impact of codification concerns the relative degree of abstraction or specificity of the codification. This choice is important with respect to both issues of amenability to judicial review, and the grounds of review. The following is indicative of the choice as it plays out in relation to the grounds of review, but analogous considerations pertain in relation to codification, so far as it relates to amenability.

[36] Ahmar (n 30) ch 1.

[37] Terms of Reference (n 9) point 1.

32.1. The more abstract the grounds of review, the less the projected statute will provide clarity, since each of the abstract grounds will be fleshed out by the judiciary, with the result that the lifeblood of judicial review will remain judicial decisions on the meaning of, for example, error of law, error of fact and the like. This is exemplified by experience in the US. The Administrative Procedure Act 1946 sets out the grounds of review in very general terms, with the consequence that the wording of these terms plays very little role in the judicial and academic debates as to the reach/standard of judicial review for matters such as error of law, error of fact, or abuse of discretion.

32.2. The more specific the grounds for review, the greater will be the potential impact of the codification. However, if the intent underlying codification is indeed clarification of the status quo through capturing the richness of the existing jurisprudence, then the statute will be considerably longer and more complex. The attendant danger is that this then generates satellite litigation as to the meaning of particular detailed provisions of the legislation, with a consequential increase in the overall body of law concerning judicial review: again bringing to mind the findings of the study of the Administrative Court's work in 2017, mentioned above.

33. Perhaps unsurprisingly, comparative evidence suggests that successful codification is the product of many years' work,[38] because it must capture adequately all the legal work of the courts (particularly at the lower levels) and how it relates to administrative decision-making. Any attempt to codify the grounds of judicial review must also contend with how codification interacts with the many other routes for legal challenge. In the UK, for example, the Administrative Court also applies the grounds of review in dealing with statutory appeals/challenges (sections 288 and 289 Town and Country Planning Act 1990). Other courts (for instance the county court, dealing with appeals on points of law from housing authorities, and criminal courts determining collateral challenges to decisions by the Crown Prosecution Service) and tribunals (most notably the Upper Tribunal) also frequently engage with the grounds of review.

[38] eg, work on the Administrative Procedure Act 1946 in the United States took over a decade and included the comprehensive *Attorney General's Committee Report on Administrative Procedure* (1941). See Fisher and Shapiro (n 11) ch 6.

34. We make further submissions about the difficulties of codification in later sections, where they are pertinent to the specific issues within the Terms of Reference.

35. Many lawyers owe their livelihood to the enduring fallacy known as the drafter's delusion – the belief that legislation can cover all eventualities. The Panel will need to consider, in light of the points raised in this section, whether codification can in fact bring anything of real value to judicial review.

Part 2: Justiciability

36. The Terms of Reference and Call for Evidence are not identical in their specification of the justiciability issue: the Call for Evidence appears to refer to the range of decision-makers which should fall within the ambit of judicial review, as well as to whether certain subjects/areas should be excluded, whereas the Terms of Reference appear to be concerned solely with the latter topic.[39] The former issue is complex, entailing description, analysis and normative evaluation of a large body of case law, and its relationship with background statutory developments and theories of the proper role of the state.[40] This being so, we will concentrate on the subjects/areas which should be amenable to judicial review, itself a large topic.

37. The Terms of Reference are predicated on:
    (i) historical assumptions concerning the reviewability of decisions that affected the manner of exercise of discretionary power;
    (ii) the contention that the range of justiciable issues must be clarified; and
    (iii) the assumption that any difficulties can be rectified through statute.

Re (i) The Historical Premise: Inaccurate Historical Assumptions Regarding Justiciability Concerning the Manner of Exercise of Power

38. First, the Terms of Reference frame the inquiry into justiciability against the background of Note E,[41] which is also relevant to the grounds of review (considered in Part 3). The argument contained in the first two sentences of Note E is that historically courts did not control the manner of exercise of power, provided the public body acted within its scope

[39] Compare Terms of Reference (n 9), para. 2; Call for Evidence (n 1), Questionnaire, Section 2, Q 4.

[40] It would entail consideration of the corpus of case law concerned with amenability to judicial review. The case law and secondary literature are analysed in Paul Craig, *Administrative Law* (8th edn, Sweet & Maxwell 2016) ch 27.

[41] Note E is as follows: 'Historically there was a distinction between the scope of a power (whether prerogative or statutory or in subordinate legislation) and the manner of the exercise of a power within the permitted scope. Traditionally, the first was subject to control (by JR) by the Court, but the second was not. Over the course of the last forty years (at least), the distinction between "scope" and "exercise" has arguably been blurred by the Courts, so that now the grounds for challenge go from lack of legality at one end ("scope") to all of the conventional [JR] grounds and proportionality at the other ("exercise"). Effectively, therefore, any unlawful exercise of power is treated the same as a decision taken out of scope of the power and is therefore considered a nullity. Is this correct and, if so, is this the right approach?'

of authority. The assumption appears to be that this is relevant to current discussion concerning justiciability, because it reveals that courts are treading where their forbears did not.

39. The argument is clearly wrong. The distinction between scope and manner of exercise, with the former being reviewable and the latter not, applied only to review of prerogative power, prior to *Council of Civil Service Unions v Minister for the Civil Service*.[42] There was no such limit on review of statutory power, which has always constituted circa 95% of the totality of judicial review actions. Judicial review from the late sixteenth century onwards routinely included manner of exercise of statutory discretionary power.[43] It was reviewed directly via tests framed in terms of rationality, and what was then called proportionability, wherein the normal remedy was *certioriari*. It was reviewed indirectly/collaterally via damages actions in trespass, trover, replevin, and action on the case, depending on the factual circumstances. The tortious remedy was sought when monetary relief was desired, but it would however issue only if the public body's action lacked legality, as manifest where exercise of discretion failed to meet the standards of rationality or proportionability.

Re (ii) The Substantive Premise: The Contention that the Range of Justiciable Issues Must be Clarified

40. The Terms of Reference suggest that the range of issues that should be justiciable might require reform. This presupposes either or both of two things: that the current case law is insufficiently clear, and/or that courts are treading on issues that should properly be regarded as non-justiciable. In reality, following the Supreme Court's detailed consideration in *Shergill v Khaira*,[44] the boundaries of justiciability seem reasonably settled. There is no evidence that when justiciability is directly placed in issue, it is not dealt with appropriately by the courts.

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[42] [1985] AC 374.

[43] The seminal early decision was *Rooke's Case* (1598) 5 Co Rep 99b. The case law concerning direct and collateral challenge relating to discretion is analysed in Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (CUP 2015) 36-42, 59-62; Paul Craig, 'Proportionality and Judicial Review: A UK Historical Perspective', in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law, European and Comparative Perspectives* (Hart 2017) ch 9

[44] [2014] UKSC 33.

41. In *Shergill*, a trusts case, two categories of justiciability were identified. In a joint judgment by Lord Neuberger, Lord Sumption, and Lord Hodge, considerations going to particular decision-making institutions and to the subject-matter in play were invoked. The first category concerns issues which are 'beyond the constitutional competence of the courts'.[45] Examples within this first category include transactions with foreign states, proceedings in Parliament, or matters which would directly impact upon the United Kingdom's foreign relations.[46] The second category is best described as issues which, by reason of their subject-matter, do not require legal intervention. This category includes 'claims or defences which are based neither on private legal rights or obligations, nor on reviewable matters of public law'.[47] Specific examples include domestic disputes, transactions not intended to create legal relations, and issues of international law which do not generate private rights or reviewable questions of public law.[48]

42. Three further points are significant in relation to this contention in the Terms of Reference.

43. First, the two categories of non-justiciability are well-grounded in normative terms, and they provide fairly generous tests for non-justiciability. *Shergill* also forms part of a pattern of frequent and careful consideration given to non-justiciability by the Supreme Court.[49]

44. Second, non-justiciability is a blunt doctrine, which ignores the contextualisation that is central to judicial review. While it is rare for courts to regard matters as wholly non-justiciable, they routinely moderate and modulate the grounds of review, according deference and varying the intensity of review applied to the decisions challenged

[45] ibid [42].

[46] ibid.

[47] [2014] UKSC 33, [43].

[48] ibid.

[49] See, eg *Belhaj v Straw* [2017] UKSC 3.

(something which also applies to other grounds of claim touching on government action).[50] We return to this issue in Part 3.

45. Third, an attempt to demarcate the justiciability of decisions by statute would have important constitutional and normative implications. While parliamentary sovereignty lends formal authority to statute, it does not dispel normative concerns inherent in respect for separation of powers and the rule of law, about whether the legislature should tell the courts what is suitable for legal resolution. This is quintessentially a judicial task, whereby the courts decide whether there are no meaningful legal standards that can be applied to the salient issue. In reality, a statute purporting to exclude the courts through a non-justiciability clause is, in substance, doing the same thing as an ouster clause, inviting extremely close judicial scrutiny.[51] The normative concerns expressed in *Privacy International* would *a fortiori* be applicable here.[52]

Re (iii) The Statutory Premise: Statutory Intervention as the Answer

46. The third distinct issue is that the Terms of Reference seemingly assume that any identified problems can only be addressed through statute. However, it is important to reflect on the form that statutory intervention might take. In principle, there are two possible forms of statutory intervention, and both are problematic.

    46.1. The first approach would entail legislation listing the *type/area of subject-matter* intended to be non-justiciable (for example, decisions affecting resource allocation or implicating foreign policy), across a range of decision-makers. There are two

[50] What Laws LJ has described as 'a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake' – *R v Secretary of State for Education and Employment ex p Begbie* [2000] 1 WLR 1115, [78] (ie irrationality review of varied intensity). For instance, in reviewing resource allocation decisions the courts ask whether the decision is 'manifestly without reasonable foundation' (eg *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21, [65] (challenge to 'benefit cap' introduced by Welfare Reform and Work Act 2016); *R (Drexler) v Leicestershire County Council* [2020] EWCA Civ 502 (challenge to local authority policy on the funding of home to school transport for children and young people with special education needs)). Similarly, the Court of Appeal has recently said that 'when dealing with matters depending essentially upon political judgment, matters of national economic policy and the like, the court will only intervene on grounds of bad faith, improper motive and manifest absurdity' (*R (Packham) v Secretary of State for Transport* [2020] EWCA Civ 1004, [55]). For a classic discussion of limits to judicial review in a sensitive area (on the facts, national security), see *Council of Civil Service Unions v Minister for the Civil Service* (n 42) 406-7 (Lord Scarman), 408-11 (Lord Diplock) and 417-9 (Lord Roskill).

[51] As classic authority, see *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147. For more recent analysis, see *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22.

[52] *R (Privacy International) v. Investigatory Powers Tribunal* (n 51).

related difficulties. First, it requires a determination about the types of subject-matter which should properly be regarded as off-bounds for the courts. Secondly, there would be a real danger that the subject-matter on the excluded list would be defined in over-inclusive terms. These difficulties are illustrated by the potential formulation of statutory exclusions concerning foreign policy or resource allocation. Generally-formulated exclusions are likely to generate considerable litigation, as claimants and government alike contest the meaning and boundaries of the non-justiciable categories listed. Furthermore, an approach seeking to exclude the courts from these areas without any qualification or precise definition would clearly be unacceptable: many aspects of foreign policy have direct implications for individual rights, and a vast number of executive decisions have implications, whether direct or indirect, for resource-allocation.

46.2. A second approach would involve legislation purporting to render *specific powers* non-justiciable. However formulated, such a provision would give rise to significant legal complexities. Consider, for example, a clause which provided that 'power X is non-justiciable'. Such a clause would be read against the background of the axiomatic principles that all legal powers have limits,[53] and that, in order to be meaningful, legal limits must be capable of being enforced.[54] These principles mean that it would be untenable to read the clause as preventing *any* judicial review of purported exercise of power X. Consequently, there would be complex legal arguments about what, precisely, 'non-justiciable' meant in this context. A drafter might seek to circumvent these challenges by defining the boundaries of the power extremely broadly: for instance, by providing that 'power X can be exercised for any purpose whatsoever'. However, this would again create considerable legal complexity, with the outer boundaries of the power inevitably raising interpretive questions. Novel legal questions would also arise about how long-established extra-statutory principles of review might apply to a clause.

[53] *Padfield v Minister of Agriculture, Fisheries & Food* [1968] AC 997, 1029-1030 (statutory power). See also *R (Palestine Solidarity Campaign Ltd) v Secretary of State for Housing, Communities & Local Government* [2020] UKSC 16, [23]; *Entick v Carrington* (1765) 2 Wils KB 275 (prerogative power).

[54] For this reason, Laws J in *R (Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin) explained that effective judicial review is a logical necessity of Parliamentary sovereignty ([38]).

47. There are two further specific problems in drafting a statute intended to broaden the doctrine of non-justiciability: risks and unintended consequences. In a legal system respecting the rule of law, constitutional and other relevant legal constraints apply to governments regardless of their political complexion. Given the Supreme Court's rejection of a broad-brush 'political questions'-based approach to justiciability in *Belhaj*[55], an approach broader than that currently used would necessarily entail acceptance that it might be employed by any future government. Concerning unintended consequences, non-justiciability is not exclusively a judicial review/public law doctrine, as is illustrated by the fact that *Shergill*[56] was a trusts case. In reality, issues of non-justiciability cut across the legal system. Consequently, unless any reconsideration of non-justiciability in the judicial review/public law context *also* undertakes the complex task of considering how any redefinition might impact upon, and be made workable, across other branches of the law, any reform in public law might easily entail unintended complications in other areas.

Conclusion to Part 2

48. In short, any attempt to legislate on the subject of non-justiciability would be likely to run afoul of important constitutional principles, to face significant drafting challenges, and to risk cementing a lack of accountability which could be abused by future administrations of various political hues. It would create considerable legal complexity, disrupting what is at present a clear, stable, and predictable body of legal principle, in turn generating litigation in every level of court. As we will explain in the next section, there is no need for anything as blunt as general non-justiciability provisions, given that the need for context-sensitivity is generally appreciated by courts across the board within judicial review.

[55] (n 49).

[56] (n 44).

Part 3: Grounds of Review

49. Although the Terms of Reference identify as issues for consideration
    (a) the *grounds* on which courts should be able to find a justiciable decision to be unlawful;
    (b) the connection between those grounds and the *nature and subject-matter of the power* in issue, and
    (c) the *remedies* available in respect of the various grounds,[57]

    the Call for Evidence makes no specific mention of these issues. Given their inclusion in the Terms of Reference, we consider it relevant to address such matters.

Grounds of Judicial Review: General Considerations

50. The grounds of judicial review have been elaborated by the courts. They have been refined and developed over time. It is of course legitimate to question the grounds of review to determine whether they are warranted. This is, however, a very considerable exercise, and raises once again the temporal concern expressed above (paras 14-15) concerning the compressed time scale within which the Panel is expected to complete its work. It would certainly not be possible within the confines of this submission to engage in detailed analysis of each ground of review. That would require a treatise in itself. Suffice it to say the following.

    50.1. The list of grounds of review is very similar to that which exists in other jurisdictions, common law and civil law alike. There are of course differences concerning, for example, the precise scope of review for error of law or mistake of fact, but this should not conceal the similarities that exist across legal systems as to the grounds of review.

    50.2. The fact that the grounds of review are replicated across common law and civil law jurisdictions alike show their centrality to the rule of law. Removal or qualification of any of the established grounds of review should be subject to a high justificatory hurdle. This is for two rule of law related reasons. First, given that a central aim of

[57] Terms of Reference (n 9) para. 3.

judicial review is to ensure that public authorities act within the scope of their lawful powers, changes which may confine the circumstances in which the legality of public authorities' actions can be challenged would dilute the maintenance of legality and public accountability. Secondly, the grounds of review are long-standing and have been relied upon by private parties and public authorities alike in planning their affairs.[58] Considerations of legal certainty therefore require that amendment or qualification not be undertaken without a suitably robust process of evidence-gathering and evaluation.

50.3. There has been some expansion in the grounds of review in the last forty years, as intimated in the Terms of Reference, Note E. This should be kept in perspective. New grounds of review evolve from existing grounds in order to establish clear conditions and requirements for different categories of case, the overall effect being to place boundaries around judicial review and ensure consistency between cases. Judicial review for error of fact has been expanded, but the current test is not overly broad when compared to its counterparts in other jurisdictions. The courts have recognized substantive legitimate expectations as a ground of review, but there are strict conditions that have to be satisfied by the claimant, and challenges are rarely successful. Rationality review has become more nuanced than hitherto, the principal driver in this respect being concern for the nature of the subject-matter – which, as noted above, is the very factor that the Terms of Reference state should be taken into account. Moreover, the evolution of judicial review cannot be described solely in terms of expansion. In some cases, the courts have sought to narrow and refine the grounds of review. In *Reprotech*,[59] the House of Lords rejected the use of the private law concept of estoppel when reviewing planning decisions, clarifying earlier case law. Review for error of law has been reined in, as exemplified by Supreme Court decisions such as *Cart*[60] and *Jones*,[61] the catalyst being once again concern for the nature and subject-matter of the power. More

[58] It is noteworthy that the frequently-cited outline 'road map' of the grounds of judicial review was laid out (*obiter dicta*) by Lord Diplock in 1984: *Council of Civil Service Unions v Minister for the Civil Service* (n 42) 410-12.

[59] *R v East Sussex County Council (Appellants) ex parte Reprotech (Pebsham) Ltd* [2002] UKHL 8 [33]-[34].

[60] *R (Cart) v Upper Tribunal* (n 26).

[61] *R (Jones) v First-tier Tribunal* [2013] UKSC 19.

recently, the Supreme Court clarified the law by holding that 'substantive unfairness' is not an independent ground of review.[62]

Grounds of Judicial Review: Terms of Reference, Note E

51. Note E of the Terms of Reference suggests that over the last forty years or more, '*the distinction between "scope" and "exercise" has arguably been blurred by the Courts, so that now the grounds for challenge go from lack of legality at one end ("scope") to all of the conventional [judicial review] grounds and proportionality at the other ("exercise"). Effectively, therefore, any unlawful exercise of power is treated the same as a decision taken out of scope of the power and is therefore considered a nullity*'.[63] While Note E asks whether the claim in the latter sentence is correct (and, if so, whether the approach concerned is appropriate), that query rests on the '*arguabl[e]*' characterisation in the first sentence. That characterisation is wrong, for the following reasons.

51.1. Viewed historically, the grounds of judicial review, when proven, led to the decision being a nullity, or null and void. The assumption in Note E to the contrary is wrong. Thus, from the seventeenth century onwards, the general rule was that reviewable errors when proven led to the decision being a nullity from the time at which the error occurred: errors relating to natural justice/bias rendered the decision null and void; so too did errors relating to rationality and proportionability.[64]

51.2. The characterisation of voidness is warranted in normative terms. Consider the matter from first principle, by reference to rule of law considerations.[65] The grounds of judicial review are expressive of different kinds of legal reasons as to why a decision should be struck down, all of which are equally serious. The salient

[62] *R (Gallaher Group Ltd and others) v Competition and Markets Authority* [2018] UKSC 25.

[63] Terms of Reference (n 9) Note E.

[64] Paul *UK, EU and Global Administrative* Law (n 43) 25-62; HWR Wade, 'Unlawful Administrative Action – Void or Voidable?' (1967) 83 LQR 499 (Part I) and (1968) 84 LQR 95 (Part II). There are exceptions to the general rule: see, Craig *Administrative Law* (n 40), ch 24.

[65] *Hoffmann-La Roche v Secretary of State* [1975] AC 295, 365*; Secretary of State for the Home Department v JJ* [2007] UKHL 45, [26]–[27]; *Mossell (Jamaica) Ltd (t/a Digicel) v Office of Utilities Regulations & Ors (Jamaica)* [2010] UKPC 1; *Ellerton, R (on the application of) v Secretary of State for Justice* [2010] EWCA Civ 906; *McLaughlin* [2007] UKPC 50*; R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [66].

point is that there is no sound normative argument as to why errors relating to abuse of discretion or natural justice should be regarded as less serious than any other error of law. The different types of error all lead to the decision being ultra vires and void. Courts control errors of law to ensure, inter alia, that the primary decision-maker does not stray beyond its remit, by, for example, adjudicating on a case that does not concern employees when its scope of authority is confined to employees. Courts control abuse of discretion through rationality review, because there should be some limit to the way in which broad discretion accorded to the executive is exercised. Courts impose natural justice because this accords with basic precepts of justice, and because a determination by a biased judge would undermine the very nature of adjudication. If there were legislation attempting to draw distinctions in this respect it would, moreover, almost certainly generate complex case law as to the metes and bounds of each category.

51.3. Voidness/nullity is, in any case, a relative and not an absolute concept. The decision will only be null and void if it is challenged by the correct person, within the established time limits, and there are no other bars to relief. This correctly circumscribes the force of the nullity principle.[66] There may, nonetheless, be instances where application of the concept of retrospective nullity can cause practical problems, by undermining the legal foundation of decisions that have been made on the assumption that the decision that has been annulled was valid. This has been recognized by courts and academics alike, and reflects reality.[67] This does not however mean that nullity is an incorrect starting point. Nor does it provide any foundation for a general argument seeking to restrict nullity to certain types of error of law; this would not obviate the problem, given that this concern can arise where subsequent decisions are undermined because they are predicated on an earlier decision said to be vitiated by an error of law. If this problem arises it can be addressed either by analysis as to whether the legality of the second order

[66] See, e.g., Wade (n 64).; MB Akehurst, 'Void or Voidable? – Natural Justice and Unnatural Meanings' (1968) 31 MLR 2 (Part One), 138 (Part Two); Dawn Oliver, 'Void and Voidable in Administrative Law: A Problem of Legal Recognition' (1981) 34 CLP 43; Christopher Forsyth, '"The Metaphysic of Nullity": Invalidity, Conceptual Reasoning and the Rule of Law', in Christopher Forsyth and Ivan Hare (eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (OUP 1998); Thomas Adams, 'The Standard Theory of Administrative Unlawfulness' (2017) 76 CLJ 289.

[67] See the material cited in (n 66).

decision is really dependent on the legality of the first order decision, or through the exercise of remedial discretion, whereby the remedy is limited to prospective impact.[68]

Relation between Grounds of Review and Nature and Subject-Matter of the Power

52. The courts already apply the grounds of review mindful of the nature and subject-matter of the power, as noted in para 44 above. They have always done so, explicitly or implicitly. Sometimes commentators will disagree as to the application of a particular ground of review in a particular case, albeit no more so than is the case in relation to the frequent and analogous issues concerning meaning and interpretation that arise in private law. We note here that the Human Rights Act is not within the purview of the IRAL.

53. Courts have a long-established practice of giving weight to subject-matter when determining the application of grounds of judicial review.[69]The salient issue for IRAL is whether further steps might be taken to underscore the idea, and if so what these might be. To attempt to legislate concerning the relevance of a power's nature and subject-matter would almost certainly be either otiose or counter-productive. It would be otiose if the legislation were simply cast in very general terms, to the effect that '*courts when applying judicial review should take account of the nature and subject-matter of the power being reviewed'*. It would be counter-productive if such legislation sought to specify in considerable detail the factors that should be determinative in this respect: for it would be time-consuming and very difficult to draft such legislation, and the exercise could well generate unproductive satellite litigation.

Relation Between Remedies and Grounds of Review

54. The Terms of Reference link consideration of the grounds of review with that of the remedies available in respect of the grounds on which a decision may be declared unlawful.[70] There are several points to consider here.

[68] For further discussion of remedial discretion, see Part 4.

[69] See, e.g., *R. v. Ministry of Defence, ex p. Smith* [1996] QB 517, 554-6 (Sir Thomas Bingham MR); Michael Fordham, 'What is "Anxious Scrutiny"?' (1996) 1 JR 81; and Paul Craig, 'Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application' [2015] PL 60.

[70] Terms of Reference (n 9) para 3.

54.1. Claimants and courts already have choices concerning the remedies to redress action that is in breach of one of the established grounds of review. There are five principal remedies available via section 31 of the Senior Courts Act 1981/Part 54 of the Rules of the Supreme Court: quashing, mandatory and prohibiting orders; declaration; and injunction.

54.2. The remedies are discretionary, such that the court can, if so inclined, take into account a range of factors (potentially including consequences for the respondent body) in deciding whether to grant a particular remedy.[71]

54.3. The legislature has already intervened via the Criminal Justice and Courts Act 2015, which requires courts, inter alia, to refuse relief and/or a monetary award if it appears to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred (subject to a proviso concerning exceptional public interest).[72]

54.4. It is then unclear what the content of any further reform would be. A more formal connection between each ground of review and the available remedy might be established, such that, for example, abuse of discretion would prima facie lead to a particular remedy, while mistake of fact would lead to a different remedy. This would generate strategic litigation – as for example was seen over the application of Order 53 of the Rules of the Supreme Court.[73] It would, moreover, make no sense for reasons that are readily apparent: the factual and legal circumstances in issue in cases to which a particular ground of review applies can differ very significantly, with no automatic connection to the factors determining the applicable remedy where an application is successful. To forge a formal connection between a particular ground of review and a particular remedy, such that the one

[71] Lord Woolf remarks: 'The existence of the discretion is of the greatest importance since it means that even if an applicant succeeds in establishing a ground for relief, that relief can be refused if his application is unmeritorious' ('Droit Public – English Style' [1995] PL 57, 61).

[72] s 84, Criminal Justice and Courts Act 2015, inserting supplementary provisions into s 31, Senior Courts Act 1981.

[73] *O'Reilly v Mackman* [1983] 2 AC 237.

always generated the other, would therefore create a Procrustean frame ill-suited for the plethora of cases that arise within every ground of review.

54.5. An alternative approach might be to specify that certain grounds of review should not have any formal legal consequence, such that the court judgment is purely declaratory. The existence of a category of decisions that would be unlawful, but would attract no remedial implications would be contrary to the rule of law. This would, moreover, be very undesirable for the following reasons.

54.5.1. It is unclear in normative terms why any of the established grounds of review should be limited to this exiguous remedial effect.

54.5.2. It would be extremely difficult, if not impossible, to draft any legislative rules that specified when this should occur.

54.5.3. It is unclear how this would fit with the remedial instruction to courts introduced by the Criminal Justice and Courts Act 2015.

54.5.4. It could cause a range of problems for public bodies, since the effect of such a remedial order could leave the public body uncertain as to the status of its existing decision, and what it should do next.

Part 4: Procedure and Remedies

55. The fourth issue in the IRAL Terms of Reference concerns a range of issues dealing with procedure, and remedies.[74] The Bingham Centre for the Rule of Law has produced some detailed practical proposals for streamlining procedures whilst ensuring the centrality of an effectively functioning system of judicial review to the rule of law, which we commend to the IRAL's consideration.[75] The remainder of this submission focuses on certain of the issues as identified in the Terms of Reference and the Call for Evidence.

Disclosure and the Duty of Candour

56. The Review should bear in mind the following.

56.1. The rules relating to disclosure are already limited, including by public interest immunity and closed material procedures. The rules were liberalised to some extent in 2006 in *Tweed*[76] for cases where proportionality was an issue. Even in cases concerning proportionality, disclosure should be carefully limited to the issues required, in a finely balanced analysis of the interests of justice. As the House of Lords noted in *Tweed*, disclosure is nonetheless more limited than in ordinary civil litigation, in part because judicial review cases often turn on issues of law rather than fact. The overriding factor determining disclosure is what is necessary to dispose of the matter fairly and justly. It would be undesirable if incursion on this case-sensitive principle by the recommendations of the IRAL were to mean that the court was deprived of what was necessary to reach a just and fair result.

56.2. Another reason why the rules on disclosure are more qualified in judicial review cases is because public bodies are generally subject to a duty of candour and cooperation that does not apply in ordinary civil litigation. The duty derives from Lord Donaldson MR's judgment in *Huddleston*. The public authority may resist

[74] We note that The IRAL Call for Evidence (n 1) is framed somewhat differently, with the remedial issues elaborated as 'Process and Procedure'. The questions relating thereto overlap with those in the Terms of Reference (n 9).

[75] Michael Fordham QC and others, *Streamlining Judicial Review in a Manner Consistent with the Rule of Law* (Bingham Centre for the Rule of Law, 2014).

[76] *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 1 AC 650.

the claim, but it must do so with 'all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands'.[77] It is a self-policing duty, but there is an obligation on lawyers acting for public authorities 'to assist the court in ensuring that these high duties on public authorities are fulfilled'.[78] It is also in some respects more demanding, since while disclosure might be satisfied by giving documentation to the claimant, the duty of candour and co-operation requires public authorities '*to assist* the court with full and accurate explanations of all the facts relevant to the issues which the court must decide'.[79]

56.3. The duty of candour is predicated on the sound normative premise that public authorities are engaged in a 'common enterprise with the court to fulfil the public interest in upholding the rule of law'.[80] This premise should be incontrovertible.

56.4. The duties of candour and disclosure are thus directed at the proper administration of justice and hence should be altered only if they *impede* the administration of justice.

56.5. There is no empirical evidence that the duties of disclosure and candour do so. The Review's Questionnaire to Government Departments about the impact of such duties will not generate sound empirical data, and is also asking the wrong question.[81]

56.6. By way of conclusion it is noteworthy that in many civil law systems, and in the EU, there is a right of access to the file, which is applicable both before the initial decision is made, and at the stage of challenge by way of judicial review. The right is enshrined in Article 41(2)(b) of the EU Charter of Fundamental Rights.

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[77] *R v Lancashire County Council, ex p Huddleston* [1986] 2 All ER 941, 945. See also *BACONGO v Department of the Environment* [2004] UKPC 6; *Application by Brenda Downes for Judicial Review* [2006] NIQB 77, [31]; *R (Mohammad Shahzad Khan) v Secretary of State for the Home Department* [2016] EWCA Civ 416, [71]; *R (Jet2.com Ltd) v Civil Aviation Authority* [2018] EWHC 3364, [47]-52]; *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508, [13]-[20]; *R (Citizens UK) v Secretary of State for the Home Department* [2018] 4 WLR 123.

[78] *Hoareau* (n 76) [18].

[79] ibid [20].

[80] ibid [20].

[81] See paras 12-13.

Standing

57. The rules on standing determine access to justice by individuals claiming to be affected by executive decisions, and by public interest groups who are well placed to articulate the wider implications of such decisions. The Terms of Reference ask whether the law of standing should be changed. In the Call for Evidence the inquiry is more directed: whether those submitting evidence have experience of litigation where issues of standing have arisen, and if so whether such people think that the rules of public interest standing are treated *too leniently* by the courts. We confine ourselves to the following observations.

57.1. The issue of standing was considered in detail in the Ministry of Justice's investigation into judicial review in 2013-2014, concluding in June 2019.[82] This exercise included a survey of other standing tests used elsewhere. The conclusion of this reform exercise was that changes should not be made to the law of standing, and in particular that the 'sufficiency of interest' test should remain the criterion.

57.2. The very great majority of judicial review cases involve no contestation as to standing.[83] They are brought by the individual affected by the contested government action. If the intent/concern behind this aspect of the IRAL is to reduce the incidence of judicial review in numerical terms, then changes to standing rules so as to circumscribe public interest challenges will have a marginal or interstitial impact on the aggregate number of challenges.

57.3. Public interest challenges serve an important function for the very reason recognized by the Supreme Court in *Walton*[84] and developed in the academic literature:[85] there are certain issues that do not affect any particular individual more than any other, and it would clearly be contrary to the rule of law if such issues

[82] Ministry of Justice, *Judicial Review: Proposals for Further Reform (Government Response to Consultation)* (4 June 2019).

[83] Bell and Fisher (n 17), section 2.2.

[84] *Walton v Scottish Ministers* [2012] UKSC 44.

[85] Peter Cane, 'The Function of Standing Rules in Administrative Law' [1980] PL 303; Peter Cane, 'Standing, Legality and the Limits of Public Law' [1981] PL 322; Peter Cane, 'Standing Up for the Public' [1995] PL 276.

could not be subject to judicial review. Public law is concerned with abuse of power, even when no private rights are at stake.[86] Lord Reed also recognized that in other contexts, where a specific individual was the primary addressee of the contested measure, then that individual would normally be expected to bring the action. For example, in *DSD v Parole Board*,[87] the Administrative Court recognised that the law of standing should be tailored to find the most appropriate claimant, where there was a possibility that multiple claimants might have standing. In that case the Mayor of London was denied standing in favour of one of Worboys' victims. In short, the 'sufficient interest' test can be contextualised to screen out overtly political claims.

57.4. There are also group challenges, where the group acts as a surrogate for those directly affected. This is warranted because those directly affected, whose interests are represented by groups such as the Child Poverty Action Group, or the coalition of charities behind Violence against Women and Girls, cannot readily bring the action in their own name. There can also be cases where the group constitutes an association of those immediately affected by, or concerned by, the action. The rationale for the group challenge in this type of instance is somewhat different. The catalyst here is normally the logic of collective action to pool resources, draw upon overall expertise, and share the burdens of litigation. Trade associations and charities commonly perform this role.

57.5. It would be wrong, given the above, to preclude public interest challenges, as some have contended.[88] There is no evidence that any limitation is required or warranted. On the contrary, empirical research by two members of our group indicates the small number of cases that fall into this category.[89] In a survey of 283 judicial review judgments from the Administrative Court in 2017, there were just 18 cases (6%) where a public interest group was the main party. These groups represented

[86] Craig, *Administrative Law* (n 40) para 12-047.

[87] [2018] EWHC 694 (Admin).

[88] Ministry of Justice, *Judicial Review: Proposals for Further Reform* (Cm 8703 2013) 22.

[89] Bell and Fisher (n 17).

a range of diverse civil society interests including those relating to human rights,[90] environmental concerns,[91] local interests,[92] animal welfare,[93] recreational activities,[94] and privacy.[95] Generalising about public interest groups thus is problematic. This number compares to 48 judgments where the main party was a company and 21 cases where the main party was a public body.[96]

57.6. Courts already have the jurisdiction to determine whether a body represents the public interest. Allowing public interest groups to bring actions (whilst small in number in the bigger picture of judicial review) is essential in upholding the rule of law. Many standards (including those provided by Acts of Parliament) do not confer benefits on individuals, but seek to promote the interests of the public as a whole. Limiting standing in such cases to, for instance, those whose 'legal rights' are being infringed would result in legislative duties, enacted to promote important public interests, becoming hollow.

57.7. Moreover, any such legislative change would almost certainly generate uncertainty and further litigation, as claimants and government alike would seek to test the boundaries of the new criteria, whatever they might be.

57.8. To conclude regarding standing, the corpus of judicial review judgments since the 1978 reform provides no foundation for amending the 'sufficient interest' test in the s 31(3) Senior Courts Act 1981. In the hands of the judges, this pragmatic test has worked well.

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[90] See, eg *The Centre for Advice on Individual Rights In Europe v The Secretary of State for the Home Department & Anor* [2017] EWHC 1878 (Admin).

[91] See, eg *R. (on the application of ClientEarth) v Secretary of State for Environment, Food and Rural Affairs* [2017] EWHC (Admin) 1966.

[92] All objecting to a planning permission. eg *Leckhampton Green Land Action Group Ltd), R (on the Application of) v Tewkesbury Borough Council* [2017] EWHC 198 (Admin).

[93] See, eg *Trail Riders Fellowship v Secretary of State for the Environment, Food and Rural Affairs* [2017] EWHC 1866 (Admin).

[94] See, eg. *The Ramblers Association v Secretary of State for Environment Food And Rural Affairs* [2017] EWHC 716 (Admin).

[95] See, eg *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWHC 114 (Admin) (privacy).

[96] Bell and Fisher (n 17) section 2.2.

Time Limits

58. The Terms of Reference ask whether the judicial review process could be streamlined by changes concerning time limits; the Call for Evidence asks those submitting evidence to consider whether the current judicial review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays. We make the following points.

58.1. The current rules are contained in s 31(6) Senior Courts Act 1981 and 54.5 Civil Procedure Rules (CPR). The provisions are not identical, although the courts have interpreted them harmoniously. The persistence of two provisions framed differently is nonetheless regrettable, and the law could be clarified in this respect.

58.2. The core of the present time limit rules is that the application must be made promptly, and in any event within three months of the contested action. Applications for judicial review can therefore be rejected if they are not brought promptly, even if they are brought within three months. When an application for leave is not made promptly and in any event within three months, the court can refuse permission on the grounds of delay, unless it considers that there is a good reason for extending the period. The court, in deciding whether to extend time, will consider whether there was a reasonable excuse for late application, the possible impact on third-party rights, and the administration, and the importance of the point raised.

58.3. It is difficult to see how the current time limit rules could be further abridged. The government does have a legitimate interest to know the legal status of its action, but at the same time there may be unlawful government action which could go unchallenged. Three months is a short period of time for an individual to obtain legal advice and make a decision whether to bring an action for judicial review, especially given the costs and other implications of starting legal proceedings against the government. There are, moreover, already rules built into the system whereby the courts take account of third-party rights and the effect on the administration.

58.4. The rules concerning time limits should, moreover, be seen in conjunction with another question posed by the IRAL Call for Evidence (question 10): '*What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review*' (also relevant to question 11 about settlements at the court door). It is unclear what potential actions are contemplated by the IRAL other than settlement discussions. There is a tension between short time limits and the desire to minimise applications for judicial review, because discussion between the affected individual and the public body does not prevent the clock running for the purposes of a judicial review application. So, lawyers are obliged to advise that it may be necessary to bring an action notwithstanding their clients' desire to settle the dispute out of court. The very fact of filing the judicial review application may be a useful impetus for settlement discussions as indicating the claimant's seriousness. The probable consequence of further abridging the application period would be to increase the number of judicial review applications filed.

Flexibility and Range of Remedies

59. In relation more generally to the Call for Evidence question 9, '*Are remedies granted as a result of a successful judicial review too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial?*', we make the following points.

59.1. Remedies are awarded in judicial review on a highly flexible basis.[97] The courts' remedial flexibility is important. It enables the courts to address unlawfulness, while taking into account the factual and institutional context. The courts take care to tailor orders in order to ensure that decisions which are best left to public authorities are taken by public authorities (and not the court), and that public authorities are afforded realistic time periods in which to address unlawfulness.[98] The court may refuse relief where there has been 'undue delay' in the making of an application and the granting of relief 'would be likely to cause substantial hardship to, or substantially prejudice the right of, any person or would be

[97] As Lord Roskill put it in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617,656: 'the grant or refusal of the remedy sought by way of judicial review is, in the ultimate analysis, discretionary'.

[98] For a recent example see *Roadpeace v Secretary of State for Transport* [2018] 1 WLR 1293.

detrimental to good administration'.[99] Courts may also refuse relief where an order would serve no practical purpose,[100] or where the legal error was not 'material' to the decision.[101]

59.2. After the 2015 inclusion of s 31(2A) in the Senior Courts Act 1981,[102] the Act now directs courts to refuse relief if, in the absence of an exceptional public interest,[103] 'it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred'. As the Court of Appeal recently put it, refusal of relief is no longer a matter of discretion, but 'one of duty, provided the statutory criteria are satisfied.'[104]

59.3. The operation of this (presumptive) duty can be difficult to justify. Consider breaches of the public sector equality duty[105] ('PSED'). The courts must refuse relief if satisfied that it is highly likely that, had the public authority had 'due regard' to the equality considerations,[106] the outcome would not have been substantially different. There are numerous problems with this. First, the test relies on a counterfactual scenario (what would have happened if the authority had complied with its duty), which is difficult to assess. Second, the courts are not institutionally, nor constitutionally, well-placed to assess the likelihood of the relevant equality considerations making a difference to the outcome: this can come close to inviting the courts to judge the merits of a decision (a point to which we return in paragraph 59.7). Third, if relief is regularly refused on this basis in PSED cases, this might undermine the effectiveness and perceived importance of the duty.

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[99] s 31(6), Senior Courts Act 1981.

[100] *Baker v Police Appeals Tribunal* [2013] EWHC 718 (Admin), [32].

[101] ibid [31]

[102] Amendment introduced by Criminal Justice and Courts Act 2015.

[103] s 31(2B), Senior Court Act 1981,.

[104] *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, [272].

[105] s 149, Equality Act 2010.

[106] Namely, the need to (a) eliminate discrimination, harassment, victimisation and any other conduct that it prohibited under the Equality Act, (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it and (c) foster good relations between persons who share a relevant characteristic and persons who do not share it (s 149(1), Equality Act 2010,).

59.4. If the Panel is considering ways of expanding the courts' remedial flexibility, reversal of the 2015 reforms would be an effective way of achieving this.

59.5. There is further possible reform of remedies in judicial review. Any reform would, however, require very careful thought, and some of the options are highly problematic. The Call for Evidence asks whether alternative remedies would be beneficial. We have addressed in Part 3 the very serious problems with introducing a declaration of unlawfulness that had no legal consequences. To summarise, such a reform would undermine the rule of law, raise serious drafting difficulties, give rise to difficult questions about its relationship with the changes introduced in 2015, and cause practical difficulties for public authorities.

59.6. As the Panel will be aware, there is extensive literature, including a Law Commission report,[107] which advocates broadening the availability of monetary damages in judicial review, beyond those with a Human Rights Act 1998, European Union, or private law dimension.[108] Introducing the possibility of a monetary award would meaningfully expand the courts' remedial flexibility.

59.7. An alternative to introducing further remedies could entail introducing new directions to courts as to the exercise of remedial discretion, or adjusting those now contained in section 31(2A). However, this could have serious unintended consequences. Consider, for instance, the possibility of lowering the 'highly likely' threshold in section 31(2A). Such an amendment would have serious constitutional implications. The 2015 reforms direct the court to determine whether it is highly likely that the outcome would not have been substantially different. Where a decision-maker has failed to consider a relevant matter or receive representations from a party, the court must thereby determine whether it is 'highly likely' that the overlooked factor would have tipped the scales the other way. This comes close to an assessment of the merits of the decision, a judgment the courts are not well-

[107] Law Commission, *Administrative Redress: Public Bodies and the Citizen* (Law Com No 322, HC-6, 2010).

[108] See especially Peter Cane, 'Damages in Public Law' (1999) 9 Otago L Rev 489; Michael Fordham, 'Reparation for Maladministration: Public Law's Final Frontier' (2003) 2(8) JR 104.

placed to make.[109] The 'highly likely' threshold has in general enabled the courts to avoid altering 'the fundamental relationship between the courts and the executive'[110] by intervening only where it is clear that the unlawfulness made a difference. Lowering the threshold of the test would considerably exacerbate the problem. The courts would effectively be directed to conduct their own weighing exercise of the respective factors, even in decision-making contexts (such as planning[111] and resource allocation[112]) where they explicitly steer clear of doing so in determining whether unlawfulness has occurred in the first place. In other words, not only would lowering the 'highly likely threshold' further diminish, rather than expand, remedial flexibility it would detrimentally alter the role of the courts.

Some Procedural Reform Proposals

60. The Call for Evidence, Questionnaire, Section 1 question 2 asks 'In light of the IRAL's terms of reference, are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)? We have one proposal, which we believe would do much to enhance public understanding of the operation of government departments and executive decisions.

60.1. Like any accountability mechanism, for judicial review to promote good decision-making and to send a clear message to citizens of what they can expect of decisions, the judgments of the courts need to be accessible. In jurisdictions such as Australia this is done as a matter of course. Judgments, including of many tribunals, are issued with catchwords and summaries on freely accessible websites. Some

[109] See for instance *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 where the Court of Appeal was asked to determine whether it was highly likely that, had the government considered the Paris Agreement on climate change, it would still have finalised a National Policy Statement expressing commitment to the building of a third Heathrow runway.

[110] *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, [273].

[111] As Lord Reed famously explained in *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13, while questions of the interpretation of planning law and policy are resolved by the courts, questions of the weight to be ascribed to factors are primarily matters of planning judgment for the decision-making.

[112] As the Court of Appeal put it in *R (Drexler) v Leicestershire CC* [2020] EWCA Civ 502: 'the courts recognise that they are not well placed to question the judgment made by either the executive or the legislature in relation to matters of public expenditure… The allocation of scarce or finite public resources is inherently a matter which calls for political judgment. This does not mean that the courts have no role to play but it does mean that they must tread with caution.' ([56]).

specialist courts also organise decisions so they can provide guidance for decision-makers and the public.

60.2. In contrast, not all judgments of courts in England and Wales are easily accessible. For example, while the Ministry of Justice's website directs those interested in the judgments of the Administrative Court to BAILII, a survey of 801 judgments for 2017 (statutory appeals, judicial review, permissions, interim matters etc) found only 541, with a further 260 transcripts (including 37 judicial review judgments) found on the non-open access database Westlaw UK.[113] In tracing cases on appeal, it was also clear that there were other cases that had gone unreported.

60.3. The efficacy of judicial review, as well as the accessibility to, and the clarity of, the law could be much improved through comprehensive publication of decisions. Publication should extend beyond judicial review decisions to include all aspects of the Administrative Court's work (including statutory challenges/appeals, permission decisions, and other decisions such as whether to authorise the holding of a closed material procedure under section 6 of the Justice and Security Act), as well as judicial reviews determined in the Upper Tribunal. Better organisation of decisions (such as by inclusion of keywords) would also considerably aid the collection of evidence and evidence-based reform in the future.

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[113] Bell and Fisher (n 17).

Appendix A

Exploring A Year of Administrative Law Adjudication in the Administrative Court

Joanna Bell and Elizabeth Fisher*

21st September 2020

For the Workshop on 'Administrative Law Scholarship & Doctrinal Realities: Are Our Intellectual Frameworks Fit for Purpose?'

In 1999, psychologists Daniel Simons and Christopher Chabris published an article on a phenomenon they called 'inattentional blindness'.[1] The paper was based on an experiment known as the 'invisible gorilla' test.[2] As part of the test, participants were shown a video of two teams passing a basketball around and were asked to count the number of passes made between members of one group. During the video, a person wearing a full gorilla costume walked across the screen. When asked if they noticed anything abnormal, around half of participants consistently reported seeing nothing. As the authors conclude 'the level of inattentional blindness depends on the difficulty of the primary task'.[3] The more difficult and absorbing that task, the more difficult it is to see other things. [4]

As has been long recognised, administrative law scholarship is a demanding intellectual enterprise. It is a diverse and dynamic area of the law with highly complex material. Scholars need to make choices about what they focus on so as to make sense of the law. Selections inevitably need to be made about which cases are legally significant and what sections of any judgment are relevant. These choices are part of the discipline of law and we use them to ensure our analysis is rigorous.[5] But there is always a danger that these choices offer up a partial or distorted picture of a legal reality, or cause us to overlook something important for the study of administrative law. As Daniel Kahneman has noted of the 'invisible gorilla' test: 'we can be blind to the obvious, we are also blind to blindness'.[6]

In this paper we take a snapshot of a year of administrative law adjudication in order to explore whether there are important aspects of administrative law adjudication that scholars should concentrate more on.[7] We analyse the judgments available to us from the Administrative

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[1] Daniel Simons and Christopher Chabris, 'Gorillas in Our Midst: Sustained Inattentional Blindness for Dynamic Events' (1999) 28 Perception 1059.

[2] http://theinvisiblegorilla.com/gorilla_experiment.html accessed 18 September 2020.

[3] ibid 1070.

[4] Trafton Drew, Melissa Võ, and Jeremy Wolfe, 'The Invisible Gorilla Strikes Again: Sustained Inattentional Blindness in Expert Observers' (2013) 24 Psychological Science 1848.

[5] As such, it is part of legal imagination. See Elizabeth Fisher and Sidney Shapiro, *Administrative Competence* (CUP 2020) Ch 10.

[6] Daniel Kahneman, *Thinking Fast and Slow* (Allen Lane 2011) 24.

[7] Another study in this vein is Sarah Nason, *Reconstructing Judicial Review* (Hart 2016), chapters 6-7.

Court in a single year - 2017. We have picked this year as, while relatively recent, we could also examine judgments in cases that were subsequently appealed. Section 1 provides an overview of our survey and the limitations inherent in it. Section 2 presents some of our most significant findings. Overall, we show a legally diverse and complex picture. Section 3 reflects on our findings for administrative law scholarship. While inattentional blindness may be inevitable, unintentional blindness of the legally important should be avoided. Our survey identifies three sources of risks of such blindness: focusing too much on the peripheral; not seeing judicial review as part of a larger legal architecture; and not seeing the relevance of legislation and policy in legal reasoning. Overall, we want to encourage a deeper approach to the study of administrative law adjudication.

Two points need to be made before starting. First, the core aim of this paper is to open up discussion about whether administrative law scholarship is overlooking anything important. We do not purport to offer a definitive statistical account of judicial review, or administrative law more broadly. As such, we have not used tables in presenting our findings and have endeavoured to keep statistics to a minimum. Our footnotes also provide examples, but not an exhaustive list of relevant cases.

Second, while this paper does have implications for administrative law scholarship, it is not a study of that scholarship.[8] To do that would undercut the inductive intellectual exercise we are carrying out here. With that said, nothing we say here, should give the impression we see administrative law scholarship, or what it focuses on, in monolithic terms.

1. Surveying the Administrative Court

We are doctrinal administrative law scholars. The conventional practice for this type of scholarship is to focus on the judgments of appellate courts that elaborate the common law. But in past projects we found there was more to administrative law doctrine than analysis of this kind captures.[9] We therefore decided to undertake a research project which would give us a better appreciation of the 'day-to-day' nature of administrative law adjudication.

In identifying our starting point, we were undoubtedly guided by our intellectual reflexes.[10] The vast majority of doctrinal administrative law scholarship concentrates on judicial review by, and on appeal from, the Administrative Court (part of the Queen's Bench Division of the High Court).[11] Our survey therefore focused on the judgments of that Court. To minimise 'inattentional blindness' we read all the judgments we could source from a single year. Our case sample consisted of 801 judgments of the Administrative Court from 2017 that

[8] Compare to Elizabeth Fisher and others, ''Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21 JEL 213.

[9] Eg Joanna Bell, *The Anatomy of Administrative Law* (Hart 2020) and Elizabeth Fisher, 'Law and Energy Transitions: Wind Turbines and Planning Law in the UK ' (2018) 38 OJLS 528. See also Nason (n 4), chapters 6-7.

[10] Those reflexes perhaps reflect 'legal centralism'. See HW Arthurs, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth Century England* (University of Toronto Press 1985) 1-2.

[11] Part 54.1, CPR.

we found on BAILII and Westlaw.[12] Appeals against 59 of these have been heard by the Court of Appeal, and 11 so far by the Supreme Court.

From the outset, our survey makes visible that the role of the Administrative Court is not limited to judicial review.[13] 283 judgments were judicial reviews (including rolled-up hearings) and 56 were applications for permission. However, 309 involved some form of statutory appeal[14] and 153 dealt with procedural and other matters such as costs or interim relief. It is for this reason that we use the term 'administrative law adjudication' throughout the paper.

As we explained in our introduction, our purpose is to catalyse debate about the study of administrative law case law, not to provide an exhaustive statistical analysis. We are aware that, as a 'mapping' exercise, our survey suffers from several inherent limitations. Focusing on only one year of decisions provides a snapshot at a point in time, and tells us little, for instance, about whether the role of the Administrative Court has evolved since its creation in 2000. In contrast to several prominent socio-legal studies of judicial review,[15] our survey also does not make visible what happens prior to a case coming to court. Of the 4,196 actions lodged in 2017, 20% (828) of those were given permission for a full hearing.[16] While many of the cases heard and decided in 2017 were lodged before 2017, these numbers give a feeling for how few judicial review applications result in full hearings. Our survey also provides little insight into what happened after a judgment was delivered.[17]

More importantly, the Administrative Court is not the only legal forum for adjudicating administrative law disputes. Not only is the jurisdiction of that Court limited to England and Wales, but there are statutory rights of appeals to tribunals, courts, and other adjudicative fora. The legality of administrative action can also be challenged collaterally.[18] The Upper Tribunal, created in 2007, can hear judicial review cases.[19] Over time it has had transferred to it judicial review in many areas where there are large number of applications (primarily relating to immigration matters) and it now considers more applications for judicial review than the Administrative Court. In the financial year 2016/7 13,372 judicial review receipts were

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[12] 541 were accessed through the open access database BAILII. We located a further 260 case transcripts (including 37 judicial review judgments) on Westlaw which were not available on BAILII. Note some of the cases on BAILII were not available through Westlaw. These two databases were used by Varda Bondy, Lucinda Platt, and Maurice Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences* (Public Law Project 2015) 6. While we did have access to a large number of cases, we are also aware our sample is not comprehensive. It is not possible to know what proportion of decisions taken by the Administrative Court we had access to. This is in part because Ministry of Justice statistics record challenges by reference to the year in which they are lodged, rather than decided.

[13] See also https://www.gov.uk/courts-tribunals/administrative-court accessed 18 September 2020.

[14] We use this term in a broad sense for reasons we explain below.

[15] Eg Bondy, Platt, and Sunkin (n 12) and Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review Litigation* (Public Law Project 2009).

[16] See Civil Justice Statistics Quarterly: January to March 2020 Tables, https://www.gov.uk/government/collections/civil-justice-statistics-quarterly accessed 18 September 2020. For a discussion of this see Bondy and Sunkin (n 15).

[17] Eg. Carol Harlow, 'Striking Back and Clamping Down' in John Bell, Mark Elliott, Jason Varuhas & Philip Murray (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart 2015).

[18] Eg *PP v The Home Office & Anor* [2017] EWHC 663 (QB); *Richards v Worcestershire County Council & Anor* [2016] EWHC 1954 (Ch).

[19] ss 18-19, Tribunals and Courts Enforcement Act 2007.

received by the Upper Tribunal (Immigration and Asylum Chamber) alone[20] as compared to 4,196 judicial review actions being lodged before the Administrative Court in 2017.[21]

2. The Judgments of the Administrative Court

In reading the 801 decisions in our survey, our approach was inductive. As Mulcahy and Wheeler have noted, 'it remains a central tenet of this approach that order is imposed from the data up rather than from the researcher down'.[22] We developed a checklist of generic information to collect in analysing the judgments, including type of legal action, parties, nature of the decision being challenged (for instance, whether the subject of the challenge was a decision or a policy), subject area, grounds of challenge (where relevant), outcome, and any striking features of the judgment or legal reasoning. As we explain below, collecting data on the grounds was inevitably a more interpretative inquiry.[23] We divided up the judgments between us, read and analysed them independently, and then compared our findings.

Overall, what emerges is a densely complex legal picture, and one which is not fully captured in legal scholarship. It is not possible to discuss everything. The aim of this section is to offer a broad outline of our findings. We divide the discussion into four parts considering (i) type of administrative law adjudication, (ii) parties and outcomes, (iii) legal arguments and reasoning and (iv) cases that were then appealed. The next section explores the question of what these findings suggest about whether there are important aspects of administrative law adjudication which are under-analysed in legal scholarship.

2.1. Administrative Law Adjudication in the Administrative Court

Given our interest in doctrine, much of our survey focused on the different types of 'administrative law work'[24] entailed in these 801 judgments. That legal work varied. This was in at least 2 ways: the legal tasks the Court undertook and how routine any particular legal inquiry was.

First, the Administrative Court carries out a variety of legal tasks. As noted above, the Court in 2017 gave judgment in 283 applications for judicial review, but also in 309 challenges brought through specific statutory routes. Given that administrative law scholarship has traditionally focused on judicial review, an initial temptation was to remove the statutory appeals from the analysis. But while statutory appeals are distinct forms of legal action,[25] their relationship with judicial review is an important, yet complex, one.

Sometimes the basis of a statutory appeal is the practical equivalent of judicial review. Statutory challenges to planning decisions, of which the Court gave judgment in 44, are

[20] Tribunal Statistics Quarterly, 'Main Tables': https://www.gov.uk/government/collections/tribunals-statistics accessed 26 August 2020. Note due to legislative reform to appeal rights this number has dropped. In the financial year 2019/20 it was 5679 but that number is still greater than the number of judicial review applications (3384 applications).

[21] Civil Justice Statistics Quarterly (n 16).

[22] Linda Mulcahy and Sally Wheeler, '"Couldn't You Have Got a Computer Program to Do That for You?" Reflections on the Impact that Machines Have on the Ways We Think About and Undertake Qualitative Research in the Socio-Legal Community' (2019) 47 JLS 149, 152. See also Nason (n 7), chapter 2 for a thoughtful discussion of methodology.

[23] Mulcahy and Wheeler (n 22), 151.

[24] We are grateful to Katie Allan for the term, 'administrative law work'.

[25] Reflected in the idea that judicial review is a 'remedy of last resort' which we discuss below.

effectively on questions of law.[26] In other contexts, rights of appeal are often broader, but still encompass review for legal errors. The Court, for example gave judgment in 147 extradition appeals. Section 27(3) of the Extradition Act 2003, which defines the grounds on which the High Court can overturn an extradition order on a section 26 appeal:

> The conditions are that (a) the appropriate judge *ought to have decided a question before him at the extradition hearing differently* and (b) if he had decided the question in the way he ought to have done, he would have been required to order that person's discharge.[27]

While this is a broader legal inquiry, the Administrative Court does not take extradition decisions afresh. Section 26 appeals, like other appeals to the Administrative Court, are subject to Part 52 of the Civil Procedure Rules, rule 21(3) of which provides:

> The appeal court will allow an appeal where the decision of the lower court was – (a) *wrong*; or (b) unjust because of a serious procedural or other irregularity.[28]

The core question is not, therefore, what the appellate court would itself have decided, but whether the initial decision could be said to be *wrong*.[29] This often requires an engagement with legal authority,[30] as well as review of reasoning and of the decision-making process in order to determine whether either was tainted by a clear error.

Furthermore, whether the Court hears a judicial review application, or a statutory appeal primarily turns on the legislative framework. For example, while a developer has an initial right of appeal against a refusal of planning permission to the Secretary of State,[31] an objector to a grant does not. There were an equal number (44) of planning statutory challenges and planning judicial reviews in our case sample. Likewise, the General Medical Council (GMC) has broad rights of appeal[32] against decisions by the Medical Practitioners Tribunal, whereas the individual who is the subject of the decision can appeal a finding of impairment[33] but must seek judicial review of other decisions.[34] In consequence, a single decision can be the subject of both judicial review and statutory appeal.[35] Those seeking to challenge decisions by Magistrates or Crown courts must navigate a particularly complex set of procedural laws in

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[26] ss 288(1) and 289(1) Town and Country Planning Act 1990.

[27] Emphasis added.

[28] Emphasis added.

[29] Eg *Cwikla v Polish Judicial Authority* [2017] EWHC 2348 (Admin).

[30] Eg *Stedman v French Judicial Authority* [2017] EWHC 2673 (Admin) and *Bobbe v Regional Court in Bydgoszcz (Poland)* [2017] EWHC 3161 (Admin).

[31] s 78, Town and Country Planning Act 1990.

[32] s 40A, Medical Act 1983.

[33] s 40, ibid.

[34] Eg *R. (on the application of Clinton) v General Medical Council* [2017] EWHC 3304 (Admin).

[35] Eg *General Medical Council v Professional Standards Authority for Health and Social Care; R (Nwachuku) v GMC* [2017] EWHC 2085 (Admin) (different applicants bringing the cases) and *R. (on the application of Denbighshire CC) v Welsh Ministers* [2017] EWHC 3219 (Admin) (same applicant bringing different action to challenge different but related actions – main action a statutory appeal).

determining whether the proper route is appeal, judicial review, or appeal by way of case stated.[36]

The legal work of the Court is not limited to judicial review and statutory appeals. For instance, 41 of the 283 judicial reviews were challenges to either immigration detention decisions or policy. Many, some of which had been transferred from the UT,[37] also involved claims for damages for false imprisonment.[38] The 153 cases on procedural matters also included a variety of legal tasks including applications for the extension of suspension orders in professional regulation cases, costs orders, disclosure orders, and applications for interim relief.

The second way that the legal work of the Administrative Court varied was in terms of how 'routine' the challenge before it was. By 'routine' we do not mean easy. In some categories of cases the legal test was well-established, and the Court's task was to apply that test to a specific set of facts – an exercise that was often complex. Extradition and professional discipline challenges[39] were clear examples. In the former, the question was usually whether the information contained in a warrant complied with statutory requirements or whether extradition would, on the facts, violate the individual's Article 8 right under the European Convention of Human Rights (ECHR).[40] In the latter, one question very commonly raised was whether the adjudicator had complied with sanctions guidance.[41] Many unlawful detention challenges also fell within this 'routine' bracket. As it was put in one case, many were 'straightforward *Hardial Singh* challenge[s], where the principles are well established but the individual resolution is case-specific'.[42] As is clear from the subject matter, these routine cases typically related to circumstances where a public decision seriously affects an individual.

There were other clusters of cases which concerned challenges to the same type of decision, but which raised a variety of different kinds of legal questions. Challenges to planning decisions were a case in point. Many concerned challenges to grants or refusals of planning permission, but the legal question(s) which arose varied considerably, and included issues of interpretation relating to local plans,[43] national policy[44] and legislation,[45] compliance with EU

[36] Law Commission, *The High Court's Jurisdiction in Relation to Criminal Proceedings* (Law Comm No 324, 2010).

[37] Eg *Molina, R (On the Application Of) v The Secretary of State for the Home Department* [2017] EWHC 1730 (Admin).

[38] This issue also rose in other contexts. See *Merida Oil Traders Ltd, R (On the Application Of) v Central Criminal Court & Ors* [2017] EWHC 747 (Admin).

[39] Including applications for interim suspension orders: Eg *Nursing and Midwifery Council v Lagoudakis* [2017] EWHC 1316 (Admin).

[40] Eg *Cimeri v Court of Agrigento (Italy)* [2017] EWHC 3048 (Admin) and *Pimenta v Government of the Republic of Brazil* [2017] EWHC 2588 (Admin).

[41] Eg *Brookman v General Medical Council* [2017] EWHC 2400 (Admin).

[42] *R (on the application of R (Bangladesh)) v Secretary of State for the Home Department* [2017] EWHC 3261 (Admin), [4]. *R v Governor of Durham Prison, Ex parte Singh* [1984] 1 WLR 704,

[43] Eg *R. (on the application of Aldingbourne Parish Council) v Arun DC* [2017] EWHC 3450 (Admin).

[44] Eg *R (Boot) v Elmbridge Borough Council* [2017] EWHC 12 (Admin).

[45] Eg *Dill v Secretary of State for Communities and Local Government* [2017] EWHC 2378 (Admin).

environmental law[46] and procedural unfairness.[47] The multi-layered nature of the legislative regimes which govern planning decision-making go a long way to explaining this diversity.

Other cases simply did not fall within clear clusters. This was most often seen in judicial review cases. We will return to the reasons for this below, but the following are a small handful of particularly striking illustrations: challenges to UK legislation on the basis of inconsistency with a recent major CJEU decision;[48] Regulations amending the eligibility criteria for personal independence payments;[49] government policy on the treatment of European Economic Area (EEA) nationals found rough-sleeping;[50] regulations and rules relating to the processing of asylum applications under the 'Fast-Track' Procedure;[51] amendments to the Civil Procedure Rules on Aarhus claims;[52] a statutory order recognising rights of way;[53] rules of an auction used to distribute wireless telephone licences;[54] guidance on the allocation of organs for the purposes of transplantation;[55] adjustments to hospital provision in Oxfordshire;[56] and two challenges concerning a scheme for the resettlement of unaccompanied child refugees from Calais.[57] It might be tempting to think of these cases as less 'legal', due to them being less 'routine'. That is not the case. These cases often involved the courts resolving novel questions of statutory construction and/or determining how well-established principles established across previous authorities applied in new contexts.

2.2. Parties and Outcomes

The above makes clear that administrative law adjudication is not a single legal task. The diversity of the case law becomes even more obvious when we turn to who were the parties to these actions and what the outcomes were. We concentrate on the 283 judicial reviews and the 309 statutory appeals. As will become clear, any generalisation should be made with extreme caution.

First, let us provide a picture of who are the parties to these cases. We focus on the primary parties, but it should be noted that in 117 (41%) of the judicial review cases there were other parties and intervenors including other public bodies, companies, and non-governmental organisations. In judicial reviews and in statutory appeals, there were also silent parties – those that had been a party in the primary decision, but were not a party to the action before the Administrative Court because they sought neither appeal or review.

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[46] Eg *R (Community Against Dean Super Quarry Ltd) v Cornwall Council* [2017] EWHC 74 (Admin); *R (Shirley) v Secretary of State for Communities and Local Government* [2017] EWHC 2306 (Admin).

[47] Eg *Wet Finishing Works Ltd, R (On the Application Of) v Taunton Deane Borough Council* [2017] EWHC 1837 (Admin).

[48] *Roadpeace v Secretary of State for Transport* [2017] EWHC 2725 (Admin).

[49] *RF v Secretary of State for Work and Pensions* [2017] EWHC 3375 (Admin).

[50] *R (Gureckis) v Secretary of State for the Home Department* [2017] EWHC 3298 (Admin).

[51] *TN (Vietnam) v Secretary of State for the Home Department* [2017] EWHC 59 (Admin).

[52] *RSPB, Friends of the Earth & ClientEarth v Secretary of State for Justice* [2017] EWHC 2309 (Admin).

[53] *R (Roxlena Ltd) v Cumbria CC* [2017] EWHC 2651 (Admin).

[54] *R (Hutchison 3G UK Ltd) Office of Communications* [2017] EWHC 3376 (Admin).

[55] *R (A) v Secretary of State for Health* [2017] EWHC 2815 (Admin).

[56] *Cherwell DC & Others v Oxfordshire CCG* [2017] EWHC 3349 (Admin).

[57] *R (Help Refugees) v SSHD* [2017] EWHC 2727 (Admin) and *Citizens UK v Secretary of State for the Home Department* [2017] EWHC 2301 (Admin).

By far the most significant portion of cases were brought by individuals: 196 of judicial reviews and 246 of statutory appeals (75% of judicial reviews and statutory appeals combined). Although a small number of these individuals sought to challenge a general measure in judicial review[58] or were of a more 'idiosyncratic' nature',[59] the vast bulk challenged a particularised decision (such as a decision to detain, to refuse a visa or decline parole) or a grant of planning permission. In a handful of planning cases, an individual was a claimant on behalf of a local group.[60] In a few other cases, the individual claimant had the support of a civil society organisation.[61]

Companies brought actions in 48 judicial review cases (including 4 brought by industry associations) and 13 statutory appeals (10% of judicial reviews and statutory appeals combined). In 22 of these challenges, companies sought to challenge a decision relating to them specifically,[62] such as orders or warrants facilitating investigations,[63] ombudsmen findings[64] and changes to visa-sponsorship status.[65] In 16, the challenge was to a regulation, regime, or policy.[66] 17 appeals or reviews concerned planning decisions such as refusals of permissions or grants to third parties, and there were 6 further challenges dealing with other matters.

A public body brought the action in 21 judicial reviews and 33 statutory appeals (9% of judicial reviews and statutory appeals combined). Three of these were brought by other states in extradition cases.[67] 14 were by local authorities in planning cases. There were also 15 other statutory appeals by professional regulatory bodies, usually challenging a failure to find an individual's fitness to practice was impaired or the leniency of a sanction.[68] Overall then, the number of cases being brought by public and professional bodies was more than brought by companies (12%). Some of these cases concerned relatively contained matters, such as which of two councils had responsibility under the Housing Act to meet the needs of an individual.[69] Others raised questions of very widespread importance, such as the lawfulness of the central government's approach to funding local authority deprivation of liberty

[58] Eg *R (Conway) v Secretary of State for Justice* [2017] EWHC 2447 (Admin) (an unsuccessful challenge to section 1 of the Suicide Act).

[59] Eg *Watts v Driver and Vehicle Standards Agency* [2017] EWHC 1019 (Admin) (appeal by way of case stated on the basis that periodic training for a minibus licence breached Magna Carta).

[60] Eg *R (Austin) v Wiltshire Council* [2017] EWHC 38 (Admin).

[61] Eg *R (On the Application Of AB (A Child)) v The Secretary of State for Justice* [2017] EWHC 1694 (Admin).

[62] Eg Some raised questions of construction of broader importance: *R (Chiltern Farm Chemicals Ltd) v Health and Safety Executive* [2017] EWHC 2491 (Admin).

[63] Eg See for instance *R (Superior Import/Export Ltd) v HMRC* [2017] EWHC 3172 (Admin).

[64] Eg *Full Circle Asset Management Ltd v Financial Ombudsman Service Ltd & Ors* [2017] EWHC 323 (Admin)

[65] Eg *R (Sri Prathinik Consulting Ltd) v Secretary of State for the Home Department* [2017] EWHC 3204 (Admin).

[66] Or, in one case, a decision-maker's approach to interpreting policy documents: *May-Lean & Co v Gas and Electricity Markets Authority* [2017] EWHC 2307 (Admin).

[67] Eg *Government of Rwanda v Nteziryayo & Ors* [2017] EWHC 1912 (Admin).

[68] Eg *Sussex Police & Anor, R (On the Application Of) v Police Appeals Tribunal & Anor* [2017] EWHC 2333 (Admin).

[69] Eg *Royal Borough of Kensington and Chelea v London Borough of Ealing* [2017] EWHC 24 (Admin).

assessments.[70] There was one case in which a local planning authority brought a judicial review against itself due to a planning officer making a determination without any power to make it.[71]

Civil society organisations brought 18 judicial review actions and were the main party in 2 statutory challenges (6% of judicial reviews or 3% of judicial review and statutory appeals combined). These claimants represented a range of civil society interests including human rights,[72] environmental concerns,[73] local interests,[74] animal welfare,[75] recreational activities,[76] and privacy.[77]

The defendants in these 592 cases were a range of public bodies. Regarding statutory challenges, the defendants were overwhelmingly inferior courts or some other form of specialist adjudicatory body. The 147 extradition appeals were appeals from District Judges. There were another 24 statutory appeals from inferior courts, usually in regard to criminal prosecutions. The 61 professional discipline appeals were from tribunals and the 44 statutory planning challenges primarily concerned decisions of Planning Inspectors. The rest of the appeals involved a miscellany of cases where a public body had made an adverse decision against an individual.

In regard to judicial review actions, the defendants were inevitably more mixed. In 125 judicial review cases the defendant was a central government department, including 85 cases brought against the Home Office. That number is misleading however in that many cases were not a decision against a Secretary of State, but of an institution exercising delegated power such as the Planning Inspectorate. 69 cases were against local authorities or local public service providers; 37 against inferior courts, tribunals or adjudicatory bodies; 24 against a body involved in the criminal justice process (including the police, Parole Board and prison authorities); 17 against some form of regulator; 7 against HMRC, 2 against public Ombudsman; and 2 against companies. In many of these cases, the decision being reviewed was part of a network of public decision-making by a range of judicial, administrative, and executive bodies at both central and local levels.[78]

In terms of outcomes, in regard to the 283 judicial review applications the court concluded that there was unlawfulness on at least one ground in 127 cases (45% of judicial

[70] Eg *R (Liverpool City Council & Anor) v Secretary of State For Health* [2017] EWHC 986 (Admin). The case follows *P v Cheshire West & Cheshire Council* [2014] UKSC 19 in which the Supreme Court endorsed a broader conception of deprivation of liberty, with very significant financial implications for local authorities.

[71] *Andrews v New Forest DC* [2017] EWHC 1545 (Admin).

[72] Eg *The Centre for Advice on Individual Rights In Europe v The Secretary of State for the Home Department & Anor* [2017] EWHC 1878 (Admin).

[73] Eg *R. (on the application of ClientEarth) v Secretary of State for Environment, Food and Rural Affairs* [2017] EWHC (Admin) 1966.

[74] All objecting to a planning permission. Eg *Leckhampton Green Land Action Group Ltd), R (On the Application Of) v Tewkesbury Borough Council* [2017] EWHC 198 (Admin).

[75] Eg *Trail Riders Fellowship v Secretary of State for the Environment, Food And Rural Affairs* [2017] EWHC 1866 (Admin).

[76] Eg *The Ramblers Association v Secretary of State for Environment Food And Rural Affairs* [2017] EWHC 716 (Admin)

[77] *Eg R (Privacy International) v Investigatory Powers Tribunal* [2017] EWHC 114 (Admin).

[78] Eg *R (R) v National Police Chief's Council & Secretary of State for Justice* [2017] EWHC 2586 (Admin).

cases), a number reasonably consistent with findings elsewhere.[79] In regard to statutory appeals the success rate was less (98 - 32% of statutory appeals). These statistics hide much, however. Not least that the success rate varied across different types of case. Thus, for example the success rate for statutory appeals concerning extradition was 22%, for professional discipline cases it was 49%, and statutory planning challenges 32%. Given the diversity of judicial review actions, it is far harder to make generalisations. There are some striking patterns however, for example in relation to the 41 immigration detention cases. Of the 37 challenges involving immigration centres, detention was held to be unlawful in 23 cases (62%). Furthermore all 3 challenges to curfews succeeded[80] as did the 1 challenge to central government guidance.[81]

It is also important to note that to see a claimant in binary terms as successful or not successful is somewhat misleading. In many cases, a claimant was only partially successful.[82] In many cases the legal remedy was to remit to the original decision maker.[83] The finding of legal error also did not mean a remedy necessarily followed.[84]

2.3. Legal Arguments and Legal Reasoning

We now turn to consider the legal arguments and the legal reasoning in these judgments. We focus primarily on the judicial review cases. As noted in Section 2.1, statutory appeals in areas such as extradition and professional regulation were largely, although not always, a form of routine legal inquiry mandated by legislation. While routine, these cases did involve the consideration of substantive legal norms. Thus, as already noted, extradition appeals often raised questions concerning Article 8, ECHR.[85]

In the judicial review cases there was more variation in legal argument. Our analysis here is not the same as an in-depth doctrinal analysis, and it cannot be comprehensive. It is also the case that of the various items on our checklist of information, the grounds relied on were by far the most difficult to gather and assess. In nearly all cases a range of grounds were argued (usually around 3). The grounds of review also bled into one another in legal reasoning. For instance, where in determining whether a decision was rational, the court would sometimes ask whether the decision-maker properly understood applicable policy.[86] There were also different ways of labelling the grounds of challenge. In some cases, the applicant's arguments were given labels clearly recognisable to public law scholars ('procedural unfairness,' 'irrationality,' etc).[87] In other cases, grounds were presented as specific complaints about something which

[79] Of the 322 judicial review cases lodged in 2017 that have been heard, 130 (41%) were found in favour of the claimant and 184 in favour of the defendant. Civil Justice Statistics Quarterly (n 16).

[80] This is unsurprising in light of *R (Gedi) v Secretary of State* [2016] EWCA Civ 409. Note that two of the decisions concerned the same challenge, later appealed to the Supreme Court: *R (Jalloh) v Secretary of State for the Home Department* [2020] UKSC 4.

[81] *Medical Justice & Others v Secretary of State for the Home Department* [2017] EWHC 2461 (Admin).

[82] *Save Diggle Action Group v Oldham Council* [2017] EWHC 349 (Admin).

[83] Eg. *R (Noye) v Secretary of State for Justice* [2017] EWHC 267 (Admin).

[84] In a small handful, relief was refused. In immigration detention challenges this was usually because, although the decision to detain was legally flawed the applicant could have been lawfully detained under a different provision. See *Lumba v Secretary of State for the Home Department* [2011] UKSC 12.

[85] (n 40).

[86] *R (SB) v NHS England* [2017] EWHC 2000 (Admin), especially [64]-[65].

[87] Though sometimes the argument could plausibly have been explained in another way, and in determining the ground the court used the language of other grounds.

had gone legally wrong in the course of decision-making. Analysis of legal reasoning in these cases is thus inevitably interpretative. With that said, four patterns can be seen.

First, legislation played a fundamental role in reasoning in these cases. The Court's judgment almost always began with an overview of the governing legislative framework. The legislative frameworks were diverse[88] and often highly detailed. Our case survey also highlighted the dynamic nature of administrative law legislation. We explained above that a significant portion of the judicial review case law could be described as 'novel.' One source of this novelty was recent, or relatively recent, legislative change. In at least 50 of the cases, the legislative framework had changed since 2010 and in a further 83 cases since 2000. While there were examples of direct challenges to the legislative amendment,[89] most cases required the court to review whether the decision-maker had properly interpreted the new provision.

In 131 of the judicial reviews the *main* legal issue before the Court was compatibility with legislation, delegated legislation or a clear legal precedent and this usually involved the question of whether law had been properly interpreted. The precise type of legal complaint varied. In some, the applicant argued that the decision-maker has failed to fulfil a statutory duty[90] or to recognise and consider exercising a statutory power.[91] Other challenges raised the question of whether the decision-maker had exceeded the terms of its statutory powers.[92] In many, the argument was simply that the decision-maker had failed to properly comply with the terms of the legislation and, as a result, reached a legally unsound decision. Furthermore, in the cases where the *primary* legal issue was to do with what might be thought of as review of discretion or procedure, legislation still played an important role. There were 8 cases where the arguments before the Court were multitudinous and/or effectively arguments on the merits (and easily identifiable as such). None of these were successful.

A second feature of the legal reasoning in the judicial review case law concerned the prevalence of guidance including statutory guidance,[93] published policy, and codes of practice and rules. 141 of the 283 judicial review challenges (just under 50%) referred to guidance. Discussion of guidance was particularly prominent in certain areas. Planning challenges, for instance, often related to local and central government planning policy.[94] Similarly, challenges to immigration decisions (including detention) commonly referred to the *Enforcement Instructions Guidance*[95] and other sources of guidance it consolidates.

Furthermore, 25 of the judicial review challenges explicitly raised the question of whether the decision-maker had acted in accordance with its own guidance, or that published by central government. As seen above, however, guidance was relevant in many other cases and, for instance, sometimes shaped how the court assessed the rationality of decisions. Related

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[88] Bell (n 8) chapter 3

[89] *R (on the application of News Media Association) v Press Recognition Panel* [2017] EWHC 2527 (Admin).

[90] *Care England v Essex CC* [2017] EWHC 3035 (Admin).

[91] *Mishra v Colchester Magistrates' Court* [2017] EWHC 2869 (Admin).

[92] *Dean v Secretary of State for Business, Energy & Industrial Strategy* [2017] EWHC 1998 (Admin).

[93] By which we mean guidance published pursuant to a legislative power or duty. An example is local development schemes, *Rogers v Wycombe DC* [2017] EWHC 3317 (Admin) but there were also a range of other cases involving statutory guidance, *R (Gilmore) v Police and Crime Commissioner for West Yorkshire* [2017] EWHC 2867 (Admin).

[94] (n 43) and (n 44).

[95] https://www.gov.uk/government/collections/enforcement-instructions-and-guidance accessed 3 September 2020. Chapter 55 (which concerns immigration detention) was especially prevalent.

to this were 27 cases which involved a direct challenge to the lawfulness of policy, guidance, Rules, Codes or schemes[96] (in a few cases, in conjunction with a broader challenge to Regulations[97] or primary legislation).[98] The grounds on which these forms of what is often described as 'soft law' were challenged were highly diverse. They included 6 allegations of improper consultation, various other procedural complaints (such as that the policy had been introduced without following the proper legislative process)[99] and arguments to the effect that the policy was inconsistent with the overarching legislative framework.

Third, and briefly, some grounds of review were conspicuous by the infrequency with which they were raised. Despite a burgeoning academic literature, for instance, legitimate expectations challenges featured in only 5 cases.[100]

Finally, our survey also emphasised the difficulties of making any general claim about what human rights challenges 'routinely' involve. In 22 cases the strongest legal argument was based on the Human Rights Act 1998 or the Equality Act 2010, although these Acts did also figure as a supplementary argument in other cases. Many of these challenges simply required courts to apply well-established legal principles about what a specific legal obligation required to a particular sets of facts.[101] Similarly, our survey made clear that it is not uncommon in some areas of administration for legislation and policy to provide detailed guidance as to how Convention rights are best respected and thus human rights adjudication sometimes shades into courts reviewing the decision for compliance with legislation/policy.[102] The courts were also noticeably concerned in many cases, not with conducting its own assessment of the merits, but with ensuring that the authority's decision-making processes were such that *it* was undertaking a sufficiently nuanced approach to balancing. For instance, in *R*[103] an Order and policy were held to be unlawful because, due to the rigidity of their content, they prevented *decision-makers* from conducting a rigorous analysis of individual cases.

2.4. Cases on Appeal

Our survey primarily focused on the Administrative Court. Cases are, of course, appealed. We thus surveyed where the Court of Appeal and the Supreme Court had given judgment on a case that had been adjudicated upon by the Administrative Court in 2017.[104] These cases are not our primary focus, and thus our analysis is brief. Comprehensive analysis of these cases would need to also encompass a survey of the leave to appeal process. But even then, our analysis would be incomplete. These courts also consider appeals from administrative law cases from courts other than the Administrative Court. The Court of Appeal also considers appeals from

[96] Note there were also 2 challenges to primary legislation and 6 to Regulations

[97] *R (McNiece) v Criminal Injuries Compensation Authority* [2017] EWHC 2 (Admin)

[98] *R* (n 89).

[99] *William Davis Ltd v Charnwood BC* [2017] EWHC 3006 (Admin).

[100] Eg *Dickinson & Ors, R (on the application of) v HM Revenue & Customs* [2017] EWHC 1705 (Admin).

[101] Eg *Green v Parole Board* [2017] EWHC 2612 (Admin).

[102] *R (Goldsworthy) v Secretary of State for Justice* [2017] EWHC 2822 (Admin).

[103] *R* (n 89).

[104] We only looked at BAILII for these. Note in two cases, the transcripts for the original Administrative Court decision were not on BAILII or Westlaw. See *OWD Ltd (t/a Birmingham Cash and Carry) & Anor v Revenue and Customs* [2019] UKSC 3 and *Putney Bridge Approach Ltd v The Secretary of State for Communities And Local Government & Anor* [2018] EWCA Civ 2268.

the Upper Tribunal and other tribunals and courts, and the Supreme Court hears appeals from the devolved jurisdictions.

The Court of Appeal has given judgment in 60 cases appealed from the Administrative Court. Again, care needs to be taken with any numbers. In some cases, there were cross appeals[105] and some cases were joined.[106] In 23 cases there were other parties. 26 cases concerned an appeal by an individual, 17 a company, 15 a public body, and 6 a civil society organisation. The subject matters areas were diverse, but the largest cluster was planning and related matters (19). In 26 cases the appeal was allowed or partially allowed, with the rest dismissed except for a joined appeal where 1 appeal was allowed and the other was dismissed. In 33 cases the main legal argument raised questions of statutory interpretation; 6 concerned the meaning of policy; 12 focused on the decision-making process; 8 concerned procedural matters; and 1 was concerned primarily with human rights.

The Supreme Court has so far determined appeals from 11 cases, 3 of which were directly appealed to the Supreme Court. 4 appeals were brought by public bodies, the rest by individuals (4), civil society organisations (2) and 1 by a company. The subject matters were again diverse and included 3 planning challenges and 3 challenges concerning criminal justice or national security issues. Strikingly, most of these cases[107] raised questions concerning the proper construction of legislation[108] and/or policy.[109]

3. Avoiding Unintentional Blindness

While our survey is limited, there is also much in the last section to digest. It makes visible that there is a lot of complex legal work going in administrative law adjudication. That is not a new phenomenon or a novel finding.[110] With that said, a lot of this complex legal work can drop out of the scholarly frame of analysis. As Daniel Kahneman notes the invisible gorilla is invisible to the observers of the invisible gorilla test because the observers are 'intensely busy counting passes'.[111] There is much for administrative law scholars to concentrate on and choices do need to be made about what to pay attention to. Selective looking is part of the expertise of law. But while inattentional blindness may be necessary, unintentional blindness of the legally important should be avoided.

In this last section we identify three potential points of scholarly blindness that our survey highlights: focusing too much on the peripheral; not seeing judicial review as part of a larger judicial architecture; and missing significant issues in legal reasoning. In identifying these issues, we are not claiming that all administrative law scholarship is blind to these issues.

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[105] *R(The Pharmaceutical Services Negotiating Committee and Susan Sharpe) v Health Secretary, National Pharmacy Association v Health Secretary* [2018] EWCA Civ 1925.

[106] *R (Hemmati & Ors) v Home Secretary, Home Secretary v R(SS)* [2018] EWCA Civ 2122.

[107] *R (Stott) v Secretary of State* [2018] UKSC 59 (a discrimination case) and *Jalloh* (n 97) (concerning the scope of false imprisonment) were exceptions.

[108] In some of these cases – e.g. *Privacy International, R (on the application of) v Investigatory Powers Tribunal & Ors* [2019] UKSC 22; *Palestine Solidarity & Anor, R (on the application of) v Secretary of State for Housing, Communities and Local Government* [2020] UKSC 16 – the interpretive question was controversial and split the Supreme Court.

[109] E.g. *R (Samuel Smith Old Brewery) v North Yorkshire CC* [2020] UKSC 3.

[110] Arthurs (n 10).

[111] Kahneman (n 6) 34.

Administrative law scholarship is remarkably diverse. Rather we identify these three risks of 'blindspots' as a means to open up, and structure further discussion.

3.1. Focusing on the Peripheral

Our first risk is the most obvious – the dangers of scholars focusing on a handful of cases at the expense of seeing that they are a small subset of what courts do. We write at a time when there is debate about the legitimacy of 'judicial power'[112] and the coherence of administrative law doctrine.[113] Those debates do affect what some administrative law scholars focus on.

Take for example anxieties over litigation by public interest groups. [114] As seen above, relatively few judgments had civil society organisations as the main party (18 of 283 judicial review; around 6%) and they made up a small proportion of the overall work of the Administrative Court (3%). The numbers are especially striking when contrasted with the proportion of challenges brought by public authorities (12%), an aspect of practice which has generated next to no attention.

Similarly, contrary to the intense current interest in review of prerogative powers, almost all challenges concerned decisions taken under statutes. There were a very small handful of challenges to the prerogative power to issue or revoke a passport.[115] This power, however, is now structured by detailed guidance, as well as being shaped by European Union law. As a result, the central issues were often ones of construction. The most striking example of an attempt to challenge a non-statutory power we came across was *McClean v First Secretary of State*.[116] The applicant sought permission to judicially review a confidence-and-supply arrangement between the Conservative and Democratic Unionist parties. Permission was refused on the basis both that the grounds were wholly unarguable and violated Parliamentary privilege.[117]

Finally, and more broadly, despite seemingly growing concern that administrative law reasoning has become increasingly open textured[118] in recent years,[119] a very mundane fact emerged from our survey: the Administrative Court's roles are structured by vast swathes of detailed law. This is true in many senses. Much of the Court's workload involves determining challenges brought pursuant to particular statutory provisions. In some areas, such as extradition and professional discipline appeals, the Court is empowered to conduct a more wide-ranging inquiry into whether the decision was 'wrong.' Even here, however, the Court is often bound by precedents offering binding guidance as to how to conduct the inquiry. Likewise, while a significant portion of case law relied on Human Rights Act/ECHR grounds,

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[112] Eg Richard Ekins and Graham Gee, 'Putting Judicial Power in Its Place' (2017) 36 University of Queensland LJ 375, 387-9 and Paul Craig, 'Judicial Power, the Judicial Power Project and the UK' (2017) 36 University of Queensland LJ 355

[113] Eg Jason Varuhas, 'Taxonomy and Public Law' in Mark Elliott, Jason Varuhas, and Shona Wilson Stark (eds) *The Unity of Public Law?: Doctrinal, Theoretical and Comparative Perspectives* (Hart 2018) and Paul Craig, 'Taxonomy and Public Law: A Response' [2020] PL 281.

[114] Ministry of Justice, *Judicial Review: Proposals for Further Reform* (Cm 8703 2013) 22.

[115] Eg *R (MR) v Home Secretary* [2017] EWHC 469 (Admin).

[116] *McClean v First Secretary of State* [2017] EWHC 3174 (Admin).

[117] Ibid, [22].

[118] Varuhas (n 113); see also Dean Knight, 'Contextual Review: The Instinctive Impulse and Unstructured Normativism in Judicial Review of Administrative Action' (2020) 40 LS 1.

[119] Note the focus has particularly been on apex courts.

these cases did not involve the courts 'second-guessing' the merits of government policy, a common critique of human rights.[120] On the contrary, many of the human rights challenges involved the application of well-established legal principles, legislation, and policy to facts.[121] Judges also pushed back against cases which were argued in general terms and did not specify the nature of the legal argument being developed.[122]

We are not suggesting that legal scholarship should confine itself to questions which occur with frequency. Our point, rather, is that it is essential that debate around these issues takes place with an appreciation of the broader context. As Tomlinson has recently put it, 'it is imperative that great care is taken to ensure [that discussion of judicial review is] firmly rooted in empirical reality and conducted with a sense of proportion to that reality.'[123] Some of the issues we flag here as being relatively unusual in practice, if they occur at all – challenges by NGOs, review of prerogative power, 'second-guessing' of merits in human rights cases – have at times been allowed to unduly influence narratives about the practice or development of administrative law adjudication *as a whole*.

3.2. Not Seeing Judicial Review as Part of a Larger Legal Architecture

That relates to the second risk we see of unintentional blindness. Doctrinal administrative law scholarship tends to focus almost exclusively on judicial review by, or on appeal from, the Administrative Court. Given the complexities of judicial review, that can easily be all-consuming. As authors of a study of intentional blindness of radiologists noted: 'When one is engaged in a demanding task, attention can act like a set of blinders, making it possible for salient stimuli to pass unnoticed right in front of one's eyes'.[124]

What became clear from our survey, is that judicial review is part of a broader legal architecture. In being so it is playing both a modest and fundamental role. These terms may not, at first sight, seem to sit well together and so let us explain what we mean by each in turn.

Judicial review is *modest* in the sense that it is only one interlocking part of a much bigger picture. Harry Arthurs once wrote that 'there is nothing less at issue in our analysis of administrative law than an inquiry into the nature of the legal system itself'.[125] His point was that there is not only one, but many legal fora which do and should play a role in resolving administrative law disputes. This point continues to be of relevance.[126] Thus, as we have explained, our case sample consisted of more statutory challenges than applications for judicial review – a reminder of how much courts are carrying out review under an explicit legislative mandate. Furthermore, the Administrative Court is only one of many courts and tribunals which adjudicate challenges to administrative decision-making. Most significantly, the Upper Tribunal now hears more judicial reviews than the Administrative Court.

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[120] Richard Ekins, *Protecting the Constitution* (Policy Exchange 2019).

[121] And see *Jollah* (n 97) where it was the government unsuccessfully arguing that ECHR reasoning should apply to the common law.

[122] *R. (on the application of Clinton) v General Medical Council* [2017] EWHC 3304 (Admin) [26]

[123] Joe Tomlinson, 'Review: Constitutional Rights and Constitutional Design: Moral and Empirical Reasoning' [2020] PL 388, 390.

[124] Drew, Võ, and Wolfe (n 4) 1848.

[125] Harry Arthurs, 'Rethinking Administrative Law: A Slightly Dicey Business.' (1979) 17 Osgoode Hall LJ 1, 42.

[126] Albeit, in a different way. Arthurs was arguing for a system of 'pluralism' in which adjudication would be the province of specialist tribunals, largely outside of the purview of 'ordinary' courts.

Our survey also emphasised that judicial review is modest in a further sense. Judicial review is a 'remedy of last resort'[127] in the English and Welsh legal system. We mean something quite significant by that. In the case of judicial review, the Administrative Court resolves disputes for which there is simply no other available, satisfactory forum. There are many legislated routes to challenge decisions before tribunals and courts. The Court was mindful of those routes in carrying out review.[128] Legislation, however, has not created an appeal route for every situation where a significant legal error can arise and judicial review provides an important safety net for dealing with those errors. To put it another way, judicial review is a 'procedural mop': one of its roles is to absorb arguable legal challenges for which there is no other route. This 'mop' like nature of judicial review provides an explanation of why legal inquiry in judicial review cases are less routine (see section 2.1).

While judicial review is modest in both of these senses, our survey emphasises that it is also *fundamental* in many ways. That judicial review is not an applicant's first port of call but the last, does not make it unimportant. Without judicial review, applicants who are not beneficiaries of a specific legislative appeals route would be unable to challenge decisions with very significant consequences. Indeed, a significant amount of the Administrative Court's judicial review workload is made up of what Nason calls 'individual grievance'[129] cases, in which individuals are given an opportunity to put their arguments and obtain an authoritative ruling on the lawfulness of a personal decision. Similarly, without accessible and effective judicial review there would not necessarily be a forum for resolving broad legal questions of very real and general practical importance. These include questions about how new legislative amendments should be read,[130] whether practical changes are needed to ensure proper implementation,[131] and what the implications are of new major court rulings, at both the domestic[132] and international level.[133] Judicial review in the Administrative Court, in other words, plays an essential role in stabilising the law in light of new legal developments in fast-moving areas of law.[134]

3.3. Overlooking Doctrinal Developments

The final unintentional blindness to note relates to legal reasoning. Our survey highlighted several aspects of doctrine which emerged as significant in these judgments, but which have not been the subject of sustained scholarly attention. We note three here.

The first is that statutes and questions of statutory construction dominated much of the case law.[135] The mismatch between the centrality of statutory interpretation in legal practice

[127] *Glencore Energy UK Ltd v HMRC* [2017] EWHC 1476 (Admin), [40].

[128] Eg *Zahid, R (On the Application Of) v The University Of Manchester* [2017] EWHC 188 (Admin).

[129] Nason (n 7).

[130] E.g. *Jimenez v First Tier Tribunal & HM Commissioners for Revenue and Custom* [2017] EWHC 2585 (Admin) (reversed on appeal); *R (Banghard) v Bedford BC* [2017] EWHC 2391 (Admin).

[131] E.g. *Gaskin v Richmond upon Thames LBC* [2017] EWHC 3234 (Admin).

[132]E.g. *TN (Vietnam)* (n 51) (determining the implications of *R (Detention Action) v Secretary of State* [2014] EWCA Civ 1634); *R (Lupepe) v Secretary of State for the Home Department* [2017] EWHC 2690 (Admin) (determining implications from *Gedi* (n 80).

[133] E.g. *Roadpeace* (n 48) (determining implications from *Damijan Vnuk v Zavarovalnica Trigalev* C-162/13).

[134] See also Fisher (n 9).

[135] See also Bell (n 9).

and its place in legal education and scholarship is well recognised.[136] What we found in these cases were not just issues of interpretation but something more complex. So much of the reasoning about legality turned on the detail of those schemes. Several cases also raised important legal questions about *how* the meaning of statutes is to be ascertained, for example when, if ever, statutory guidance can be used as a guide to construction.[137] In highlighting the importance of statutes, we are not making an argument about the constitutional justifications of judicial review.[138] Rather our point is that administrative law case law does not arise in a legal vacuum, but in the context of often detailed legislative schemes, and far more scholarly attention needs to be given to that.

Second, guidance and policy were a central feature of legal argument in a significant portion of case law. This emphasises that law and administration are not separate, but closely entwined in practice.[139] Policies played an important role in structuring the courts' inquiry, for instance, where they reviewed the exercise of discretion.[140] In short, therefore, there is a need for more legal scholarship exploring the role of policy in administration and judicial review, both generally and in specific fields.[141]

Third and finally, our survey also made visible several common law principles which, though well-established or developing, have not received much consideration in scholarship. For instance, while aspects of review for procedural fairness – such as the requirement to give notice[142] – are well-known, many procedural challenges turned on other issues. For example, there were several challenges which raised the question of whether a public authority, commonly HMRC, had complied with the common law duty to make 'full and frank disclosure'[143] in ex parte proceedings. Challenges to failures to properly consult were also common. Another recurring question was what decision-makers of different kinds were required to do in order to ensure that their decision(s) were consistent with previous conclusions[144] or the findings of other bodies.[145]

4. Conclusion

Administrative law scholarship is demanding. There is a lot to focus on and a lot to think about. Our attention in this paper is on the administrative law work of the Administrative Court. By surveying a year's worth of administrative law scholarship, we want to provoke constructive discussion about what it is that scholars pay attention to when they study administrative law doctrine. Even in this short paper we have revealed that there are potential spots of

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[136] Andrew Burrows, *Thinking About Statutes: Interpretation, Interaction, Improvement (The Hamlyn Lectures)* (CUP 2018) and Lord Justice Sales, 'Modern Statutory Interpretation' (2016) 38 Statute L Rev 125.

[137] *R (CXF) v Central Bedfordshire Council NHS Norfolk Clinical Commissioning Group* [2018] EWCA Civ 2852.

[138] Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart 2000).

[139] See also Fisher and Shapiro (n 5) Ch 1.

[140] See above and also *London School of Science and Tech v Home Secretary* [2017] EWHC 423 (Admin).

[141] Stephen Daly, *Tax Authority Advice and the Public* (Hart 2020).

[142] E.g. *Lupepe* (n 132); *R (Iqbal) v Secretary of State for the Home Department* [2017] EWHC 79 (Admin); *R (A) v Central Criminal Court* [2017] EWHC 70 (Admin).

[143] E.g. *Superior Export/Import Ltd* (n 74).

[144] E.g. *R (Midcounties Cooperative Ltd) v Forest of Dean DC* [2017] EWHC 2056 (Admin).

[145] E.g. *R (Miah) v Secretary of State for the Home Department* [2017] EWHC 2925 (Admin).

unintentional blindness. In response to this we see the virtues of fostering a deeper approach to the study of administrative law adjudication that sees it as part of both a bigger judicial and administrative architecture.

We hope this survey will encourage others to conduct their own analysis and to explore areas of administrative law adjudication that have been overlooked. Specifically, we hope it aids further discussion about how to avoid focusing on the peripheral, how to develop a wider picture of administrative law adjudication, and how to comprehensively analyse doctrinal reasoning. In putting these themes on the table, the purpose of this survey is to open up, not close down debate.